The Separation of Church and State: Where We are Today and Where we Might be Tomorrow

David F. Walbert
PARKS, CHESIN & WALBERT, P.C.
75 Fourteenth Street, 26th Floor
Atlanta, Georgia 30309
(404) 873-8000

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I. INTRODUCTION

Virtually every clause of the United States Constitution was drafted, debated, and adopted with a critical eye to preceding European history. The Framers of the Constitution sought to establish a functional national government, but they were, of course, profoundly concerned about the potential of that government to abuse the rights, property, and lives of the people. The particular history of Europe and the colonies concerning religious tolerance, religious intolerance, religious wars, and the like, provides an especially deep and poignant background underlying the adoption of the Free Exercise and Establishment Clauses of the First Amendment to the Constitution.

It is far beyond the scope of this paper to delve beyond the surface of that history. Yet it is worth mentioning that one of the best known authors who has addressed these First Amendment issues in the context of history is John Witte, Jr. John is a law professor at Emory, and among other things, the author of RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2d Ed. 2005). Whether one agrees with John's First Amendment viewpoints or not, his book provides a good historical overview and historical context in which those United States constitutional principles were adopted, as well as ample citations to other more in-depth treatments of that history. As Professor Witte notes:

> The American founders did not create their experiment on religious liberty out of whole cloth. They had more than a century and a half of colonial experience and more than a millennium and a half of European experience from which to draw both examples and counter-examples.

J. Witte at 1.

Many of the Americans who participated in the drafting of the Constitution and the Bill of Rights viewed the Western historical precedents not as something to be carried forward, to be sure, but rather something to be avoided. James Madison succinctly described that bloody Western history as a "career of intolerance." *Id.* at 2. Another writer at the time – referring to the adoption of Christianity by the Holy Roman Empire under Emperor Constantine – summed up the history as follows:

> No doubt, Constantine the Great, who first established christianity, had a good intention in the same; but all the darkness that has since overspread the Christian church, the exorbitant power of the popes and church of Rome, all the oceans of blood that have been shed in the contests about religion, between different sects of Christians, the almost total cessation of the progress of christianity, the rise of Mahometanism, the rise and spread of deism, the general contempt in which christianity is fallen; all may fairly be laid at the door of that establishment.

Id. at 2, quoting Winchester, "A Sermon."

Thomas Jefferson put it similarly in commenting on the effort of people throughout the centuries to proselytize, pursue their particular religious beliefs, and impose the same on others. As Jefferson stated both succinctly and graphically: "Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity." Jefferson, *Notes of the State of Virginia (1781-1785),* in THE COMPLETE JEFFERSON.

North Carolinian James Iredell eloquently described Western religious and persecution as follows:

> Every person in the least conversant in the history of mankind, knows that dreadful mischiefs have been committed by religious persecutions. Under the color of religious tests the utmost cruelties have been exercised. Those in power have generally considered all wisdom centered in themselves.

> That they alone had a right to dictate to the rest of mankind, and that all opposition to their tenets was profane and impious. The consequence of this intolerant spirit had been, that each church has in turn set itself up against every other, and persecutions and wars of the most implacable and bloody nature have taken place in every part of the world. America has set an example to mankind to think more modestly and reasonably; that a man may be of different religious sentiments from our own, without being a bad member of society.

North Carolina ratification debates, in J. Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1854),[1] Witte at 2-3.

With the complementary religious freedoms of the First Amendment – the Free Exercise Clause and the Establishment Clause – the Framers hoped to chart a different course for the United States. On this course, it was the aim that all would have the right to freely pursue their religious beliefs, or belief in non-religion, without distinction, persecution, or coercion. And at the same time, there would be no establishment of religion by the national government. The First Amendment thus states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Because the First Amendment, as drafted, explicitly applied only to the national government, the states were initially free to adopt or forego any form of the free exercise and disestablishment principles. Indeed, there was all variety of different state constitutions adopted from the end of the eighteenth century to the mid-twentieth century – well over a hundred in total. Georgia was one of the leading states in promulgating new constitutions, with eight new versions as of 1945. Witte at 107.

