

1-1-2005

## The problem of prayer in school: A discussion of legal interpretation and policy

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THE PROBLEM OF PRAYER IN SCHOOL: A DISCUSSION OF LEGAL  
INTERPRETATION AND POLICY

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2005

A thesis submitted in partial fulfillment  
of the requirements for the

**Master of Arts Degree in Political Science**  
**Department of Political Science**  
**College of Liberal Arts**

**Graduate College**  
**University of Nevada, Las Vegas**  
**August 2005**

UMI Number: 1429696

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June 15, 2005

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The Problem of Prayer in School: A Discussion of Legal Interpretation  
and Policy

is approved in partial fulfillment of the requirements for the degree of

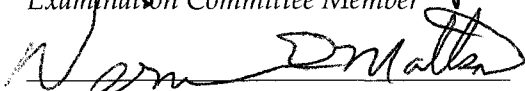
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## ABSTRACT

### **The Problem of Prayer in School: A Discussion of Legal Interpretation and Policy**

By

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The problem of prayer in public schools is a divisive one that has grown out of a changing and confusing interpretation of the Establishment Clause with respect to school activities. Traditionally and historically, the United States has recognized public praise of God in a nonsectarian manner; however, this type of religious activity has been deemed unconstitutional in the school setting. The United States Supreme Court has also allowed public financial support of religion while vehemently disallowing symbolic religious support in public schools. The accommodationists on the Court has prevailed in most venues except school, where the separationists have managed to force a wedge between religious practice and the school setting. This varying interpretation of the Establishment Clause that is dependent on the time, place, and manner of government support has created a maze of incongruent, incomprehensible precedent that has denied the democratic nature of the American system of government. Some simple changes in policy toward state-endorsed religious activities could restore the American school to its traditional and democratic purpose in regards to religious education.

## TABLE OF CONTENTS

ABSTRACT .....	iii
CHAPTER 1 INTRODUCTION .....	1
Literature Review.....	2
The Problem.....	8
CHAPTER 2 THE HISTORY OF ESTABLISHMENT CLAUSE	
INTERPRETATION.....	14
Church-State Relations in a Republic .....	17
Education in America .....	21
Intent of the Framers.....	23
Literal Interpretation .....	28
Evolutionary Interpretation .....	31
Conclusion .....	35
CHAPTER 3 <i>ENGEL V. VITALE</i> .....	37
Public Opinion and Federalism.....	38
History.....	41
Tradition.....	47
Differentiation from Previous Establishment Clause Cases .....	52
Conclusion .....	56
CHAPTER 4 <i>LEE V. WEISMAN</i> .....	58
Background of <i>Lee v. Weisman</i> .....	60
The Lemon Test .....	61
<i>Marsh v. Chambers</i> .....	69
Coercion.....	75
State Sponsorship of Religious Activity .....	81
The Aftermath of <i>Lee</i> .....	82
<i>Santa Fe Independent School District v. Doe</i> .....	82
<i>Elk Grove Independent School District v. Newdow</i> .....	84
Conclusion .....	89
CHAPTER 5 POLICY GOALS AND A MODEST PROPOSAL .....	92
Goals .....	92
Policy Alternatives.....	94
Policy Proposal .....	98
Conclusion .....	103

WORKS CITED .....	104
VITA .....	108

## CHAPTER 1

### INTRODUCTION

Many of the colonies that gave birth to the United States were founded for religious freedom by religious zealots. This paradox is fundamental to the religious tradition in the United States. The First Amendment of the Constitution starts, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." (United States Constitution) When the government hires chaplains to minister to military personnel, excuses practitioners of the Jewish faith from school or from government jobs on Jewish holidays, or allows religious student organizations to meet and to teach on public school campuses, these clauses may even come into direct conflict with each other. (Center for Civic Education 1999) One of the most controversial clashes between the clauses began in 1962 with the Supreme Court decision in *Engel v. Vitale* (370 U.S. 421). The war continues though the constitutional battlegrounds have changed, and the opinion of the majority of Americans has consistently been squarely opposed to the decisions of the Court. (Green and Guth 1989; Jacoby 1990; Servin- Gonzalez and Torres-Reyna 1999) Notwithstanding the Supreme Court's right and duty to make unpopular decisions when called upon to do so by the principles of the Constitution, the decisions regarding school prayer seem out of step not only with the democratic nature of the United States but also with the interpretation of the Establishment Clause in regard to other areas in which religion and state often commingle.



## Literature Review

Since 1962, scholars have noted the diversity of interpretation to which the Establishment Clause is subject, especially in regard to issues involving schooling. Modern Court opinions on prayer in public school seem to follow a natural progression from *Engel v. Vitale* in 1962 (370 U.S. 421) to 2000's *Santa Fe Independent School District v. Doe* (530 U.S. 290). Each case in the progression further restricts prayer on school grounds and at school-sponsored activities. Where the Court begins to contradict itself is in aligning these prayer cases with other types of Establishment Clause cases, such as school funding or public display cases. This should come as no surprise to a student of the Court, since Establishment Clause interpretation in these areas seems inconsistent and mired in lists of exceptions to constitutional rules.

Prior to 1947, the Establishment Clause had no bearing on school prayer or funding, because that part of the Constitution applied only to the federal government. (*Everson v. Board of Education* 330 U.S. 1) Writing in 1951, Lynford Lardner described the inherent problems with Establishment Clause interpretations, including problems interpreting the wording of the clause, problems of tradition and custom, and problems defining the extent of the limitation on Congress. (Lardner 1951) All of these problems were at least exacerbated by the incorporation of the provision to the states, which then had to consider their own constitutions as well as their traditional or ceremonial practices.

The *Everson* decision fundamentally altered powers of the several states with regard to government involvement in religion and complicated the interpretation of the establishment clause. Since the time of colonial occupation of North America by the British, colonies or states had controlled religious freedom and toleration statutes. Early

in the history of the United States, several key founders had argued that religious matters were to be handled by these smaller units of government, since they were closer to the people. The federal government, however, has been steadily increasing its power over the state governments at least since the end of the Civil War, and the national government has exerted a steady stream of increasing influence over protections of individual rights and matters of religion. National laws aimed at defense and education purposes have a significant effect on religious practices within states, even though the aims might be secular. Walfred Peterson argued in 1963 that national legislation and case law concerning religion exert a pressure for uniformity and caused conflict when state and local agencies acted in defiance of national policy in order to protect their own traditions. (Peterson 1963)

As the Supreme Court set to the task of defining the Establishment Clause for application to state governments, it was clear to William Van Alstyne that the definition given from case to case was incoherent. At first, he claimed, the Court's view was overly restrictive while at the same time making an exception for the parochial school aid program in question, such as in *Everson* (1947, 330 U.S. 1) in which the Court purported to establish a strict separation between church and state while still allowing the state to bus students to parochial schools. Uncomfortable with the dismissal by the Court of pertinent historical argument, Van Alstyne suggested that the Court needed to interpret the Establishment Clause in light of the Free Exercise Clause. He argued that the two are complementary rather than contradictory, and that the Court could abandon some of its more confusing and disturbing arguments by interpreting the two clauses as one provision. (Van Alstyne 1963)

William Carroll agreed that Establishment Clause interpretation lacks consistency from case to case, even resulting in a rare Court occurrence: the overturning of a previously established precedent when the *Zorach* (1952, 343 U.S. 306) case overturned a Court restriction, set only a few years previously, against release time for students for the purpose of religious education. Carroll argued that the broad interpretation of the Establishment Clause as meaning that the state can in no way support religious activity is unwieldy and unrealistic. In order to counteract this, the Court has developed a system of exceptions to the rule. These exceptions revolve mainly around the concepts of state neutrality, free exercise, and secular purpose. The last of the tests presents the biggest problem in Establishment Clause interpretation and may result in the nullification of some laws that protect free exercise. Carroll suggested that the Court develop a definition for “religion” that is suitable for both the Free Exercise and the Establishment Clauses since the Court appears to be using a different definition for each. In order for one definition to be equally applicable, it must include belief and non-belief. (Carroll 1967)

A 1985 study of school prayer supporters by Elifson and Hadaway identified school prayer as a particularly religious and political issue, particularly salient to older Southern Protestant with little education. Supporters of school prayer tended to be more likely to be conservative also. Though a majority of the United States approves of prayer in public school, Congress has failed in its attempts to create a constitutional amendment. According to the study, this failure may be attributable to the difficulty inherent in writing an amendment that would be acceptable to the many disparate Christian groups on the school prayer bandwagon. This is a problem in the wider school prayer issue, as

these groups may agree, conceptually, that there should be a prayer, but argue over how the prayer should be written and or delivered. Many challenges to school prayer activities have come from persons of faith objecting to the wording, style, or delivery of the prayer in question. Also, since these groups tend to come from less politically powerful demographic groups, allowing Congress to get by on mere lip service to the amendment movement. (Elifson and Hadaway 1985)

One of the reasons for the continued discontent among the American public is the perception of challengers to school prayer activities as members of marginal religious sects. Though this perception may be largely false when it comes to school prayer, a 1983 study by Way and Burt found some Court bias in favor of marginal religious sects. Between 1970 and 1980, Establishment and Free Exercise Clause challenges made by members of marginal sects, those religions not associated with a Judeo-Christian tradition, were successful over 55% of the time, while challenges brought by mainline Protestant succeeded only 34% of the time, with slightly higher success rates for Catholics and litigants of Jewish faith. According to Way and Burt, this alarming trend shows the willingness of the Court to set aside the rights of the majority of religious people in order to protect the rights of those of marginal faiths when they come into conflict. (Way and Burt 1983) In fact, in discussions of school prayer, even in Court opinions, it is the respect for the views of those of marginal religious sects that often causes the Court to reject any notion of school-sponsored prayer activity.

In 1985, Frank Way suggested that the way to stabilize the issue of Establishment Clause interpretation was to shift power back to communities. Prior to *Engel*, courts upheld public piety statutes on the basis of old blasphemy precedent, deference to

legislatures, and democratic values. Also, states deciding the constitutionality of school prayer, resolved the issue in single cases, 75% of which were unanimous, that were never appealed. Of twenty-three states that made prayer decisions, 16 upheld the prayers, 5 struck them down, and two called for excuse mechanisms. (Way 1985)

A. James Reichley in 1986 contended that a Court, overly reliant on the Free Exercise Clause, had abandoned the tradition of acceptable government acknowledgement of religion in its interpretation of the Establishment Clause. His argument relied on references to the founders and to Alexis De Toqueville. Reichley did not claim that religion itself was the foundation of democracy, just that moral values, difficult to separate from religion itself, provided a foundation for democracy. (Reichley 1986)

Leonard Levy, writing in the same year, contended that the founders intended, as the Court had solidified, to create a wall of separation between church and state, such that neither should interfere with the other. Levy argued that, based on the historical record, the founders intended a broad view of both the religion clauses, in order to prevent the kinds of religious persecution with which they were too familiar. Even support of religion in general by federal or state governments would be clearly proscribed by this view of the clauses. School prayer, though it may not favor any denomination or may not be coercive, would fall under this general support category and be unconstitutional in Levy's view. (Levy 1986)

Green and Guth's study of political activists explained the distance between Congress, the Courts, and the public on the issue of school prayer, as one attributable to the deep divide among political activists on the issue of school prayer. The general

public seems to maintain a consistent majority in favor of school prayer that does not exist among political activists. Activists, by definition are more involved in participation in government processes, providing a vital link between the people and their governing bodies. Activists are often also more informed about constitutional issues and about the inner workings of government institutions than are members of the general public. Among this group, there is a clear majority against school prayer. (Green and Guth 1989)

Much debate in the area of Establishment Clause interpretation revolves around the intent of the Framers of the amendment, especially James Madison. Answering accommodationists who had made claims that Madison was accommodating of religious practices as a framer, a Congressman, and a president, Thomas Lindsay reexamined Madison's writings to argue that he was grudgingly accepting of only the most peripheral role of government in religious practice. Madison, after all, was a practical politician, faced with the same democratic pressures and deliberative processes that modern politicians face. Madison, however, was clearly dismayed at the public outcry for days of prayer and fasting during the War of 1812, and issued such ceremonial declarations only to quell the furor, insisting that he would never prescribe the manner in which these days would be observed or insist on observation at all. Madison later cringed at the fact that he felt forced to make the suggestion of days of prayer and fasting at all. (Lindsay 1991)

A recent survey by Servin-Gonzales and Tores-Reyna in 1999 indicated that public support for a school prayer amendment depended directly on the amount of information respondents were given. The general public, given no information, consistently showed majorities in favor of prayer. When informed of the restrictions of

the Establishment Clause or when it was implied that public school prayer would restrict the rights of parents to teach their children their own religious beliefs, support for the amendment was low. This may indicate that the general public wishes to support prayer but has little background knowledge of the purpose, meaning, and implications of the constitutional law surrounding the subject. (Servin-Gonzales and Torres-Reyna 1999)

### The Problem

In the debate over the acceptability of prayer in public school, there are at least two easily definable opponents, and each side defines the problems associated with school prayer differently. Those who approve of school prayer see a problem with the deterioration of moral values and traditions in the American democracy. They also identify a broad interpretation of the Establishment Clause by the Supreme Court as a problem that must be overcome and see the obstruction of state-sponsored school prayer as a violation of the concept of federalism. School prayer opponents believe that constitutional principles are at stake when a state sponsors a prayer. They argue that separation between church and state must be maintained in order to protect believers and non-believers from undue state coercion in the area of religious beliefs. Both sides recognize inherent problems in the inconsistent interpretation of the salient constitutional clauses by the Supreme Court.

Those who believe that prayer in school is acceptable and fundamental to a solidly founded community find themselves aligned with a great tradition that spans from Plato (The Republic Book III) through Tocqueville (Democracy in America Volume 1 Part 2 Chapter 9) and beyond. Though some may disagree with the validity of this

philosophical tradition, a study by the Brookings Institution in 1985 found the argument for the religious foundations of democracy compelling at least. The study indicated some correlation between decline in religious activity and the increase in anti-social behavior such as crime, cynicism, and mistrust of social institutions. (Reichley) This side of the argument is largely defined by the concept that moral education, through school prayer, will lead to a safer and more stable society. The problem, as defined by the pro-prayer group, also called religious accomodationists, is that prayer in school is a necessary component of democracy and vital to the continuation of a free society.

Tradition is also a key focus of the pro-prayer debaters. Justice Potter Stewart, in his dissent in *Engel v. Vitale* (370 U.S. 421), argued that school prayer is part of the heritage of the nation and that to deny the prayer would be to deny students a key part of American tradition. To this effect, he extensively footnoted references to God in accepted government activities, presidential speeches, and the Declaration of Independence. To the supporters of school prayer, this helps to define another problem meant to be answered by the use of a non-denominational non-coercive prayer in school, the disappearance or lack of tradition in the United States.

Federalism may also be at stake when the Supreme Court denies the right of a state to adopt a sponsored prayer. Many accomodationists point out that the First Amendment was written originally to limit the federal government only, as indicated by use of the word "Congress" at the outset of the Amendment. It was not meant to restrict the states, each having its own constitution and religious practices. (Peterson 1963) The Supreme Court, guided by the Fourteenth Amendment, changed the relationship between the states and the federal government with the decision in *Everson v. Board of Education*



(330 U.S. 1), giving the federal government more power over church-state relations. Most accommodationists would argue that this fundamental change to the clause is an attack on the rights of states. (Peterson 1963)

Constitutionally, the accomodationists focus more on the importance of the Free Exercise Clause and on a narrow interpretation of the Establishment Clause. In 1985, the Supreme Court struck down a mandated moment of silence for prayer in Alabama schools simply because the statute mentioned prayer as one of many student activities that could take place during that moment. (*Wallace v. Jaffree* 472 U.S. 38) The Court interpreted the list of activities as a list of endorsed activities that should take place during the moment of silence, thereby placing the government stamp of approval on religious practice. In his dissent, Chief Justice Warren Burger relied mainly on an interpretation of the Free Exercise Clause that would allow each student to practice his or her own religious beliefs, which would enjoy recognition and support by the school. Justice William Rehnquist dissented based on a traditional interpretation of the Establishment Clause that limited the effect of the clause to outright and obvious support of a specific religious belief or sect by the federal government. The accomodationists see the problem as one of allowing Free Exercise of religious beliefs within the constraints of the Establishment Clause.

Accomodationists share many demographic factors. School prayer advocates are more likely to be Southern, older, Christian, blue-collar workers with educational backgrounds often limited to the completion of high school. (Green and Guth 1989) These demographics correlate well with the demographics of the Republican party, so it may come as no surprise that the Republican party platform has consistently contained a

plank regarding a proposed School Prayer Amendment. (Janda 1999) A solid and stable majority of the American public defines the problem of school prayer from the accomodationist perspective. (Green and Guth 1989; Jacoby 1990; Servin- Gonzalez and Torres-Reyna 1999) Therefore, the problem cannot be limited to either side of the political aisle, although prayer may be one of many religious issues that have swung congressional majorities and even the presidency into the hands of Republicans.

People who do not support prayer in school define the problem in a much different manner. They rely on a broad interpretation of the Establishment Clause as first clearly delineated in the case of *Everson v. Board of Education* (330 U.S. 1) which incorporated the Establishment Clause to the states. Though there are exceptions, the rule is basically defined as follows:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' (*Everson v. Board of Education* 330 U.S. 1)

The separationists believe that there are fundamental constitutional values at stake that have just as fine a tradition as the philosophical one claimed by the accomodationists. This tradition springs from the years of religious persecution and war in Europe and in the early colonies. This history is referenced in Justice Hugo Black's decisions in both

*Everson* (330 U.S. 1) and *Engel v. Vitale* (370 U.S. 421). For those opposed to state-sponsored prayer, non-belief holds and should maintain the same level of protection as any religious belief. (Carroll 1967) Therefore, one problem associated with prayer in school includes the danger of religious persecution or subtle coercion of non-believers.

