Chapter 6:
Prayer and Scripture Reading in Public Schools

By Josh House

"The petitioners contend…that the state laws requiring or permitting use of the Regent's prayer must be struck down as a violation of the Establishment Clause…We agree with this contention since we think that, in this country, it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."
-Justice Hugo Black *Engel v. Vitale* (1962)

Introduction

In this chapter, the issues of prayer and scripture reading in public schools as it relates to the Establishment Clause of the First Amendment of the Constitution of The United States will be addressed in three stages. Current conceptualizations of the Church and State in America are shaped through historical tensions and recent Supreme Court decisions. For that reason, initially this chapter will examine the earliest colonies, the formation of the country, and the earliest Supreme Court decisions on the issue. Next, this chapter will focus on the two landmark decisions in the 1960's that have established the current accepted framework on the issue, and two more recent decisions that built on that framework by providing further clarity Finally, this chapter examines the challenges that still persist in interpreting and implementing the law regarding prayer in public schools.

Early History

The earliest colonies established in the United States were established by people escaping the imposition of an official state religion. This created the foundation for the debate about the relationship between Church and State within the United States. The settlers of Jamestown established the Church of England in Virginia in 1607, fully embracing this as an official religion.[1] The settlers of Plymouth were separatists and generally more lenient than the Puritans who followed them to Massachusetts with an intolerance of other religions.[2] Most of the disputes concerning the role of government in religion and vise versa for the first several hundred years in this country revolved around the extent of appropriate interaction.

Two of the founders in particular contributed the framework for deciding how do deal with issues of religion and the state. Thomas Jefferson is the most prominent figure on the issue in public memory, having introduced the metaphor of a wall separating church and state.[3] However, James Madison was arguably as responsible as anyone else for getting the Establishment Clause into the First Amendment. Both he and Jefferson took cues from political philosopher John Locke on a number of issues. In "Letters of Toleration" he argued for a national church, comprehensive and universal in creed.[4] Madison took exception to the concept of the government tolerating differences in religion. He argued that toleration presumed a state prerogative that did not exist. The government was in no position to either persecute or tolerate religion, and he used a metaphor similar to the one Jefferson made

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[1] Alley, Robert. School Prayer. Buffalo, New York: Prometheus Books, 1994.
[2] Id.
[3] Alley, Robert. School Prayer. Buffalo, New York: Prometheus Books, 1994.
[4] Alexander Campbell Fraser, "John Locke," in *The Encyclopedia Britannica*, 11th ed. (1911), vol. 16

famous "the line of separation between the rights of religion and the Civil authority." In drafting the Virginia Declaration of Rights prior to the revolutionary war George Mason suggested an article that read "All men should enjoy the fullest toleration in the exercise of religion." Madison countered with what became the final wording of the article, "All men are equally entitled to the free exercise of religion."[5]

The First Amendment was written, to reflect the Free Exercise and Establishment Clauses of the First Amendment. Still, how to provide equitable treatment of differing Christian sects was problematic, primarily because of the tension between the majority Protestants and minority Catholics. In the nineteenth century public education was "nonsectarian" insofar as it reflected the forms of Protestantism practiced by most Americans. However, because students were forced to listen to a Protestant Bible regardless of faith, by 1844 in Philadelphia, tensions ran so high that several Catholic churches and a convent were set on fire in response to their objections.[6]

It was also in 1844 that the Supreme Court made one of its first decisions regarding public education and religion. *Vidal. v. Girard's Executors* (1844) upheld the validity of a will establishing a college for orphans in Pennsylvania although that will "required no *ecclesiastical*, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college." However, the Court did not mention the First Amendment as grounds for its decision. In fact, very few cases came to the Supreme Court because these issues were considered the jurisdiction of State governments. [7]

In *Church of the Holy Trinity v. United States* (1892), Justice David Brewer wrote for the Court that to blaspheme against Christianity was not protected exercise of religion. Brewer stated "Nor are we bound, by any expressions in the Constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of Mahomet or of the Grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply engrafted upon Christianity and not upon the doctrines or worship of those impostors." This case was the last major decision in which the Court defined religion as exclusively Christian..