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[1] Elliot's treatise has an importance on the order of Farrand's work concerning records and documentation of the original debates. *See, M. Farrand,* THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, Vols I-IV (1966 ed.).

While a number of these constitutions provided language prohibiting the establishment of religion by the government, others made no mention of the issue, which may have been a reflection of the remoteness of the perceived threat of the state establishing religion as a practical matter. As one would expect, there was significant variety among the laws of the states regarding both the free exercise of religion and the establishment principle concerning the separation of the state and religion.

As a practical and legal matter, most of the issues concerning religion and government were thus resolved by the states pursuant to their constitutions and organic law. That changed, of course, after the Fourteenth Amendment was adopted. As with most other provisions of the Bill of Rights, the First Amendment was fully incorporated and applied to the states through the Fourteenth Amendment. The original limitations against the "congress" became proscriptions, as well, against the states. *See Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Everson v. Board of Education*, 330 U.S. 1 (1947).

During the past 60 years, the Establishment Clause and its coordinate principles of the separation of church and state and the disestablishment of religion have, at different times, become firmly established; criticized among substantial segments of the body politic (and demagoging politicians); and more recently been eroded to permit the government more support for and participation in religious activities. How far the Supreme Court would go with its present composition is something that can be reasonably guesstimated in light of past split decisions of the Court, read in conjunction with the recent changes in the Court's membership. How far the Court might go in the event even more Justices of the very conservative bent exemplified by Justices Robert

and Alito joined the Court is a good subject for speculation, though speculation it is.[2]

A. **A Brief Overview of Establishment Clause Jurisprudence from the 1940's to the Present**.

A fundamental question in determining the bounds of the Establishment Clause has been whether the clause prohibits both the preference, or establishment, of one religion or another, and also the preference for religion itself over non-religion. As a practical matter, of course, any affirmative government support or participation in religion – even in the absence of a formally declared "official" religion (i.e., the full "establishment" of ***a*** religion – involves some promotion of religion and some entanglement of government with religion.

At the same time, a completely strict and absolute "separation" of government from religion, to the point of avoiding any interaction between government and religion, would lead to results that most would see as impractical and unnecessary, if not utterly bizarre. For example, there is some degree of "entanglement" between church and state simply by providing municipal services to religious facilities on the same basis as they are provided to other institutions and to the citizenry at large. Yet, few if any would suggest that parochial schools or churches should not receive municipal services like water, sewer, fire and police protection.

The overriding principle for decades has been that: "The First Amendment

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[2] The chances of President Bush appointing another ultra-conservative to the Supreme Court before the end of his term would appear unlikely, though certainly not impossible. It remains anyone's guess what kind of appointments might occur during the next President's term, but there are at least two Justices who are either very advanced in age or have had significant health problems, so the likelihood of some change in Court personnel is reasonably likely in the not too distant future.

mandates governmental neutrality between religion and religion, and between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Epperson, supra* at 15-16; *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985). Under that principle, the Court has wrestled with formulating a framework for analyzing when government participation in religious affairs is so incidental as to be permissible, and when it is too intrusive, substantial, or promotional of religion to be prohibited.

From 1970 until 1997, the Supreme Court usually performed this analysis under the so-called *Lemon* test that was articulated in *Lemon v. Kurtzman* 403 U.S. 602 (1971). The three parts of the *Lemon* test required a determination by the courts of: (1) whether the law or practice at issue had a secular purpose; (2) whether the primary effect of the challenged practice or law advanced or inhibited religion; and (3) whether the challenged law or practice created an excessive entanglement between religious institutions and government. Thus, the law or governmental practice violates the Establishment Clause, under the *Lemon* test, unless its purpose is secular; its primary effect neither advances nor inhibits religion; and there is no "excessive entanglement."

The history of the *Lemon* test has been strange, to the say the least. More than once, a majority of Justices have stated that the *Lemon* test was no longer subscribed to by most members of the Court. In other cases, the *Lemon* test was effectively ignored where the Court found the challenged practice violative of the Establishment Clause. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lee v. Weisman*, 505 U.S. 577 (1992)

Still, *Lemon* has continued to be used on occasion in even some of the most recent decisions of the Supreme Court that were handed down in 2005. Apparently, no

majority of the Court has been able to devise a more principled decision that can be applied to a broad range of cases in a predictable, coherent, and convincing fashion.

