

Public Schools and Religion

There is perhaps no aspect of the Constitution more controversial than that relating to the relationship of “church and state”. This is a nation wherein the vast majorities of people profess a belief in a supreme being and most attend church at least periodically. Homage to God is a regular feature on our money, in our pledge of allegiance, in courts, congress, etc. On the other hand, the Supreme Court has said public schools cannot promote religion in public schools. For many adults, who remember prayer as a regular feature in the classrooms, at graduation ceremonies, and other school functions, this is puzzling.

Most of the arguments related to the relation of church and state focus on the First Amendment. This amendment is short: **“Congress shall make no law respecting an establishment of religion, or prohibiting the free speech thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.”** It is short, but as we know, not so simple in meaning.

This essay is designed to elaborate on the religious aspect of the “Establishment Clause” of the First Amendment and will focus specifically on religious activities in schools. The controversial nature of this clause is reflected in the many 5-4 Supreme Court decisions concerning religion. These differences are reflected in the people; polls indicate the public supports such activities as prayer in schools. States repeatedly pass legislation to test how far they can go in putting prayer and “creationism” courses in the schools, hoping to avoid language that will be unacceptable to the court, or hoping a more conservative court will reverse earlier decisions.

Historical Background.

As pointed out in other essays in this series on the Constitution, one needs to place interpretations of the Constitution in historical context. What was the intent of the framers when they made this the first item in the Bill of Rights? Many were learned men who were students of history. They knew that throughout history governments had allied themselves with churches to maintain power. The recent experience in England at the time of the founding of this nation was one of bitter religious conflict and persecution. Many settlers had fled Europe to escape persecution and to have the freedom to worship as they pleased. As we know, in many colonies and later in States, the people established their own State religions and did not allow religious freedom. Intolerance often turned to violence against non-conformists. Most state constitutions at the time the Constitution was approved had established official state religions—usually Congregational in the northern states and Episcopal (Church of England) in the southern states. Consider the following provisions in state constitutions:

South Carolina: “...no person shall be eligible to a seat in the said senate unless he be of the Protestant religion.”

Delaware: “...I do profess faith in God the Father, and in Jesus Christ His only Son and the bible as divinely inspired.”

Other states had similar provisions. Public funds were routinely used to support the clergy and church schools.

Some of the delegates at the 1787 Convention wanted to address the religious issue in the original Constitution. Earlier that year Congress (under the Articles of Confederation) had debated the issue during consideration of the Northwest Ordinance and decided to omit provisions for governmental support of religion in the Northwest Territory, which had been proposed by some representatives. Many of the delegates to the Constitution believed that no specific rights need be included in the Constitution and religion was not mentioned. During ratification, however, the issue of religion came up along with other individual rights. Thomas Jefferson and James Madison played critical roles on this issue. Both had fought for religious freedom in Virginia. Jefferson had tried to include religious freedom in the original Virginia Constitution in 1776, but was unsuccessful. Madison had visited Culpepper, VA and was disturbed to find Baptists in jail for practicing that faith. While Jefferson was in France as our Minister, James Monroe was able to get Jefferson's proposal passed as the Virginia Statute of Religious Liberty in 1786. Jefferson later said that this was one of three things for which he wanted to be remembered. When Jefferson reviewed the original Constitution, he initially opposed it, largely because it lacked provisions to protect individual rights. In a letter to Madison, he suggested clear language in a bill of rights be included to ensure freedom of religion.

Not all founders shared the views of Jefferson and Madison regarding separation of church and state, nor did all interpret the amendment to do that. Moreover, the amendment only prohibits *Congress* from making laws establishing a religion; it said nothing of States authority to do such. Indeed, State constitutions continued to do just that. When Vermont was admitted to the Union in 1791, its constitution required the following oath by officials: "I do believe in one God...and acknowledge the scriptures of the Old and New Testament to be given by divine inspiration, and own and profess the Protestant religion." Many other new states had similar provisions. Massachusetts had an established State church well into the 19th century. Nonetheless, many historians believe Madison and Jefferson, along with several other key founders, intended to establish a "firewall"* between church and State and by 1787 when the Constitution was written, the framers knew that it was necessary to build a wall between church and State. Others of course, disagree with that interpretation (see Justice Rehnquist's comments in *Wallace v Jaffree*, 1985). In any event, the issue was mute until well into the 20th century. States were allowed to do whatever they chose. This was due largely to the earlier court decision that the Bill of Rights did not apply to the States (*Baron v Baltimore*, 1833). As we know this interpretation was reversed by later court decisions.

