Prayer and Religious Activity in American Public Schools

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Introduction

According to the religion clauses of the First Amendment, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' Even though the First Amendment religion clauses prohibit only Congress from making such laws, in 1940 the Court applied its provisions to the states through the Fourteenth Amendment.[1] Appeals to history as to the original intent of the Establishment Clause fail to provide clear answers primarily due to the fact that close ties between religion and government began during the colonial period.[2]

Rather than engage in a lengthy discussion of the different approaches to the Establishment Clause, suffice it to say that the Court has largely relied on the Jeffersonian metaphor of maintaining a 'wall of separation' between church and state,[3] language that does not appear in the Constitution, over the past forty years with regard to the place of religion in American public schools Put another way, since its first case on school prayer, Engel v. Vitale,[4] the Court has consistently prohibited school sponsored prayer and religious activities in public schools. At the same time, recognizing that religious speech is a subset of free speech, the Court has softened its restrictions, notably in terms of student led activities in schools and granting access to school facilities by outside groups.

Even as it has largely rejected the place of religion in American public schools, as with most issues that come before it, it is important to recognize that the Supreme Court is highly fragmented into three distinct camps with regard to the place of religion in schools. At one end are the accommodationists, Chief Justice Rehnquist and Justices Scalia and Thomas, Justices who do not believe in an absolute separation of church and state and who consistently vote in favor of permitting prayer and religious activity in public school. At the other end are the separationists, Justices Stevens, Ginsberg, Souter, and Breyer[5] who vote to exclude religious activities in public schools. In the middle are the two moderate or swing votes, Justices O'Connor and Kennedy, who have reached mixed results with regard to religious activity in school settings. For example, Justice O'Connor joined Justice Kennedy's majority opinion in striking down graduation prayer in Lee v. Weisman[6] and both joined the Court's majority in Santa Fe Independent School District v. Doe,[7] invalidating student led prayer before high school football

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1 *Cantwell v. Connecticut*, 310 U.S. 296 (1940). 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 because its history indicated that it was limited in force to the federal government.

2 Up until at least the time of the Revolutionary War, there '... were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five.' *Engel v. Vitale*, 370 U.S. 421, 428 n. 5 (1962).

3 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 (1879) (rejecting a Free Exercise Clause challenge to a federal polygamy statute).

4 370 U.S. 421, 422 (1962).

5 Although still a separationist, Justice Breyer has shown some flexibility, concurring in permitting aid in *Mitchell v. Helms*, 530 U.S. 793 (2000) and permitting a religious group access to school facilities in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), discussed at footnote 77 below and accompanying text.

6 505 U.S. 577 (1992).

7 530 U.S. 290 (2000).

games. Yet, both Justices joined the majority in Good News Club v. Milford Central School (Good News),[8] wherein the Court upheld the right of a Christian club to meet in public school facilities after hours since secular groups had access to do the same.

In addressing First Amendment religion cases, the Court has created confusion over the appropriate judicial standard. That is, although the Court created a two part purpose and effect test in School District of Abington Township v. Schempp and Murray v. Curlett[9] in considering the constitutional propriety of prayer and Bible reading in public schools, it later expanded this measure in creating the tripartite Establishment Clause standard in Lemon v. Kurtzman (Lemon).[10] In Lemon, the Court considered the constitutionality of programs from Rhode Island and Pennsylvania that aided religiously affiliated non-public schools. Invalidating both programs, the Court subsequently added a third prong, from Walz v. Tax Commission of New York City,[11] to Schempp's two part purpose and effect test to create the tripartite test that, until fairly recently, it has relied on in most Establishment Clause cases. The Court explained 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[12] with religion".'[13]

Even though the first two parts of the increasingly unworkable Lemon test emerged in cases involving prayer and Bible reading in public schools in Schempp and the third developed in a dispute over a charitable tax exemption, it was widely, and perhaps inappropriately, applied as a one-size fits all solution in disputes involving aid to non-public schools until the Court recast it in Agostini v. Felton (Agostini).[14] In Agostini the Court permitted the on-site delivery of Title I services to children in their religiously affiliated non-public schools, modifying the Lemon test by reviewing only its first two parts while recasting entanglement as one criterion in considering a statute's effect.

As the Court grew dissatisfied with Lemon, Justices O'Connor's endorsement test in Lynch v. Donnelly,[15] a non school case in which the Court upheld the display of a creche among secular symbols, and Kennedy's psychological coercion standard offered alternatives in Lee v. Weisman, discussed below.[16] However, neither test has gained widespread judicial support.

When the Court applied the Lemon test in cases arising under both the Establishment and Free Exercise Clauses, its failure to explain how, or why, this test had become a kind of 'one-size fits all' measure in First Amendment disputes has left lower courts and commentators seeking greater clarity. This confusion is exacerbated by virtue of the fact that as membership on the Supreme Court bench changes, so does its attitude with regard to various aspects relating to the place of religion in the market place of ideas. Given the controversy surrounding the place of prayer and religious activities in American public schools, this chapter examines an array of issues and litigation in this regard before reflecting on what theses case mean for the future place, if any, of religion in the schools.

Prayer and Religious Activities and Public Schools

Released Time

The practice of permitting public school officials to release children during the class day. The first topic that it considered involving religion other than aid, so that they could receive religious instruction reached the Supreme Court on two occasions. The first program to be challenged was in Champaign, Illinois, where members of the

8 *Good News*, footnote 5 above.
9 374 U.S. 203 (1963).
10 403 U.S. 602 (1971).
11 397 U.S. 664 (1970) (upholding New York State's practice of providing state property tax exemptions for church property that is used in worship services).
12 Addressing entanglement and state aid to institutions that are religiously affiliated, the Court examined three additional factors: '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.' *Lemon*, footnote 10 above at 615.
13 *Idem* at 612-613 (internal citations omitted).
14 521 U.S, 203 (1997).
15 465 U.S. 668 (1984).
16 See footnote 33 below and accompanying text for a discussion of this test.

Jewish, Roman Catholic, and Protestant faiths formed a voluntary association and obtained approval from the local school board for a cooperative plan to offer religion classes to children whose parents agreed to have them take part in the program. These students had to be attend the classes while the religion instructors notified the regular teachers if they were absent. The classes were taught in regular classrooms, in three separate religious groups, by Protestant teachers, Catholic priests, and a Jewish rabbi. Students who did not attend religious instruction had to leave their classrooms and go to some other place in the school to pursue their secular studies.

In People of State of Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County (McCollum),[17] the Court vitiated the program. The Court pointed out not only that tax-supported public schools were being used to disseminate religious doctrine but also that the state afforded religious groups an invaluable aid in helping them to provide students for their classes via the state's compulsory education machinery.