In 1997, the Supreme Court decided *Agostini v. Felton*, 521 U.S. 203 (1997), which overruled the relatively recent decision *Aguilar v. Felton*, 473 U.S. 402 (1985). *Aguilar* and a companion case, *Grand Rapid School District v. Ball*, 473 U.S. 373 (1985), held that the Establishment Clause prohibited school districts from using public employees to provide remedial classes at religious schools. The fact that the remedial help was provided in a secular context in those schools – e.g., the classes were provided in areas of the private religious schools that did not have religious symbols – did not save the program. Neither did the fact that these public employees participated in no religious instruction satisfy the Establishment Clause.

While purporting not to substantially modify the *Lemon* test, *Agostini* came to the opposite result in 1997, holding that public schools could provide such general educational assistance, of a specifically non-religious character, to students at religious schools. Among other things, the dissent pointed out that such subsidies to the operation of a religious institution were, as a practical matter, indistinguishable from a more general, and effectively unrestricted subsidy. With government paying for part of the operational expenses of the religious school at issue, more of the funds of the school were available for religious teaching and operation. Taken to the extreme, such "non-religious assistance" could make viable a religious school that, without such assistance, could not function. While that scenario was not presented in *Agostini*, the problem of line drawing, once some subsidy is permitted, becomes extremely difficult.

In a decision soon after *Agostini*, the Supreme Court could not provide a majority opinion regarding what *Agostini* actually meant, nor how the constitutional test set forth in *Agostini* should be applied. *See, Mitchell v. Helms*, 530 U.S. 793 (2000).[3] *Mitchell* upheld a government program that provided non-religious educational materials to private schools generally, including private schools with religious affiliations. The plurality opinion in *Mitchell* read *Agostini* to permit any kind of assistance to religious schools if that assistance was, itself, not religious in its specific character. As to the obvious fact that such non-religious assistance necessarily facilitated the ability of the school to provide religious education, the plurality was untroubled. Indeed, Justice Thomas' opinion would permit such assistance programs even if the school were to divert the aid it received to directly support religious activities! One could read in that approach, of course, a general view of the plurality that direct subsidies to religious institutions – so long as it is done without discrimination from one religious institution to another – would no longer violate the Establishment Clause.

The two concurring Justices who agreed with the plurality that the program in *Mitchell* was constitutional would not go that far. They believed that ostensibly religiously neutral aid satisfied the Establishment Clause if and only if it was in fact religiously neutral. If the recipient was diverting such aid to support religious instruction, they believed that would transgress the Establishment Clause. Only Justices Souter, Stevens, and Ginsburg dissented, with a view that was anything like the majority

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[3] The judgment of the Court was announced in a plurality opinion written by Justice Thomas, joined by Rehnquist, Scalia, and Kennedy.

opinion in the 1985 *Aguilar* decision.[4]

The issue of direct subsidies to religious institutions arose again not long after *Agostini*. In *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), the Supreme Court upheld a government tuition voucher program which could be used at private as well as public schools. The 5-4 decision purported to give lip service to the "purpose and effect" test that had been articulated in *Lemon v. Kurtzman*. According to the majority's opinion, authored by Chief Justice Rehnquist, those Establishment Clause values were satisfied because the tuition voucher program at issue was created to give parents a choice of schools, including both private and public schools. The fact that those private schools might be religious was of no consequence to him.

Before *Lemon* was decided, the Supreme Court upheld in *Board of Ed. v. Allen,* 392 U.S. 236 (1968), a New York law that required public schools to loan text books to students in all schools, whether public or private. The statute and the program pursuant to it resulted in text books being provided to parochial school students. The school books at issue were specifically for secular studies and had to have been approved by the school board as secular in nature. The majority's opinion rested on the view that the purpose of the statute was a secular one – the promotion of educational opportunities of all children, regardless of where they attended school – and the belief that teaching secular subjects in a religious school sufficiently separate from religious values did not improperly promote religion.

