

Quo Vadis The Free Exercise of Religion?

The Diminishment of Student Religious Expression in American Public Schools

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The Court “bristles with hostility to all things religious in public life.”¹

The first sixteen words of the First Amendment to the United States Constitution, according to which, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” contains an inherent conflict between its clauses that has generated more litigation at the Supreme Court than any education-related topic in its history.² In other words, while Americans are free to believe in what they wish, the First Amendment has been interpreted as not permitting the government from taking any actions, such as aiding religious institutions or permitting prayer in state-sponsored activities such as public schools, for fear of establishing a state religion. At the same time, although the Federal Constitution forbids Congress from establishing religion, since the United States Supreme Court extended the same prohibition to State governments,³ individuals have the same rights against the federal or state governments with regard to religion in the public marketplace; State constitutions typically include similar provisions.

When disputes arise under the First Amendment with regard to prayer and religious expression by students in public schools, the lack of judicial clarity, coupled with what can be interpreted as judicial hostility, has led to the near banishment of many student-led religious activities in many public schools.⁴ This unhappy state of affairs with regard to the Religion Clauses resulted in large part by the Supreme Court’s inability to create separate and distinct standards when dealing with the Establishment and Free Exercise Clauses. Initially, the Justices

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created a two-part test in *School District of Abington Township v. Schempp* and *Murray v. Curlett*⁵ to review the constitutionality of prayer and Bible reading in public schools. However, the Court subsequently expanded this two-part measure into the tripartite Establishment Clause test in *Lemon v. Kurtzman (Lemon)*,⁶ a dispute involving government aid to religiously affiliated non-public schools.

When the Supreme Court applied the so-called *Lemon* test in cases involving both aid and religious activity, its failure to explain how, or why, it had become a kind of “one-size fits all” measure that addresses issues of both Free Exercise and Establishment, created confusion for lower courts, lawyers, commentators, and school officials who seeking judicial clarity, if not consistency. This confusion is exacerbated because as membership on the Court changes, its collective jurisprudence on the status of the Establishment and Free Exercise Clauses is impacted. The Court’s jurisprudence has also been subject to modification through the creation of two later tests. In the earlier of these two tests, *Lynch v. Donnelly*,⁷ a non-school case, the Court upheld the inclusion of a Nativity scene in a Christmas display on public property pursuant to what Justice O’Connor described as the endorsement test when dealing with religious activity in public settings. Then, in *Lee v. Weisman*,⁸ a case prohibiting prayer at public school graduation ceremonies, the Court enunciated the so-called psychological coercion test when addressing prayer in schools.

In light of on-going conflicts over the place of student prayer and religious activity in public schools in the United States, with the result that the free exercise rights are arguably diminishing, this paper is divided into three substantive sections. After a brief prolegomena, the first part sets the stage by reviewing the tests that the Supreme Court created. The second section examines four cases where the courts have demonstrated what can be described as hostility

toward Christianity. The third part of the paper reflects on where the Court's jurisprudence with regard to students' free exercise of religion in public schools may be headed. The paper rounds out with a brief conclusion.

Prolegomena

An argument can be made that the Supreme Court has set a judicial tone that is largely hostile to religion, Christianity in particular. In so doing, the Court has seemingly aligned itself with those who oppose religion⁹ in the on-going culture war¹⁰ that has swept the United States in excluding prayer and most religious activity from public schools to the detriment of the free exercise rights of students. As such, this essay reflects on how the judiciary, and school officials, have misapplied and misunderstood the so-called *Lemon* test,¹¹ the Court's quintessential standard for dealing with religious matters in public education, discussed below, in essentially adopting an attitude that is hostile to religion in the public marketplace of ideas.

At the outset, it is important to note that this essay does not advocate the inclusion of sectarian prayer and religious activities in public schools. Rather, the essay suggests that the courts, and educators, should adopt a more even-handed approach to religion, especially Christianity, when evaluating the constitutionality of such activities under Establishment Clause analysis, recognizing that allowing individuals the freedom to express their faiths is not the same as imposing a state religion.

Setting the Stage

As noted, according to the religion clauses of the First Amendment to the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting

the free exercise thereof” While this part of the First Amendment contains two religion clauses, Establishment and Free Exercise, much of the Court’s school-related jurisprudence has essentially blurred the line between the two, treating both as basically one, often relying on what is referred to as its Establishment Clause analysis.

The Jeffersonian metaphor of the “wall of separation”¹² between Church and State which is at the heart of the Supreme Court’s First Amendment jurisprudence, words that are not in the text of the Constitution entered its educational lexicon as a kind of Trojan horse in *Everson v. Board of Education (Everson)*.¹³ In *Everson*, the Court, in a judgment by Justice Hugo Black, a former member of the Ku Klu Klan and its virulently anti-Catholic attitudes,¹⁴ upheld a statute from New Jersey which allowed local school boards to reimburse parents for the cost of transporting their children to religiously affiliated non-public schools.¹⁵ In other words, while upholding the program, an argument can be made that in light of his attitude towards Roman Catholicism, Black sowed the seeds for the erection of the “wall of separation” between Church and State in declaring that “[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”¹⁶ The Court would rely on this fateful phrase repeatedly over the next sixty years and more.