Recent Events.

The relationship of church and state has arisen in the last 50 years largely due to the reinterpretation of the Constitution. We have covered in other essays in this series the fact that the 14th Amendment has been interpreted to extend the Bill of Rights to the States (e.g., *Mapp v Ohio*, 1965). Since the first ten amendments now clearly apply to the States, the 1st Amendment and the religious issue have come to the fore. This was made quite clear in *Cantwell v*

* This term was used by Jefferson in a letter to the Danbury Baptist association in 1805, in response to accusations that he was anti-religion. In that letter, he also said: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Connecticut (1940), where the court said the 14th Amendment had rendered the legislatures of the States as incompetent as Congress in evading the Establishment Clause. In Engel v Vitale (1962) the court ruled that mandated prayer in the public schools was unconstitutional. New York had composed a prayer that was designed to be denominationally neutral and was to be recited by students in public schools at the beginning of each school day. The court said that even if students were allowed to remain silent or leave the room, the activity was coercive and prohibited by the 1st Amendment. In another case in 1963 (School District of Abington v Schempp), the court ruled that the state cannot require readings from the bible or recitation of the Lord's Prayer at the beginning of the school day.

Another landmark case was Wallace v Jaffree (1985) which dealt with an Alabama law that required a minute of silence at the beginning of the school day for "meditation or voluntary prayer". The District Court found the law unconstitutional, but was reversed by the Circuit Court, which, among other findings, said the state could promote religion, i.e., the 1st Amendment did not bind the states. The Supreme Court, in a 6-3 decision, reversed the Circuit Court and affirmed that the 14th Amendment had made the 1st Amendment Establishment Clause binding on the states. Further, it declared that "the 1st Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion". It mattered not that no specific religion was being advanced. Governor Fob James (then the Alabama governor) acknowledged that the intent was to advance religion, but maintained the right of Alabama to do that. Chief Justice Burger and Justice Rehnquist dissented. They pointed out that their court had just that morning said a prayer at the opening and the Congress across the street had done the same. They said the Alabama law amounted to "benevolent neutrality", which should be the standard for judging such practices. They went on to say "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful school children—even if they choose to pray". Rehnquist made an argument, citing many sources that the framers intended the Establishment Clause to apply solely to the national government. The Court majority rejected these arguments.

In the case of Lee v Weisman (1992), the Court, in a 5-4 decision, ruled that a prayer given by a Rabbi at a school function violated the Establishment Clause of the 1st Amendment even though the Rabbi had been instructed to make it non-sectarian. The Court said that as a minimum, a government may not coerce anyone to support or participate in religion or its exercise or otherwise act in a way which establishes a religion or religious faith, or tends to do so. They went on to say that prayers in elementary and secondary schools carry a particular risk of indirect coercion since adolescents are often susceptible to peer pressure that amounts to coercion. Also, the argument that Congress and the Courts say prayers does not hold. Such practices are among adults, who can come and go as they please and there is little social pressure to conform.

The most recent case is that of Santa Fe Independent School District v Doe (2000). In this far-reaching decision, the Court, in a 6-3 decision, struck down a Texas law that allowed student-led prayer at sports events. The decision expanded previous decisions prohibiting clergy-led prayers at school functions such as graduations and applies the prohibition to sports events. It matters not that the students had elected the particular student who gave the prayer; that does not alter the fact that the school district was the actual sponsor of the activity. For the majority: "The religious liberty protected by the Constitution is abridged when the state affirmatively sponsors the particular religious practice of prayer".