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[4] *Mitchell* overruled two contrary decisions from the 1970's, *Meek v. Pittenger,* 421 U.S. 349 (175) and *Wolman v. Walter*, 433 U.S. 229 (1977).

There have been many other Establishment Clause cases decided in a variety of subject areas. Although generally not quite as dramatic as the abrupt switch exemplified by *Aguilar* to *Agostini*, those decisions, too, reflect a drift in the willingness of the Supreme Court to relax the historic separation of church and state. The Court over the last 20 years is more willing to allow government support of religion, and the participation of religion in government.

II. PARTICULAR APPLICATIONS OF ESTABLISHMENT CLAUSE JURISPRUDENCE

1. *Genesis, evolution, Darwin and "intelligent design"*

For a century, the clash between religious belief and observed fact – i.e., literal biblical creation and evolution, as developed by scientific inquiry – has been a core conflict under the Establishment Clause. Religious adherents to a fundamentalist view of creation are, under the Free Exercise Clause, entitled to believe and advocate whatever they think the Bible might literally say as revealed truth. Under the Free Speech and Free Exercise clauses, neither the state nor the federal government can limit their advocacy of those views. It is another matter when those religious views are made the basis of government teachings, based as they are on religious philosophy and an acceptance of purported fact not because of the facts themselves, but because of the *a priori* assumption that "fact" must be as certain religions adherents choose to interpret the Bible.

Most famous, of course, in this long conflict between observed fact and "facts of faith," was the Scopes trial and Clarence Darrow's cross-examination of William Jennings Bryan, his opposing advocate and, ultimately, a witness for the state. The actual judgment in the *Scopes* case is almost an historical after-thought in comparison

to the trial itself. Scopes was convicted, given a nominal fine, and that was the end of the case.

It was not until 1968 that the Supreme Court was directly confronted with the issue of whether anti-evolution policies were unconstitutional. *Epperson v. Arkansas*, 393 U.S. 97 (1968). In *Epperson*, the state specifically made it unlawful for public school teachers to teach a theory of human biological evolution. The statute was unconstitutional because its purpose was religious in that it banned teaching of a fact-based view of the world because that view contradicted the religious tenets of some people. The government had lost all pretense of "neutrality" where it singled out certain information and proscribed it simply because it conflicted with a religious belief.

Neither *Epperson* nor the enormous factual record that supports evolutionary theory came close to ending the effort of biblical literalists to advocate and impose their views in the public schools. The ongoing struggle has certainly been interesting from a philosophical point of view. Fundamentalists claim "foul" by asserting, among other things, that their world view has somehow become constitutionally excluded from the public school system under the First Amendment, while a "godless" world view has become mandatory in the public schools. In fact, evolution does not address whether there is or is not a god or gods anywhere in the scheme of evolution or origin. Rather, evolution is a fact and observation based explanation of many thousands of years of animal and plant evolution. Creationism, intelligent design, genesis, or any of the other such constructs, on the other hand, is based on a religious belief that a particular interpretation of the Bible is necessarily and inevitably true because it is revealed word. Staunch adherents would say that that view is unchallengeable precisely because it is

revealed, regardless of what observed facts might indicate. The "competition" is thus not simply one between two world views – one science based, one religious in origin – it is the "competition" between the facts as we are best able to observe them, and an assumption about facts regardless of what the evidence indicates. Creationism has foundered in the courts because of this, not because of a judicial preference for science over religion. The flaw in "creationist" theories is that they are not based on observable fact, but rather on religious belief.

Thus, in *Edwards v. Aguilard*, 482 U.S. 578 (1987), the Supreme Court again invalidated a legislative effort to inject religious theory into the classroom as purported science. The effort to create an appearance of science to justify religious belief as a theory of origin was termed "scientific creationism" in the 1970's and the 1980's. The Louisiana statute at issue required any public school that taught scientific evolution to also teach "scientific creationism." The statute was invalidated because it promoted religion in violation of the Establishment Clause.

Consistent with *Edwards v. Aguilard*, a public school could have a course that taught the religious theories of the origin of mankind without concern for the scientific integrity of any of those theories. So long as the course were presented as an analysis of cultural views of origin, rather than a scientific course, there should be no problem. Indeed, given the great variety of historic myths regarding the origin of higher species among many different cultures in the world, such a course might draw an unusual amount of student interest! It is unlikely that fundamentalist advocates would ever consider such an option, however, since to do so would conflict with their basic proposition that it is only their belief that can be correct, and it would conflict with their

desire to promote their religion.