It would be folly to suggest that separationists are all atheists, agnostics, or secular humanists. (Green and Guth 1985) In fact, the recent Texas suit regarding student-led prayer prior to football games was commenced by a Catholic and a member of the Church of Jesus Christ of Latter Day Saints. (*Santa Fe Independent School District v. Doe* 530 U.S. 290) Many fear that a close relationship between church and state is as harmful to religious practice as it is to state secular goals. (Van Alstyne 1963) People who disagree with state-sponsored prayer in school see a problem with the overt entanglement between state and religion. In the case of *Lemon v. Kurtzman*, the Court incorporated this definition of the problem into the official test for Establishment Clause cases. (401 U.S. 192)

The main difference in problem definition lies in the accepted method of Establishment Clause interpretation for each side. Accommodationists read the clause narrowly to allow non-denominational, non-coercive prayer, while separationists read the clause broadly to disallow any support of religion by the government, including any kind of recognized prayer activity. If the Court were consistent in its application of the Establishment Clause, it would give both sides an interpretation to agree on, but arguments continue based on many inconsistencies. Though the Court's definition in *Everson* (330 U.S. 1) seemed like a steadfast rule, the justices immediately started to riddle the rule with exceptions. (Carroll 1967) The opinion in *Everson* actually

supported state funded busing to private schools. Since then, the Court has allowed release time for religious education (*Zorach v. Clauson* 343 U.S. 306), public school teachers providing secular education in private schools (*Agostini v. Felton* 521 U.S. 203), and even direct public payment to private schools (*Zelman v. Simmons-Harris* 536 U.S. 639). At the same time, the Court has prohibited non-denominational, non-coercive school prayer (*Engel v. Vitale* 370 U.S. 421), a mandated moment of silence for prayer (*Wallace v. Jaffree* 472 U.S. 38), ceremonial prayer at graduation (*Lee v. Weisman* 505 U.S. 577), and student-led ceremonial prayer at the beginning of school sporting events (*Santa Fe Independent School District v. DOE* 530 U.S. 290). If the problem is the ceremonial usage of religious ceremony in government sponsored activity, it is difficult to understand how the Court has allowed the use of the national motto, "In God We Trust," on all U.S. currency, and chaplains in state and national legislative sessions. (*Engel v. Vitale* 370 U.S. 421) Both sides can recognize the major problem with school prayer policy in the United States is inconsistency in Establishment Clause interpretation on the part of the Court.

## CHAPTER 2

### THE HISTORY OF ESTABLISHMENT CLAUSE INTERPRETATION

Because of the prohibition of the First Amendment against the enactment of any law ‘respecting an establishment of religion,’ which is made applicable to the States by the Fourteenth Amendment, state officials may not compose an official state prayer and require that it be recited in the public schools of the State at the beginning of each school day - even if the prayer is denominationally neutral and pupils who wish to do so may remain silent or be excused from the room while the prayer is being recited.

Justice Hugo Black’s decision in *Engel v. Vitale* (370 U.S. 421) did more than end a practice of religious prayer in New York’s public schools, it touched off a wave of controversy that has stretched into the twenty-first century. Nationwide, school districts tried to maneuver around this new, broader interpretation of the Establishment Clause. Solutions ranged from moments of silent prayer and reflection (*Wallace v. Jaffree* 472 U.S. 38) to ceremonial prayer at graduation (*Lee v. Weisman* 505 U.S. 577) to student-led prayer at extracurricular activities (*Santa Fe Independent School District v. DOE* 530 U.S. 290). None of these solutions was acceptable to the Court, and many school districts simply act in defiance of the Court’s decisions, silently hoping that no parent will bring legal action.

Much of the reason behind the search for loopholes and the acts of defiance can be found in the changing and inconsistent interpretation of the Establishment Clause itself. Its reluctant author, James Madison, penned the clause as a part of a broader

statement of rights that he had promised to the Anti-Federalists in order to secure ratification of the Constitution. Citizens, to be sure, would be protected from a formal declaration of a national religion. (Annals I: 729-731) The new government had in fact grown out of colonies, some of which had been established solely for the purpose of freeing these new settlers from the bounds of established religions in Europe, therefore many citizens under the new Constitution thought it necessary to enact such a barrier between the matters of church and those of state. (*Engel v. Vitale* 370 U.S. 421) The original interpretation of the clause, however, restricted only national governments and did not seem to prohibit some ceremonial sponsorship of religion in general. Through the Court's doctrine of incorporation, the Establishment Clause was applied to the states in 1947 in the case of *Everson v. Board of Education*. (330 U.S. 1) Since then, the special relationship between schools and religion has created a murky area of constitutional law.

There are three general methods of interpretation used by Supreme Court justices, and even scholars within these three schools differ in their interpretation of this seemingly simple statement in the First Amendment. The first method involves searching for the literal meaning of the words of the clause being interpreted, the second relies on the intent of the Framers of the provision, and the third involves the application of time-honored constitutional principles to modern problems. Some justices, typically described as conservative or restraintist, look to the words of the provision for insight into the true meaning and application of the clause to modern situations while others comb the historical record for clues as to the true intentions of the Framers of the Amendment. (Levy 1986) More liberal justices, often accused of being activist, take an evolutionary approach, viewing the Constitution as a living document, the principles of which must be

shaped to match the changing needs of a new society. (Scalia 1998) Each method of interpretation has its flaws, and each presents a special challenge in Establishment Clause cases, which are often further complicated by the interplay between that clause and its sister, the Free Exercise Clause.

As a result of the different methods of interpretation, the changing makeup of the Court, and the continuous pull of public opinion, the Court has created a maze of definitions of the Establishment Clause, and many modern cases involving establishment of religion contradict each other or contradict precedent. The most glaring inconsistency comes in the application of the Establishment Clause to school prayer. Following a broad, evolutionary interpretation, the Court has struck down any and all forms of government sponsored prayer in schools while allowing the government to sponsor the use of chaplains in state and national governments as well as the ceremonial use of religion on currency, and in patriotic songs sung in the school environment. (*Engel v. Vitale* 370 U.S. 421) They have disallowed use of prayer in extracurricular activities (*Santa Fe Independent School District v. DOE* 530 U.S. 290) while allowing religious clubs to meet on campus with a school advisor (*BOE of Westside Community Schools v. Mergens* 496 U.S. 226) and direct monetary payments to private schools by the state. (*Zelman v. Simmons-Harris* 536 U.S. 639) As the Court moves to narrow the scope of the Establishment Clause in terms of monetary support to religious institutions, it has broadened the interpretation of state support in terms of prayer in school

## Church-State Relations in a Republic

When the first known republic was established by the Greeks, there was no call for the separation of church and state activities. Early political philosophers found the two concepts inextricably tied together, and saw religion as a key function of the state. In The Republic, Plato lays out the design for a model government in which education must be the foundation for the state. Crucial to this state education was a common set of values taught to all children through the use of religious tales. (Plato The Republic Book III) Aristotle, writing many years after Plato, thought religion to be a necessary function of the state in order for the community to survive. (Aristotle Politics Book VII; viii) Classical republicans believed that the serenity of the state rested in part on uniformity in morality and civic goals, and that in order to achieve that uniform morality, religion should be supported by the state.

When the Roman Republic fell to its own imperialism, the early age of republics disappeared and was replaced by a new age of authoritarian rule. State sponsorship of religion in many parts of Europe gave way to religious sponsorship of the state. The Romans persecuted Jews and Christians; the Christians, separated in two sects, forced non-Christians into Eastern Europe where ethnic tension raged. Christians, Jews, and Muslims fought Holy Wars over sacred land, and the fire of expansionism was fueled by religious fervor. Popes and kings struggled with each other for power. Religion corrupted the state, and the state sullied religion. (Ellis, E. and Esler, A. 1999)

It was this unholy alliance between church and state, coupled with the rebirth of classical learning that led to the Reformation, the revolt against the Catholic Church in Western Europe. Whereas the Renaissance had led to the questioning of religious beliefs



in matters of science, the Reformation invited inquisitive souls to seek their own salvation without assistance from church or state. It was from this revolutionary chain of events that the predecessor to the American ideology was born, Enlightenment Philosophy. People began to see themselves as autonomous individuals who could seek their own salvation and make their own decisions regarding their governance through the power of logic with which each man had been gifted at birth. (Ellis, E. and Esler, A. 1999)

Many Protestant faiths faced persecution in Europe and fled to the American colonies in order to escape the established churches of the old world. However, many of those settlers created similarly entangled governments once they had created a homogeneous community of their own, and their colonial charters reflect this urge to sanctify their own colonial governments. (Center for Civic Education) Some Protestant leaders, however, recognized a need for the some distinction, though not a clear one, between church and state powers. John Calvin, a Protestant founder whose followers faced discrimination in many parts of Northern Europe, wrote:

Nor let anyone think it strange that I now refer to human polity the charge of the due maintenance of religion, which I may appear to have placed beyond the jurisdiction of men. For I do not allow men to make laws respecting religion and the worship of God now, any more than I did before; though I approve of civil government, which provides that the true religion which is contained in the law of God, be not violated and polluted by public blasphemies with impunity. (Calvin 1536)

The Protestant distinction between the sphere of government and the sphere of religion seemed to depend on the homogeneous or heterogeneous situation in which they found themselves. More bluntly, it may have simply depended upon who held power.

Most importantly, the Enlightenment period marked a return to democratic ideas. John Locke, a British philosopher who bristled at the king's claim to divine right, may be the most influential philosopher from the period. Locke's essay on religious tolerance details a type of separation of church and state in which each individual would be responsible for his own path to salvation; therefore, it was not the duty of the government to enforce religious precepts on the people. Judging by Locke's last several paragraphs, however, there must be some role for the government, because he believes that Catholics and atheists are not to be tolerated by any government. Locke wrote:

That church can have no right to be tolerated by the magistrate which is constituted upon such a bottom that all those who enter into it do thereby ipso facto deliver themselves up to the service and protection of another prince...Lastly, those are not to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. (Locke 1689[1983])

In his Second Treatise on Government, Locke wrote extensively about the beginning and nature of human society. He theorized that even in a state of nature in which no government exists, there is a law, which is handed down by God and that God grants all people with rights to life, liberty, and property. The purpose of the government is to protect those God-given rights. (Locke 1689[1983]) Therefore the Enlightenment and the Reformation gave birth to the idea of a separation of church and state, but the separation was never meant to be a strict one, nor was the idea commonly practiced over much of Europe.

This history and philosophy is directly reflected in the founding documents of the United States. Many of the colonial charters in the American colonies referred to a duty to God. For example, under a listing of capital laws in The Body of Liberties of the Massachusetts Colonie of New England, is written, "If any man after legal conviction

shall have or worship any other god, but the lord god, he shall be put to death.” (1641)

The Declaration of Independence nearly quotes Locke’s natural rights philosophy as well as referencing God in several sections. It ends, “And for the support of this Declaration, with a firm reliance on the protection of the divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.” (1776) After the states gained independence and wrote their own Constitutions, many of them seemed to reflect the separation of church and state suggested by the religious reformers, but with the same, seemingly mixed message of partial support of religion by the government. The Virginia Declaration of Rights states:

That Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of his own conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other. (1776)

This tradition of walking the fine line between government support of public morality in the form of religion and allowing people the right to exercise religion freely has obfuscated the standing case law in regards to participation in religious activity in school.

As A. James Reichley puts it

Historically, there is no doubt that religion played an important, perhaps indispensable, part in the development of democratic ideas and institutions, first in Europe and then in America. Some political theorists argue, however, that once these institutions are in place, they can be maintained on the basis of purely secular values. Others, supporting the beliefs of the Founders, contend that if values derived from religion are removed, the moral pillars on which democracy stands will crumble. (1986)

## Education in America

The history of education in the United States presents a new challenge to the separation of church and state. Originally, schools were church run, and the purpose of education on the American continent was to prepare students for life in the religious community. Much of this education focused on Bible reading and study, and higher levels of education were created to prepare young boys for a future in becoming ministers. (Boyers, et al 1996) Eva Brann writes,

With respect to the colleges, my main concern, there were no strictly private schools in this country in the early days. The colonial colleges were financed both from public and private sources; sectarian and secular influences were thoroughly entangled with each other. (Brann 1979)

Initially, religion and education were inexorably tied, and the state intermingled funding and land grants to these church sponsored institutions of learning. The Northwest Ordinance solidified this role of the government in education by requiring that each new state that joined the Union would be required to set aside a certain amount of land to the support of public education. (Northwest Ordinance 1787)

Thomas Jefferson, who is often seen as a guiding philosopher in the area of church and state, was also an advocate of publicly funded education for all citizens. Jefferson developed an idea of schooling in which small communities would run and fund community schools in which students would be prepared to serve the community. Many aspects of his plan reflected the classical republican philosophies of the early Greeks. Even Jefferson, who is famous for his Deist perspective and attempt to remove all superstitious and supernatural references from the Bible, recognized the need to allow religious practice in the public schools. In an 1825 letter to Arthur Spicer Brockenborough, Jefferson wrote:

In the Rockfish report it was stated as probable that a building larger than the Pavilions might be called for in time, in which might be rooms for a library, for public examinations, and for religious worship under such impartial regulations as the Visitors should prescribe, the legislature neither sanctioned nor rejected this proposition; and afterwards, in the Report of Oct 1822. the board suggested, as a substitute, that the different religious sects should be invited to establish their separate theological schools in the vicinity of the University, in which the Students might attend religious worship, each in the form of his respective sect, and thus avoid all jealousy of attempts on his religious tenets. among the enactments of the board is one looking to this object, and superseding the first idea of permitting a room in the Rotunda to be used for religious worship, and of undertaking to frame a set of regulations of equality and impartiality among the multiplied sects. I state these things as manifesting the caution which the board of Visitors thinks it a duty to observe on this delicate and jealous subject. your proposition therefore leading to an application of the University buildings to other than University purposes, and to a partial regulation in favor of two particular sects, would be a deviation from the course which they think it their duty to observe.. (Jefferson [1825]1983)

Though Jefferson did go on to suggest that it might be easier for students to attend churches in a nearby community, he did not indicate any disapproval of the board's suggestions regarding the provision of a building for religious worship on the University's grounds, and seemed to support the idea that the problem with his friend's plan was the support of specific sects. This would support the accommodationist view that government could support religious practice in general while not granting special privileges to certain sects.

As the nation expanded and the government took on more roles, states began to provide public education for all students. Many of these states developed compulsory attendance laws that forced students to attend school between certain ages. The demands of the Industrial Revolution and of the increasing complexity of American public life required that the youth in America be provided with compulsory education in order to be effective citizens. (Arends 1998) Schools never entirely separated themselves from

their history of religious instruction. Until the 1960s, most states maintained traditions of prayer in school and devotional Bible reading. Many of these activities went unchallenged in the United States, because the Establishment Clause of the First Amendment applied only to the federal government, but the case of *Everson v. Board of Education* (330 U.S.1) changed that and incorporated the clause into the fundamental liberties covered by the Due Process Clause of the Fourteenth Amendment. The sheer weight of *amicus curiae* briefs filed by other states in support of New York in the case of *Engel v. Vitale* (370 U.S. 421) and in support of the state of Maryland in the case of *Abington School District v. Schempp* (474 U.S. 203) prove the fact that many states had retained tradition carried over from the religious foundations of education in the U.S.

#### Intent of the Framers

Legal scholars who interpret the Constitution by seeking the intent of the original writers of key clauses and sections search legal record for the true meaning of the Establishment Clause in relation to the problem of school prayer. (Scalia 1998) This type of interpretation allows a consistent set of beliefs about the fundamental principles of the American government. An interpretation of this type could provide clear case law which might stand the test of time, leading to a more consistent set of laws within the United States. Seeking the intent of the Framers can be an arduous process, however, and may be fraught with a new set of interpretations. Even experts in Framers' intent can disagree on the final definition of a provision in light of the historical record. Furthermore, many of the Framers disagreed amongst themselves, and this type of interpretation often relies on the journals and notes of one or two key Framers, such as James Madison. (Levy

1986) As Justice David Souter notes in his concurrence on *Lee v. Weisman* (505 U.S. 577), “the Framers simply did not share an understanding of the Establishment Clause.” Newer amendments are interpreted through the scope of congressional debate records, but those records may not reflect the full range of discussion and disagreement that occurred over the provision’s meaning.

Interpreters who use this method to define the Establishment Clause often rely on the writing and history of James Madison and of the First Congress. For the scholar, the natural starting point is the purpose of the provision, or in this case, the purpose of the Bill of Rights itself, a compromise made between the Federalists and the Anti-Federalists in order to secure the ratification of the Constitution. (Center for Civic Education 2000) The Anti-Federalists had many concerns regarding the new government, and their most significant concern was that the right of the states to rule within their own spheres was going to be usurped by a newly empowered national government. (Ketcham 1986) Among their greatest fears was the idea that the national government could infringe on the rights of the people, rights protected by the individual state constitutions.

James Madison, ideological leader of the Federalist movement, was initially reluctant to include religious protections in the list of liberties that would be guaranteed by the federal government. It was not that he expected the national government to allow religious persecution, but he did not wish to list rights over which the federal government had no initial power. At the Virginia Ratifying Convention, Madison is quoted as remarking, “There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.” Both Madison and the Anti-Federalists agreed that religion was a matter that was strictly under

state control, but the Anti-Federalists insisted that the same protections for religion that existed on a state level should be applied to the federal government.

Madison modeled the Establishment Clause of the First Amendment after similar clauses in many state constitutions, including the clause in the Virginia constitution that Madison encouraged Mason to include. (Center for Civic Education 2000) Maryland's official interpretation of non-establishment meant that all Christian churches were to have equal access to state funding. (Maryland Constitution of 1776, Declaration of Rights) The New Jersey Constitution of 1776 reads, "That there shall be no establishment of any one sect in this Province, in preference to another," but in the next sentence grants special privileges to Protestant. From these, Madison developed a clause which simply read, "Congress shall make no law respecting an establishment of religion." (United States Constitution) This wording is clearly broader and more tolerant of non-Christian sects than the state constitutions were, but the basic meaning was the same: Congress was not to support a religion.