Unlike its jurisprudence with regard to state aid to religiously affiliated non-public schools, which has allowed more or less assistance primarily depending on the composition of the High Court Bench,¹⁷ the Justices have consistently opposed any kind of state sponsored prayer and/ or religious activity in schools. Beginning¹⁸ with *Engel v. Vitale*,¹⁹ its first case on prayer in public schools, the Supreme Court has invalidated prayer and Bible reading,²⁰ the posting of the Ten Commandments in classrooms,²¹ a moment of silence,²² and graduation prayer.²³ The Court also struck down student-led prayer at school sponsored activities such as

high school football games.²⁴ In fairness, it should also be noted that the Court has upheld student organized prayer and Bible study clubs under the Equal Access Act²⁵ and allowed outside religious groups to use school facilities if they are available to other, non-religious, groups.²⁶

In addition to the cases discussed below, lower federal courts, often affirming the actions of educational officials, have struck down a wide array of religious, specifically, Christian activities in schools. Among these instances courts permitted educators to prohibit a student from writing a biography about Jesus as a historical figure since she failed to follow her teacher's directions in completing the assignment,²⁷ finding that educators did not violate a second-grade student's First Amendment rights to freedom of religion in preventing her from showing a videotape of herself singing a religious song to classmates during show-and-tell.²⁸ Courts have also allowed school officials to direct a high school student to remove Christian religious messages from a mural she painted as part of a school-wide beautification project,²⁹ and to prevent a child from placing a religious poster on a school wall.³⁰

Constitutional difficulties over the place of prayer and/ or religious activity in schools can most directly be traced to *Lemon v. Kurtzman (Lemon)*,³¹ the Court's most significant case in the history of Church-State relations. In *Lemon*, the Court vitiated statutes from Pennsylvania that called for the purchase of secular services and Rhode Island that basically provided salary supplements for teachers in religiously affiliated non-public schools. In its far-reaching opinion, the Court relied on two of its then recent decisions in creating the seemingly ubiquitous tripartite *Lemon* test. The Court combined the two-part purpose and effect test that it created in *School District of Abington Township v. Schempp* and *Murray v. Curlett*,³² invalidating the constitutionality of prayer and Bible reading in public schools by adding the excessive

entanglement test from *Walz v. Tax Commission of the City of New*,³³ wherein it upheld New York's practice of providing state property tax exemptions for church property that is used in worship services. The Court wrote that:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."³⁴

The difficulty with *Lemon* results in part from the fact that it is something of a mixed metaphor which traces its origins to cases involving both the free exercise and establishment of religion. More specifically, since, as noted, *Lemon*'s first two parts were developed in the context of a dispute concerning prayer and Bible reading in public schools and the third in a disagreement over tax exemptions, essentially governmental aid, to religious institutions. Even so, the judiciary applies the *Lemon* test widely, almost indiscriminately, in an array of disputes involving both aid to religious institutions and prayer and religious activities and public schools.

Perhaps the greatest challenge that the *Lemon* test presents, particularly from the point of view of this essay, arises under its second prong. Under this standard, any governmental action must have a "principal or primary effect . . . that neither advances nor inhibits religion."³⁵ Yet, in focusing on avoiding the advancement of religion, and largely ignoring practices that have the practical effect of inhibiting religious freedom, the courts have contributed significantly to attempts to exclude religion improperly from a wide array of educational activities. Moreover, despite the Court's occasional dissatisfaction with the *Lemon* test as the primary vehicle for evaluating prayer and religious activity in public schools, having refused to rely explicitly on

Justice O'Connor's proposed endorsement test³⁶ or Justice Kennedy's psychological coercion test,³⁷ the Justices have yet to eschew this increasingly unworkable standard in favor of a more manageable test.

Difficulties with the Court's Establishment Clause jurisprudence arise because its separationist wing, Justices Stevens,³⁸ the departing Souter,³⁹ and Ginsburg,⁴⁰ often joined by Justice Breyer, demonstrate a talisman-like obeisance for the tired, if not failed, Jeffersonian metaphor. The separationists, sometimes joined by Justice Breyer, consistently vote to exclude religion, whether aid, or activity, in public schools. These Justices' reliance on the wall metaphor has led Stevens, for example, to reveal a deep-seated animosity to religion in any form based on his voicing his almost paranoid fear that providing poor children in failing urban schools with vouchers might turn the United States into a nation that demonstrates the same misuse of religion as occurs in parts of the world that are replete with ethnic-religious strife.⁴¹

The dominance of the separationists⁴² may, however, be coming to an end with the addition of Chief Justice Roberts and Justice Alito as they join the reliably accommodationist Justices Scalia⁴³ and Thomas,⁴⁴ often aided by the moderate Justice Kennedy,⁴⁵ because the newest members of the High Court bench are expected to adopt more moderate, accommodationist perspectives. It will be interesting to observe whether these new Justices shift the Supreme Court's First Amendment jurisprudence more in the direction of accommodation or whether they will leave the situation remains basically unchanged. Time will undoubtedly tell.