Four years later, the Supreme Court considered the constitutionality of a different type of released time program. A statute from New York, provided for the release of students from their public schools so that they could attend religious classes at other locations. Opponents of the program claimed that this plan was not basically different from the one in McCollum. The key argument of opponents was that the weight and influence of public schools was used to support a program of religious instruction because records were kept with regard to which students were released while the remaining students had to stay in school even though regular classes were halted so that their peers could attend released time classes.

In Zorach v. Clauson,[18] the Court upheld the program's constitutionality, deciding that a state can accommodate the religious wishes of parents to the extent of releasing pupils at their request at a specified time. Unlike McCollum, the Court was satisfied that the practice was not impermissible since school buildings were not used for the religious instruction. The Court commented that this disagreement, like many in constitutional law, was one of the degree of separation of Church and State. The Court also analogized that released time was similar to acceptable arrangements and excuses for students who were absent for religious reasons.

Use of the Bible

Prior to the Supreme Court's first foray into the use of Bibles in public schools, lower courts reached mixed results on this question. Most state courts upheld the legality of Bible reading as part of opening exercises if two conditions were met: the reading was without comment, thereby preventing indoctrination, and those whose parents objected must be excused.

The landscape with regard to the use of the Bible in public schools shifted dramatically when, in the companion cases of School District of Abington Township v. Schempp and Murray v. Curlett[19] the Supreme Court found that prayer and Bible reading as part of the opening of a school day violated the Establishment Clause. In its opinion, the Court extensively documented the point that in barring this exercise as part of the school program it was not deviating from its established precedents. The Court ruled that since the Bible was a sectarian document, the First Amendment dictated state neutrality with regard to religious matters based on the premises that the government could not aid any or all religions and that every person has a right to choose a personal course with reference to religion free of state compulsion. The Court observed that it had consistently held that the First Amendment denied the government all legislative power respecting religious belief or its expression.

In evaluating the constitutionality of prayer and Bible reading in public schools, the Court declared that '[t]he test may be stated as follows: what are the purpose and the primary effect of the [legislative] enactment? ... [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion'.[20] Perhaps in an attempt to allay concerns that it was anti-religious, the Court, in concluding, adopted a tone unlike the one it expressed at the outset of its rationale, pointing out that nothing in its opinion excluded the secular study of the Bible in public schools in an appropriate context such as literature or history.[21]

[17] 333 U.S. 203 (1948).
[18] 343 U.S. 306 (1952).
[19] 374 U.S. 203 (1963).
[20] *Idem* at 222.
[21] *Idem* at 225.

Lower courts continue to struggle with the place of the Bible in the public school curriculum.[22] For example, the Fifth Circuit disapproved a Bible as Literature course because it was taught, essentially from a Christian religious perspective and within that a fundamentalist and/or evangelical doctrine.[23] The court also noted that the state-approved textbook revealed this approach and contained no discussion of the Bible's literary qualities. Although the teacher was fully certificated, as well as being an active minister, and testified that he used a recognized secular teaching guide, the court found that his approach and examinations were not consistent with the guide. In the interim, lower courts suggested guidelines under which the Bible may be studied in public schools, including the use of fully certificated teachers who are employed in the same manner as other staff, vesting complete control of course content and materials in the school board, supervision of the course to assure objectivity in teaching, and requiring that no part of the course to be a mandatory for students.[24]

The Eighth Circuit affirmed the unconstitutionality of a program in Arkansas which permitted students to leave their regular classrooms to learn about the Bible in voluntary sessions that took place during regular school hours.[25] The classes were taught by volunteers who did not act on behalf of any church and students did not receive course for participating. In sidestepping whether the purpose of the classes was primarily religious or secular, the court found that the program had the principal effect of advancing Christianity. More recently, a federal trial court in Mississippi forbade a school board from offering a Bible study class that was taught in a rotation with music, physical education, and library classes or one which purported to teach the history of the Middle East as violating the Establishment Clause.[26] Similarly, opponents challenged a school board's adoption of a two-semester Bible history course, with time equally divided between the Old and New Testaments, even though it already had a comparative religion class. A federal trial court in Florida refused to enjoin the Old Testament class but granted one as to the New Testament course based on its belief that the plaintiffs were likely to prevailing on the merits of their claim that it violated the Establishment Clause.[27]

School Prayer

In Engel v. Vitale,[28] the Supreme Court accepted its first case involving school prayer. At issue was a prayer from the New York State Board of Regents for suggested use in public schools to inculcate moral and spiritual values in students. When a local school board adopted the prayer as part of a policy which required it to be recited in class each day, a group of parents challenged its action even though it included a provision which permitted children to be exempted from participation if their parents objected in writing. The prayer was:

> 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.'[29]

The Supreme Court held that daily classroom prayer was a religious activity wholly inconsistent with the Establishment Clause. The Court devoted a significant portion of its opinion to a detailed review of the history of state-sponsored prayer in the Anglo-American system of government from Sixteenth Century England through the Colonial Period. Having completed its examination of the role of governmentally endorsed prayer in public life, the Court declared that '[t]here can be no doubt that New York State's prayer program officially establishes the religious beliefs embodied in the Regents' prayer.'[30]

The Court next noted that the First Amendment's Establishment and Free Exercise Clauses forbid different types of governmental encroachment against religion. It pointed out that since the Establishment Clause, unlike the Free Exercise Clause, does not depend on any direct government compulsion, public officials violate it by enacting laws which establish an official religion regardless of whether their action coerces nonbelievers. The Court voiced its additional fear that even if there was no overt pressure, placing the power, privilege, and support of the government behind a particular religious belief ran the risk of asserting indirect coercion on others, especially minorities, to conform to the officially approved religion. The Court decided that since the Founders were of

[22] See, e.g., *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), cert. denied, 505 U.S. 1218 (1992) (preventing a teacher from silently reading a Bible during class time).
[23] *Hall v. Board of Sch. Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. 1981).
[24] *Wiley v. Franklin*, 497 F. Supp. 390 (E.D. Tenn.1980); *Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983).
[25] *Doe v. Human*, 725 F. Supp. 1503 (W.D. Ark.1989), aff'd 923 F.2d 857 (8th Cir. 1990), cert. denied, 499 U.S. 922 (1991).
[26] *Herdahal v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996).
[27] 27 *Gibson v. Lee County Sch. Bd.*, 1 F. Supp.2d 1426 (M.D. Fla. 1998).
[28] 370 U.S. 421 (1962).
[29] *Idem* at 422.
[30] *Idem* at 430.

the view that religion was 'too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate',[31] state-sponsored prayer ran contrary to their original intent in drafting the First Amendment.