Madison was a Deist and feared excessive intermingling of church and state. A 1774 letter to William Bradford detailed Madison's fear of an overly powerful religious sect taking over government functions as he detailed persecution of religious dissenters in his own community. He wrote, "That diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their Quota of Imps for such business. This vexes me the most of any thing whatever. There are at this in the adjacent County not less than 5 or 6 well meaning men in close for publishing their religious Sentiments which in the main are very orthodox." (Madison 1774) Evidence suggests that Madison's view of the clause he penned may be more narrow than many



have assumed. Madison is quoted in the Congressional record as stating that “he apprehended the meaning of the words to be, that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship in any manner contrary to their own conscience.” (Annals I: 729-731) Further proof that Madison did not intend to prohibit all forms of government support for religious practice comes from Madison’s presidency. During the War of 1812, Madison declared a national day of prayer and fasting. (Madison 1814)

The First Congress also left some key as to what the Establishment Clause meant. In its debate over the clause, the wording was clarified so as to restrict only the federal government and not to infringe on the states’ right to adopt their own religious protections. Many of the congressmen feared that the amendment would be too harmful of religion and would restrict the relationship between religion and state too narrowly. (Annals I:729-731) That debate took place, as all others since the founding of Congress, after a prayer led by a chaplain paid by federal funds. This Congress also approved both a national day of prayer and thanksgiving and direct financial support to privately run schools that were still in the practice of teaching religious principles. (Center for Civic Education)

Thomas Jefferson’s role as Secretary of State did not give him much of a voice in the process of proposing or ratifying the amendment, but Jefferson is often quoted in Court decisions restricting governments involvement with religion. The most quoted phrase, “Wall of Separation” comes from a letter he wrote to a Baptist committee in 1801. Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his

worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

In this context, he seems to be referring to the fact that government cannot infringe on a citizen's right to believe as he chooses. Jefferson acknowledges the importance of the moral values that religion carries with it in regards to the education of youth. In his second inaugural address, he was clear as to where power over religion lay.

In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the constitution found them, under the direction and discipline of state or church authorities acknowledged by the several religious societies. (1805)  
Evidence as to the intent of the Framers with regard to the meaning of the

Establishment Clause would lead one to the conclusion that religious matters were to be left mainly to the state. This is complicated by the Fourteenth Amendment and the incorporation doctrine spawned by the Court in the early twentieth century.

Interpretation of the Establishment Clause in light of the Due Process Clause of the Fourteenth Amendment revokes this power from the state governments. (*Everson v. Board of Education* 330 U.S. 1) However, several justices have argued that a more historical interpretation of the First Amendment allows the states the right to ceremonially use prayer in school facilities. Footnotes 1,2, and 3 of Justice Stewart's dissent in *Engel v. Vitale* (370 U.S. 421) detail the many instances in which the federal government has ceremonially made reference to God in official public speeches or

activities. Chief Justice Rehnquist, in his dissent in *Wallace v. Jaffree* (472 U.S. 38), called modern interpretation of the Establishment Clause a misreading of the history. This record would seem to indicate that the intent of the Framers was not to restrict state sponsored schools from offering an opening prayer which was neither coercive nor denominational.

One cannot necessarily rely, however, on the intent of the Framers as sound constitutional interpretation. The Congress that framed the Fourteenth Amendment also passed an ordinance forcing Washington, D.C.'s public schools to be racially segregated. (*Brown v. Board of Education* 347 U.S. 483 1954) Few would argue today, however, that the Fourteenth Amendment's Equal Protection Clause allows the segregation of public schools in the United States. Those who believe that the Constitution should adapt to changing times and mores cite *Brown* and other civil rights cases as examples of the Constitution not only adapting, but fulfilling the promise of its provisions.

### Literal Interpretation

Scholars of literal interpretation seek to divine the meaning of a constitutional provision by interpreting word usage and placement. Proponents of this method claim that it will maintain the integrity of the Constitution as a guiding document as it allows for a consistent and clear reading of constitutional provisions. Opponents claim that changing nuances in word usage confound the method and that experts will continue to disagree over the importance of word placement and word choice. This method allows little adaptation of the Constitution to modern problems and relies on the same limited historical record on which the intent of the Framers rests. (Scalia 1998)

As far as interpretation of the Establishment Clause is concerned, one would have to look at the very specific usage of the words. First of all, Congress is specified as the institution which may not make a law respecting an establishment of religion. This would restrict the usage of the clause to the federal government only, but this interpretation would have to be modified in order to account for the effects of the Fourteenth Amendment and the incorporation doctrine. (*Everson v. board of Education* 330 U.S. 1)

Secondly, one would have to study the wording. It seems as if all sides agree that the Establishment Clause restricts the federal government from setting up a mandated state church the way the English king had established the Church of England. There is, however, debate over the definition of the word “establishment.” In the Framers’ time, establishment may have meant simply that a government was setting up an official religious practice, but the Court has defined Establishment by three criteria: non-secular purpose, advancing or inhibiting religion, and the excessive entanglement of government with religion. (*Lemon v. Kurtzman* 401 U.S. 192) This definition has caused a great deal of confusion over the definition of a secular purpose. (Van Alstyne 1963) Most of the debate has been limited to cases involving state funding of parochial schools; however, the Lemon test has become the standard measure by which all school prayer cases are measured as well. Incidentally, it is the secular purpose test on which school prayer activities fail the test.

There is also confusion as to the definition of religion. Writing in 1951, Lynford Lardner asserts that

If we assume that the Framers of the First Amendment used words carefully, it is easy to see that the Amendment might well mean more than

just a prohibition of a national church in the British sense. A law respecting an establishment of religion has more comprehensive connotations than a law respecting the establishment of a church.

In 1963, William Carroll suggested that the only definition of the word religion would have to be one which acknowledges the rights of non-believers with the same respect as those of believers. These varying definitions of even the word religion can cause problems as school and districts, feeling pressed by their constituencies, seek to find a form of prayer that does not further religion.

The literal interpretation of the Establishment Clause, in its narrowest sense, would seem to support state sponsored prayer in school, although it might prohibit nationally sponsored prayer in school. Of course the Fourteenth Amendment and *Everson* have, at least, complicated that part of the literal interpreter's argument. There is too much difficulty in this form of interpretation to say with any certainty the extent to which the clause is applicable to the states as well as the extent to which it protects any religious activity from state intermingling. Different people involved in the congressional debates may even have had different definitions of the words in question. Also, placing special emphasis on specific words, such as "respecting" or "an", can change the literal meaning of clause. Some interpreters even grant special significance to the absence of the word "a" before the word religion. (Levy 1986) Therefore, a justice with a sharp mind could use a literal interpretation either to strike down or to defend school prayer.

## Evolutionary Interpretation

The most common modern method of interpretation is the evolutionary method. This allows a justice to broadly apply constitutional principles and concepts to the changing needs of a changing society. It allows the constitution to bend and mold itself to modern times without the lengthy and arduous process of constitutional amendment and permits justices to apply their own morality and sense of fairness to constitutional doctrine. Many scholars label this method “judicial activism,” which is a derogatory term in the legal realm, and some complain of the lack of consistent precedent that is spawned by the evolutionary approach. As difficult as it may be to scour the historical record to discover the meanings of the past, it is more difficult to peer into a proverbial crystal ball to discover the needs of the future. (Scalia 1998)

Justices usually try to confine themselves within accepted traditional principles of constitutional government when interpreting the Constitution in this way. One of the key concepts in relation to prayer in school is that of popular sovereignty, or rule by the will of the people. Public opinion concerning school prayer has shown a consistent and overwhelming majority in favor of non-denominational prayer in public school. (Green and Guth 1989; Jacoby 1990; Servin- Gonzalez and Torres-Reyna 1999) In recognition of public opinion, the Republican Party maintains a platform plank calling for an amendment to allow non-denominational non-coercive prayer in public school. (Janda 1999) The *amicus* briefs filed to support states in each of the prayer cases can be accepted as examples of popular support of school prayer. (*Engel v. Vitale* 370 U.S. 421, *Wallace v. Jaffree* 472 U.S. 38) Many states, such as Nevada, have passed silent

contemplation statutes that avoid the ruling in *Jaffree* by not making any mention of prayer.

Another of the main doctrines of the American political system is that of federalism, each state maintains certain powers that are not under the control of the federal government. The Tenth Amendment states that “The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.” (United States Constitution) Judging by the claims of Madison at the Virginia Ratifying Convention that the federal government had no hint of power over religion, one might conclude that these powers would be left to the states and to the people. Education, since becoming a public instead of private function, has always been a state function (Arends 1998), and states are allowed to set their own moral standards in other cases. (*Miller v. California* 418 U.S. 915) Therefore, one might conclude that community standards should be the guiding principle in the matter of school prayer. (Peterson 1963)

The interpretation of the Fourteenth Amendment as apply the Establishment Clause to the states (*Everson v. Board of Education* 330 U.S. 1) complicated the relationship between the state governments and the Establishment Clause. The Fourteenth Amendment was constructed in order to protect the rights of people from the abusive powers of state governments. In *Everson*, the Court identified the right to protection against the establishment of religion to be one of the fundamental rights to be protected under the umbrella of the Fourteenth. This decision precluded states from setting their own standards in regard to the establishment of religion and forced states to

adapt to the national definition of the Establishment Clause, as defined by the United States Supreme Court.

The general purpose of the First Amendment in total seems to be to protect freedom of expression of ideas and beliefs. The Court has recognized this as a concern in the case of *Westside Community Board of Education v. Mergens* (496 U.S. 226). In order to achieve Mill's ideal of the marketplace of ideas, freedom of expression must be protected in all places and in regards to all different forms of expression. (Mill 1982) Students' rights to express themselves do not disintegrate when school is in session (*Tinker v. Des Moines School District* 393 U.S.503), but students do face stricter restrictions on speech protections than do adults in public places. (*Bethel School District Number 403 v. Fraser* 478 U.S. 675) This protection of the freedom of expression might support a non-coercive school prayer if it was deemed to be an expression of the students' beliefs and not of the state's, but the Supreme Court has also denied that this type of expression is protected when school equipment is used for the dissemination of the religious message and the school is aware that the student might express a religious sentiment. (*Santa Fe Independent School District v. Doe* 530 U.S. 290)

Madison believed that the greatest protection against religious persecution would come from the diversity of belief within a nation as large and populated as the United States. (Virginia Ratifying Convention 1787) This largely agreed with his view of factions as expressed in Federalist 10. The protection of diversity, the respect to minority rights, and the tolerance of religious factions are all basic parts of the American foundation of government. The Establishment Clause gives American citizens a freedom from religion. The Constitution denies the right of the government to establish a



religious test for any public office. (United States Constitution Article VI) According to some, any law concerning religion in the United States should consider the rights of non-believers as equal with the rights of believers and allow non-believers to follow their own conscience without coercion, subtle or otherwise. (Carroll 1963) These principles may conflict with the establishment of a state-written prayer, even if it is non-denominational.

Lastly, the Constitution was written to limit the scope of government. It is a social contract by the definition of John Locke, meant to protect people from the government. (Wooten 1983) Under this definition, the government exists to protect life, liberty, and property; it has no right to direct citizens to the proper use of any of those rights unless they are in conflict with the rights of another. Since the reformation, religion has been widely viewed as a private matter between the worshipper and his or her God. Protestants are directed to read and interpret biblical scriptures for themselves, and many sects believe in a personal path to salvation. (Ellis, E. and Esler, A. 1999) Under this interpretation, state sponsored school prayer would probably not be constitutional.

This type of interpretation leads to muddled and confusing policy. It may lead a judge to decide that it is up to each individual community to decide and define prayer statutes for itself. It may lead him to encourage school districts to write a prayer that recognizes all religious traditions, including atheism, equally, a nearly impossible task. A judge may require that the people in a state strip religion from their moral codes and teach them from a secular perspective, another daunting task. Evolutionary interpretation seems to be the type used in the case of *Engel v. Vitale* (370 U.S. 421) and on which, by the doctrine of *stare decisis*, all subsequent prayer cases have rested.

## Conclusion

Establishment Clause interpretation is notoriously difficult and inconsistent. Religious practices involving school have enjoyed the support of the state and the Court as long as the state acted neutrally, not showing favor to any sect, and as long as the people participating had the right to choose their level of participation in the activity. This is true of state funded busing to private school (*Everson v. Board of Education* 330 U.S. 1), release time for students studying religion during the school day (*Zorach v. Clauson* 343 U.S. 306), Bible club meetings on school campus (*Westside Community Board of Education v. Mergens* 496 U.S. 226), public school teachers providing assistance to student with special needs in parochial schools (*Agostini v. Felton* 521 U.S. 203), and direct public payments to parochial schools for the education of at-risk students. (*Zelman v. Simmons-Harris* 536 U.S. 639) Somehow, however, the same logic of neutrality and choice does not apply to non-denominational, non-coercive prayer (*Engel v. Vitale* 370 U.S. 421), moments of silence for prayer (*Wallace v. Jaffree* 472 U.S. 38), or prayer at extra-curricular activities. (*Santa Fe Independent School District v. DOE* 530 U.S. 290) In these cases, the Courts have asked that the state be decidedly anti-religion. With regard to prayer, the Supreme Court has allowed public sponsorship of prayer as a means of ceremonial recognition of God. Footnotes in *Engel v. Vitale* reference the congressional use of chaplains, the crier's introduction of the Supreme Court, presidential proclamations of days of prayer and fasting, the national motto "In God We Trust" on all U.S. currency, and the addition of the words "under God" to the Pledge of Allegiance. This ceremonial usage, however, does not protect ceremonial prayer at the beginning of the school day (*Engel v. Vitale* 370 U.S. 421), ceremonial

invocations and benedictions at public school graduation ceremonies (*Lee v. Weisman* 505 U.S 577), or ceremonial prayer to begin a football game. (*Santa Fe Independent School District v. DOE* 530 U.S. 290)

In the United States, there has always been a tangled relationship between religion and state, especially in regards to the education of children. There is a precarious balance between the protection of people from religious indoctrination and persecution and protecting the public morality. Religion has always been recognized as an important piece of the foundation for democracy, from the writings of the classical republicans (Plato The Republic Book III) to the observations of Tocqueville (Tocqueville Democracy in America Volume 1 Part 2 Chapter 9) to the studies of modern political scientists. (Reichley 1986) Prayer in school has been a major battlefield for the balancing of rights of the individual and protection of the common good, and the war of lawsuits, proposed amendments, and state insubordination continues. (Elifson and Hadaway 1985) For the Court, the challenge is to create a definition of the Establishment Clause that is consistent, that protects the free exercise of the religious people of the nation, that protects the freedom from religion for non-believers, and that satisfies public opinion in order to preserve democracy.

## CHAPTER 3

### *ENGEL V. VITALE*

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." (*Engel v. Vitale* 370 U.S. 421) These simple words, spoken by school children in the State of New York at the beginning of their school day in 1962 would set off one of the most controversial cases in recent history. The regents in New York developed the prayer as part of a program that would improve moral and spiritual training in the public schools. It was the purpose of this prayer, not simply the wording, that caused some parents to immediately object to what they perceived as the Christian indoctrination of their children and as a direct violation of the First Amendment. (*Engel v. Vitale* 370 U.S. 421)

Although the New York Court of Appeals forced schools in New York to allow students to remain silent or to leave the room without any comment from the teacher, the parents were unsatisfied. They appealed to the Supreme Court of the United States for redress of their grievances uncovering, on a national level, the controversy that had been brewing in many of the states. (Way 1985) Certainly, they argued, the Establishment Clause of the First Amendment should protect people of marginal religious faiths from encroachment by the majority. When the Supreme Court agreed, school districts across the nation scrambled to find some way around the decision and the public cried foul. (Elifson and Hadaway 1985, Servin-Gonzalez and Torres Reyna 1999)

The problem with the *Engel* decision may not have been one of proper reading of the Constitution, though previously decided establishment precedent, if closely followed, may have led to a different conclusion. (*Everson v. Board of Education of Ewing Township* 330 U.S. 1, *Zorach v. Clauson* 343 U.S. 306) In his decision, Black attempted to divorce the tradition of the United States from its state practices while using aspects of American history to deride even cursory state support of religion and ignoring the positive interplay between government and religion that has characterized the United States. (*Engel v. Vitale* 370 U.S. 421) It might have been this divorcement of America from its traditions in the case of schooling that led to the greatest portion of the public outcry.

Overall, the issue of whether or not prayer is permissible in public school did not begin or end with the *Engel* decision. The divisiveness of the issue stretches back into the early twentieth century; however, the split within the Court to some degree mirrored the split within the nation, and the case nationalized the issue of public prayer. Justice Black, while expanding the protections of the Establishment Clause, shed little light on proper interpretation of the clause, which led to further cases as states and school districts maneuvered around the decision.

### Public Opinion and Federalism

One of the key principles of the Supreme Court is that it is designed to be apolitical, free from the pressures of public opinion and from the forces that often control other branches. It is not surprising, then, that the Court occasionally makes decisions that are severely out of step with public passions. Such was the case with the *Engel* decision.

Usually, over several years, the societal norms shift to align themselves with judicial doctrine, as in the case of school desegregation. (Wilson 2002) This did not happen in the *Engel* case, as public opinion in favor of non-denominational prayer in school has only narrowly declined in the twenty years since the decision has been enforced. (Elifson and Hadaway 1985, Servin-Gonzalez and Torres-Reyna 1999)

The sheer weight of public opinion is evident in the number and types of *amicus curiae* briefs filed in relation to the case. Twenty-two different states filed *amici* in support of the right of the state of New York to continue these prayers. It is obvious that these twenty-two states would be directly affected by the decisions, since they would have to amend their moral education codes as well. Filing *amicus* against the prayer were an ethical union and two Jewish Councils. (*Engel v. Vitale* 370 U.S. 421) The Jewish population of the United States is admittedly smaller than the Christian population and has always been part of a type of marginal religious group, but this case should not be interpreted as a problem of Christians against Jews, since the Court acknowledged that some respondents professed no particular religion.