The Court recently demonstrated how confused its Establishment Clause jurisprudence is in a pair of admittedly non-school cases over the propriety of public displays of the Ten Commandments. For example, in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky (McCreary County)*⁴⁶ and *Van Orden v. Perry (Van Orden)*⁴⁷ the Court handed down

a pair of conflicting five-to-four rulings, in which seven of the nine Justices penned opinions,⁴⁸ with only Justice Breyer switching allegiances, joining the majorities in both cases.⁴⁹ With Justice Souter continuing his unbroken streak of voting to maintain the “wall of separation” between Church and State, he relied on the *Lemon* test in striking struck down public displays of the Ten Commandments in courthouses in *McCreary County*. Conversely, a plurality⁵⁰ opinion by Chief Justice Rehnquist explicitly eschewed the *Lemon* test in affirming the constitutionality of a monument to the Commandments that was situated on the grounds of the Texas State Capitol in *Van Orden*. As such, the next part of this essay examines three recent cases that demonstrate how courts, in an attempt to bolster the sagging wall have misplaced primacy on the second prong of the *Lemon* test and demonstrated hostility to the free exercise rights of students in American public schools.

Judicial Hostility toward Religion

Four relatively recent federal cases in particular stand out as demonstrating what can only be described as overt hostility to Christianity, ignoring *Lemon*'s directive that governmental action can neither “advance nor inhibit religion.” This hostility is all the more apparent in light of the fact that the courts seemed to be willing protect religious expression of faiths other than Christianity, in the second and third of these four cases, belying a lack of evenhandedness, often aided and abetted by school officials. While readily conceding that there are some cases where the courts did display even-handedness,⁵¹ their systemic failure to adopt such a perspective consistently reflects judicial attitudes toward religion in public schools.

C.H. ex rel. Z.H. v. Oliva (C.H.),⁵² a case from New Jersey that made its way to the Third Circuit, reveals an appalling lack of understanding the Establishment Clause by both school

officials and the judiciary.⁵³ The controversy started when the child was in kindergarten and lasted until he was in second grade. The Third Circuit affirmed that school officials could not be liable for prohibiting a student from reading a religious story, “A Big Family,” an adaptation of the story of the reconciliation of the Biblical story of Jacob and Esau, and, in a Thanksgiving exercise, from hanging a poster that he drew expressing his thanks for Jesus. Although the court affirmed the actions of school officials largely on procedural grounds, it is perplexing to imagine how educators could have viewed the actions of child, even if he were encouraged to act by his mother, as involving state action.

In *Skoros v. City of New York, (Skoros)*,⁵⁴ the Second Circuit reached a puzzling result in upholding a policy from the Board of Education with regard to holiday displays. The court ruled that the board policy, which permitted December “holiday” displays that included a menorah commemorating Chanukah and the star and crescent celebrating Ramadan in public schools but which excluded Nativity scenes of the Baby Jesus on the basis that the Christian displays were wholly religious, was constitutional.⁵⁵ While conceding that a Nativity scene is, indeed religious, it is amazing that the court, acting as a kind of religious tribunal in determining that the other objects were entirely secular.⁵⁶ Moreover, one can only marvel how the Second Circuit’s serving as arbiter of the relative significance of the religious symbols involved did not violate either *Lemon*’s excessive entanglement clause or violate the Free Exercise of religion clause.

Perhaps the most outrageous decision was the Ninth Circuit’s affirmation of the dismissal of a claim filed by parents of seventh-grade who challenged their school board’s use of Islamic-friendly curricular materials in *Eklund v. Byron Union School District (Eklund)*.⁵⁷ Here school officials included a simulation unit on Islamic culture in a social studies course that, among other things, required students to wear identification tags displaying their new Islamic names, dress as

Muslims, memorize and recite an Islamic prayer that has the status of the Our Father or Lord's prayer in Christianity as well as other verses from the Qur'an, recite the Five Pillars of Faith, and engage in fasting and acts of self denial.⁵⁸ Without addressing the merits of the objecting parents' underlying claims, the Ninth Circuit summarily affirmed that the activities at issue "were not . . . 'overt religious exercises' that raise[d] Establishment Clause concerns."⁵⁹ One can only imagine the out-roar that might have resulted, particularly from selected corners of the "mainstream media" had school officials distributed rosary beads to students or required them to dress as Roman Catholic priests or nuns.