With the decline of scientific creationism came the successor strategy, “intelligent design.” The linchpin of intelligent design theory was that the world is so complex that there “has to be” a greater intelligence behind it – i.e., god – which drove, engineered, conceived of, and caused the world to appear as it is. Of course, the exact opposite conclusion is at least equally tenable, that the observed complexity is such that no such supernatural individual could possibly have designed, engineered, and created the world as it exists. Be that as it may, intelligent design had become sufficiently popular in recent years that none other than President Bush opined that it should also be taught in schools together with evolution. Whether the President actually believed that or whether his stated view was simply a political expression, is an inquiry beyond the scope of this paper.

Intelligent design crashed down spectacularly in a recent decision involving the Dover Pennsylvania School District. *See, Kitzmiller v. Dover Area School District*, 400 F.Supp.2d 707 (M.D.Pa 2005). As one feels constrained to do these days, it should be noted at the outset that the judge who heard and decided the case was a “conservative Republican” appointee. To the extent that one might have found anything legitimate in the intelligent design theory of origin, one might have expected that court to have so found.

In fact, in a lengthy and painstaking analysis of the evidence, the court found intelligent design to be a sham, an immediate and contrived descendant of scientific creationism. When the previously hidden history of intelligent design was peeled back, intelligent design was found to be the very same doctrine that constituted “creation

science," simply presented in a new dust jacket. Were it not for the serious consequences of modern no-nothingness that comes from putting absolute belief ahead of observed fact, the events in Dover Pennsylvania would just be amusing and entertaining. One employee of the school district burned an evolutionary mural, and the chairman of the school board's curriculum committee "gleefully watched it burn." 400 F.Supp.2d at 753. Public school board meetings were scenes of emotional religious invocations, accusations, and counter-accusations. As the court noted: "there were accusations of Atheism and un-Americanism, and many tears were shed." The chairman of the curriculum committee was, at least, candid in his view of what should dictate curriculum: "2000 years ago someone died on a cross. Can't someone take a stand for him?" 400 F.Supp.2d at 752.

Fortunately, no witches were burned. The teaching of intelligent design, however, was permanently enjoined. The Court found that the efforts of the creationists to characterize evolution as a "mere theory" was nothing less than a religiously motivated effort to distort observable facts and evidence for the purpose of advancing religious belief.

In *Selman v. Cobb County School District*, 449 F.3d 1320 (11th Cir. 2006), reversing, 390 F.Supp.2d 1286 (N.D.Ga 2005), the school board required that a sticker be attached to the inside of the front cover of biology text books. The sticker stated: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered."

Counsel to the school board had drafted this statement, which was adopted

unanimously by the school board after counsel advised the board that intelligent design could not constitutionally be taught. The district court ordered removal of the sticker. On appeal, the Eleventh Circuit vacated and remanded because of confusion over the actual evidence that had been admitted and the exclusion of significant evidence from the record on appeal. The case was settled on remand with the entry of a consent order permanently enjoining the use of the stickers. Order of Dec. 19, 2006, Civ. No. 1:02-cv-2325-cc.

2. *Displaying the Ten Commandments on Public Property*

The Supreme Court decided two companion cases involving this issue in 2005, *McCreary County v. ACLU*, 545 U.S. 844 (2005) and *VanOrden v. Perry*, 545 U.S. 677 (2005). The former case arose from Kentucky, the latter from Texas. The posting of the Commandments in the McCreary County, Kentucky courthouse was found to violate the Establishment Clause. The presence of a monument inscribed with the Ten Commandments on the grounds of the Texas State Capitol was held to be permissible.

The specific contexts in which the Ten Commandments were displayed are certainly different. In *McCreary*, they were inside the county courthouse where litigants, jurors and other members of the public must come for official business. In Texas, the display was outside, in a monument on public property. The difference in the outcome of the cases did not turn on that fact, however. Moreover, one might question whether *McCreary* would be decided the same today. It was a 5-4 decision, and Justice O'Connor, who joined the majority opinion, has been replaced by a Justice who is more likely to permit religious advocacy in government.