According to Justice Black's decision in *Everson v. Board of Education*, states are meant to be neutral in the treatment of religion. He writes, "That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." (330 U.S. 1) Modern analysis has shown, however, that the Court has tended to favor marginal religious practices over those of the majority population. This was not common prior to the decision in *Engel*;

however, it was common after the judicial religious revolution of which *Engel* was the beginning. Way and Burt wrote,

In our study of litigation from 1946 through 1956 when marginal religious claimants sought exemptions from social norms that conflicted with their religious beliefs and strict codes of behavior, the judiciary was generally not receptive...the percentages of successful claims increased dramatically during the period from 1970 to 1980. (1983)

Although this research deals most directly with the Free Exercise Clause, it is applicable here for the fact that persons belonging to marginal faiths or professing no faith were challenging an established traditional practice within the public school system, and the Court ended up ruling in favor of these litigants. It is arguable also, that the free exercise of the majority faith was curtailed by the decision to end school prayer, as those litigants were no longer able to reap full enjoyment of their own religious practices, even after the state made many clear attempts to remain neutral by composing a prayer that was non-denominational and by allowing exemptions for those whose parents did not wish them to participate.

Again, this issue did not arise from nothingness beginning with the *Engel* case, but prior to the decision in *Everson*, each state was left to make its own rules regarding religious establishment according to its own constitution. Some states even struck the practice prior to the *Engel* decision, but most states in which it was challenged agreed that public school prayer did not constitute direct state support of religion. Way writes,

Prior to *Engel/Schempp*, sixteen states upheld prayer and Bible reading, generally in single decisions which were never overturned or adjusted. Similarly, five states ruled against prayers and/or Bible reading in single decisions which, again, were never overturned or modified. Two additional states, while upholding the constitutionality of prayer and Bible reading, required that schools institute an excuse system for students who did not wish to participate on the grounds of religious belief. (1985)

Fully eighteen state courts, when challenged, upheld the right of states and school districts to create prayers for use in the public schools as part of a moral or character education based on the fact that history and tradition fully supported the practice. This reinforces the importance, prior to *Engel*, of the history and traditional alignment of prayer and public schooling.

Several factors contribute to the controversial nature of this case. First, the decision was in direct opposition to prevailing public opinion on the issue. (Elifson and Hadaway 1985, Servin-Gonzalez and Torres-Reyna 1999) The fact that three of the seven justices who sat on the case wrote separate opinions signals the degree of the depth of disagreement in the United States over the issue of school prayer. Second, some interpreted the decision as the Court to place the Establishment Clause to place the Free Exercise rights of marginal religions above those of the majority. (Way and Burt 1983) Third, it exempted public schools from enjoyment of a religious practice which is acceptable in other public spheres. Last, and most importantly, it shifted accepted interpretation of the Establishment Clause from that practiced by the states (Way 1985) and from that made law by the *Everson* decision.

### History

Justice Black began his decision in *Engel* with a long history of the establishment of religion from colonial settlement until the passage of the First Amendment, a feat he repeated from his decision in *Everson*. (*Everson v. Board of Education* 330 U.S. 1, *Engel v. Vitale* 370 U.S. 421) Although he recognized the early interplay of religion and community life, he dismissed the need for continuing religious interference in education.



Black invoked the names of Thomas Jefferson and James Madison as proponents of a strict separation of church and state, but he ignores the interplay of religion and public goals even within the writings of these two Founders. Last, he used the history of religious establishment to justify the interpretation of the Establishment Clause that would allow him to remove even non-denominational, non-coercive prayer from schools, but research into the passage and meaning of the clause implies another answer might be possible.

The history of establishment in Europe is most definitely one of violent persecution. Black used this backdrop to describe the excesses of religious establishment that can start with something as simple as state support of a non-denominational prayer. He wrote, "It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America." Early colonial experience, he described, was fraught with religious persecution of minority faiths, prompting, at least by the late eighteenth century, but earlier in some colonies, the passage of a string of religious toleration laws in the early states. James Madison and Thomas Jefferson led the charge in Virginia, with Madison making significant effort to tame the wording of the Virginia Bill of Rights.

What Black ignored when he invoked both Jefferson and Madison is the religious nature of many of their writings. Neither, of course, was in favor of establishing specific churches for any state in the Union nor of forcing support of any religion by tax monies. However, Jefferson and Madison are far from irreligious, and there was not a strict separation, for these two, between religious virtues and secular, democratic virtues. Both

recognized the large role that religion played in the development of the American ideal (Reichley 1986), although Madison especially feared the power of overbearing religious majorities. (Lindsay 1991)

Thomas Jefferson, often wrongly believed to be the original source of the wall of separation metaphor, often wrote with a religious overtone. The Declaration of Independence of 1776 makes several references to a Creator. Jefferson, in a letter to Dr. Thomas Cooper in 1822, relayed his recommendation that the University of Virginia invite all sects to establish theology professorships for the training of young men. In addition, he thought that the theological discussion that would take place in such close quarters would lead to greater cooperation and peace between competing sects. (Jefferson [1822]1984) His disagreement was with education controlled by a specific sect.

In *Everson*, Black focused on Jefferson's authorship of the Act Establishing Religious Freedom in Virginia in 1785. (330 U.S. 1) Black considered this bill to be the furthest reaching of the early religious freedom bills and purported to support Jefferson's principles. (*Engel v. Vitale* 370 U.S. 421) However, Jefferson began this Bill with the words "Almighty God." The thrust of Black's argument; however, seemed to rest on a passage removing public financial support from any religious function.

that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; Virginia, Act Establishing Religious Freedom 1785)

In order for this argument to apply successfully in the case of *Engel v. Vitale*, one would first have to equate the salary of the teacher who is leading the prayer with a financial support of said prayer. As Justice William O. Douglas clarified in his concurrence,

In New York the teacher who leads in prayer is on the public payroll; and the time she takes seems minuscule as compared with the salaries appropriated by state legislatures and Congress for chaplains to conduct prayers in the legislative halls. Only a bare fraction of the teacher's time is given to reciting this short 22-word prayer, about the same amount of time that our Crier spends announcing the opening of our sessions and offering a prayer for this Court. (*Engel v. Vitale* 370 U.S. 430)

For Douglas, as for many Americans, it was difficult to see the prayer as an unconstitutional financial support of religion. Douglas also stated that all semblance of coercion had been removed from the practice, except the coercion of teachers, of which no one was complaining. Therefore, Black's argument that he is following Jefferson's principles does not seem to hold up to historical analysis, since there was no coercion.

James Madison was also rather prolific in his writing concerning religious values and the role of the state, and more importantly, he is generally deemed the author of the First Amendment. Madison, though considered hostile toward religion by some (Lindsay 1991), often spoke of a duty to a creator. Even while arguing against a bill that would provide direct state aid to Christian teachers, Madison exhorted the importance of religion in the lives of the American people. He even directly quoted a previous statement attributed to himself by saying, "Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.'" (Madison 1785) Madison believed that no man should be coerced into supporting any religious belief.

Again, beginning with Douglas' argument, one can see why Madison's principle is not necessarily in conflict with the Regents' prayer in New York. Douglas wrote,

No student, however, is compelled to take part. The respondents have adopted a regulation which provides that "Neither teachers nor any school authority shall comment on participation or non-participation . . . nor suggest or request that any posture or language be used or dress be worn or be not used or not worn." Provision is also made for excusing children, upon written request of a parent or guardian, from the saying of the prayer or from the room in which the prayer is said. A letter implementing and explaining this regulation has been sent to each taxpayer and parent in the school district. As I read this regulation, a child is free to stand or not stand, to recite or not recite, without fear of reprisal or even comment by the teacher or any other school official. (*Engel v. Vitale* 370 U.S. 421)

So, under the exemption plan as devised by the New York State Court of Appeals, no child was being coerced to support any religious beliefs. Second, both Black and Douglas concede the non-denominational nature of the prayer, meaning that the Regent's prayer imparted no specific religious belief, according to the Court. The problem instead seemed to be the format of the prayer, out of sync with Jewish tradition, and the fact that it supported religion in general, which may have offended those who professed no religion. Last, the spirit of the prayer was in the tradition of the ceremonial recognition of God, a tradition to which Madison was not immune. In footnote 3 of his dissent, Justice Stewart quoted Madison as saying, during the term of his presidency,

"But the source to which I look . . . is in . . . my fellow-citizens, and in the counsels of those representing them in the other departments associated in the care of the national interests. In these my confidence will under every difficulty be best placed, next to that which we have all been encouraged to feel in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." (*Engel v. Vitale* 370 U.S. 421)

Even Thomas Lindsay, who believed that Madison was hostile to religion concluded that Madison would not support the dissolution of a law based on that law's support of general religious morality over the rights of marginal religions to freely exercise. (1991)

Black attempted to use this historical argument to provide a sound basis for his view of the purpose of the Establishment Clause of the First Amendment made applicable to the states by the Fourteenth Amendment. He wrote

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. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. 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. (*Engel v. Vitale* 370 U.S. 421)

In this way he made an argument that is broader in its stroke than either Jefferson's or Madison's. Black did not reference, however, the historical data that would argue that the purpose of the Establishment Clause is much more narrow than he would assume.

The First Congress authorized many outlays of public monies to assist schools, at a time when most schooling was done in religious institutions. They also authorized a chaplain who would lead daily prayer in the chambers of Congress. Although Black recognized the chaplaincy in Congress as an acceptable form of public prayer, which is not only often denominational in nature and somewhat coercive on the members of Congress, he separated this historical authorization of public support of prayer from the authorization of prayer in public schools. (*Engel v. Vitale* 370 U.S. 421)

Justice Black's reliance on the historical record to prove the dangers of establishment are very convincing to the extent that they concern direct establishment of specific religious beliefs by the federal government, but they are less convincing to accommodationists in the case of a non-denominational, non-coercive school prayer established by a state government. The state of New York made no attempt to establish a particular religious belief and to coerce young students into blindly accepting such, the way a European nation of the Middle Ages might have done. Jefferson and Madison, who were vehemently opposed to this type of establishment as well as other direct state support of specific religious principles, both seem to recognize the importance of traditional morality and virtue in the schooling process. Furthermore, Black's interpretation of the Establishment Clause seems to be more sweeping than even his previous interpretation in *Everson*. In his concurrence, Douglas conceded the historical argument to the accommodationists, saying, "I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words. A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads." (*Engel v. Vitale* 370 U.S. 421)

### Tradition

The most prevalent argument in the concurrence and dissent of *Engel* is that of tradition. Black grazed by this argument, relegating it to a footnote, but the sheer weight of public outcry may be based in large part on the long-standing tradition in the United States of marking important activities with an invocation of God. In fact, more recent cases involving school prayer have centered themselves around this traditional aspect in

asking the Court to consider prayer at graduation (*Lee v. Weisman* 505 U.S. 577) and even student led prayer to begin a football game. (*Santa Fe Independent School District V. Doe* 530 U.S. 290)

There are in fact two parts to the argument that traditional features of American government would support a non-denominational prayer at the beginning of the school day. First, there is a traditional link between secular and religious education that began with the first schools in the United States. Second is the fact that public prayer is recognized as proper in many different publicly supported forums besides that of school. Justice Stewart's dissent in *Engel* rested almost entirely on the second feature. (370 U.S. 421)

The first institutions of learning in the United States arose in order to train clergy and were later expanded to training in other fields of academia without losing their fundamentally religious flair or church funding. Justice Douglas noted in footnote 9 that

Religion was once deemed to be a function of the public school system. The Northwest Ordinance, which antedated the First Amendment, provided in Article III that "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." (*Engel v. Vitale* 370 U.S. 421)

Douglas, does not concede, however, that this is a valid reason to continue the entanglement of government and religion in the area of education. The justices made no attempt to explain why 1962 was the appropriate year to cut the vine of religion from the tree of learning. One must assume that no one had ever challenged a similar practice at the Supreme Court level prior to that year.

School is the place in which students learn to become part of the American society, not only through rote and tests, but also through the practice of American values and ceremonial rituals. Justice Black claimed

There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance. (*Engel v. Vitale* 370 U.S. 421)

As difficult as it is for the common reader to understand the difference between the non-denominational prayer and the reference to God in more patriotic pieces, it has also become increasingly difficult to separate these two in the long wake of the *Engel* decision. In 2002, a father in the state of California claimed Establishment Clause violation by the Congress when it added the words “under God” to the Pledge of Allegiance in 1953 as a means to enhance patriotism during the Cold War. To much public dismay, the United States Court of Appeals for the Ninth Circuit agreed with the parent, using the *Lee* decision as a guide. (*Newdow v. United States Congress* 00-16423) The United States Supreme Court stayed the lower court decision and eventually overturned the decision based on a standing issue. (*Elk Grove Independent School District v. Newdow* 000 U.S. 12-1624) The three minority opinions issued in *Newdow* dealt with the merits, however. One, Justice Clarence Thomas’, traced the evolution of Establishment Clause interpretation directly through the decision by the Ninth Circuit, claiming that the Ninth Circuit made their decision fully aligned with a flawed precedent that dated back to *Everson*.



Considering that there is a direct connection between the decision in *Lee* and the precedent of *Engel* it seems as if Black's fear of a slippery slope of establishment, that allowing the state to write a non-denominational prayer would lead to further state encroachments of religion, has worked in the opposite direction since the publication of the *Engel* decision. As Court of Appeals Judge O'Scanlain pointed out in dissent to the denial of an order presented in *Newdow*, "Such an assertion would make hypocrites out of the founders and would have the effect of driving any and all references to our religious heritage out of our schools, and eventually out of our public life." (*Newdow v. United States Congress* 00-16423)

American public life is intertwined with religious practice and tradition. Justice Douglas detailed a list of just some of the pervasive aspects of religion in public life in footnote 1 of his concurrence. Quoting David Fellman, he stated,

"There are many 'aids' to religion in this country at all levels of government. To mention but a few at the federal level, one might begin by observing that the very First Congress which wrote the First Amendment provided for chaplains in both Houses and in the armed services. There is compulsory chapel at the service academies, and religious services are held in federal hospitals and prisons. The President issues religious proclamations. The Bible is used for the administration of oaths. N. Y. A. and W. P. A. funds were available to parochial schools during the depression. Veterans receiving money under the 'G. I.' Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals. The slogan 'In God We Trust' is used by the Treasury Department, and Congress recently added God to the pledge of allegiance. There is Bible-reading in the schools of the District of Columbia, and religious instruction is given in the District's National Training School for Boys. Religious organizations are exempt from the federal income tax and are granted postal privileges. Up to defined limits - 15 per cent of the adjusted gross income of individuals and 5 per cent of the net income of corporations - contributions

to religious organizations are deductible for federal income tax purposes. There are no limits to the deductibility of gifts and bequests to religious institutions made under the federal gift and estate tax laws. This list of federal 'aids' could easily be expanded, and of course there is a long list in each state." Fellman, The Limits of Freedom (1959), pp. 40-41. (*Engel v. Vitale* 370 U.S. 421)

Many of the rest of Douglas' footnotes give further insight to the many government activities entrenched in religious ceremony; however, he and Justice Black saw a significant difference in the case of schooling. There was no indoctrination, they argued, but the problem seemed to lie in the non-neutral nature of the law under which the prayer was written, since that law was aimed at the moral and spiritual training of young citizens. (*Engel v. Vitale* 370 U.S. 421)

Justice Stewart went further with the tradition argument, detailing the many instances of presidential reference to God in public speeches as well as usage of God on money and in the motto of the United States. Stewart claimed, "I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." (*Engel v. Vitale* 370 U.S. 421) Adults in the United States are subject to many unsolicited calls for prayer or recognition of God in the public sector. If school is to create Americans citizens prepared to join in the civic life of the nation, a non-denominational prayer seems fully aligned with the ceremonial usages of religion these citizens-in-training will confront as adults.

Judge O'Scanlain made a powerful argument about the removal of religion from all aspects of public life. (*Newdow v. U.S. Congress* 00-16423) To erase God entirely from the classroom would deny students the rich tradition of the United States, which can be found in the Declaration of Independence and in patriotic anthems and poems. It is possible that there are several interpretations of the idea implied in the word "God." It is

true that many different religions, from monotheistic to polytheistic forms, have differing interpretations of this concept. In the United States, there exists a secular concept of God as a force that has guided the country through peril and through success. It is this concept that is recognized in the traditional ceremonial uses of the word.

To remove God from education is to disentangle rope that has been knotted for too long. Original schemes of education in the United States depended on religion, and religion depended on education. Long-standing traditions encourage Americans to recognize a deity or a creator in many different ceremonial forms. These things are ingrained into the American culture, and as Kymlicka writes, "It is possible for a state not to have an established church. But the state cannot help but give at least partial establishment to a culture." (1997)

#### Differentiation from Previous Establishment Clause Cases

Possibly the most alarming thing about the decision in *Engel* was its departure from precedent in the area of state support to religion. *Engel* made a distinction between prayer in public school and other forms of public support of religion in school. The two most pertinent precedents are *Everson v. Board of Education of Ewing Township* and *Zorach v. Clauson*. In each instance the state was allowed to provide some support to students seeking religious education within the school day, either by providing bus transportation to parochial schools (*Everson* 330 U.S. 1) or by allowing students to travel off campus in order to attend religious instruction. (*Zorach* 343 U.S. 306) Although Black distinguished the situation in *Engel* based on the non-neutrality of the legislation,

Black admitted the similarities and simply stated that *Everson's* conclusion was incorrect. (*Engel v. Vitale* 330 U.S. 421)

It was in *Everson* that the Court first applied the Establishment Clause of the First Amendment to the states through the Due Process Clause of the Fourteenth Amendment, bringing the issue of school prayer clearly under the jurisdiction of the federal government. It was also here that Justice Black reinvigorated the metaphor of a wall of separation between church and state that separates the actions of each to protect each one from the other. He wrote,

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' (*Everson v. Board of Education* 330 U.S. 1)

After this impassioned plea for the strict separation of church and state, Black decided that states may provide bus transportation for children to parochial schools, because it is akin to the many other protections that a government must provide to parochial schools and public schools without discriminating between the two, such as fire and police protections. Therefore, the decision in *Everson* allowed direct state support of religious functions so long as that support did not favor any specific religion or religion over irreligion. (330 U.S. 1)

It seems as if other justices on the Court were confused by this distinction as well. The vote of the Court was a close 5-4, and two of the dissenting justices felt compelled to attach dissents calling for a more complete separation of church and state. Justice Jackson wrote,

The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. (*Everson v. Board of Education* 330 U.S. 1)

It is ironic that if the dissenters had prevailed in *Everson* rather than Black's own decision becoming precedent in that case, Black's decision in *Engel* would be better aligned with established precedent.