Most recently, in *Corder v. Lewis Palmer School District No. 38*,⁶⁰ the Tenth Circuit affirmed that school officials in Colorado did not violate a student's First Amendment and Equal Protection rights in requiring her to make an e-mail apology to those who had been in attendance for ignoring the principal's instructions by delivering a speech during graduation which mentioned her Christian faith and encouraged listeners to explore Christianity before she could receive her diploma. The court held that educators did not impinge or burden the student's right to free exercise of religion because they had the authority to regulate school sponsored speech. The court added that a state law protecting the free expression rights of students applied only to written publications such as school newspapers and that even if the statute had been ambiguous, it could not have been interpreted as prohibiting officials from regulating speech that could violate the Establishment Clause. The court maintained that since the student graduated, her equal protection claim was moot. While one could seek to distinguish this case away from the others on the basis that the student was speaking at a school sponsored, rather than a public, event, one can only wonder whether officials would have been as quick to discipline her had she spoken on a politically correct topic with which they, and perhaps the audience, agreed.

Reflections

When considering judicial hostility to prayer and/ or religious activities in public schools, three inter-related issues, raised by cases in the densely populated, and judicially influential, Second, Third, and Ninth Circuits, in particular, can help to transform the debate over the constitutionality of these events from a contentious exercise to a teachable moment to unite communities. The way in which educators and the judiciary clarify the place of prayer and/ or religious activity in schools will have a major impact on the United States because the way in which this debate is played out will reveal whether the Nation still cherishes the underlying values of freedom of religion that contributed so greatly to its foundation.

The first question involves the effect prong in *Lemon*. More specifically, if the United States is to continue to foster on-going dialogue about diversity of perspectives, it is imperative that the Supreme Court provide guidance for the remainder of the federal judiciary as well as school officials in order to avoid the appearance of inhibiting religion, especially in the aftermath of recent cases that have been less than favorable to expressions of religious belief. For example, it is unclear how ordering the removal of child's drawings or permitting him to read a religious story in *C.H.* or permitting symbols that are closely associated with Islam and Judaism, but not Christianity, in *Skoros* or having children to act as if they were Islamic in *Eklund*, are anything but inconsistent, if not hostile to Christianity, since they display a lack of even-handedness, to say the least.

The decision in *C.H.* is particularly troubling because it is unclear how school officials could have reached the conclusion that a young child's desire to read a religious story to classmates, even if spurred on by his mother, could somehow have been attributed to the school board as an arm of the state. Further, how the Second Circuit in *Skoros*, backed by attorneys and

other school officials from the New York City Board of Education, could claim that both the menorah and star and crescent are wholly secular is nothing short of astounding, rejecting the religious significance that these objects have long held. *Skoros* demonstrates a clear lack of even handedness in addressing religious symbols and is exacerbated by the fact that the court took it upon itself to be the arbiter of the meaning of the iconographic images at issue, compounding the educators' lack of religious understanding that was evidenced in the board's wrong-headed policy. One cannot help but to wonder whether secular jurists "cannot disguise the fact that the[y] have] gone beyond the realm where judges know what they are doing,"⁶¹ in acting essentially as religious arbiters in passing judgment in areas well beyond their competence.

Lip service over the importance of respect for differences of opinion aside, educators and the courts must allow educational leaders in schools to practice what they preach and do more than merely talk about inculcating different values. At a time when values occupy a prominent role in public debate, one can only wonder what message children receive in their classrooms when the courts have permitted school officials to ensure that their schools are virtually sanitized of references to prayer and religion other than "appropriate" discussions in history or English classes. By imposing a wall of silence that prevents believers from exercising their constitutional rights, educators and the courts risk sending out the unmistakable message to children and parents that freedom of religion is little more than a pious platitude that can be freely ignored without consequence.

A second, closely related question concerns the paradox of how a democratic society that was founded on religious principles but continues to preserve the Jeffersonian metaphor by maintaining the "wall of separation" between Church and State with regard to prayer and/ or religious activities, can respect the rights of both the majority and minority. In other words, while

certainly agreeing with Justice O'Connor's salient observation that "we do not count heads before enforcing the First Amendment,"⁶² in protecting the rights of the minority with regard to such potentially contentious matters as prayer and religious activity in schools, it remains to be seen how the courts can avoid the tyranny of the minority. Therefore, finding an acceptable middle ground is essential.

When the Supreme Court struck down school-sponsored graduation prayer in *Lee v. Weisman*, the majority spoke of a "mutuality of obligation" that safeguards the rights of minorities.⁶³ If this "mutuality of obligation" is to have any meaning, then public school officials and the courts must find a way to accommodate the viewpoints of all, rather than stifle the religious expression of believers. One can only question how educators expect to foster an appreciation of diversity in all of its manifestations beyond such demographic characteristics as race, gender, and socio-economic status if school officials cannot tolerate expressions of religious beliefs that may not be shared by all members of an audience or community.