A year later, the Court barred the use of prayer in public schools in Abington v. Schempp and Murray v. Curlett, discussed earlier. In the meantime, almost twenty years would pass before the Supreme Court returned to the question of prayer in public schools on the merits.

After not addressing such a case in almost twenty years, in 1992 the Supreme Court examined school sponsored prayers in public schools in case from Providence, Rhode Island. At issue was whether a religious leader, here a rabbi, could offer prayers as part of official school graduation ceremony incident to a board policy which permitted principals to invite members of the clergy to offer nonsectarian prayers. The principals also gave speakers guidelines for prayers on civic occasions prepared by an interfaith organization. Students were not required to attend the graduation ceremony in order to receive their diplomas.

When lower federal courts[32] agreed that school sponsored graduation prayer was unconstitutional, a bitterly divided Supreme Court, in Lee v. Weisman,[33] affirmed. Side-stepping the Lemon test, the Court based its judgment on two major points. First, the Court explained that prayer was unacceptable because the state, through school officials had a pervasive role in the process not only by selecting who would pray but also by directing the content of prayer. Second, the Court feared that such governmental activity could result in psychological coercion of students. The Court decided that since students were a captive audience who may have been forced, against their own wishes, to participate in a ceremony, they were not genuinely free to be excused from attending.

On the same day that the Court struck down Lee, it vacated, and remanded without comment, a case from the Fifth Circuit with a similar set of facts.[34] The major difference between the suits was that in this case members of a high school's senior class, rather than school officials, selected volunteers to deliver nonsectarian, nonproselytizing prayers at their graduation. On remand, the Fifth Circuit followed the dissent in Lee and narrowly interpreted it as precluding only school-sponsored prayers.[35] This time, the Court refused to hear a further appeal, thereby leaving the door open to further controversy.

After Lee, the circuit courts remain divided over the question of student sponsored prayer at graduation ceremonies. Both the Third and Ninth Circuits struck down student sponsored prayer while the Fifth, as noted, and Eleventh Circuits have upheld the use of prayer. The Ninth Circuit initially struck down student sponsored prayer on the basis that since school officials still ultimately controlled the ceremony, they could not permit students to decide whether to have public prayer at graduation.[36] The Supreme Court sidestepped the controversy by vacating the judgment as moot and remanding with instructions to dismiss, apparently since the students had graduated.[37] Shortly thereafter, the Fifth Circuit allowed part of a statute from Mississippi that allowed student sponsored prayer at graduation to remain in effect, but struck down those portions of the law which allowed pupils to initiate nonsectarian, nonproselytizing prayer at various compulsory and noncompulsory events.[38]

In a similar dispute, the Third Circuit affirmed that a board policy of permitting student-led prayer at a public high school graduation ceremony violated the Establishment Clause since in retaining significant authority over the ceremony, prayer could not be upheld as promoting the free speech rights of students.[39] After first upholding a board policy of allowing a minimum of four graduating students to offer an address, poem, reading, song, musical presentation, prayer, or any other presentation at their commencement based on neutral secular criteria,[40] the Ninth Circuit vacated its earlier judgment on the ground that a parent lacked standing to challenge the policy since the student plaintiff graduated.[41]

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31 More recently, the Fifth Circuit affirmed that a statute permitting verbal prayer in school was unconstitutional. *Doe v. School Bd. of Ouachita Parish*, 274 F.3d 289 (5th Cir. 2001).
32 *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990), aff'd 908 F.2d 1090 (1st Cir. 1990).
33 505 U.S. 577 (1992).
34 *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991), cert. granted, vacated, and remanded, 505 U.S. 1215 (1992).
35 *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), reh'g denied, 983 F.2d 234 (5th Cir. 1992), cert. denied, 508 U.S. 967 (1993).
36 *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994).
37 Cert. granted, judgment vacated with directions to dismiss as moot, 515 U.S. 1154 (1995).
38 *Ingebretsen v. Jackson Pub. Sch. Dist.*, 83 F.3d 274 (5th Cir. 1996), cert. denied sub nom. *Moore v. Ingebretsen*, 519 U.S. 965 (1996).
39 *American Civil Liberties Union of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996).
40 *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998).
41 Rehearing granted, opinion withdrawn, 165 F.3d 1265 (9th Cir. 1989), vacated, 177 F.3d 789 (9th Cir. 1999).

In two separate cases from California, the Ninth Circuit affirmed that school officials' could refuse to allow students to deliver a sectarian prayer or proselytizing valedictory address. In the first, it added that the prohibition did not violate the students' free speech rights.[42] In the second, the court agreed that when school officials denied a student's request to include religious proselytizing comments in his salutatorian commencement address, they did not violate his rights to freedom of religion, speech, or equal protection.[43]

Conversely, in a case that reached the Supreme Court on the issue of prayer at high school football games, parents and students challenged two board policies permitting student volunteers to deliver prayers at graduations and football games. A federal trial court in Texas upheld both policies as long as the prayers were nonsectarian and nonproselytizing. Subsequently, the Fifth Circuit affirmed that prayer at graduation had to be nonsectarian and nonproselytizing but reversed in striking down the policy permitting prayers at football games.[44] Even though the board appealed on both forms of prayer, at graduation and prior to football games, the Supreme Court inexplicably opted to address only the latter,[45] thereby leaving the split between the Circuits with regard to student sponsored graduation prayer a live controversy.

In Santa Fe Independent School District v. Doe (Santa Fe),[46] a typically closely divided Supreme Court affirmed that the policy permitting student-led prayers prior to the start of high school football games violated the Establishment Clause. In Santa Fe, the Court primarily relied on the endorsement test[47] rather than the psychological coercion test enunciated in Lee. Put another way, the Court reviewed the status of prayer from the perspective of whether its being permitted at football games was an impermissible governmental approval or endorsement rather than as a form of psychological coercion which subjected fans to values and/or beliefs other than their own. In striking down the prayer policy, the Court rejected the boards three main arguments. First, it rejected the board's contention that the policy furthered the free speech rights of students. Second, the Court disagreed with the board's stance that the policy was neutral on its face. Third, the majority rebuffed the board's defense that a legal challenge was premature since prayer had not been offered at a football game under the policy.