*Zorach* offers a similar situation and conclusion as does *Everson*. It is notable that *Zorach* is an almost complete reversal of a previous case in which the Court struck down release-time schemes in schools that allowed religious instructors to use school facilities during school hours. (*McCollum v. Board of Education* 333 U.S. 306) The minor adjustment that allowed the Court to reverse itself, an action it rarely takes, was the movement of the religious instructors off school grounds. Under this scheme, children were allowed to be released from school during the day to report to religious instructors off campus and any absence was reported to the public school teacher. In the absence of explicit public funding or use of public facilities, the Court ruled that release-time was not in violation of the Establishment Clause. (*Zorach v. Clauson* 343 U.S. 306)

Justice Douglas sums up the arguments against the release time program as follows:

Their argument, stated elaborately in various ways, reduces itself to this: the weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the cooperation of the schools this "released time" program, like the one in the *McCollum* case, would be futile and ineffective. The New York Court of Appeals sustained the law against this claim of unconstitutionality (*Zorach v. Clauson* 343 U.S. 306)

These claims seem similar to some of the arguments involved in the *Engel* case in which Douglas comes to the exact opposite conclusion. In *Engel*, anti-prayer forces argued that the fact that the weight and influence of the state was put behind the prayer, that public school teachers were involved in reading the prayer, and that there was an underlying coercion involved in state prayer that could not be factored out by allowing students to remain silent or to leave the room made the development of the prayer an unconstitutional act. (*Engel v. Vitale* 370 U.S. 421) The notable difference seems to be that in the case of release-time, students choose the manner of religious observance or non-observance by choosing the religious program that each wished to attend, while in the case of prayer, the manner of observance or non-observance was dictated by the state. No justice in *Engel* drew this distinction.

*Zorach*, like *Everson*, was a closely decided case, with a high proportion of separate dissents. Black's position on state support of religion began to look more like the strict separationist position he took in *Engel*. He wrote

Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery. That this is the plan, purpose, design and consequence of the New York program cannot be denied. The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some

religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids. In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all. New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State. (*Zorach v. Clauston* 343 U.S. 306)

In this case Black actually derided the argument of spiritual heritage and attached himself whole-heartedly to the doctrine of separation.

The precedent, though highly disputed within the Court, was clear through the published decisions in *Everson* and *Zorach*. Public support of religious institutions, even moderate financial support, was allowable under the Constitution as long as that support was neutral. New York made every attempt to make the Regents' prayer neutral and non-coercive while remaining in keeping with traditional ceremonial usage of religion. The Court, however, separated this form of state support of religion from all other forms, deciding that the state could not in any way have play a direct role in composing a prayer for public schools. (*Engel v. Vitale* 370 U.S. 421) This change in Establishment Clause interpretation created the turbid stream of Establishment Clause cases that have found their way to the Court most recently.

### Conclusion

The application of the Establishment Clause to the states has been inconsistent, especially with regard to state support of religion in school settings. This inconsistency springs largely from the decision in *Engel v. Vitale*, which distinguished state sponsorship of prayer from all other forms of state sponsorship of religion in schools. In one decision, the Court shifted the historical interpretation of the purpose of the

Establishment Clause, ended a time-honored traditional link between education and religion, and confused accepted interpretation of the Establishment Clause. Public opinion against the outcome of this case has little waned, and the Court has been forced to decide even more recent school prayer cases as schools, districts, and states maneuver through the tangled precedent of Establishment Clause interpretation.

If the Court considers state financial support of religious schooling to be consistent with the Establishment Clause, then it should uphold school prayer. If the Court finds prayer abhorrent to the First Amendment, then it should strike down release-time legislation as well. However, the Court should carefully examine its view of the foundations of American democracy and the traditional ties between education and religion, interpreting the words of the First Amendment in the light of the experience of the nation.



## CHAPTER 4

### *LEE V. WEISMAN*

The nearly three decade interval between the *Engel* (370 U.S. 421) case and that of *Lee v. Weisman* (505 U.S. 577) found the Court seeking to clarify and codify Establishment Clause interpretation, but to little avail. Chief Justice Warren Burger, writing in *Lemon v. Kurtzman* (403 U.S. 602), sought to present a guide for future interpretation of the Establishment Clause by creating a three-part test for discerning an acceptable level of government interaction with religion. However, by the early nineties, the Court seemed to have developed three different Establishment Clauses, dependent on the situation. In cases concerning religious displays on public property, the Court seemed to grudgingly accept the traditional and historical significance of symbolic religious displays as long as there was no overtly denominational message. (*Lynch v. Donnelly* 465 U.S. 668, *Allegheny v. ACLU* 492 U.S. 573) Cases of school sponsored worship in the forms of devotional readings or even moments of silence maintained a strict interpretation of the Establishment Clause. (*Abington v. Schempp* 374 U.S. 203, *Wallace v. Jaffree* 472 U.S. 38) Somewhere in the middle of these conflicting interpretations lay the funding cases, which remained mired in constitutional misunderstanding and vague constructions, leading to frequently contradictory rulings and even the overturning of some cases. (*Aguilar v. Felton* 473 U.S. 402, *Agostini v. Felton* 521 U.S. 203)

The Court has established that the school environment is one that distinct from the world of American adults. Teachers and administrators are not held to strict standards of search and seizure protections in the school environment (*New Jersey v. TLO* 469 U.S. 325); student rights to freedom of speech and press are more limited than they would be outside of school (*Bethel v. Fraser* 478 U.S. 675, *Hazelwood School District v. Kuhlmeier* 484 U.S. 260). Still, the very recognition of these expression rights, first in 1943 (*West Virginia State Board of Education v. Barnette* 319 U.S. 624) then in the *Tinker* case of 1969 (393 U.S. 503), in addition to the more recent recognition of free exercise rights in *Westside Community Board of Education v. Mergens* (496 U.S. 226), set the First Amendment at odds with itself in the lives of the nation's students. *Lee v. Weisman* (505 U.S. 577) sought to draw a distinction between private speech and exercise, which was protected by the First Amendment, and public speech which was limited by the Establishment Clause.

Also at play in the case was the continual pull between American traditions and modern constitutional interpretation. The controversy in *Lee* sprang from a practice that was widely accepted and traditionally acknowledged. The decision itself, barring schools from allowing invocations and benedictions at public school graduations (505 U.S. 577), touched off a new controversy that has led to further cases. Clark County School District in Nevada, in response to an ACLU-led attack, has changed its policy in order to allow prayer at graduation by students, but only if school officials relinquish the right to prior review of student speeches. (Bach 2003) A case recently decided by the U.S. Court of Appeals for the Eighth Circuit recognized the right of a public official to pray at a public event if the prayer is part of a private statement. (*Doe v. School District of the City of*

*Norfolk* No. 02-4135) This is a distinct representation of the inherent difficulty in protecting the right of private individuals to speak and to freely exercise religion while maintaining Establishment protections for those who choose not to participate in those private exercises. The precedent established in *Lee* has only served to further this conflict and has directly resulted in an attack on the Pledge of Allegiance. (*Elk Grove Independent School District v. Newdow* 000 U.S. 1624)

#### Background of *Lee v. Weisman*

When Lee, a principal of a Rhode Island middle school, invited a rabbi to speak at an upcoming graduation, he did not know that he was inviting a lawsuit that would become an important piece of Establishment Clause litigation. He had invited clergy before, always careful to provide his guests with a pamphlet that had been prepared by religious organizations in order to guide them in offering non-denominational prayer at public gatherings. Deborah Weisman and her father, however, took offense to this traditionally accepted practice and filed suit, claiming that the invocation and benediction to be offered at the graduation constituted an establishment of religion by the state of Rhode Island. (*Lee v. Weisman* 505 U.S. 577) As the Court had previously decided, the non-denominational nature of the prayers and the non-coercive nature of the graduation ceremony would not appear to exempt this religious act from constitutional restrictions. (*Engel v. Vitale* 370 U.S. 421)

In the previous two decades, the Court had made attempts to further clarify Establishment Clause interpretation, first by issuing a three-pronged test by which statutes in question could be measured and secondly by defining further the limits on

prayer in school. The Weismans' arguments relied on these cases, the first restricting government payment to parochial schools (*Lemon v. Kurtzman* 403 U.S. 602) and the second striking down a mandated moment of silence for meditation and prayer in a public school (*Wallace v. Jaffree* 472 U.S. 38). The school, however, relied on a decision, not even a decade old, allowing ceremonial use of prayer in public functions. (*Marsh v. Chambers* 463 U.S. 783) The case would pit modern, broad interpretations of the Establishment Clause against the force of tradition.

### The Lemon Test

One of the most significant changes to Court interpretation of the Establishment Clause occurred between *Engel* and *Lee*. In 1971, the Court, seeking to streamline Establishment Clause interpretation, issued a decision that is often recognized as one of the most important precedents in Establishment Clause history. The case of *Lemon v. Kurtzman* (401 U.S. 192) created a three-pronged test for deciding whether or not the wall of separation between church and state has been breached. In order to pass constitutional muster, any statute which supports religion in any way must have a secular purpose. Secondly, the statute may not advance or inhibit religious practice. Lastly, the statute must not foster excessive entanglement between church and state. It is by this test that even the most recent Establishment Clause issues have been measured, but the Court seems to have made only cursory mention of this important precedent in *Lee*. (505 U.S. 577)

One reason the Court may have chosen to comment little on this precedent might be its overall failure to create a clear and consistent means of Establishment Clause

interpretation. As an institution, the Court is dependent upon decisions of the past to guide its current actions; this is called *stare decisis*. It is relatively rare for the Court to reverse itself, but it seems as if the area of religious establishment is one in which reversal is more common than in other areas of constitutional law. This may be related to the fact that there are conflicts between protection from religion through the Establishment Clause and protection of religion by the Free Exercise Clause of the Constitution. Most importantly, however, school provides a fertile ground for establishment conflicts as the dual private and public education systems in the United States interact.

Even after clarification of the Establishment Clause by *Lemon*, the Court found itself in waters mired by contradictions. Its assertion that church and state must be strictly separated had come into conflict with national legislation meant to provide for the free and equal education of students with special needs. In 1984, parents in New York City brought suit against the school district, since the district was paying public school teachers to spend time with special needs students who were attending parochial school. According to the district, this was the most efficient way for the state to comply with the federal law that forced the state to provide special services to eligible children, even if the parents of those children chose to send the children to private parochial schools. Though there was no preference for religious schools over non-religious private schools, the Court ruled that this practice was in direct violation of the interpretation of the Establishment Clause as defined in *Lemon v. Kurtzman*. (*Aguilar v. Felton* 473 U.S. 402 1985) *Lemon*, in fact, was based on a similar situation in which a state was providing funding to private schools in order to improve secular education in those schools. The

state money was not to be used to provide any sort of religious education and was distributed to all private religious and non-religious schools. (*Lemon v. Kurtzman* 401 U.S. 192)

Twelve years after the decision in *Aguilar*, the ability of the state to serve special needs children had been so circumscribed by the ruling as to draw further suit. In reversing the previous decision, the decision read

In *Aguilar v. Felton*, 473 U.S. 402, 413, this Court held that New York City's program that sent public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965 necessitated an excessive entanglement of church and state and violated the First Amendment's Establishment Clause. On remand, the District Court entered a permanent injunction reflecting that ruling. Some 10 years later, petitioners--the parties bound by the injunction--filed motions in the same court seeking relief from the injunction's operation under Federal Rule of Civil Procedure 60(b)(5). They emphasized the significant costs of complying with *Aguilar* and the assertions of five Justices in *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, that *Aguilar* should be reconsidered, and argued that relief was proper under Rule 60(b)(5) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388, because *Aguilar* cannot be squared with this Court's intervening Establishment Clause jurisprudence and is no longer good law. The District Court denied the motion on the merits, declaring that *Aguilar's* demise has "not yet occurred." The Second Circuit agreed and affirmed. (*Agostini v. Felton* 521 U.S. 203 1997)

In ruling that *Aguilar* was now bad law, the Court was admitting to the many complexities of Establishment Clause interpretation in a modern world. Though decided several years after *Lee*, it is indicative of the confusion in the Court regarding interpretation of the First Amendment's religion clauses.

The Supreme Court had also obviously spent many years chipping away at the edifice of *Lemon*. Further complicating this relationship between church and state, a law was passed by the United States Congress, allowing religious groups equal access to

public facilities. Again schools became the battle ground as a group of students in 1990 asked the Court to approve the creation of a Bible Club on the campus of their high school. Now having to consider three separate clauses of the First Amendment concerning freedom of speech and freedom of religion, the Court found itself approving the club, allowing students to speak freely about religious subjects under the constant supervision of a state employee on state property. (*Westside Community Board of Education v. Mergens* 496 U.S. 226 1990) Therefore, by the time *Lee* landed on the Court's docket, the seemingly clear and defined concept of establishment under the *Lemon* precedent seemed much less clear and much less defined. To this day, the *Lemon* test remains under judicial scrutiny, as the Court seeks to broaden the definition of Establishment as it applies to funding, even allowing states to provide tax money to religious schools through parent choice and the use of vouchers. (*Zelman v. Simmons-Harris* 536 U.S. 639 2002)

Still, it is clear that funding and prayer are fundamentally different issues, since state support in the latter case seems more obvious than in the former. Obviously providing state funding to operate a fire station that saves a parochial school from burning to the ground does not constitute state establishment of religion, just as busing students to the school of their choice does not violate this precious principle. (*Everson v. Board of Education* 330 U.S. 1 1947) However, the Court has established precedent in regards to state sponsored prayer on school grounds. In *Engel*, the Court ruled that the non-denominational, non-coercive prayer violated the Establishment Clause by favoring religion over irreligion. The lower courts still tried to rely in part on *Lemon*, however, as the accepted Establishment Clause interpretation. In doing so, the District Court and the

United States Court of Appeals disagreed on the application of *Lemon* to the case. The District Court ruled that the prayer at graduation violated only the second prong of *Lemon*'s three-pronged test, that concerning the rule that the state can neither support nor inhibit the practice of religion. According to the District Court, the prayer was a direct support of religious practice. On appeal, the U.S. Court of Appeals concluded that the actions of the rabbi had violated all three parts of the *Lemon* test. With such unclear precedent, it may be easy to understand why interpretation of Establishment Clause issues remain a consistent topic of legal debate. (*Lee v. Weisman* 505 U.S. 577)

As to the secular purpose of the action, one could argue that the Court has allowed a multitude of secular uses of God in the public realm. It is noted in the footnotes, even as the Court struck down state-sponsored prayer in *Engel*, that the history of the United States is littered with examples of national government support of public prayer, from the announcement of national days of Thanksgiving from nearly every president since Washington to congressional chaplains to the printing of the national motto, "In God We Trust," on all national currency. (*Engel v. Vitale* 370 U.S. 421) Though James Madison, according to his own Memorial and Remonstrance (1785), rejected the notion of national support of prayer, even he, when pressured by public opinion during the War of 1812, issued a proclamation for a national day of prayer and fasting. (Madison 1814) He justified his actions by claiming that the proclamation was merely a recommendation and that it would favor no religion over another. This is the same claim made by the school district in *Lee*. The presence of the rabbi was a secular tradition, the remarks he made favored no religion over another, and students had the option of not attending the graduation. (*Lee v. Weisman* 505 U.S. 577) Scalia's dissent in *Lee* predicted how far this



precedent can go in limiting the secular uses of God in public life. He foresaw, with amazing accuracy, that someone would even someday challenge the inclusion of the words “under God,” meant to inspire patriotism during a crisis of war, in the Pledge of Allegiance. Ten years after the decision was issued in *Lee*, a claim was filed in California challenging just those words. The U.S. Court of Appeals for the Ninth Circuit decided that case based on the precedent established by *Lee*. When the case moved to the Supreme Court, Scalia recused himself. The Court dismissed the case based on a standing issue. (*Elk Grove Unified School District v. Newdow* 000 U.S. 02-1624)

The three-pronged test requires that the state neither advance nor inhibit religious practice. This was the one prong that the District Court claimed was violated by the state of New York by inclusion of the rabbi at the graduation ceremony. (*Lee v. Weisman* 505 U.S. 577) That the prayer advances religion over irreligion seems an impressive argument to make. Clearly, the inclusion of the rabbi gives students and parents the impression that the state lends a certain respect and admiration to religious figures and treats such people as special guest speakers at important ceremonies. However, the same examples above provide a guide as to when support of religion in general is acceptable. When Madison issued his national proclamation calling for a day of prayer and fasting, according to the interpretations by the modern Court, he was promoting the practice of religion over irreligion. The respondents in this case claimed, as did Madison, that the non-coercive and non-denominational aspects of the action in question exempted it from constitutional conflict. (Madison 1814) Under the precedent in *Lemon*, Madison’s action could have been deemed unconstitutional, yet today’s presidents continue to call for national days of prayer, fasting, and thanksgiving. It has become a national tradition. If

the Court could exclude these actions for their traditional value as well as for the gravity of the situations under which they are usually passed, then it would have been reasonable for the respondents in *Lee* to believe that the Court could make a similar exception in the case of graduation.

Finally, the last part of the three-pronged test requires that states not become excessively entangled with religion. In issuing a pamphlet to the rabbi, the state, according to the Court, entangled itself with religious activity. The pamphlet, which had been written by religious organizations, directed the rabbi in the manner of keeping his remarks non-denominational and tolerant. However, though there may have been tacit coercion by the district in providing the pamphlet, the rabbi was never threatened with any corrective action should he choose to make comments other than those deemed acceptable by the guidelines of the pamphlet. (*Lee v. Weisman* 505 U.S. 577) If the state was outside constitutional boundaries by providing guidelines to the speaker, many questions remain as to the conduct of important state ceremonies, especially ceremonies involving minors and parents. It is in this regard that the Establishment Clause begins to more directly conflict with the provision protecting freedom of speech.