It is ironic that in a Nation that values freedom of religion, the American courts have been unable to reach a consensus on the appropriateness of public prayer and religious activity. Further, protestations to the contrary notwithstanding, schools teach values regularly, whether informing children not to cheat, to study and work hard, not to fight, and to drink their milk. While readily conceding that the inculcation of religious values is a familial obligation that is best done at home, one can only what message students, especially those from the homes of believers, receive when they are told that they cannot discuss religion in school. One cannot help but to think that the message is of one rejecting religion. The notion that there can be no discussion of religion in schools is dubious at best, disingenuous at worst in light of dicta in *School District of Abington Township v. Schempp* and *Murray v. Curlett* that:

It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.⁶⁴

Judicial inability to formulate a measure that respects the rights of diverse groups of believers is frustrating where educators have, as in *Lee*, included well-reasoned safeguards such as selecting a religious leader from a different faith each year and providing broad-based guidelines under which prayers may be offered. The Supreme Court's failure to respond adequately to Justice Scalia's salient dissent in *Lee* that silence in response to public prayer does not necessarily mean assent has further exacerbated the situation.⁶⁵ By silently listening to and perhaps even reflecting on whatever prayer is being offered, or if a different point of view is being presented, listeners can develop a deeper respect for perspectives other than their own, thereby enhancing the presence of intellectual diversity in schools (and other locales). If students can learn to maintain such a respectful stance, whether in silence as at the graduation, or by engaging in appropriate discussion should such matters arise in classroom settings, when exposed to ideas with which they disagree, then it could be that they, and the adults present, may have learned a valuable lesson in tolerance.

The third question relates to the nature of the prayers specifically. One can only wonder whether Americans risk trivializing the profound relationship between believers and their God about the nature of the "prayers," in particular, at graduations and other public events. To this end, it could be that these "prayers" run the risk of being reduced to mere formalities, words uttered to bring a gathering to order, essentially reducing God to little more than a theological rabbit's foot, a mantra to hope that events will go well. If this is the case, then perhaps

individuals could rely on selections from books of poetry that can have the same effect in order to avoid the fear of “coercing” listeners by “forcing” them to maintain silence.

In other words, if one views prayer as being, in some way, shape, or form, a type of communication with, or, a lifting of the heart and mind to God, then these discussions on prayer at graduations may be a variation on the theme of reduction to the absurd. In other words, an argument can be made that it is unfair to claim that a few brief words from scriptures, among many others, run the risk of “establishing” a state religion. Alternatively, it may be that the erection of the “wall of separation” runs the risk of mocking believers while turning them into second class citizens. By relegating prayer and religious activities to kinds of afterthoughts, the courts and school officials may be setting a precedent that undermines the very foundation on which the United States was founded.

Conclusion

If anything, the ongoing public discourse over the place of prayer and religious activity in public schools is a revealing barometer of how deeply conflicted American attitudes are on this important topic. As the United States, like Australia, grows increasingly pluralistic and multi-cultural groups that have previously been marginalized move into the mainstream, new and novel issues involving the place of religion in the schools will arise. Perhaps a case raised by one of these groups that formerly have been disenfranchised will serve as the spur that energizes the Supreme Court to reevaluate its stance and set a different tone for the remainder of the judiciary and school officials. At the same time, it is important to recognize that the Court does not run the risk of establishing a state-sponsored religion by permitting prayer at public school graduation ceremonies or other forms of religious activity. Rather, by acknowledging the legitimate place of

prayer and religious activity in the public schools, the Court can assume a leadership role in truly fostering a climate wherein diversity of opinions and beliefs are both appreciated and celebrated by all Americans regardless of their personal beliefs or lack thereof.

Notes

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1. *Sante Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 318 (2002) (Rehnquist, C.J., dissenting) (striking down student led prayer at a high school football game).
 2. Desegregation in the second most commonly litigated issue involving public schools in the United States.
 3. *Cantwell v. Connecticut*. 310 U.S. 296 (1940) (striking down the convictions of Jehovah's Witnesses for violating a statute against the solicitation of funds for religious, charitable, or philanthropic purposes without prior approval of public officials).
Previously, in *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 7 (1833) the Court held that the Bill of Rights was inapplicable to the states since its history revealed that it was limited to the federal government.
 4. Of course, Equal Access Act, enacted in 1984, is an exception. Among its many provisions, the Act provides that public secondary schools that receive federal financial assistance and permit non-curriculum related student groups to meet during non-instructional time cannot deny access to groups due to the religious, political, philosophical, or other content of their speech. The Act also allows officials to exclude groups if their meetings materially and substantially interfere with the orderly conduct of school activities. 20 U.S.C.A. §§ 4071 *et seq.* The Supreme Court upheld the constitutionality of the Act in *Board of Education of Westside Community Schs. v. Mergens* (*Mergens*), 496 U.S. 226 (1990).