In the 20th century, *Cantwell v. Connecticut* (1940) applied the First Amendment to the states through the Fourteenth Amendment, thereby extending Federal jurisdiction on the matter. Justice Owen Roberts wrote for the Court "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."[8]

Everson v. Board of Education (1947) saw the Court adopt a firm separationist view, with all nine justices supporting the decision written by Justice Black.

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[5] Alley, Robert. School Prayer. Buffalo, New York: Prometheus Books, 1994.
[6] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.
[7] Alley, Robert. School Prayer. Buffalo, New York: Prometheus Books, 1994.
[8] Alley, Robert. School Prayer. Buffalo, New York: Prometheus Books, 1994.

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.[9]

In *McCollum v. Board of Education* (1948) the justices unanimously agreed that public schools in Illinois violated the Establishment Clause by allowing religious groups classroom space during school hours to teach religion.[10] Then, in *McGowan v. Maryland* (1961) Chief Justice Warren wrote, "But, the First Amendment, in its final form, did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion. Thus, this Court has given the Amendment a 'broad interpretation...in the light of its history and the evils it was designed forever to suppress...[11]'" With these two decisions the Court both removed outside religious groups from public schools and gave a justification for how they would rule in the two major cases to come before them in the next few years. The Court's landmark decisions of the 1960s evolved out of these earlier rulings.

Other Landmark Supreme Court Decisions

Engel v. Vitale (1962)

The decision in *Engel v. Vitale* (1962) applied the Establishment Clause to prayer in public schools. Engel was one of ten parents who sued the Hyde Park Unified School district school board over a generic, nonsectarian prayer that the New York State Board of Regents required students and teachers to repeat every morning. Every public school, starting in the late 1950's was required to repeat, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."[12] Vitale was the president of the school board, and although this was the case that made it to the court similar practices were in place throughout the nation. The school board in Washington D.C. directed their public schools to open with "the salute to the flag, a reading from the Bible without note or comment, and the Lord's Prayer."[13] The opposition to that practice from the ACLU and the Jewish Community Council of Greater Washington demanded that the recitation of the Lord's Prayer be discontinued immediately.[14]

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[9] Available online at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=330&invol=1
[10] Alley, Robert. School Prayer. Buffalo, New York: Prometheus Books, 1994.
[11] Harrison and Gilbert. Landmark Decisions of The United States Supreme Court. Vol. 2 Beverly Hills: Excellent Books, 1991.
[12] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.
[13] Alley, Robert. School Prayer. Buffalo, New York: Prometheus Books, 1994.
[14] Id

The plaintiff in the Engel case alleged that the prayer promoted belief in a particular deity, violating the Establishment Clause. The New York Court of Appeals sustained the order of the lower state courts which supported the Regents as long as no student was forced to join in prayer against the wishes of their parents.[15] However, Engel did not want his children to be ostracized by leaving the room while the rest of the class stayed and the case was appealed to the Supreme Court. The justices voted 5-2 to overturn the lower court, with Justice Black providing the opinion containing the quotation at the opening of this chapter. That decision came despite friend-of-the-court briefs filed by the attorneys general of twenty-two states urging the justices to declare the prayer constitutional.[16]

Justice Black explained the reasoning of the court, rebutted the arguments of the respondents, and gave a brief history lesson placing this decision squarely in line with this country's oldest and most revered political traditions. He argued that "Under that (the First) Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."[17]

In response to the arguments that the prayer was non-denominational and permits those that do not wish to participate to be excused with parental permission, Black drew a distinction between the Free Exercise Clause and the Establishment Clause. Acknowledging that the two clauses may overlap, Black argued that they deal with two different types of government encroachment on religious freedom. "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." [18]

To justify this view Justice Black retrieved the historical justification for the Establishment Clause, quoting Madison as to the acceptability of "non-denominational" prayer. "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"[19] He also argued that the earliest colonies were established to escape an official state religion. The same people who had fled an official state religion turned around and implemented their own state religion so that by the time of the revolution eight colonies had established an official church and four of the remaining five had established religions.