If the school cannot direct a religious leader to remain non-denominational in his or her remarks at a public ceremony, then would those remarks be considered an establishment of religion once they are uttered as the private speech of the religious leader? Is the state to hereby refrain from inviting any religious leader or any person of devout religious conscience to speak at a public function out of fear that their remarks might be interpreted as Establishment? The U.S. Court of Appeals for the Eighth Circuit recently took up these questions. When students at a Nebraska high school voted to

include prayer in their graduation and generated a non-denominational prayer to be led by a student speaker, a parent from the school filed for injunctive relief. The U.S. District Court in Nebraska agreed to issue the injunction, halting the planned prayer. At the graduation ceremony, another parent, who happened to be on stage in his role as a school board member, rose to speak as one parent to a sea of unsuspecting students and parents. The parent recited the Lord's Prayer, an overtly Christian expression of belief, and he asked the crowd to join with him. This touched off a greater legal battle, as the parent was a school board member and was speaking at a decidedly school-sponsored event. The board, however, had not reviewed the man's statements prior to the speech and claimed no responsibility for the religious message. Faced with the challenge of balancing free speech with the Establishment Clause protections, the U.S. Court of Appeals for the Eighth Circuit decided that the claimants were not due any protection from the personal comments of this school board member. (*John Doe v. The School District of the City of Norfolk* No. 02-4135) If the school, according to *Lemon*, can have absolutely no entanglement with religion, then the state is left with the option of simply inviting speakers who may present any message, even an overtly religious or dangerous one, to a solemn group of young people. Though this may square with the Framers' intentions regarding free public speech, it seems at odds with Establishment Clause precedent and the deeply held tradition of religious toleration in this country. However, it follows precisely the precedent set in *Lemon*. The school board member was asked to share an inspirational message as a parent, a clearly secular goal. The state act of inviting him to speak was not based on his membership in any religious group and was not

intended to advance or inhibit religion. Having not reviewed his comments, the state did nothing to entangle itself with religious practice.

In his scathing dissent, Justice Scalia took aim at the precedent in *Lemon*. He wrote, “Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called Lemon test...which has received well-earned criticism from many Members of this Court.” Scalia recounts the many instances of judicial conflict with this precedent and hopes that the Court, by ignoring the precedent, has cast off the shadow of *Lemon* for good. (*Lee v. Weisman* 505 U.S. 577) The case is still considered important legal precedent. It is, however, a hazy precedent, and its noticeable absence from the decision in *Lee* highlighted its main fault in that it does not seem to fulfill its function. The three-pronged test is not a sufficient guide for the Court in drawing the line between accommodation of religious freedom and protection against state establishment in all cases. Until such precedent is established, there is little hope for clarity in the area of state establishment.

#### *Marsh v. Chambers*

Another useful precedent ignored by the Court was that set in the case of *Marsh v. Chambers* (463 U.S. 783 1983), in which the Court ruled that the use of congressional chaplains did not violate the Establishment Clause, since it was a ceremonial usage of religion with deep roots in American history. The Court refused to classify the use of prayer at graduation in a similar manner, claiming that significant differences existed in

the context of the prayers which made the graduation prayer a form of government support of religion while exempting the legislative ceremony. First, the Court asserted that adults serving in a legislative environment could enter and leave the room as they pleased during invocations without any notice being taken or any judgment being passed as a result of their actions. Second, the Court asserted that a graduation prayer had more influence over the minds of the graduating class members than a congressional invocation would have over adult legislators. Last, the state control of the content of the graduation prayer, in the form of the pamphlet, distinguished this practice from that of hiring a chaplain who may direct the content of his own daily prayers. (*Lee v. Weisman* 505 U.S. 577)

*Marsh* is admittedly a singular exception to the *Lemon* test precedent, and the Court took special note of its extraordinary circumstances. The precedent established in *Marsh* had more to do with the tradition and history of the practice of congressional chaplains, which predated even the writing of the federal Constitution. The Court held:

The practice of opening sessions of Congress with prayer has continued without interruption for almost 200 years ever since the First Congress drafted the First Amendment, and a similar practice has been followed for more than a century in Nebraska and many other states. While historical patterns, standing alone, cannot justify contemporary violations of constitutional guarantees, historical evidence in the context of this case sheds light not only on what the drafters of the First Amendment intended the Establishment Clause to mean but also on how they thought that Clause applied to the chaplaincy practice authorized by the First Congress. In applying the First Amendment to the states through the Fourteenth Amendment, it would be incongruous to interpret the Clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government. In light of the history, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke divine guidance on a public body entrusted with making the laws is not, in these circumstances, a violation of the Establishment Clause; it is simply a tolerable

acknowledgment of beliefs widely held among the people of this country.  
(*Marsh v. Chambers* 463 U.S. 783)

Based on this peculiar historical context, the Court found no reason to believe that the Constitution would have meant to eliminate the practice. Also, the Court had previously recognized as exceptions, the particular uses of what Justice Sandra Day O'Connor has come to name "secular deism" in the use of chaplains by the United States Congress, presidential proclamations of days of prayer and fasting, and the invocation of God by the marshal of the Supreme Court at the beginning of any day on which cases are heard in the Court. The exceptions appear in the footnotes of *Engel v. Vitale* (370 U.S. 421).

In the case of *Lee v. Weisman* (505 U.S. 577), the Court rejected the historical argument entirely. The Court noted that public education itself is a relatively new feature of American democracy, therefore the existence of invocations and benedictions at public school graduation ceremonies does not carry with it the full weight of history and tradition of congressional prayer. As noted in *Engel*, among other school cases, compulsory attendance laws create a very specific, state-sponsored, environment for speech and religion in schools. (370 U.S. 421) School children are particularly susceptible to indoctrination by school officials, since these officials are placed in a position of authority over students in a school environment. Any religious utterance by these respected authority figures may result in undue religious inculcation of students against the will of the students or their parents.

In *Lee*, however, the Court was presented with a very different type of environment, in which students are not required to be in attendance, and the importance of the ceremony in the lives of the students might give schools reason to believe that ceremonial recognition of religion is appropriate. As the beginning of a congressional

day might call for recognition of God's guidance of elected representatives, the passage of students from one phase of their lives into another might similarly call for recognition of God's blessings and guidance. In rejecting this argument, the Court drew the following distinctions between the congressional environment and that of a graduation

Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*, 463 U.S. 783 (1983). The considerations [505 U.S. 577, 597] we have raised in objection to the invocation and benediction are, in many respects, similar to the arguments we considered in *Marsh*. But there are also obvious differences. The atmosphere at the opening of a session of a state legislature, where adults are free to enter and leave with little comment and for any number of reasons, cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*. The *Marsh* majority in fact gave specific recognition to this distinction, and placed particular reliance on it in upholding the prayers at issue there. 463 U.S., at 792. Today's case is different. At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). In this atmosphere, the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit. (*Lee v. Weisman* 505 U.S. 577)

According to the majority opinion, the choice not to attend graduation was an untenable one for a dissenter. Even though the graduation ceremony was technically not required for receipt of a diploma, one could not expect a student to forgo such an important event simply out of protest of a religious activity. Students were asked to remain standing quietly during the graduation prayer, leaving no means for a dissenter to express his or her dissent. To the common observer, the dissenter would be seen to be participating in the prayer activity.

Souter's dissent disregarded the practice in *Marsh* as something of minimal importance, claiming that most Americans take little notice of congressional prayer, days of thanksgiving and fasting, and presidential proclamations of any religious variety. The American public chooses to largely ignore these traditional aspects of government, while it is seemingly impossible for a graduate and her family at a high school graduation to ignore the direct government approval of religious activity. Souter noted,

Petitioners would deflect this conclusion by arguing that graduation prayers are no different from presidential religious proclamations and similar official "acknowledgments" of religion in public life. But religious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families. (*Lee v. Weisman* 505 U.S. 577)

In drawing the distinctions between the congressional and graduation environment, the Court rejects the argument that graduation prayers are a form of ceremonial deism.

In his dissent, Justice Scalia took the majority to task for the broad strokes it took with the *Marsh* precedent. In *Marsh*, the Court had noted that the practice of congressional chaplains predated the U.S. Constitution, while in *Lee* no such claim was possible since publicly funding schooling was such a new addition to the framework of U.S. government. Scalia noted that, at the very least, prayer at public school graduation predated the Fourteenth Amendment, through which the First Amendment was applied to state governments. He claimed that the majority opinion, "lays waste a tradition that is as old as public school ceremonies themselves, and that is a component of an even more longstanding American tradition of non-sectarian prayer to God at public celebrations generally." Scalia went on to detail the public tradition as well as to describe the first recorded public school graduation in history. (*Lee v. Weisman* 505 U.S. 577)



With regard to the Court's distinction of the ability of adults in Congress to show dissent without even being noticed, in that they can enter and leave the room at will, Scalia pointed out three poignant facts. First, the students in question are graduating, marking a transition from youth to adulthood, yet the Court treated them the same as it would treat first graders in an elementary school classroom for the time that they were involved in the ceremony. Second, students were asked to stand quietly with bowed heads during the reading of invocations and benedictions, yet there was no punishment for either raising one's head or for sitting down, granting dissenters the right to express their dissent reasonably. Third, that remaining respectfully silent while another expresses his or her belief is a civic skill that students should be taught. (*Lee v. Weisman* 505 U.S. 577)

The rejection of the precedent of *Marsh* created another situation in which school prayer became the exception to an otherwise accepted constitutional rule. The Court has repeatedly been willing to recognize the traditional practice of invoking the name of the creator during crises or important events. Although Madison is widely viewed as a separationist (Lindsay 1991), even he issued three separate proclamations of days of prayer and fasting during a time of war. (*Lee v. Weisman* 505 U.S. 577) As Van Alstyne suggests, "the Court has rejected a number of arguments still troublesome to the historically-minded." (1963) The case of *Lee* provides some of these arguments.

The Court here stated that public accommodation of an historical religious tradition through prayers offered by Congress, the President, and even the marshal of the Supreme Court itself has no bearing on a public school atmosphere, even in a one-time important ceremony such as graduation. In short, prayer in school could be

accommodated the way that other public prayer can. The rejection of the principle of *Lemon* basically stated that accommodation of religion through prayer is somehow fundamentally different than accommodation of religion through taxpayer support, the latter of which was more directly the aim of the First Amendment when it was constructed. Therefore, through this troubling precedent, the Court defined the school environment as something that does not resemble the world outside of it, the world for which students are meant to be prepared through the process of schooling.

### Coercion

Much of the debate in *Lee* revolved around the issue of state coercion of religious activity. According to the Weismans' and subsequently, the Court's decision, the invocation and benediction offered at the public school graduation reeked of state coercion as demonstrated by the request that students remain standing with bowed heads during both events and the sense that students felt obligated to attend the graduation ceremony. The school argued that remaining silent did not force participation in the prayer and that the graduation ceremony was purely optional. In turn, the Court focused much of its attention on the rights of the reasonable dissenter in the situation presented. (*Lee v. Weisman* 505 U.S. 577)

Justice Souter rightfully noted in his concurrence, "The Framers adopted the Religion Clauses in response to a long tradition of coercive state support for religion, particularly in the form of tax assessments." (*Lee v. Weisman* 505 U.S. 577) Madison and Jefferson firmly objected to such a tax in the state of Virginia. (Madison 1785) Supreme Court precedent even prior to *Lee* seems to allow this type of coercion (*Everson*

*v. Board of Education* 330 U.S. 1, *Zorach v. Clauson* 343 U.S. 306) while *Lee* rejects a much more subtle and indefinable type of coercion. In fact, these two different types of precedent have led to a further broadening of Establishment Clause interpretation with respect to the use of tax money in *Zelman v. Simmons-Harris* (536 U.S. 639) while interpretation in regards to prayer services on school property has been further narrowed. (*Santa Fe Independent School District v. Doe* 530 U.S. 290) The difference between these two types of cases plays on the role of coercion or choice. According to modern Court interpretation, school vouchers are acceptable accommodation because parents exert choice in directing the voucher contributions to the parochial or public school of their choosing. The Court defines the school environment, even at extra-curricular activities, to be fraught with subtle coercive pressure that prey on young, fragile minds, even when students have the choice to participate or not in said non-denominational religious activities.

In *Lee*, the Court created a broad definition of coercion not based on legal sanction but based on the psychology of adolescents. According to Justice Anthony Kennedy's majority opinion, the simple request that students stand with heads bowed during the ceremony was enough to constitute an indirect, subtle coercive power creating a psychological pressure to at least appear to participate in the religious activity. He stated:

The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture, standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to

standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that, for her, the act of standing or remaining in silence signifies mere respect, rather than participation. (*Lee v. Weisman* 505 U.S. 577)

Therefore, what one might see as an act of respect, the dissenter interprets as an act of coercion to participate in religious activities. This is not the direct coercion of taking tax money from an individual in order to transfer such payment to a religiously sponsored activity, nor is it the coercion of punishment of dissent according to conscience.

According to the Court, the coercion lies in the fact that the dissenter feels, whether it is truth or not, that he or she simply cannot dissent without boycotting a ceremony marking an important life event.

The First Amendment exists to protect freedom of conscience in religious and political matters as well as the expression of those beliefs with minimal government interference. Justice Harry Blackmun's concurrence claimed, "There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience. Even subtle pressure diminishes the right of each individual to choose voluntarily what to believe." (*Lee v Weisman* 505 U.S. 577) This echoes Madison's claim that religious belief and practice can be directed only by the individual's conscience and will, not by the government's direction or intervention. (Madison 1785) Still the claim that the government was somehow forcing students to participate in a religious activity simply by requesting that they stand in respect for a religious speaker at a government ceremony

seems to lack merit. The Court's decision relies, instead, on an indirect, intangible, subtle psychological coercion.

Scalia's scathing dissent on the coercion issue claimed that the "Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have 'coerced' students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent." (*Lee v. Weisman* 505 U.S. 577) In fact, dissenting students still had a means of expressing their dissent without being overly disruptive of the ceremony, Scalia pointed out.

This assertion - the very linchpin of the Court's opinion - is almost as intriguing for what it does not say as for what it says. It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Durer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. (Perhaps further intensive psychological research remains to be done on these matters.) It claims only that students are psychologically coerced "to stand . . . or, at least, maintain respectful silence."

He further accused the Court of not giving enough thought to the test of psychological coercion in a particularly ominous statement noting that the Court seemed not to bother at all with the fact that students had, only moments previous, stood in solemn respect for the Pledge of Allegiance, which now contains the phrase "under God," possibly raising a similar Establishment Clause issue. Scalia implied that under the psychological coercion test applied to the prayer, it would be just as unconstitutional for the state to coerce students to stand in respect of a declared allegiance to the United States government, in that the First Amendment protects freedom of conscience in regard to government policy as well as to religion. As Scalia puts it, "I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty."

Scalia's dissent brought up the important notion of broadening the Establishment Clause to the point that no government accommodation of religion is permissible, thereby negating, in certain circumstances, the Free Exercise Clause. Also, if government, especially schools, can have no interaction with religious belief, then the study of American history and government will be lacking in content and clarity, as so much of the history and tradition of the United States has, at its core, a set of religious belief. This is why Scalia listed, again, the many instances of public recognition of God in government ceremonies. (*Lee v. Weisman* 505 U.S. 577)

The Court also argued that the graduation ceremony itself was obligatory in a "real and fair" sense. Although students could have chosen not to attend the ceremony, that seemed an untenable position, to the Court, for a student at a crossroads in his or her life to forego the graduation ceremony out of a wish to dissent from prayer at such a ceremony. The argument about the importance of the affair was two-fold; however, as such an important event may warrant a prayer service. Kennedy discussed the double edge of this argument when he wrote, "The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons the argument must fail." (*Lee v. Weisman* 505 U.S. 577) Scalia struck back,

But let us assume the very worst, that the nonparticipating graduate is "subtly coerced" . . . to stand! Even that half of the disjunctive does not remotely establish a "participation" (or an "appearance of participation") in a religious exercise. The Court acknowledges that, "in our culture, standing . . . can signify adherence to a view or simple respect for the views of others." Ibid. (Much more often the latter than the former, I think, except perhaps in the proverbial town meeting, where one votes by standing.) But if it is a permissible inference that one who is standing is doing so simply out of respect for the prayers of others that are in progress, then how can it possibly be said that a "reasonable dissenter . . .

could believe that the group exercise signified her own participation or approval"? Quite obviously, it cannot. I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate - so that, even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in fostering respect for religion generally.

Therefore, according to Scalia, even if students are coerced, it is not necessarily an unconstitutional endorsement of religion, but more a civic exercise in keeping with the tradition of graduation ceremonies and American public recognition of God in general.

The Framers of the First Amendment sought to prevent the kind of religious establishments in which person were forced to support religion, usually through taxation. (Annals I 1790) There is a long, recognized history of recognition of God at public functions by Congress, the President, and even the Court itself. (*Engel v. Vitale* 370 U.S. 421) This tradition found its way into the very first recorded public school graduation. (*Lee v. Weisman* 505 U.S. 577, Scalia in dissent) Although the Court recognized the tradition in other environments (*Marsh v. Chambers* 463 U.S. 783), it refused to recognize the traditional nature of prayer at school graduations as an effect of the "subtle coercive pressure" exerted on students in a school-sponsored environment. This coercion is not the type that the Framers had in mind when constructing the First Amendment. Nowhere in the writings of the Framers is found any reference to subtle psychological pressures of being asked to stand out of respect.

The Court paid little mind to the nondenominational nature of the prayer or to the fact that no student was forced to pray, claiming that the idea that the prayer simply offered a choice to attending students is misleading. Even Justice Souter's concurrence

recognized that Madison, deemed the chief author of the Establishment Clause, argued that his proclamations of prayer and fasting were mitigated by the fact that they were mere suggestions and condoned no particular religion. Although Souter called this an admission of backsliding, it does give some credence to the argument the rabbi's invocation offered a chance for prayer for those who wished to join. (*Lee v. Weisman* 505 U.S. 577) The weight of argument laid at the feet of the student dissenter, allows the dissenter a sort of heckler's veto over a traditional event.