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5. 374 U.S. 203 (1963).
 6. 403 U.S. 602 (1971).
 7. 465 U.S. 668 (1984).
 8. 505 U.S. 577 (1992).
 9. For evidence of this recent trend wherein intellectuals have promoted atheism over belief, *see, e.g.*, such popular best selling books as Richard Dawkins, *The God Delusion* (2006), Sam Harris, *Letters to a Christian Nation* (2006), and Daniel Dennett's *Breaking the Spell: Religion as a Natural Phenomenon* (2006).
 10. In an admittedly different factual context, Justice Scalia decried the fact that the Court has taken sides in the culture war. In a dissenting opinion in *Lawrence v. Texas*, 539 U.S. 558, 602-603 (2003) (Scalia, J., dissenting), wherein the Court struck down a state statute that made it a crime for two persons of the same sex to engage in specified intimate sexual conduct as unconstitutional when applied to adult males who participated in a consensual act of sodomy in the privacy of their home, Scalia maintained:

It is clear from this that the Court has taken sides in the culture war departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that

they believe to be immoral and destructive. The Court views it as “discrimination” which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously “mainstream””

11. See note 31 *et seq. infra* and accompanying text for a discussion of *Lemon*.
12. The metaphor of the “wall of separation” comes from Thomas Jefferson's letter of January 1, 1802, to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. 16 WRITINGS OF THOMAS JEFFERSON 281 (Andrew A., ed. 1903). Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God ... 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.

The Supreme Court first used the term in *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (rejecting a Free Exercise Clause challenge to a federal polygamy statute).
13. 330 U.S. 1 (1947), *reh'g denied*, 330 U.S. 855 (1947).
14. See, e.g., Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 Emory L. J. 19 at note 120 (2006). Citing to Philip Hamburger's *Separation of Church and State* (2002) for Black's prior connections to the Ku Klux Klan and its anti-Catholicism.

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15. The Supreme Court first used the term in *Reynolds v. United States*, 98 U.S. 145, 164 (1878) wherein it rejected a Free Exercise Clause challenge to a federal polygamy statute.
 16. *Everson*, *supra* note 13 at 16.
 17. The Court's modern Establishment Clause jurisprudence with regard to state aid in the context of K–12 education evolved through three phases. During the first stage, which began with *Everson, id.*, and ended with *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding a state law mandating the loans of text books in secular subjects for students in religiously affiliated non-public schools), the Court enunciated the Child Benefit Test, a legal construct that permits an array of publicly funded aid on the ground that it assists children rather than their religiously affiliated non-public schools. The years between *Lemon v. Kurtzman*, *supra* note 6, and *Aguilar v. Felton*, 473 U.S. 402 (1985) (striking down the on-site delivery of Title I services to students in their religiously affiliated non-public schools) were the low point with regard to the Child Benefit Test as the Court refused to move beyond the limits it created in *Everson* and *Allen*. However, with *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (permitting the on-site delivery of special education services to a student in his religiously affiliated non-public high school) the Court breathed new life into the Child Benefit Test that extends through the present day.
 18. Earlier, in *People of State of Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71, Champaign County*, 333 U.S. 203 (1948), the Court invalidated a program that permitted members of the Jewish, Roman Catholic, and Protestant faiths to offer religion

classes in public schools to children whose parents agreed to have them take part in the program. The Court ruled that the program impermissibly allowed tax-supported public school buildings to be used to teach religious doctrine and that public school officials gave religious groups an unacceptable aid in helping them by providing students for their classes.

In its only other pre-*Vitale* case involving religion, *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court upheld a program in New York City that allowed school officials to release students early from their public schools so that they could attend religious classes at other locations on the basis that this was similar to accommodating parental wishes by granting excused absences for children who were absent for religious reasons.

19. 370 U.S. 421 (1962).
20. *Abington Township v. Schempp* and *Murray v. Curlett*, 374 U.S. 203 (1963).
21. *Stone v. Graham*, 449 U.S. 39 (1980), *reh'g denied*, 449 U.S. 1104 (1981), *on remand*, 612 S.W.2d 133 (Ky.1981).
22. *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating a statute from Alabama on the ground that it lacked a secular purpose since its sponsors hoped that it would lead to a return to school prayer).
23. *Lee*, *supra* note 8.
24. *Santa Fe*, *supra* note 1.
25. *Supra* note 4.

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26. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist. (Lamb's Chapel)*, 508 U.S. 384 (1993), *on remand*, 17 F.3d 1425 (2d Cir.1994) (permitting a religious group to show a film series on child-rearing in a school facility); *Good News Club v. Milford Cent. Sch. (Milford)*, 533 U.S. 98 (2001) (allowing a non-school-sponsored club to meet during non-class hours so that members and moderators could discuss child-rearing along, character, and moral development from a religious perspective since officials permitted other groups to address similar topics from a secular perspective).
27. *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir.1995), *cert. denied*, 516 U.S. 989 (1995). While the teacher certainly had the authority to set the parameters for assignments, she might have turned the event into a teachable moment, rather than litigation, had she pointed out that in addition to the Bible, the First Century Roman historians Pliny and Tacitus reported on the existence of Jesus. For a commentary on this case, see Ralph D. Mawdsley & Charles J. Russo (1996). "Religious Expression and Teacher Control of the Classroom: A New Battleground for Free Speech." *Education Law Reporter*, Vol. 107, No. 1, 1-14.
28. *DeNooyer v. Livona Pub. Schs.*, 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd sub nom. Denooyer v. Merinelli*, 1 F.3d 1240 (6th Cir.1993), *reh'g denied, opinion superseded without published opinion*, 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