Not surprisingly, Santa Fe did not resolve all controversy over prayer. In two separate cases, the Eleventh Circuit upheld student initiated prayer in school settings. In Alabama, parents challenged a state statute permitting nonsectarian, non-proselytizing student-initiated prayer at school-related assemblies, sporting events, graduation ceremonies, and other school events. The court ruled that the board's permitting genuinely student-initiated religious speech in school and at school-related events did not violate the Establishment Clause and was required under the Free Speech and Freedom of Expression Clauses. The court also acknowledged that while the students' religious speech could not be supervised by the state, it was subject to time, place and manner restrictions.[48] On remand, the Eleventh Circuit,[49] held that the injunction which enjoined the school board from permitting any prayer in a public context at school functions was over- broad to the extent that it equated all student religious speech in any public context at school with State supported speech. The court added that the school officials may not prohibit genuinely student-initiated religious speech nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech. The Supreme Court again refused to hear an appeal.[50]

In Florida, a superintendent of schools issued a memorandum for high school graduation ceremonies in response to a request from students who wanted to have some type of brief opening and/or closing message by a classmate. The guidelines afforded students the chance to direct their own graduation messages without monitoring or review by school officials. When speakers at ten of seventeen high school graduation ceremonies delivered some form of religious message, other students unsuccessfully challenged the practice as an establishment of religion and an infringement on their free exercise of religion. A federal trial court entered a judgment in favor of the

[42] *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000), cert. denied sub nom. *Niemeyer v. Oroville Union High Sch. Dist.*, 532 U.S. 905 (2001).
[43] *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003).
[44] *Santa Fe Indep. Sch. Dist. v. Doe*, 168 F.3d 806 (5th Cir. 1999).
[45] 528 U.S. 1002 (2000).
[46] 530 U.S. 290 (2000).
[47] The endorsement test, which asks whether the purpose of a governmental action is to endorse or approve of a religion or religious activity, arose in *Lynch v. Donnelly*, 465 U.S. 668, 687 ff., (O'Connor, J., concurring) (1984) (a non-school case upholding a display including a creche among secular symbols).
[48] *Chandler v. James*, 180 F.3d 1254 (11th Cir.1999), request for en banc rehearing denied, 198 F.3d 265 (11th Cir. 1999), cert. granted, judgment vacated and remanded sub nom. *Chandler v. Siegelman*, 530 U.S. 1256 (2000).
[49] *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), suggestion for rehearing en banc denied, *Chandler v. Siegelman*, 248 F.3d 1032 (11th Cir. 2001).
[50] Cert. denied sub nom. Chandler ex rel. *Chandler v. Siegelman*, 533 U.S. 916 (2001).

board. On appeal, the Eleventh Circuit initially reversed in favor of the students,[51] but was overruled by an en banc panel.[52] The Supreme Court vacated and remanded,[53] for further consideration in light of Santa Fe. The Eleventh Circuit reinstated its original opinion since it thought that the policy of permitting a graduating student, elected by members of the class, to deliver an unrestricted message did not facially violate the Establishment Clause since it had the secular purposes of not only affording graduating students the chance to direct the ceremony but also of permitting student freedom of expression.[54] Further, the Ninth Circuit affirmed that school officials in California did violate a students right to the free exercise of his religion in requiring him to delete religious proselytizing comments from commencement address.[55]

Periods of Silence

In its first case on the merits of a such a dispute, the Supreme Court reviewed a law from Alabama that authorized a period of silence at the start of the school day for 'meditation or voluntary prayer'. In Wallace v. Jaffree,[56] the Court examined the bill's legislative history, including the purpose of the sponsors to return voluntary prayer to the public schools and its preamble, in concluding that it lacked a secular purpose. Later, after lower federal courts struck a statute from New Jersey down as unconstitutional,[57] the Supreme Court dismissed an appeal without reaching the issue on the merits.[58] The court ruled that the former speaker of the state general assembly and former president of the state senate who intervened in and participated in the litigation to uphold the law's constitutionality could no longer participate in the suit since they lacked standing by virtue of having lost their leadership positions.

More recently, two circuit courts upheld statutes permitting silence in school. The Eleventh Circuit[59] affirmed that a state statute from Georgia that permitted a moment of silent reflection in school was constitutional since it passed all three prongs of the Lemon test.

Similarly, the Fourth Circuit upheld a state law from Virginia mandating a minute of silence in schools that included the word pray in listing an unlimited range of mental activities that it authorized.[60] A divided court affirmed that the statute did not violate the Establishment Clause because even though it had two purposes, one clearly secular and the other an accommodation of religion, it did not run afoul of the Lemon test's requirement of a secular purpose. The court added that the statute neither advanced nor hindered religion and did not result in the state's becoming excessively entangled with religion.

Student-Initiated Religious Activity

In 1981 the Supreme Court refused to review a case which upheld a school board's refusal to allow a group of students to conduct voluntary communal prayer meetings in the school immediately before the start of the academic day.[61] The court ruled that the prohibition did not infringe the students' rights to the free exercise of religion, freedom of speech, or equal protection since the school officials had a compelling interest to remove any indication that they sponsored religious activity in public schools.

A week before it refused to hear an appeal in the preceding case, in Widmar v. Vincent,[62] the Court held that a state university that made its facilities generally available for activities of registered student groups could not close them to others such groups based on the religious content of their meetings. Relying on the framework of freedom of speech, the Court noted that since over one hundred registered student groups used the facilities, university officials created a forum for exchange of ideas and so could not bar access to it solely because of content of the speech. The Court expressly distinguished the case from those involving religious activities in public grade

[51] *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999).
[52] *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000).
[53] *Adler v. Duval County Sch. Bd.*, 531 U.S. 801 (2000).
[54] On remand, opinion reinstated, *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, cert. denied, 534 U.S. 1065 (2001).
[55] *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003).
[56] *Wallace v. Jaffree*, 472 U.S. 38 (1985).
[57] *May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983), on reconsideration, 578 F. Supp. 1308 (D.N.J. 1984), aff'd in part, 780 F.2d 240 (3rd Cir. 1985).
[58] Jurisdiction dismissed sub nom. *Karcher v. May*, 479 U.S. 1062 (1987), appeal dismissed, 484 U.S. 72 (1987).
[59] *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997).
[60] *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001), cert. denied, 533 U.S. 1301 (2001).
[61] *Brandon v. Board of Educ. of Guilderland Cent. Sch. Dist.*, 635 F.2d 971 (2nd Cir. 1980), cert. denied, 454 U.S. 1123 (1981).
[62] 454 U.S. 263 (1981).

schools by observing that facilities in these settings are not generally used as open forums and that university students are less impressionable than younger students.