Justice Black and the majority in the *Engel* case saw a need to establish (at least officially) that the United States is not a Christian nation, nor a nation of any other religion. Much of the reaction to the decision was negative, and opponents declared it "the day God was kicked out of the public schools."[20] There was a roadside billboard campaign launched calling for the impeachment of Chief Justice Earl Warren, and in July members of Congress introduced over

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[15] Finkelman. Controversies in Constitutional Law. New York: Garland Publishing, Inc. 1993
[16] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.
[17] Available online at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=370&invol=421
[18] Finkelman. Controversies in Constitutional Law. New York: Garland Publishing, Inc. 1993
[19] Finkelman. Controversies in Constitutional Law. New York: Garland Publishing, Inc. 1993
[20] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.

twenty-five different resolutions proposing constitutional amendments to override the Court's decision. Senator Prescott Bush of Connecticut, father of future president George Herbert Walker Bush and grandfather to future president George Walker Bush, called the decision "unfortunate, divisive, and quite unnecessary."[21]

U.S. Solicitor General Kenneth Starr, speaking for the Bush administration, was questioned on the issue by Justice Stevens; Starr made it clear that *Engel* was now settled law. Asked if classroom prayer compelled by a teacher was unconstitutional, Starr replied, "Yes, because it is coercive."[22] This was during a time that the Bush administration was trying to protect prayer at graduation, as will be discussed in the *Lee v. Weisman* case, which sent a strong message that if challenges to prayer related to public schools were to be made, they would at least have to accept the parameters of *Engel v. Vitale*.

Abington Township School District v. Schempp (1963)
This case dealt with scripture reading and recitation of scripture passages. In 1949, Pennsylvania passed a law mandating daily devotional Bible reading in every classroom, followed by class members reciting the Lord's Prayer. Any teacher refusing to abide by this law was to be fired. Edward Schempp, a Unitarian parent sued the local school district in federal court in 1958 arguing that the Bible-reading was unconstitutional because it promoted Christianity through the state.[23]

The federal court ruled in favor of Schempp, which forced the Pennsylvania legislature to change the law to allow students to leave during the Bible readings if their parents requested. Schempp believed this ruling ostracized his children and others that would leave the classroom during scripture-reading. He sued again, and again the federal court supported him. The school district then appealed the case to the Supreme Court, where it was heard alongside a similar case from Maryland. The court ruled 8-1 in favor of Schempp and O'Hair (who was challenging a Baltimore school-board rule.)[24]

Writing the majority opinion, Justice Thomas Clark acknowledged the role religion had played in the history of the nation and explained what the law means to that history.

> It is true that religion has been closely identified with our history and government...Indeed, only last year an official survey of the country indicated that 64% of our people have church membership...while less than 3% profess no religion whatever...therefore...as in the beginning [of our republic], our national life reflects a religious people...In addition, it might be well said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. This is not to say, however, that religion has been so identified with out history and government that religious freedom is not likewise as strongly embedded in our public and private [lives]. This freedom to worship [as we please, or not at all, is] indispensable in a country whose people come from the four quarters of the earth and brought with them a diversity of religious opinion. Today authorities

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[21] Alley, Robert. School Prayer. Buffalo, New York: Prometheus Books, 1994.
[22] Id.
[23] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.
[24] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.

> list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups.[25]

In order to provide clarity for future cases, Justice Clark expanded the scope of the *Engel* decision by establishing purpose and effect tests regarding establishment. For a law to be valid, 'there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion....' Contained in that decision were the roots of the later, three-part 'Lemon test' advanced by Justice Warren Burger in the 1971 Lemon v. Kurtzman decision."[26] In addition to these standards, Burger questioned whether or not the action excessively entangles religion and government.[27] Finally, Burger's decision explicitly established that matters of prayer were subject to the fourteenth amendment by extending the precedent set in *Cantwell v. Connecticut* (1940).[28] In turn a new precedent was created that said, private schools were free to operate however they wanted, but public schools were not allowed to mandate either prayer or scripture reading. The impact of the purpose and effects tests would be tested in later cases, as would the meaning of what constitutes a school mandate.