In brief, the court decisions have added up to the position that public funds cannot be used to promote religion in schools. Thus, when public schools introduce, or encourage, prayer, the courts are likely to say that they violate the separation of church and state. Again, states try to find language that will circumvent the court rulings and will continue to do so. Public opinion seems to favor the position of the effort to “put prayer back into the schools”. For the most part, the Supreme Court has been sharply divided on specific cases, but has consistently upheld earlier decisions that there must be separation of church and state. Where the line is to be drawn, however, is murky. Certain Justices, such as Rehnquist, Scalia, and Thomas, have consistently criticized these majority decisions, which they claim represent an active opposition to religion. The majority opinion “bristles with hostility to all things religious in public life”, wrote Rehnquist for the minority in the Santa Fe case. In a related case, the Court, in another 6-3 decision, let stand a lower court decision that struck down a Louisiana school board policy requiring teachers to tell students that the teaching of evolution was not intended to influence or dissuade the biblical version of creation or any other concept. Rehnquist, Scalia, and Thomas also dissented in this case.

None of these decisions prohibits individuals praying on their own in school, before a meal and at other times. Groups of students also can meet for worship on school grounds as long as other student groups have equal privileges. Other court decisions have indicated that public funds can be used for various purposes, e.g., transportation, computers, non-religious textbooks, vouchers, etc., in religious schools. Critics point out that such use of public funds frees up funds for religious activities and thus amounts to public support of religion. Both Gore and Bush support these practices and the trend is to allow more and more public funds for religious schools. Polls suggest there is wide support for breaking down the wall between “church and state”. Whether that support translates into a constitutional amendment is problematic.

The Bush administration significantly challenged the “firewall” by implementing “faith-based” programs. Approximately \$2 billion a year was funneled to religious organizations to be used for services to the public. It remains to be seen if these programs will be upheld by the Supreme Court, which is now considering a challenge brought by a group of tax payers. Analysts believe the new court, with Roberts and Alito on it, will back the Bush policies. Obama seems to be favorably inclined toward this program.

Evolution and Creationism.

Another area of controversy has to do with teaching the theory of evolution, and the absence of teaching “creationism”, in our public school system. The most noted case involving this issue is the 1925 “Scopes” trial in Tennessee. The State had passed a law prohibiting the teaching of Darwin’s theory of evolution and prosecuted a high school teacher for violating that law. The teacher was found guilty, but on appeal, the conviction was reversed. The reverse was on a technicality, however, so the constitutionality of the law was not determined. Tennessee kept the law on the books until the 1960s, although it was not enforced. Several states have attempted to restrict the teaching of evolution (e.g., the Kansa Board of Education in 1999) or require the teaching of creationism. In general, courts dealing with this issue will prohibit the explicit teaching of a specific version of creation, e.g., the Christian version, but will allow the teaching of various versions of creation as an academic analysis. The problem comes from the attempt by most legislation or school policy to teach the Christian version, which is clearly the intent of most policies.

What can we expect in the future? Given the general public support for religion and the sharply divided court decisions, we can expect states to continue to test how far they can go in circumventing the court decisions applying the Establishment Clause of the 1st Amendment. There have been attempts to amend the Constitution to allow prayer in the public schools. There appears to be widespread support for this among the population, but not enough support in Congress. Some fringe groups advocate amending the Constitution to establish Christianity as the national religion. Such an action would, of course, allow public support of Christian churches and religious activities in public schools, a policy that exists for other religions in some countries, especially Islamic theocracies. There appears to be little support for such a drastic action.

There is also the composition of the Supreme Court as a means for putting religion back into schools. A swing of one or two votes on the Court could change the recent rulings dramatically. George Bush has expressed displeasure with the recent decisions on school prayer and has stated that his favorite justices are Scalia and Thomas—the two most ideologically opposed to the majority opinions. He believes he has accomplished that with the appointments of Roberts and Alito. There is a good chance that many of the recent decisions prohibiting religious activities in schools, to include prayer, will be reversed under a court dominated by the Bush appointees. Working through the courts to reinterpret the Constitution appears to be the most likely approach to change the relation of Church and State. Thus, the outcome of the 2008 election may have long term consequences for this controversial issue. It is unlikely that Obama appointees will change the ideological composition of the Court, since those who are most likely to leave will be on the liberal side.