Acting in large part in response to Widmar, Congress enacted the Equal Access Act,[63] which provides that any public secondary school which receives Federal financial assistance and which permits one or more noncurriculum related student groups to meet on school premises during noninstructional time must not withhold such privilege on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

The Supreme Court upheld the Act in Board of Education of Westside Community Schools v. Mergens.[64] Relying on statutory interpretation rather than reaching the constitutional question, the Court was of the opinion that Congress maintained that most high school students could recognize that allowing a religious club to function in school does not imply endorsement of religion. However, insofar as Congress did not define 'noncurriculum related', the Court found it necessary to do so in order to ascertain the status of some student groups. The Court held that since several existing clubs failed to meet the criteria, the religious group was entitled to meet in school. Insofar as the Court did not to explain why the Act passed Establishment Clause muster (a plurality ruled that it did not violate the Establishment Clause), instead resolving the case on the matter of statutory interpretation, it left the door open to further litigation. The Court's failure to address the constitutional dimensions of the Equal Access Act has led to a line of cases which treat religious expression as a kind of hybrid wherein it protects a religious group's right to express its opinion as a form of free speech.[65]

In Mergens' aftermath, it was clear that the Equal Access Act expressly does not protect speech that is otherwise unlawful. In such a case, the Ninth Circuit held that the Act did not encompass a violation of a state constitutional church-state restriction greater than that in the federal establishment clause.[66] The panel emphasized the Court's interpretation of the Act as being read to effectuate a broad Congressional purpose, thereby preempted state law.

Circuit courts have extended the scope of the Equal Access Act to allow students to select leaders who comply with a club's religious standards,[67] to meet during lunch time,[68] and to have access to funding and fund raising activities, a school yearbook, public address system, bulletin board, school supplies, school vehicles, and audio-visual equipment.[69] In an interesting twist, federal courts ruled that clubs sponsored by gay and lesbian students could not be denied use of school facilities under the Act.[70] However, at least one court rejected the claim that a school board created a limited open forum within the meaning of the Act and so refused to permit members of a religious club to make announcements involving prayers and Bible readings before the start of the day on a school's public address system; the court did permit voluntary student prayer before school to continue.[71]

Religious Access to School Facilities by Non-School Groups

A dispute in New York arose when a school board enacted a policy that permitted it to make its facilities available to an array of social and civic groups. When the board refused to rent a facility to a group which sought to show a film series on child-rearing because it was presented from a religious perspective, lower courts ruled in favor of the board.[72]

The Supreme Court, in a rare unanimous decision, in Lamb's Chapel v. Center Moriches Union Free School District (Lamb's Chapel),[73] reversed in favor of the religious group. In a hybrid situation wherein it treated religious speech as a form of free speech, the Court essentially extended Mergens' rationale. The Court maintained that

63 20 U.S.C.A. para. 4071 et seq.
64 496 U.S. 226 (1990).
65 See, e.g., *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).
66 *Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641 (9th Cir. 1993), cert. denied, 510 U.S. 819, (1993), appeal after remand, 21 F.3d 1113 (9th Cir. 1994), on remand, 1994 WL 555397 (W.D. Wash. 1994) (granting declaratory judgment and awarding attorney fees to the plaintiffs).
67 *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996), cert. denied, 519 U.S. 1040 (1996).
68 *Ceniceros v. Board of Trustees of the San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997).
69 *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002).
70 *Colin Ex. Rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp.2d.1135 (C.D. Cal. 2000); *East High Gay/Straight Alliance v. Board of Educ.*, 81 F. Supp.2d 1166 (D. Utah 1999), 81 F. Supp.2d 1199 (D. Utah 1999); *East High Sch. Prism Club v. Seidel*, 95 F. Supp.2d 1239 (D. Utah 2000).
71 *Herdahal v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996).
72 *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 770 F. Supp. 91 (E.D.N.Y. 1991), aff'd 959 F.2d 381 (2d Cir. 1992).
73 508 U.S. 384 (1993); on remand, 17 F.3d 1425 (2nd Cir. 1994).

since the board created a limited open forum, it violated the free speech rights of the group by engaging in viewpoint discrimination.

Eight years later, a dispute arose when officials in New York refused to permit a non-school sponsored club to meet during non-class hours so that members and moderators could discuss child-rearing along and character and moral development from a religious perspective. Even though the school system prevented the religious club from meeting, officials allowed three other groups to meet because although they addressed similar topics, they did so from a secular perspective. On further review of rulings in favor of the board,[74] the Supreme Court agreed to hear an appeal to resolve a split in the lower courts since the Eighth Circuit,[75] had upheld the right of the same kind of cub in Missouri to use school facilities for its meeting.

In Good News Club v. Milford Central School,[76] the Supreme Court reversed in favor of the Club. The Court reasoned not only that the Board violated the Club's rights to free speech by engaging in impermissible viewpoint discrimination when it refused to permit it to use school facilities for its meetings, which were not worship services, but also that such a restriction was not justified by fears of violating the Establishment Clause.[77]

Other Religious Influences

Flag Salute

Amid controversy over the constitutionality of the requirement that students salute the American flag and repeat the Oath of Allegiance, the Supreme Court initially refused to address the question on its merits, summarily affirming a ruling which refused to enjoin a state statute which required students to recite the pledge.[78] A year later, in Minersville School District v. Gobitis,[79] the Court rejected the claim of Jehovah's Witnesses who argued that requiring their children to saluting the flag while in school was the equivalent to forcing them to worship an image contrary to a fundamental of their religious beliefs. The Court concluded that the students were not free to excuse themselves from participating in the Pledge of Allegiance.

In the face of significant criticism of Gobitis, the Court revisited the issue when Jehovah's Witnesses and others challenged the constitutionality of a revised regulation of a state board of education, according to which refusal to participate in saluting the flag could be treated as an act of insubordination such that they could be expelled from school. As in Gobitis, the Jehovah's Witnesses argued that the Pledge violated their rights to religious freedom. In West Virginia State Board of Education v. Barnette,[80] the Court reversed in favor of the plaintiffs and ruled that children could not be compelled to salute the flag. The Court was convinced that requiring children to salute the flag transcended constitutional limitations on governmental power because it invaded the individual's sphere of intellect and spirit that is protected by the First Amendment.

Almost a quarter-century later, the Supreme Court of New Jersey faced the issue of whether Black Muslim children who refused to pledge allegiance to the flag could be excluded from public school when they claimed that the ceremony violated their religious beliefs.[81] School officials excluded the students because they refused to pledge allegiance based on their contention that their beliefs were motivated as much by politics as by religion, rejecting their claim of 'conscientious scruples' because the two were closely intertwined with their racial aspirations. Although not resolving whether the students' refusal to salute the flag was religious or political, the court ordered their reinstatement, adopting the view that the Supreme Court had a broader base than that of organized religion. The court specifically pointed out that the students stood respectfully at attention during the Pledge and were not disruptive.