Wallace v. Jaffree (1985)

A case concerning the law in Alabama and its governor, George Wallace, came before the court in 1985. At issue was a 1978 law passed by the Alabama legislature that required students and teachers to begin each public school day with a moment of silence "for meditation." Although this law was deemed constitutional because it did not designate that moment as a religious activity, a 1981 expansion of the law changed the moment of silence to one minute for "meditation or voluntary prayer."[29] Ishmael Jaffree, father of three public school students, sued in district court. The district court ruled that the statute did encourage religious activity, but that the Establishment Clause of the First Amendment did not prohibit *a State* from establishing a religion, even if it prohibited *the state* from doing so.[30] The district court's ruling was reversed by a court of appeals, and the Supreme Court upheld the reversal 6-3 on the ground that the purpose of the legislation was religious rather than secular. The Court explained that genuinely neutral moments of silence, as were being observed in many other states, were legal as long as the legislation had a genuinely secular purpose.[31] In a statement that would foreshadow future problems in implementing the decisions of the court Governor Wallace said Alabama would defy the Court's stand. "I don't care what they say in Washington, we are going to keep right on praying and reading the Bible in the public schools of Alabama."[32]

Lee v. Weisman (1992)

While the *Jaffree* decision applied the purpose test from *Schempp*, *Lee* defined what counts as state endorsement of religion. At issue was a June, 1989 graduation ceremony at Nathan Bishop Middle School in Providence, Rhode Island. The principal, Robert E. Lee, invited a Rabbi to open the ceremony with an invocation and close it with a benediction. Weisman, the

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[25] Available online at http://www.firstamendmentcenter.org//rel_liberty/publicschools/topic.aspx?topic=school_prayer
[26] Alley, Robert. School Prayer. Buffalo, New York: Prometheus Books, 1994.
[27] Most schools complying with prayer guidelines. Available online at http://www.firstamendmentcenter.org/news.aspx?id=11469
[28] Harrison and Gilbert. Landmark Decisions of The United States Supreme Court. Vol. 2 Beverly Hills: Excellent Books, 1991.
[29] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.
[30] Id
[31] Id
[32] Alley, Robert. School Prayer. Buffalo, New York: Prometheus Books, 1994.

father of one of the graduates, unsuccessfully sought a restraining order on the Rabbi.[33] Weisman then sought a permanent injunction to prevent all Providence public schools from inviting clergy to deliver invocations and benedictions at future graduations. The district court granted the injunction on the ground that prayer violated the Establishment Clause. The school district challenged the judgment in the court of appeals.[34]

That court supported the circuit-court, and the case went to the Supreme Court, which voted 5-4 to uphold the ban on school-sponsored prayers at graduation ceremonies. The ban prohibited having administrators, teachers, or invited clergy offer a public prayer, school officials granting religious speakers preferential access to public audiences, and otherwise selecting public speakers on a basis that favors religious speech.[35] Justice Anthony Kennedy wrote for the majority and stated, "The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment. For the reasons we have stated, the judgment of the Court of Appeals is Affirmed"[36]

One problem, however, with Kennedy's opinion was that it did "not address the question of whether students—such as valedictorians—or guests who spoke at graduation time would be prohibited from offering a prayer or religious remarks.[37]" That question would arise in short time, along with a variety of other challenges to these four cases that generally establish how the First Amendment is to be interpreted in matters of prayer in public schools.

Persistent Challenges

After the decision in the *Weisman* case several rulings attempted clarify what allowed by valedictorians and guests speaking at graduation ceremonies could say. In 1999 an Idaho school district won their case in the 9th Circuit Court of appeals to allow prayer by a valedictorian because no tax money was being used to implement the policy.[38] However, not all cases involving prayer by valedictorians have been met with the same result. Officials at a California high school prevented a valedictorian from asking the audience to "accept God's love" and live by "Jesus' example." Lower courts ruled it was within the school's rights to censor such a speech, and the Supreme Court refused to hear the case, leaving the prior restraint policy in tact.[39]

In 2002, the Eleventh Circuit Court of Appeals heard *Adler v. Duval County School Board*. Duval County, Florida had a long-standing tradition of allowing clergy to speak at graduation. That changed with the *Lee v. Weisman*; so the county changed the policy to allow students to pick a fellow student to give a brief opening or closing message at graduation. The statement

[33] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.
[34] Available online at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=505&invol=577
[35] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.