### State Sponsorship of Religious Activity

In concurrence, Justice Blackmun recognized the fact that Supreme Court precedent in the area of school prayer does not require coercion of the student in order to effect a violation of the Establishment Clause. He wrote, "proof of government coercion is not necessary to prove an Establishment Clause violation." (*Lee v. Weisman* 505 U.S. 577) Therefore, the discussion of coercion can even be considered inconsequential given the overt state sponsorship of a religious activity as evidenced by the choice of the Rabbi as a speaker at graduation and the direction of the content of the prayer through use of the pamphlet. Kennedy stated, "The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school." (*Lee v. Weisman* 505 U.S. 577)

Again, the Court departed from precedent to identify prayer in school as a very specific instance of state sponsorship of religion that is not allowed, whereas other forms of sponsorship are allowed. The Court allowed release time (*Zorach v. Clauson* 343 U.S. 306) and use of school facilities for meetings of religious groups. (*Westside Community*



*Board of Education v. Mergens* 496 U.S. 226) State sponsorship of prayer and similar religious activity is allowed in the case of congressional chaplains (*Marsh v. Chambers* 463 U.S. 783) and military chaplains (*Katcoff v. Marsh* 755 F.2d 223). While striking down non-denominational prayer in schools, the Court littered *Engel* with footnotes detailing acceptable government sponsorship of religion outside the public school sphere. (370 U.S. 421)

### The Aftermath of Lee

*Santa Fe Independent School District v. Doe* (530 U.S. 290)

The precedent set by *Lee v. Weisman* as well as *Lemon v. Kurtzman* swept so broadly as to be interpreted less than a decade later as prohibiting student-led, student-chosen prayer at public school football games. Since the school had allowed and encouraged the election of a student-chaplain for such events, the Court concluded that, “These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events.” (*Santa Fe Independent School District v. Doe* 530 U.S. 290) It seems as if simply the fact that the school was aware that the student chaplain was elected to utter a religious statement in a school context places the stamp of approval upon the utterance, claiming that the school policy actually encouraged religious messages, although it did not specifically indicate in its policy what types of messages the student speaker would be allowed to convey. The Court objected to the idea that election of a chaplain by a majority vote would promote both democracy and a sort of tradition civic religion. Instead, the opinion argued that such votes demean and dismiss minority viewpoints from the public sphere. Relying on *Lee*, the Court asserted

that the football prayer is coercive to the students who would like to participate in extracurricular activities. Again, the claim that the choice between participation and protest was an untenable one for the average student dissenter is reasserted. Further, the Court made this decision before any student speaker uttered a word, arguing that even the mere threat of a religious message was enough to strike down the policy on its face.

Chief Justice Rehnquist's dissent focused on the reassertion of the *Lemon* test in school prayer settings, claiming that a *Lemon* test assessment of the policy would show that the election of the student speaker did not violate the test and actually protected freedom of speech and exercise. Rehnquist then detailed the many divergences the Court has taken from the *Lemon* test, arguing that the test should be abolished since it is so unclear. He concluded, "The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if it is found to be the case." (*Lee v. Weisman* 505 U.S. 577)

In short, *Doe* used the precedent in *Lee* to basically invalidate any religious utterance on school grounds that does not take place in a club setting. The non-coercive nature of the prayer, even at a completely optional event, does not bear on the constitutionality of the prayer. The student-led nature of the activity does not bear on the constitutionality of the prayer. The democratic nature of the activity does not bear on the constitutionality of the prayer. More importantly, the free exercise and speech rights of the speaker do not bear on the constitutionality of the prayer. Seemingly, it is enough that the school was aware that a religious message might have been uttered for the activity to be struck down in accordance with the Establishment Clause of the Constitution.

For accomodationists, this turn in precedent was a frightening affront to the history and tradition of non-sectarian public prayer in the United States. It is a misrepresentation of the purpose of the Framers of the amendment. It is an overbroadening of the Establishment Clause. It is, furthermore, out of step with other Establishment Clause precedent regarding public funding and accommodation of religious behavior and belief in public places.

*Elk Grove Independent School District v. Newdow* (000 U.S. 02-1624)

The most recent effect of *Lee* on American jurisprudence is the challenge to the phrase "under God" in the Pledge of Allegiance. In his dissent, Scalia foresaw this challenge when he wrote,

The opinion manifests that the Court itself has not given careful consideration to its test of psychological coercion. For if it had, how could it observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which immediately preceded Rabbi Gutterman's invocation? Ante, at 583. The government can, of course, no more coerce political orthodoxy than religious orthodoxy. West [505 U.S. 577, 639] *Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Moreover, since the Pledge of Allegiance has been revised since *Barnette* to include the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation ceremonies and from the classroom)? In *Barnette*, we held that a public school student could not be compelled to recite the Pledge; we did not even hint that she could not be compelled to observe respectful silence - indeed, even to stand in respectful silence - when those who wished to recite it did so. Logically, that ought to be the next project for the Court's bulldozer.

A decade later, Michael Newdow, on behalf of his biological daughter, filed that very challenge. Although the Court struck down the challenge based on Newdow's custodial relationship with the child, many justices felt impelled to comment on the merits of the

case. Given his many public statements regarding the issue, Scalia recused himself from the case, leaving the most vehement voice on the Court to be Justice Thomas. (*Elk Grove Independent School District v. Newdow* 000 U.S. 02-1624)

Justice Sandra Day O'Connor took the opportunity to reaffirm the constitutional soundness of making reference to God in public ceremonies, but did not lay blame for the incorrect judgment of the lower court at the feet of an incorrect decision in *Lee*.

O'Connor applied what she calls an "endorsement test" based on expected reaction and interpretation of a reasonable observer in a social context rich with history and tradition.

Where she failed to recognize the traditional value of invocations and benedictions at graduations ceremonies, a traditional activity that dated back to the mid nineteenth century, she recognized a traditional significance in the use of "under God" in the Pledge of Allegiance when the phrase was added in the mid twentieth century. She noted,

The Court has permitted government, in some instances, to refer to or commemorate religion in public life. See, e.g., *Pinette, supra*; *Allegheny, supra*; *Lynch, supra*; *Marsh v. Chambers*, 463 U. S. 783 (1983). While the Court's explicit rationales have varied, my own has been consistent; I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes. One such purpose is to commemorate the role of religion in our history. In my view, some references to religion in public life and government are the inevitable consequence of our Nation's origins. Just as the Court has refused to ignore changes in the religious composition of our Nation in explaining the modern scope of the Religion Clauses, see, e.g., *Wallace, supra*, at 52-54 (even if the Religion Clauses were originally meant only to forestall intolerance between Christian sects, they now encompass all forms of religious conscience), it should not deny that our history has left its mark on our national traditions. It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.\*<sup>2</sup> Eradicating such references would sever ties to a history that sustains this Nation even today. (*Elk Grove Independent School District v. Newdow* 000 U.S. 02-1624)

According to O'Connor's endorsement test, it is appropriate to acknowledge God in a patriotic manner but not in a manner that is purely traditional without reference to the history and tradition of the United States. Given the invocation that the rabbi had written for the graduation in question in *Lee*, it is difficult to see O'Connor's dissatisfaction with the outcome of the school sponsored activity. The prayer read,

God of the Free, Hope of the Brave:  
For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.  
For the liberty of America, we thank You. May these new graduates grow up to guard it.  
For the political process of America in which all its citizens may participate, for its court system where all may seek justice, we thank You. May those we honor this morning always turn to it in trust.  
For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.  
May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.  
AMEN (*Lee v. Weisman* 505 U.S. 577)

The prayer's specific mention of patriotic traditions might make it acceptable. The fact that the content may have been influenced by the pamphlet given to the rabbi in preparation for the event; however, seems to have been a particular point of contention in *Lee*.

O'Connor's endorsement test fails here. If patriotic and traditional recognition of God in public ceremonies is acceptable, but controlling the content of religious messages in a school context is unacceptable, then schools are left with no choice but to disregard and abandon traditional prayer practices in all instances, including the Pledge of Allegiance. It is unclear why it is acceptable for Congress to incorporate religious messages into public formats such as the Pledge, congressional prayer, and the imprintation of the national motto on money, while it is unconstitutional for schools to try

to incorporate religious messages into public formats while trying to maintain a traditional non-sectarian, non-coercive format. The wording of the Establishment Clause and its original interpretation would guide the Court in the opposite direction, stripping Congress of this right and granting it to state governments.

Rehnquist also accepted the legitimacy of the Pledge without specifically attacking *Lee*. He recounted, yet again, the tradition of religious invocation in the public sphere from George Washington to modern presidents. He then laments that the same problem that arises in *Lee*, the introduction of the heckler's veto that grants so much power to the dissenter that the rights of the majority are restricted. Rehnquist wrote,

There is no doubt that respondent is sincere in his atheism and rejection of a belief in God. But the mere fact that he disagrees with this part of the Pledge does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress. There may be others who disagree, not with the phrase "under God," but with the phrase "with liberty and justice for all." But surely that would not give such objectors the right to veto the holding of such a ceremony by those willing to participate. Only if it can be said that the phrase "under God" somehow tends to the establishment of a religion in violation of the First Amendment can respondent's claim succeed, where one based on objections to "with liberty and justice for all" fails. Our cases have broadly interpreted this phrase, but none have gone anywhere near as far as the decision of the Court of Appeals in this case. The recital, in a patriotic ceremony pledging allegiance to the flag and to the Nation, of the descriptive phrase "under God" cannot possibly lead to the establishment of a religion, or anything like it. (*Elk Grove Independent School District v. Newdow* 000 U.S. 02-1624)

Rehnquist believed, as do many, that the Court had expanded the interpretation of the Establishment Clause so far as to become oppressive to the free expression of the nations citizens and also restrictive of the nation's traditions.

Clarence Thomas, the most vocal commentator in the Pledge case, took the Court to task for the decades of Establishment Clause precedent that led to the current problem,

including the *Everson v. Board of Education* case which incorporated the Establishment Clause to the states. He wrote, "I would welcome the opportunity to consider more fully the difficult questions whether and how the Establishment Clause applies against the States. One observation suffices for now: As strange as it sounds, an incorporated Establishment Clause prohibits exactly what the Establishment Clause protected--state practices that pertain to 'an establishment of religion.'" Justice Thomas argued that the Establishment Clause never should have been incorporated, since incorporation is reserved for fundamental individual liberties, and, as he claimed, the protection against Establishment is not an individual liberty but a protection of the states against federal infringement. Thomas lays the blame for the decision of the U.S. Court of Appeals for the Ninth Circuit squarely on the Supreme Court's precedent in *Lee*. Thomas' concern with *Lee* revolved around the fact that it expanded precedent so far as to prohibit even the slightest recognition of God in a school context. Thomas argues,

I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional. I believe, however, that *Lee* was wrongly decided. *Lee* depended on a notion of "coercion" that, as I discuss below, has no basis in law or reason. The kind of coercion implicated by the Religion Clauses is that accomplished "*by force of law and threat of penalty.*" 505 U. S., at 640 (Scalia, J., dissenting); see *id.*, at 640-645. Peer pressure, unpleasant as it may be, is not coercion. But rejection of *Lee*-style "coercion" does not suffice to settle this case. Although children are not coerced to pledge their allegiance, they are legally coerced to attend school. Cf., e.g., *Schempp, supra*; *Engel v. Vitale*, 370 U. S. 421 (1962). Because what is at issue is a state action, the question becomes whether the Pledge policy implicates a religious liberty right protected by the Fourteenth Amendment. (*Elk Grove Independent School District v. Newdow* 000 U.S. 02-1624)

Therefore, the problem with the *Lee* case stemmed from the distortion of the Establishment Clause from a protection of federalism to an individual right, added to the *Engel* contortion of the meaning of coercion. By these precedents, the recognition of

God in the Pledge of Allegiance in a school context would violate the Establishment Clause while the same words uttered in a congressional context or by a president at a public event would pass constitutional muster.

### Conclusion

The precedent in *Lee* needlessly departed from the precedents in both *Lemon* and *Marsh*. Depending on interpretation, the Court could have chosen to strike down the graduation prayer using either precedent. Appellate courts had argued that the prayer violated two or three of the prongs of the *Lemon* test. (*Lee v. Weisman* 505 U.S. 577) Still, the Court disregarded *Lemon*, partially due to its inability to clarify the boundaries of government accommodation of religion or traditional activities. *Marsh*, on the other hand, dealt directly with the role of traditional secular deism in public ceremony. The Court cast off *Marsh* as not relating to the particularly sensitive environment created by school. The Court instead relied on precedent set in *Engel v. Vitale*, a previous school prayer case, and one of the more controversial decisions in Court history, if only for its disregard of the traditional role of morality and religion in the public school classroom. (*Engel v. Vitale* 370 U.S. 421) This break from more widely accepted precedent and the continuation of the segregation of the school environment from the adult world in the area of religion seems to have deepened confusion regarding the meaning of the Establishment Clause. Monetary support of religion in schools relies on different precedent than state recognition of religious activity which relies on different precedent than state sponsored prayer in places other than school which relies on different



precedent than school prayer. Each of these situations invokes a unique interpretation of the Clause.

*Lee* deepened the divide between Court and public on the issue of school prayer. Polling data show that parents and students are still interested in incorporating some recognition of a higher power into public school events. (Green and Guth 1989; Jacoby 1990; Servin- Gonzalez and Torres-Reyna 1999) The Court also granted an overpowering right of religious minorities and dissenters to stop non-denominational, non-coercive practices on the basis that they are state sponsored. Rather than rule by majority with respect to the minority, this continued the development of a system of precedent by which the minority rules, giving more credence to the rights of non-observers than to the system of tradition and history that endorses the practice of prayer at public ceremonies. (Way and Burt 1983)

The majority decision in *Lee* also expanded the conception of coercion in American jurisprudence, but only as it applies to children in a school setting. Where the Court had previously admitted a long tradition of non-sectarian public support of religion in many cases, reiterated in *Lee* by Justice Antonin Scalia, Justice Souter disregarded this entire history as misinterpretations of the Establishment Clause. The majority, however, upheld many of these public recognitions of God. The Court treated the schoolhouse as an entirely different type of environment, rife with coercive forces and restrictions on expression. (*Lee v. Weisman* 505 U.S. 577) This not only separated the school environment from the adult environment, even at graduation, which is supposed to mark a transition from youth to adulthood, it also separated the protections of expression of non-religious beliefs in school campuses from other forms of expression and dissent in

the same environment. (*Tinker v. Des Moines School District* 393 U.S. 503 , *West Virginia State board of Education v. Barnette* 319 U.S. 624 ) If the Court had chosen to follow the precedent set in a decision only two years prior to *Lee*, it may have chosen to allow the religious expression even with state support. *Westside Community Board of Education v. Mergens* allows the expression of religious beliefs by students, even with the state support of a state-funded teacher-adviser who administrates the activities if the religious group. (496 U.S. 226)

The effects of *Lee* drove a wedge between traditional practices and the requirements of the Court. It led to the facial challenge of a pre-game prayer practice in Texas that was democratically supported by students of the district in question. (*Sante Fe Independent School District v. Doe* 530 U.S.290) The most recent scandal that has grown out of the *Lee* decision has been the challenge to the phrase “under God” in the Constitution. (*Elk Grove Independent School District v. Newdow* 000 U.S. 1264) Although the Court sidestepped the merits in the case by denying standing to Michael Newdow, he has refiled the case in the federal district courts under different circumstances.

## CHAPTER 5

### POLICY GOALS AND A MODEST PROPOSAL

#### Goals

It should be no surprise that with differing definitions of problems associated with school prayer policy, separationists and accomodationists disagree as to the goals of the Establishment Clause protections as they apply to school prayer. First of all, the main goal of any policy in the American republic is to provide representation of majority opinions with respect to minority rights. Conflicting claims to rights under the Establishment Clause and under the Free Exercise complicate the issue further with accomodationists claiming violations of their free exercise rights and separationists claiming violation of the Establishment Clause. Though the issue of majority sentiment is clear (Green and Guth 1989; Jacoby 1990; Servin- Gonzalez and Torres-Reyna 1999), the definition of minority rights is not.

Accomodationist goals include the maintenance of religious tradition. Alexis de Tocqueville observed that the fate of democracy rested on the strength of its religious tradition, and that even diverse traditions can be adapted to a Democracy. (Tocqueville Democracy in America Volume 1 Part 2 Chapter 9) Key founders of the United States government who were famous for their religious skepticism still supported the need for religious education in the maintenance of a free society. (Reichley 1986) In fostering religious tradition and practice in the public schools, accomodationists seek to provide a

respect for the religious traditions of the nation and a solid foundation for democratic government.

Until 1963, it seems, the prayer supporters were upfront about their goals. Both petitioners and respondents in the case of *Engel v. Vitale* (370 U.S. 421) agreed that the Regents' Prayer was a religious practice, but the respondents claimed that there was a state interest in encouraging religious activity. Separationists see no state interest. Since then, accommodationists have tried to couch their religious goals in relatively secular language. Since the problem in *Engel* seemed to be that the state had written the prayer and that there may be subtle coercion, the state of Alabama authorized a statute that would provide public school children with a moment of silence for prayer and meditation. The goal was the same, to support religious activity and respect the tradition of beginning a day with prayer. The Court struck this provision down as well. (*Wallace v. Jaffree* 472 U.S. 38) Since then the accommodationists have relied on the footnotes from *Engel* which allow ceremonial usage (370 U.S. 421) to justify prayer at graduation (*Lee v. Weisman* 505 U.S. 577) and prayer at the beginning of football games (*Santa Fe Independent School District v. DOE* 530 U.S. 290) Each of these cases tried to cast prayer in the light of a secular tradition that could really neither further nor inhibit anyone's practices, but the implied goal of the tradition was to encourage religious activity according to the Court.

Separationists seek to protect non-believers and believers alike from government involvement in religious practices. Their goal is to drive a wedge of separation between church and state, and in the matter of school prayer, each decision has driven the wedge deeper. This wedge protects religion from state interference and protects people from the

fervors of religious persecution. (Carroll 1967) The ultimate goal of the separationist is to eradicate prayer or any religious activity from public schools. None of the compromises, such as moments of non-denominational prayer, non-coercive prayer, student-led prayer, and ceremonial prayer, have been acceptable to the separationists.