74 21 F. Supp.2d 147 (N.D.N.Y. 1998), aff'd 202 F.3d 502 (2d Cir. 2000).
75 *Good News/Good Sports Club v. School Dist. of the City of Ladue*, 28 F.3d 1501 (8th Cir. 1994), cert. denied, 515 U.S. 1173 (1995).
76 533 U.S. 98 (2001).
77 For a similar result in a long-ranging dispute, see *Bronx Household of Faith v. Board of Educ. of the City of N.Y.*, 226 F. Supp. 401 (S.D.N.Y. 2002).
78 See, e.g., *Johnson v. Town of Deerfield*, 25 F. Supp. 918 (D. Mass. 1939) (refusing to enjoin a state statute requiring students to recite the pledge), aff'd 306 U.S. 621 (1939), rehearing denied, 307 U.S. 650 (1939).
79 310 U.S. 586 (1940).
80 319 U.S. 624 (1943).
81 *Holden v. Board of Educ., Elizabeth*, 216 A.2d 387 (N.J. 1966).

Maryland's high court[82] and the Fifth Circuit[83] struck down plans which would have had students who objected to the flag salute stand while their classmates recited the Pledge. In neither of these cases had school officials offered students the option of leaving their rooms. Yet, even if students had the option of leaving a room or standing silently, the Second Circuit held that school officials could not discipline a child who remained quietly seated.[84] The court declared that forcing a student to stand could no more be required than the Pledge and that having an individual leave a room during its recitation might reasonably have been viewed as a punishment for not participating.

The Seventh Circuit affirmed that school officials could lead the Pledge, including the phrase 'under God', as long as students were free not to participate.[85] The court held that the use of the phrase in the context of the secular vow of allegiance was 'patriotic or ceremonial' expression rather than a religious one. More recently, the Ninth Circuit refused to reconsider its own opinion in a case wherein it found that California violated the Establishment Clause by having teachers recite the words 'under God' in the Pledge.[86] The way in which the Supreme Court resolves this case may go a long way to clarify the place, if any, of religion in the American market place of ideas.[87]

Religious Dress

Students

The courts seem to agree that educators must come up with less restrictive alternatives to placing an explicit ban on students who wish to wear religious garb to school.[88] For example, the Ninth Circuit affirmed that school officials violated the rights of Sikh students by trying to prevent them from wearing ceremonial daggers under their clothes.[89]

Teachers

Many older cases dealt with the issue of the wearing of distinctive religious garb by teachers in public schools. The disputes arose either to require boards to permit Catholic nuns to wear their habits while teaching or to force boards to cease allowing the practice. In a related matter, at least one court ruled that because nuns turn their earnings over to a religious society is not a basis for barring them as public school teachers.[90] The newer litigation has involved dress of other religions.

In an early case, the Supreme Court of Pennsylvania affirmed the authority of a local school board to hire Catholic nuns as teachers and to permit them to appear in teach in their habits.[91] Shortly thereafter, the state legislature enacted a statute specifically designed to prevent teachers from wearing any dress or insignia indicating membership in any religious order while at work. The same court upheld the law, noting that it was aimed against acts, not beliefs, and only against acts of the teachers while they performed their professional duties.[92]

More recently, the Supreme Court of Oregon, in a case involving a teacher who had become a Sikh and wore white clothes and a white turban while teaching, held that she was subject to a state legislative ban on religious dress while performing teaching duties.[93] In dicta the court acknowledged that the prohibition would not apply to incidental elements such as a cross or Star of David, nor to ethnic or cultural dress.

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82 *State v. Lundquist*, 278 A.2d 263 (Md. 1971).
83 *Banks v. Board of Public Instr. of Dade County*, 314 F. Supp. 285 (S.D. Fla. 1970), aff'd 450 F.2d 1103 (5th Cir. 1971).
84 *Goetz v. Ansell*, 477 F.2d 636 (2nd Cir. 1973).
85 *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township.*, 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993).
86 *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), 328 F.3d 466 (9th Cir. 2003), cert. granted sub nom. *Elk Grove Unified Sch. Dist. v. Newdow*, 71 U.S.L.W. 3724 (U.S. Oct 14, 2003).
87 Russo, Charles J. (2003) , 'The Pledge of Allegiance: Patriotic Duty or Unconstitutional Establishment of Religion?', *School Business Affairs*, 69, No. 7, pp. 22-27 (2003).
88 In a related type of dispute, a federal trial court granted a board's motion for summary judgment when a student relied on the First Amendment right to free speech to wear a head wrap to school to celebrate her cultural heritage. *Isaacs v. Board of Educ. of Howard County, Md.*, 40 F. Supp. 2d 335 (D. Md. 1999).
89 *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).
90 *Gerhardt v. Heid*, 267 N.W. 127 (N.D. 1936).
91 *Hysong v. Gallitzin Borough Sch. Dist.*, 30 A. 482 (Pa. 1894). For a similar case, see *Rawlings v. Butler*, 290 S.W.2d 801 (Ky.1956).
92 *Commonwealth v. Herr*, 78 A. 68 (Pa. 1910). For a similar results, see *O'Connor v. Hendrick*, 77 N.E. 612 (N.Y. 1906), *Zellers v. Huff*, 236 P.2d 949 (N.M. 1951).
93 *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298 (Or. 1986), appeal dismissed, 480 U.S. 942 (1987).

The Supreme Court of Mississippi ruled that school officials could not dismiss a teacher who was a member of the African Hebrew Israelites out of Ethiopia faith for insubordination when she wore a religious head wrap to school.[94] Conversely, the Third Circuit, ruled against a female Muslim teacher who adhered to the religious conviction that she should, when in public, cover her entire body except face and hands.[95] The court relied on the state statute involved in cases earlier in this section and which had been upheld eight decades before.

A federal trial court in Connecticut granted a school board's motion for summary judgment in a dispute where officials directed a substitute teacher either to cover a tee-shirt with the message 'Jesus 2000' on it or to go home and change into other clothes.[96] The court was of the opinion that administrators did not violate the teacher's First Amendment rights to the free exercise of religion or free speech.

Distribution of Literature/Proselytizing

Another persistent issue deals with the dissemination of religious materials and literature in schools. As long as school officials have enacted generally applicable policies for all student groups, courts have held that they can impose reasonable time, manner, and place restrictions on the ability of students to distribute religious literature such as the Gideons[97] or proselytize in schools.[98] The Fifth,[99] Seventh,[100] and Tenth Circuits, and federal trial courts,[101] have generally agreed[102] that students cannot distribute religious materials in school or invitations to such events as alternatives to Halloween parties where the activities were motivated by religious objections[103] or religious meetings.[104] In a case with mixed results, the Fourth Circuit ruled that a neutral board policy permitting non-students to disseminate Bibles and other religious materials in public secondary schools during class hours did not violate the Establishment Clause; at the same time, the court struck the policy down as it applied to students in elementary schools.[105] However, at least one court ruled that school officials could not prohibit a student from distributing Gideon Bibles in front of a school since it was an open forum in view of the fact that it had allowed teacher to picket and engage in related activities at that location.[106]

Instructional Issues

Consistent with dicta in Abington v. Schemp, 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 ... '[107] the judiciary has reached mixed results with regard to the place of religion in the public school curriculum. The challenge for the courts is to discover the appropriate balance between teaching about religion and the teaching of religion in public schools.