[36] Lee v. Weisman," United States Law Week, June 23, 1992, vol. 60, no. 50, p. 4723.
[37] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.
[38] Robinson, B. A. (2003a, February 21) Court decisions on prayers during graduation ceremonies at U.S. public schools. *Religious Tolerance.* Available online at http://www.religioustolerance.org/ps_prae.htm.
[39] Id

would have no official review, and some saw it as an attempt to keep prayer in graduation. However, the Eleventh Circuit Court of Appeals ruled it constitutionally acceptable because it neither promoted nor established religion; it only permits the graduating class to decide whether or not to include unrestricted speech in their ceremony.[40] Here the purpose test would suggest that if the intent of the policy was not secular the ruling would be different, as was the case in Alabama in the *Weisman* case.

Pontotoc County, Mississippi had an 80 year history of prayer in schools in the early 1990's. There were daily devotionals over schools' intercom systems, a class taught with the Bible as the only textbook, and student/teacher prayer sessions in the gym. The mother of six children in the district filed a lawsuit to stop these activities and won. However, the school district attempted to circumvent the ruling by holding mandated prayers 10 minutes prior to the start of the official school day. What is more, "On 6 May 1997, school officials, including Superintendent Jerry Horton, led prayers at a 'school pride day' assembly at which students were required to be present, in apparent violation of the judge's order."[41] This case illustrates two legal problems. First, as was the case with in *Wallace v. Jaffree*, the history and traditions involved can lead to attempts at circumvention if not outright ignoring of the ruling of the court. Secondly, in order to challenge school policies or state laws that are in violation of the First Amendment parents with standing in the case must bring a lawsuit. Furthermore, the process of filing and winning a lawsuit can involve numerous appeals, all of which require a great deal of time and money. When the mother in this lawsuit filed another lawsuit to recoup her legal expenses she faced backlash from the community who accused her of trying to bankrupt the school district.[42]

Santa Fe Independent School District v. Doe (2000) dealt with the difference between public and private speech and what counts as school endorsement. District and Appellate court ruled that prayer over the public address system before high-school football games in the Santa Fe, Texas school district violated the Establishment Clause. The Supreme Court voted 6-3 to uphold the district and appellate court rulings Justice Stevens wrote in the majority decision "The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that…The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia…In this context the members of the listening audience must perceive the pre-game message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."[43] As Governor of Texas at the time, George W. Bush actively supported the school district and after the ruling he said, "I support the constitutionally guaranteed right of all students to express their faith freely and participate in voluntary student-led prayer."[44] However, much like Reagan and his father, George W. Bush was largely unable to overturn the Supreme Court's authority on these matters nor have the recent Court's rulings hinted at overturning the principles in place since *Engel* and *Schempp*.

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[40] Id
[41] Thomas, Murray. God in the Classroom. Connecticut: Praeger, 2007.
[42] Id.
[43] Id.
[44] Id.

Conclusion

The Supreme Court has been consistent since 1962 in endorsing Jefferson's concept of a wall between church and state created by the First Amendment with regard to prayer in schools. Organized, school-endorsed prayer in public school settings is unconstitutional. Those settings include classrooms, athletic events, and graduation ceremonies as well as lunchrooms, faculty meetings, and school-board meetings. On the other hand, private, voluntary prayer that does not disrupt the educational function of the school is constitutionally allowed, such as saying a blessing to oneself before a meal. Beyond that a portion of the school day, usually quite brief, can be set aside for a moment of silence. So long as the time is not designated as an opportunity to pray, this practice has routinely been upheld.

While that seems to provide a relatively comprehensive set of guidelines, school districts and states may continue to impose regulations in violation of those guidelines if they so chose. Not only do lawsuits have to be filed, but in order for a particular practice to be banned or applied nationally, it has to be heard by the Supreme Court. That not only means a necessarily long and expensive battle, but requires cases to meet exacting standards in order for their case to even be eligible to reach that level. In 2003 the Federal Government used perhaps the most effective tool at its disposal to attempt to get all school districts to comply. It threatened to withhold federal money if all schools did not prove that they allowed all constitutionally protected prayer and that they had no policies that promoted religion. Results have been slow in some cases, but they are moving steadily in the intended direction.[45]

[45] Available online at http://www.firstamendmentcenter.org/news.aspx?id=11469