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29. *Bannon v. School Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004), *reh 'g* and *reh 'g en banc denied*, 125 Fed.Appx. 984 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 330 (2005).
30. *See also Peck ex rel. Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005).
31. *Supra* note 13.
32. 374 U.S. 203 (1963).
33. 397 U.S. 664 (1970).
34. *Lemon supra* note 6 at 612-613.
- In reviewing entanglement and state aid to religiously affiliated schools, most often in the context of providing aid, the Court identified three additional factors that must be taken into consideration: “we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.”*Id.* at 615.
35. *Id.*
36. Writing in a concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687ff (1984), a non-school case upholding a display including a creche among secular symbols, Justice O’Connor’s endorsement test asked whether the purpose of a governmental action is to endorse or approve of a religion or religious activity.

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37. In the majority opinion in *Lee*, *supra* note 19, Justice Kennedy’s opinion invalidated school-sponsored prayer on the basis that such governmental activity could result in psychological coercion of students. He explained that since students were a captive audience who may have been forced, against their own wishes, to participate in ceremonies, they were not genuinely free to be excused from attending.
38. Since joining the Court, Justice Stevens voted against permitting prayer or religious activity in public schools in all but two cases, both of which involved access to educational facilities and which essentially treated religion as a subset of speech. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, *supra* note 26. In all other instances, he voted against religious liberty. *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down a moment of silence); *Edwards v. Aguillard*, 482 U.S. 578, 610 (1987) (striking down a statute that prohibited the teaching of “evolution-science” in public schools unless accompanied by instruction on “creation-science”); *Mergens*, *supra* note 4 at 270 (1990) (Stevens, J., dissenting); *Lee*, *supra* note 8; *Santa Fe*, *supra* note 1; *Milford*, *supra* note 26; *Newdow v. U.S. Congress*, 542 U.S. 1 (2004) (refusing to address whether the words “under God” could remain in the Pledge of Allegiance), *reh’g denied*, 542 U.S. 961 (2004).
39. Since being appointed to the Court in 1990, Justice Souter voted against religious activity in the three cases in which he participated, *Lee v. Weisman*, *Id.*; *Santa Fe*, *supra* note 1; *Milford*, *id.*; *Newdow v. U.S. Congress*, *id.*

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- 40 During her time on the High Court, Justice Ginsberg also opposed religious activity in the cases in which she was involved, *Santa Fe*, *supra* note 34; *Milford*, *supra* note 26; *Newdow*, *id.*
- 41 In *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002), Justice Stevens wrote, “I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another.”
- 42 An imprecise science at best, patterns tend to reflect how the Justices tend to vote. For example, one study reported that in a mathematical analysis of patterns over the then past eight years, covering 468 cases, Justices Scalia and Thomas voted together more than 93% of the time while Justices Ginsburg and Souter voted the same way more than 90% of the time. *See* Ideal Justice, Erica Klarreich, Science News, June 28, 2003, 2003 WL 9148305; Jack Kilpatrick, Justices don’t fit into predictable ideological boxes, Deseret News, Aug. 4, 2003, A 9, 2003 WL 61037124.
- 43 Justice Scalia has also upheld religious freedoms in school settings. *Edwards v. Aguillard*, at 610 (1987) (Scalia, J., dissenting) *supra* note 34; *Mergens*, *supra* note 4; *Lee*, *supra* note 19 at 631 (Scalia, J., dissenting); *Lamb’s Chapel*, *supra* note 22; *Santa Fe*, *supra* note 1; *Milford*, *supra* note 26. Justice Scalia did not participate in *Newdow*. For a discussion of *Newdow* and Justice Scalia’s non-participation, *see* Charles J. Russo (2004). “The Supreme Court and Pledge of Allegiance: Does God Still Have a Place in

American Schools?” *Brigham Young University Education and Law Journal*, Vol. 2001, No. 2, 301-330.

44 *Lee, id.; Lamb’s Chapel, id.; Santa Fe, id.; Milford, id.; Newdow, id.*

45 Justice Kennedy voted in favor of religious freedom in *Mergens, supra* note 4, *Lamb’s Chapel, supra* note 22, *Milford, supra* note 26. *But see Lee, supra* note 19; *Santa Fe, supra* note 1; *Newdow, supra* note 34.

46. 545 U.S. 844 (2005).

47. 545 U.S. 677 (2005).

48. In *McCreary County*, Justice Souter’s majority opinion was joined by Justices Stevens, O’Connor, Ginsburg, and Breyer. Justice O’Connor also authored a separate concurrence. Justice Scalia’s dissent was joined by Chief Justice Rehnquist along with Justices Thomas and Kennedy (as to parts II and III).

In *Van Orden*, Chief Justice Rehnquist’s majority opinion was joined by Justices Scalia, Kennedy, and Thomas. Justice Breyer concurred in the judgment. Justices Scalia and Thomas also authored separate concurrences. Justice Stevens’ dissent was joined by Justice Ginsburg. Justice Souter’s dissent was joined by Justices Stevens and Ginsburg.