In its only case on point, the Supreme Court's per curiam decision in Stone v. Graham[108] held that posting the Ten Commandments in classrooms, even in they were purchased with private funds, violated the Establishment Clause. The Court found that the Kentucky statute requiring the posting lacked a secular purpose, emphasizing that the Ten Commandments were not integrated into the school curriculum, where the Bible can be used in an appropriate study of such subjects as history, civilization, ethics and comparative religion. The Court was

94 *Mississippi Employment Securities Comm'n v. McGlothin*, 556 So. 2d 324 (Miss 1990), cert. denied, 498 U.S. 879 (1990).
95 *United States v. Board of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882 (3rd Cir. 1990).
96 *Downing v. West Haven Bd. of Educ.*, 162 F. Supp.2d 19 (D. Conn. 2002).
97 *Tudor v. Board of Educ. of Borough of Rutherford*, 100 A.2d 857 (N.J. 1953), cert. denied, 348 U.S. 816 (1954).
98 But see *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1993) (holding that a student and her father lacked standing to challenge the distribution of Bibles in school since she was not in a class where they were given out and the board did not expend funds in the process).
99 *Meltzer v. Board of Pub. Instr. of Orange County, Florida*, 577 F.2d 311 (5th Cir. 1978), cert. denied, 439 U.S. 1089 (1979).
100 *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir. 1993), cert. denied, 508 U.S.911 (1993); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1539 (7th Cir. 1996), cert. denied, 520 U.S. 1156 (1997).
101 See, e.g, *Hemry v. School Bd. of Colorado Springs Sch. Dist. No. 11*, 760 F. Supp. 856 (D. Colo. 1991) But see *Rivera v. East Otero Sch. Dist. R-1*, 721 F. Supp. 1189 (D. Colo. 1989) (wherein the same court permitted a student to distribute a religious newsletter); *Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987); *Walz v. Egg Harbor Township Bd. of Educ.*, 342 F.3d 271 (3rd Cir. 2003) (denying students the opportunity to distribute candy canes with religious messages at Christmas time). But see, Westfield High School L.I.F.E. Club v. City of Westfield, 249 F. Supp.2d 98 (D. Mass. 2003) (permitting students to distribute candy canes with religious messages).
102 But see *Harless v. Darr*, 937 F. Supp. 1339 (S.D. Ind. 1996) (requiring further briefs on whether a policy restricting student distribution of religious tracts at school placed a substantial burden on his religious faith).
103 See, e.g., *Guyer v. School Bd. of Alachua County*, 634 So. 2d 806 (Fla. Dist. Ct. App. 1994), review denied without published opinion, 641 So. 2d 1345 (Fla. 1994), cert. denied, 513 U.S. 1044 (1994); *Johnson-Loehner v. O'Brien*, 859 F. Supp. 575 (M.D. Fla. 1994).
104 143. Muller by *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. Oct 30, 1996), cert. denied, 520 U.S. 1156 (1997).
105 *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998).
106 *Bacon v. Bradley-Bourbannais High Sch. Dist. No. 307*, 707 F. Supp.1005 (C.D. Ill. 1989).
107 *Abington*, footnote 9 above at 300.
108 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed.2d 199 (1980), rehearing denied, 449 U.S. 1104 (1981), on remand, 612 S.W.2d 133 (Ky. 1981).

unpersuaded by a notation 'in small print' to the effect that the Commandments were part of the fundamental legal code of Western Civilization and the Common Law of the United States.

Debate continues to rage over the Ten Commandments in school settings. A case from Kentucky involved the Ten Commandments even though it did not directly implicate curricular concerns. A federal trial court granted a student's request for an injunction to prevent a public school officials from displaying the Ten Commandments and other religious documents finding that she had a strong likelihood of success on the merits of her claim.[109] Another court in Kentucky issued a supplemental injunction in a similar dispute, rejecting modifications to the display that included the full text of the Magna Carta, the Declaration of Independence, and the Ten Commandments with a Biblical citation. The court decided that since the display had the effect of advancing religion, it was barred by the Establishment Clause.[110] This decision is consistent with recent non-school cases that have reached similar results.[111]

As to religious celebrations in schools, the Eighth Circuit upheld a set of guidelines for handling religious observances and holidays in public schools.[112] The guidelines permitted objective discussion of holidays with both religious and secular bases. The court observed that explanations of historical and contemporary values relating to a holiday, short term use of religious symbols as examples of the heritage, and integration into the curriculum of music, art, literature, and drama having religious themes were acceptable if presented in an objective manner and as a traditional part of the cultural and religious heritage of the holiday. In an early stage of the litigation, a federal trial court had held that segments of a Christmas program presented before the rules were adopted were impermissible because the activities were predominantly religious.

In an interesting case, a federal trial court in Pennsylvania addressed a situation where school officials permitted a 'Winter Holiday' display that included information on Chanukah and Kwanza, but nothing on Christmas.[113] The court rejected a challenge from a youth minister, responding that the display did not offend the Establishment Clause by favoring one religion over another.

Evolution

Forty years after it was enacted, in 1968, the Supreme Court considered a challenge to a law from Arkansas that forbade the teaching of evolution in public schools. In Epperson v. Arkansas,[114] the Court struck the statute down as unconstitutional since it failed to comply with Abington's two part purpose and effects test. The Court held that the statute was unconstitutional since it attempted to blot out a particular theory because of its supposed conflict with the literal biblical account of creation. A federal trial court later struck down another law from Arkansas that would have required providing balanced treatment for instruction on Biblical notions of creation if evolution was included in the curriculum.[115]

A second Supreme Court case on evolution arose in Louisiana where a statute prohibited the teaching of 'evolution-science' in public elementary and secondary schools unless accompanied by instruction on 'creation-science' In Edwards v. Aguillard,[116] the Court vitiated the law was unconstitutional since it violated the first prong of the Lemon test insofar as it lacked a secular purpose. The Court explained that the legislation affected the science curriculum in a way that reflected a religion-based view, namely, either by banishing of the theory of evolution from the classroom or presenting a religious viewpoint that rejected evolution in its entirety.

Most recently, in Louisiana, a school board adopted a resolution disclaiming the endorsement of evolution after it failed to introduce creation science into its district curriculum as a legitimate scientific alternative to evolution.

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109 *Doe v. Harlan County Sch. Dist.*, 96 F. Supp.2d 667 (E.D. Ky. 2000).