### Policy Alternatives

School prayer is often seen as an all or nothing endeavor. Either the school supports prayer or it does not. There are, however, many alternatives to the win-lose approach that the Court has taken in school prayer cases. There may be a way to satisfy the main goals of each side of the argument, respect tradition, encourage moral values, and still protect the rights of non-believers. Below, find a matrix of policy alternatives and their probable effects. Of course, many of these effects are perceived. The assumption that believers and non-believers deserve the same protection is taken as a given. The chart focuses on daily prayer, and does not reference prayer at special events such as graduations and football games.

Policy Alternative	Perceived effect
Status Quo	<p>The right of non-believers to be free of religious coercion will remain protected. Government and religion will remain unentangled.</p> <p>Believers will perceive a restriction in their freedom of expression.</p> <p>Majority opinion and some state action will continue to be out of step with established Court doctrine. Believers will perceive a loss of tradition and moral value.</p>
Daily Moment of Silence	<p>Non-believers may perceive some mild coercion to take part in religious practices. Government will be acting in support of religious practice though it will not identify a specific sect or type of activity that is supported. The purpose of the law would be to advance religious practice, in violation of modern Establishment Clause interpretation. (<i>Wallace v. Jaffree</i> 472 U.S. 38) The free exercise of believers would be protected. Tradition would be preserved. There may be little or no effect on the moral education of the children who may need more guidance.</p>

Non-Denominational, Non-Coercive, state-written daily prayer led by teachers	Non-believers may perceive subtle coercion. The state government would be directly involved in the overt support of a religious action. <i>Engel v. Vitale</i> (370 U.S. 421) would have to be overturned. There is inherent difficulty in writing a prayer with which all denominations would agree. Free exercise rights of believers would be protected. Tradition would be preserved. The prayer may have some effect on the moral education and values of children. The state's involvement would preserve principles of federalism and community standards of morality. Involvement of faculty might violate Free Exercise rights of faculty and might lend undue state sanction to the activity.
Non-Denominational, Non-Coercive daily prayer led by guest clergy	Non-believers may perceive coercion. The state government would be directly involved in the overt support of a religious action. <i>Engel v. Vitale</i> (370 U.S. 421) would have to be overturned. There is inherent difficulty in writing a law with which all denominations would agree. Free Exercise rights of believers would be protected, however some believers would object to the sectarian nature of guest clergy. Tradition would be preserved. The prayer may have some effect on the moral education and values of children. The state's involvement would preserve principles of federalism and community standards of morality. This activity would seem to coincide with accepted government ceremonial usage of clergy.

Non-denominational, Non-coercive, student-written and student-led daily prayer	Non-believers might perceive peer coercion. The state would be directly involved in support of an overt religious action. Free exercise rights of believers would be protected. Tradition would be preserved. The prayer may have some effect on the moral education and values of children. State involvement would preserve principles of federalism and community standards of morality. There are inherent problems in writing a prayer to which all denominations can agree. There are inherent problems in student volunteer selection and administrative approval of the prayer.
Community non-denominational, non-coercive prayer prepared by citizen board for reading by student volunteers	Non-believers may feel coercion. Majority sect of a community might exert undue influence over the creation of the accepted prayer. Free exercise rights of believers would be maintained. Tradition would be preserved. The prayer might have an effect on the moral education and values of children. The state's involvement is marginal, but the state is still supporting a religious activity. There is an inherent problem with writing a prayer to which all denominations can agree. Principles of federalism and community standards are upheld. Largely secular communities could choose to have no prayer while religious communities could choose a prayer that suits their needs. Consistent with aspects of religious choice recently infused into the Establishment Clause interpretation. ( <i>Zelman v. Simmons-Harris</i> 000 U.S. 000-1751) Majoritarian aspects of democracy would be maintained.



Let it be noted that each alternative is riddled with problems, and that the difficulty in a democratic republic is to balance the rights of competing groups. Though the status quo is acceptable to separationists, prayer supporters find it distasteful and even dangerous. (Reichley 1986) None of the above policy alternatives suggests a return to colonial days of established religion, nor does any one of them suggest a completely sectarian approach to the problem of school prayer. Some changes would have to be made to established Supreme Court rulings regarding the conflict between school prayer and the Establishment Clause, but these changes might help to clarify the clause so that there is one, easily understandable definition that applies to all establishment cases. Instead, there is currently disagreement between Establishment cases involving school funding, such as *Zelman* (536 U.S. 639), and those involving prayer, such as *Doe*. (530 U.S. 290)

### Policy Proposal

Of the aforementioned policy objectives, one seems to be the best at balancing the rights of believers and non-believers, marrying the Establishment and Free Exercise Clauses, and creating a more consistent view of the Establishment clause with regards to schools. That same proposals meets the main goals of the accomodationists: preserving tradition, imparting moral values, maintaining states' rights, and protecting the free exercise of believers. Though it does not reach the ultimate goal of the separationists, removing religion from the school entirely, it should quell arguments over direct state involvement in religion and protection of the rights of non-believers. The policy of

allowing communities to develop non-denominational, non-coercive prayer using a citizen board and student volunteers seems to be the best compromise between the two arguments.

The board could be organized by a vote at an open meeting, similar to a school board meeting. What is obvious in this situation is that the extremes of the two sides of the prayer debate will be at the meeting. Religious zealots from many denominations will be in attendance in order to protect perceived rights or to steer the discussion, deliberation and vote in a preferred direction. There is little doubt, at least in a diverse community, that all sides could be well represented on a board of approximately ten parents of students in the school, which is probably the smallest and most effective level for this type of activity. In a less diverse community, followers of marginal religious practices might be locked out of the process, even at the initial election stage, but their right to testify at the meeting would not be infringed.

In order to establish “community consensus,” the vote of the board should have to be a supermajority of 2/3, or 7 out of ten. This would insure that a convincing argument of a dissenter would have a decent chance in toppling the proposed prayer, or that a moderate amount of dissent by the board would be enough to push the prayer in a less offensive direction or abolish it altogether. The supermajority would force greater deliberation on content, style, tone, and delivery of the prayer in the school, and would also serve as a means to dull zealotry by opening the discussion to many different points of view. Those adamant that a prayer should be added might be swayed, by the impassioned arguments of others, into believing that a private, sectarian prayer group would be more appropriate for their children in that community. Others may decide that

respect to other people's beliefs in the community, including atheism and agnosticism, would dictate much broader language than they would have originally intended.

Members of marginal faiths might be inclined to allow the activity if they were permitted broad freedom in exempting their children.

The search here would be for fundamental truths that could bind the community together rather than allowing the pull of religious dissension and zealotry to tear it apart. If the community can come to no such consensus, perhaps the mere existence of the board and the occurrence of the discussion will soften the divisions now being fed by religious differences. As Jefferson wrote to Dr. Thomas Cooper,

In our annual report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of encouraging the different religious sects to establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have the free use of our library, and every other accommodation we can give them; preserving, however, their independence of us and of each other. This fills the chasm objected to ours, as a defect in an institution professing to give instruction in *all* useful sciences. I think the invitation will be accepted, by some sects from candid intentions, and by others from jealousy and rivalry. And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality. (Jefferson [1822]1984)

If no prayer results, perhaps the supporters will emerge more understanding of the concerns of their fellow citizens. If a prayer results, perhaps dissenters, given their opportunity to dissent respectfully, will retain a role in the overall religious debate and be recognized, by the community in which they have chosen to live, as holding legitimate beliefs worthy of expression at the least.

Much of the Court's current interpretation of the Establishment Clause includes a choice factor. For example, the Court found in *Zelman v. Simmons-Harris* (536 U.S. 639) that the voucher program in Ohio did not violate the Establishment Clause mainly because the money was directed by parent choice and not by state assertion. The policy of allowing a community review board to write the state prayer allows parent choice on a community-wide level. An even broader non-coercion doctrine than the one suggested by the U.S. Court of Appeals in the *Engel* case would serve to create a second individual choice on behalf of the parent or student in question. The lower court, in *Engel*, forced the state to allow students to leave the room or to refrain from saying the prayer if a parent requested such accommodations. Teachers were to refrain from commenting on the students' actions. (370 U.S. 421) Under the revised program students should be able to refrain from saying the prayer without the burden of parental request, and teachers would still be unable to comment. This would protect the rights of the non-believer or the dissenter to be free from government coercion in religious matters. It would be similar to the holding in *West Virginia v. Barnette* (319 U.S. 624), which allows students to refrain from the Pledge of Allegiance without comment from teachers.

The Free Exercise rights of believers to take part in traditional, ceremonial religious activity would be protected as well. Removing the teachers and administrators from the process frees the state of any excessive entanglement, while allowing student volunteers, selected, presumably, by the citizen board, would allow the students to practice their religion freely. In the case of *Westside Community Board of Education v. Mergens* (496 U.S. 226), it was decided that students had the right to practice and study religion on school campus to the same extent that non-religious groups and individuals

could express their own beliefs on that same campus. The key to avoiding the Establishment Clause issue in *Mergens* was to remove the school staff from the equation. Just as teachers are to act merely as supervisors for Bible clubs, their roles would become merely supervisory during the reading of the prayer. This also avoids a problem found in *Engel*, which was that students might become indoctrinated by religious activities if the person leading those activities was an authority figure. If the person leading the activity is a peer, there is little danger of indoctrination. (370 U.S. 421)

The act of having the prayer written and regulated by a community board would preserve the power of the states to set their own regulations and standards as well as the original interpretation of the Establishment Clause by its Framers. (Peterson 1963) The demographics of prayer supporters show that many of them live in concentrated areas, especially in the South. (Green and Guth 1989) Those areas with high concentrations of prayer supporters would be able to exercise their desire to have a brief, traditional, ceremonial religious activity in the school. Those areas with high levels of separatism would maintain the status quo. This would support the idea of a republican democracy that rules in accordance with majority opinion and with respect to minority rights.

Some may still argue that there may be some perception of coercion amongst non-believers, but certainly, there is no Constitutional right against being offended. Under this plan, the state would have to remain neutral and the prayer could not be overtly coercive. More importantly, the rights of the minority must be balanced with those of the majority. The majority would give up its right to be coercive or to be overtly denominational, and the minority would have to be moderately tolerant of majority traditions. If there is to be a check on the non-denominational and non-coercive nature of

the prayers, it must be the Courts. Since the Court would have to overturn precedent in order to allow this new plan to occur, it would have to establish a clear test for the non-denominational and non-coercive prayer so that prayers that violate this standard could still be challenged in court.

### Conclusion

Since 1963, the debate over school prayer has been highly contentious. As Elifson and Hadaway wrote:

Prayer and Bible reading in Public schools have led to three major Supreme Court decisions; they are the impetus for approximately 200 constitutional amendments in the U.S. Congress, amendments designed to permit voluntary prayer in public schools or curtail federal court jurisdiction in school prayer cases. (1985)

Of course, the battle has continued since 1985, and the Republican Party still devotes a platform plank to a proposed school prayer amendment. (Janda 1999) As divisive as the issue is, there still may be some middle ground to stake out, a compromise that might satisfy some of the requirements of both sides. It is necessary to find this answer, and a non-denominational, non-coercive, community-created prayer might be a step in that direction. As the Court further develops the interpretation of the Establishment Clause in relation to school prayer, perhaps they will happen on a definition of the clause that is consistent, coherent, and adheres to the fundamental principles and traditions of the United States government.

## WORKS CITED

- Abbington School District v. Schempp* 474 U.S. 203 (1963)
- Agostini v. Felton* 521 U.S. 203 (1997)
- Annals I. 1790. as printed in The Founders Constitution. Kurland, P. and Lerner, R. (eds.) Chicago: University of Chicago Press.
- Arends, R. 1998. Learning to Teach. Boston: McGraw-Hill
- Aristotle. 2000. *Politics*. Jowett, B. (translator) New York: Dover
- Bethel School District Number 403 v. Fraser* 478 U.S. 675 (1986)
- Bloom, A., ed. 1968. The Republic of Plato. New York: Harper Collins, Pp. 63-96
- The Body of Liberties of the Massachusetts Colonie of New England. 1641. as printed in The Founders Constitution. Kurland, P. and Lerner, R. (eds.) Chicago: University of Chicago Press.
- BOE of Westside Community Schools v. Mergens* 496 U.S. 226 (1990)
- Boyer, et al. 1996. *The Enduring Vision: A History of the American People*. Lexington: DC Heath
- Brann, E. 1979. Paradoxes of Education in a Republic. Chicago: University of Chicago Press, Pp. 38-58
- Brown v. Board of Education* 347 U.S. 483 (1954)
- Calvin, J. 1536. *Institutes of the Christian Religion*. As printed in The Founders Constitution. Kurland, P. and Lerner, R. (eds.) Chicago: University of Chicago Press.
- Carroll, W. 1967. "The Constitution, The Supreme Court, and Religion." *The American Political Science Review*. 61:3 pp. 657-674
- Center for Civic Education. 2002. We The People: The Citizen and the Constitution. California: Center for Civic Education.

The Declaration of Independence. 1776. as printed in Center for Civic Education. 2002.  
We The People: The Citizen and the Constitution. California: Center for Civic Education

Elifson, K. and Hadaway, C. "Prayer in Public Schools: When Church and State Collide." *Public Opinion Quarterly*. 49:3 pp. 317-329

*Elk Grove Independent School District v. Newdow* 000 U.S. 02-1624 (2004)

Ellis, E. and Esler, A. 1999. World History: Connections to Today. New York: Prentice Hall

*Engel v. Vitale* 370 U.S. 421 (1963)

*Everson v. Board of Education*. 330 U.S. 1 (1947)

Green, J. and Guth, J. 1989. "Political Activists and Support for School Prayer." *Public Opinion Quarterly*. 53:41-57

Jacoby, W. 1990. "Variability in Issue Alternatives and American Public Opinion." *The Journal of Politics*. 52:2 pp.579-606.

Janda, K. et al. 1999. The Challenge of Democracy. Boston: Houghton-Mifflin.

Jefferson, T. 1984. Writings/Thomas Jefferson. ed. Merrill D. Peterson. New York: Viking Press.

*Katcoff v. Marsh* 755 F.2d 223 (CA2 1985)

Ketcham, R. (ed.) 1986. The Anti-federalist Papers and the Constitutional Debates. New York: Mentor.

Kymlicka, W. 1997. "States, Nations, and Cultures." Assen: Van Gorcum.

Lardner, L. 1951. "How Far Does the Constitution Separate Church and State?" *The American Political Science Review*. 45:1 pp. 110-142

*Lee v. Weisman* 505 U.S. 577 (1992)

*Lemon v. Kurtzman* 401 U.S. 192 (1973)

Levy, L. 1986. The Establishment Clause. North Carolina: UNC Press.

Lindsay, T. 1991. "James Madison on Religion and Politics: Rhetoric and Reality." *The American Political Science Review*. 85:4 pp. 1321-1337



- Madison, J. 20 June 1785. A Memorial and Remonstrance Against Religious Assessments. Papers 8:298—304. As printed in The Founders Constitution. Kurland, P. and Lerner, R. (eds.) Chicago: University of Chicago Press.
- Madison, J. 16 November 1814. A Proclamation. As printed in The Founders Constitution. Kurland, P. and Lerner, R. (eds.) Chicago: University of Chicago Press.
- Marsh v. Chambers* 463 U.S. 783 (1983)
- Maryland Constitution of 1776, Declaration of Rights. As printed in The Founders Constitution. Kurland, P. and Lerner, R. (eds.) Chicago: University of Chicago Press.
- McCullum v. Board of Education* 333 U.S. 203 (1948)
- Mill, J. 1982. *On Liberty*. Himmelfarb, G. (ed.) New York: Viking.
- Miller v. California* 418 U.S. 915 (1974)
- New Jersey Constitution of 1776. as printed in The Founders Constitution. Kurland, P. and Lerner, R. (eds.) Chicago: University of Chicago Press.
- Northwest Ordinance. 1787. as printed in The Founders Constitution. Kurland, P. and Lerner, R. (eds.) Chicago: University of Chicago Press.
- Peterson, W. 1963. "The American Federal System and Church-State Relations." *The Western Political Quarterly*. 16:3 pp. 598-609
- Riechley, A. 1986. Democracy and Religion. *PS*. 19:4 pp. 801-806
- Santa Fe Independent School District v. Doe* 530 U.S. 290 (2000)
- Servin-Gonzalez, M. and Torres-Reyna, O. 1999. "Trends: Religion and Politics." 63:4 pp. 592-621
- Scalia, A. 1998. A Matter of Interpretation. Gutman, A. (ed.) New Hersey: Princeton University Press
- Tinker v. Des Moines School District* 393 U.S. 503 (1969)
- Tocqueville, A. 2000. Democracy in America. Ed. Mansfield, H. and Winthrop, D. Chicago: University of Chicago Press.
- United States Constitution. As printed in Center for Civic Education. 2002. We The People: The Citizen and the Constitution. California: Center for Civic Education.

- Van Alstyne, W. 1963. "Constitutional Separation of Church and State: The Quest for a Coherent Position." *The American Political Science Review*. 57:4 pp. 865-882
- Virginia, An Act for Establishing Religious Freedom. 1785. Madison Papers 8:399-401  
As printed in The Founders Constitution. Kurland, P. and Lerner, R. (eds.)  
Chicago: University of Chicago Press.
- Virginia Declaration of Rights. 1776. as printed in Center for Civic Education. 2002. *We The People: The Citizen and the Constitution*. California: Center for Civic Education
- Wallace v. Jaffree* 472 U.S. 38 (1984)
- Way, F. 1985. "Stability and Change in Constitutional Litigation: The Public Piety Cases." *The Journal of Politics* 47:3 pp. 910-925
- Way, F. and Burt, B. 1983. "Religious Marginality and the Free Exercise Clause". *The American Political Science Review*. 77:3 pp. 652-665
- Westside Community Board of Education v. Mergens* 496 U.S. 226 (1990)
- West Virginia State board of Education v. Barnette* 319 U.S. 624 (1943)
- Wooten, D. (ed.) 1983. The Political Writings of John Locke. New York: Mentor
- Zelman v. Simmons-Harris* 536 U.S. 639 (2002)
- Zorach v. Clauson* 343 U.S. 306 (1952)

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