49 For a commentary on these cases, *see* Charles J. Russo (2006) “Religious Neutrality in Public Schools and Elsewhere: An Assessment of the Supreme Court’s Approach to

Posting the Ten Commandments in Public Places in the U.S.” *Education Law Journal*, Vol. 7, No. 1, 21-34.

50. In a plurality, less than a majority of justices agree on the same rationale for a decision. In such a case, the earlier judgment remains in place for the parties but is not binding on other litigants or in other jurisdictions
- 51 *Hansen v. Ann Arbor Pub. Schs*, 293 F. Supp.2d 780 (E.D. Mich. 2003) (ruling in favor of a student who sued school officials after they refused to permit her to participate in a panel discussion involving clergy and religious leaders on homosexuality and religion because they disagreed with her religious message and sought to insure that only one point-of-view was presented, on the basis that their actions violated all three prongs of the *Lemon* test).
- 52 226 F.3d 198 (3d Cir.2000), *cert. denied sub nom. Hood v. Medford Township Bd. of Educ.*, 533 U.S. 915 (2001). Future member of the Supreme Court, Justice Samuel Alito, then on the Third Circuit, dissented from the majority’s opinion. *C.H.* at 204 (Alito, J., dissenting).
- 53 But see, *Peck ex rel. Peck v. Baldwinsville Cent. School Dist.*, 426 F.3d 617, 621 (2d Cir. 2005) where parents of a kindergarten child in New York filed suit after a teacher refused to display their son’s entire poster. When directed to illustrate simple ways to save the environment, the child selected and cut out pictures from a magazine with the help of his mother, arranging them on a poster. In answering the teacher’s question about who the man with outstretched arms was, he responded that it was Jesus, “the only way to save

the world.” On being told that the poster was unacceptable due to “religious” reasons, the child and his mother created a second poster. The second poster also depicted a robed man but included people picking up and recycling trash along with children holding hands encircling the world. After a federal trial court granted the educators’ motions for summary judgment, the Second Circuit reversed in favor of the parents on the free speech claim. The court reasoned that since the assignment was curriculum related, the teacher could reject the child’s work as unresponsive to the assignment. Even so, the court reversed in favor of the parents on the free speech claim because genuine issues of fact remained as to whether the reasons that educators proffered for censoring the poster constituted viewpoint discrimination since they may not have excluded secular images that were equally non-responsive. The court affirmed that when officials folded the child’s unresponsive poster before displaying it so that the robed religious figure was not visible, they did not violate the Establishment Clause.

54 437 F.3d 1 (2d Cir. 2006), *cert. denied*, 2007 WL 506033 (Feb. 20, 2007).

55 For a discussion of *Skoros* and its implications, see Charles J. Russo (2006). “Of Baby Jesus and the Easter Bunny: Does Christianity Still Have a Place in the Educational Marketplace of Ideas in the United States?” *Education and Law Journal*, Vol. 16, No. 1, 61-81.

56 For a similar case in a school setting, see *Sechler v. State College Area Sch. Dist.*, 121 F. Supp.2d 439 (M.D. Pa. 2000) (rejecting a challenge from a youth minister where school officials permitted a “Winter Holiday” display that included information on Chanukah

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- and Kwanza, but nothing on Christmas on the basis that the display did not offend the Establishment Clause by favoring one religion over another. For a similar case in a non-school setting, *see Spohn v. West*, 2000 WL 1459981 (S.D.N.Y. 2000) (dismissing the claim of a Christian worker in a public hospital that a display of Jewish, but not Christian, religious symbols during the December holiday season violated his First Amendment rights under the Establishment Clause).
- 57 154 Fed.Appx. 648 (9th Cir. 2005), *cert. denied*, 549 U.S. 942 (2006).
- 58 *Eklund v. Byron Union Sch. Dist.*, 2006 WL 1519184 (Appellate Petition, Motion and Filing) (U.S. May 31, 2006). *Petition for a Writ of Certiorari*. (NO. 05-1539) at 3-13.
- 59 *Eklund v. Byron Union Sch. Dist.*, 154 Fed.Appx. 648 (9th Cir. 2005), *quoting Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir.1994) (affirming that a curricular program which asked children to discuss witches or create poetic chants and pretend they were witches or sorcerers did not require them to practice the “religion” of witchcraft in violation of Establishment Clause or California Constitution).
- 60 566 F.3d 1219 (10th Cir. 2009).
- 61 *Lee*, *supra* note 19 at 636 (Scalia, J., dissenting).
- 62 *McCreary County*, *supra* note 42 at 884 (O’Connor, J., concurring).
- 63 *Lee*, *supra* note 19 at 591.
- 64 374 U.S. 203, 225 (1963).

In his concurring opinion, the separationist Justice Brennan added that “[t]he holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history . . . ,” *Id.* at 300 (Brennan J., concurring).

65 *Lee, supra* note 19 at 637 *et seq* (Scalia, J., dissenting).