110 *American Civil Liberties Union v. McCreary County*, 145 F. Supp.2d 845 (E.D. Ky. 2001).

111 See, e.g., *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), cert. denied, 532 U.S. 1058 (2001) (prohibiting a monument on the grounds of the statehouse including the Ten Commandments); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001) (forbidding a monument on the lawn of a city's municipal building inscribed with the Ten Commandment); *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997) (banning a display of the Ten Commandments in a county courtroom); *Glassroth v. Moore*, 2002 WL 31546094 (N.D. Ala. 2002) (proscribing a monument engraved with the Ten Commandments in a courthouse).

112 *Florey v. Sioux Falls Sch. Dist. 49–5*, 619 F.2d 1311 (8th Cir.1980), cert. denied, 449 U.S. 987 (1980).

113 *Sechler v. State College Area Sch. Dist.*, 121 F. Supp.2d 439 (M.D. Pa. 2001). For a similar result in a non school setting, see *Spohn v. West*, 2000 WL 1459981 (S.D.N.Y. 2000).

114 393 U.S. 97 (1968).

115 *McClean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).

116 U.S. 578 (1987).

Parents successfully challenged the disclaimer under the Establishment Clause in both the state and federal constitutions. The Fifth Circuit affirmed that the disclaimer did not further the articulated objective of encouraging informed freedom of belief or critical thinking by students and that it furthered the purposes of disclaiming orthodoxy of belief and of reducing offense to the sensibilities of any student or parent.[117]

Discussion

In light of strife throughout the world, much of which has religious overtones, Americans should take heart that debate over religion and religious activity in a wide array of settings, most of which are beyond the scope of this article, such as the use of the words 'under God' in the Pledge of Allegiance to the Flag,[118] are resolved without violence. Yet, the realization that Americans can settle their religious differences peacefully does little to remedy the situation.

At the same time, even though it almost goes without saying that religion is, and should remain, a primary concern of parents, assuming that educators understand the law,[119] one can only wonder what is gained when the courts leave no choice but exclude most religious activities from schools or run the risk of litigation. Put another way, although the debate is often framed as not wanting values, especially those of a religious nature, to dominate in public schools, this is not really the issue. Rather, since educators teach values every day, whether, for example, by instructing students not to cheat and to respect others, the question is better framed as a class of cultures, meaning that it is an issue of whose values should prevail in schools. If separationists and accommodationists would acknowledge that this controversy is more about whose values will prevail, rather than whether values can be taught in schools, then perhaps cooler heads can prevail and avoid having debate dominated by extreme positions at both ends of the spectrum.

As the Nation remains divided on the issue, the way in which the Supreme Court clarifies the place of religious activity in schools is likely to have a major impact on the future because the manner in which this debate is played out will reveal whether Americans still cherish the underlying values of freedom of religion (and speech) that contributed so greatly to the Nation's history. Given the split between lower federal courts, for example, especially with regard to student sponsored graduation prayer, leaving it legal under narrow circumstances in the Fifth Circuit and acceptable in the Eleventh Circuit but impermissible in the Third and Ninth Circuits, the Supreme Court owes it to educators, students, and parents, not to mention the general public, to provide one standard for all states.

The core of this debate rests on the paradox of how a democratic society that was established at least in part on religious principles can respect the rights of both the majority and minority. In other words, while the majority of Americans seems to favor at least some prayer and religious activity in schools. At the same time, it is worth remembering that since constitutional rights are not subject to the ballot box or public opinion, it is important to safeguard the rights of the minority. Thus, tensions flare when, in protecting the rights of increasingly vocal secularist opponents of religion, the judiciary has not steered a clear path in avoiding what can best be described as the tyranny of the minority as a kind of 'heckler's veto'[120] which allows a small group to drown out the wishes of the majority.

To the extent that they have often over-ridden legislative and school board efforts to do so, the courts must establish an acceptable middle ground. If judicial ideologues, who find impermissible governmental establishment of religion in such matters as the words 'under God' in the Pledge[121] or prevent a student from reading a religious story to classmates and to place a religious poster on a school wall while in kindergarten and first grade[122] or uphold a prohibition against a kindergartener's distributing pencils and candy canes in class during December

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117 *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999).

118 *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), 328 F.3d 466 (9th Cir. 2003), cert. granted sub nom. *Elk Grove Unified Sch. Dist. v. Newdow*, 71 U.S.L.W. 3724 (U.S. Oct 14, 2003).

119 In an interesting case wherein it permitted members of a religious club to distribute candy canes with religious messages during non-instructional time prior to the start of the school's 'Winter breaks' between 2000 and 2002, the federal trial court in Massachusetts reprimanded the principal for not knowing the law in deeming that he described the student messages as 'offensive' in not refusing to respond to their claim that he characterized them in this manner. *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp.2d 98 (D. Mass. 2003).

120 In *Good News*, footnote 76 above at 118, Justice Thomas made just this point in warning that the Court is unwilling '... to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what ... members of the audience might misperceive.'

121 *Newdow*, footnote 118 above.

122 *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000), cert. denied sub nom. *Hood v. Medford Township Bd. of Educ.*, 533 U.S. 915 (2001).

because they had religious messages attached,[123] continue to impose their wills on the American people, then perhaps Congressional leaders will make good on their promise to restrict the authority of the federal courts in matters of religion and set off a potentially divisive constitutional crisis.[124]

Amid debate over religion, and inconsistent judicial messages, one must wonder how educators can expect to foster their espoused appreciation for diversity in all of its manifestations, if they are unwilling to tolerate expressions of religious beliefs that may not be shared by all members of a school community. It is ironic that in a Nation that claims to value religious freedom, the courts have not only been unable to reach a consensus on the appropriateness of religious activities in schools but, as noted, have arguably taken impermissible steps to remove just about all school-sponsored references about religion from schools, however tenuous their connections to establishment may be.

Conclusion

The ongoing debate over the place of prayer and other forms of religious expression in public schools, let other dimensions of public life, is unlikely to be resolved any time soon.

However, by acknowledging the place of religion and religious activity in public schools, and balancing the rights of all, the Court can assume a leadership role in fostering a climate wherein diversity of opinions and beliefs are not only appreciated but are celebrated by all Americans.

[123] *Walz v. Egg Harbor Township Bd. of Educ.*, 342 F.3d 271 (3rd Cir. 2002). But see *Westfield*, footnote 101 above.

[124] See, e.g., United States Congress, 'An Act to reaffirm the reference to one Nation Under God in the Pledge of Allegiance', PL 107-293, 2002 S 2690, 116 Stat. 2057 (2002); Walsh, Mark(2003), 'Supreme Court is Next Stop for Pledge Ban', *Education Week*, March 12, 2003, p. 3.