Twenty-five years earlier, in *Stone v. Graham*, 449 U.S. 39 (1980), the Supreme Court held that a state statute requiring the posting of the Ten Commandments on the wall of each public classroom contravened the Establishment Clause. Although the legislation purported to be based on a secular purpose (though transparently so in an effort to circumvent the *Lemon* test), the Supreme Court held that the statute was "plainly religious in nature" and had no secular legislative purpose.[5]

The *McCreary* opinion, at the outset, re-affirms the validity of *Stone*. *McCreary* also reiterated the Establishment principle that "the First Amendment mandates government neutrality between religion and religion, and between religion and *non*-religion." 545 U.S. at 860 (italics added). Following the holding in *Stone*, the Court reiterated that the Ten Commandments are "an instrument of religion," and the display of the text "can presumptively be understood as meant to advance religion." Still, both *Stone* and *McCreary* acknowledge that the constitutionality of a Ten Commandments display depends upon how, where, or why they are displayed by the government in a particular case. "The question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the context in which the contested object appears." *Id.* at 868, quoting from *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989).

As a matter of fact, the history of the Ten Commandments display in the McCreary County Courthouse may be more troubling than the ultimate way they were

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[5] The state law in *Stone* required that the following language appear at the bottom of each posted copy of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as a fundamental legal code of Western Civilization of the United States." 449 U.S. at 40, n.1.

displayed when the case was finally tried. The religious purpose of placing the Commandments in the courthouse initially had been relatively obvious and explicit. But the display had evolved before the district court's final decision, as the county was attempting to maintain the display while avoiding an adverse federal order. While acknowledging that an improper initial purpose would not taint an otherwise constitutional display of the Ten Commandments at a later time, the majority held that the history leading up to the final display was properly considered by the district court in its finding that the purpose of including the Ten Commandments in the final display was a religious, non-secular one.

The final display at issue was an exhibit entitled the "Foundations of American Law and Government," which placed the Commandments in the company of other documents that the county thought especially significant in the historical foundation of American government. Among other purposes the county proffered to the district court in this third version of the Commandants display, was an alleged desire to "educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." 545 U.S. at 871. The majority concluded that the finding of religious a purpose by the lower court was supported by the evidence, and affirmed the injunction against the display.

The dissent by Scalia, joined by Rehnquist and Thomas, includes a diatribe advocating a greater role for religion in government and acerbically criticizing the majority. Scalia advocates and endorses the advocacy of religion and god by government officials when acting in their official governmental capacities under the notion that "governmental invocation of god is not an establishment" of religion. 545 U.S. at 900.

In coming to this position, Justice Scalia and the other two Justices who joined that part of the dissent not only brush aside the historical objective of the Establishment Clause of protecting citizens from the imposition of any religion upon them, they also dismiss as effectively irrelevant the "more than 7 million Americans that adhere to religions that are not monotheistic." *Id.* at 899. The government can constitutionally promote "god" over the views of such polytheists, according to Scalia, because "the overwhelming majority of religious believers" in the United States are monotheistic. "Our national tradition resolved [this] conflict in favor of the majority." *Id.* at 900.

Justice Scalia's analysis of these issues under the Establishment Clause is short and sweet. He simply proclaims the issue to be outside the bounds of the First Amendment. As he puts it, "governmental invocation of God is not an establishment." *Id.* Because "many Americans think" that "God watches over . . . the United States," the Court should not read the Constitution to separate God from government. *Id.*

Though concurring with the dissent otherwise, Justice Kennedy did not join that extreme viewpoint. Instead, he joined only parts II and III of the dissent, which (1) found the *Lemon* test minimally helpfully, at best, in deciding the *McCreary* case and (2) concluded that the *Lemon* test should have been found to be satisfied by McCreary County if it did apply. Those parts of the dissent casually dismiss the notion that the presence of the Ten Commandments in the courthouse might create "subtle" pressure on persons there. The point was also made in dissent that no one was compelled to observe any "religious ceremony or activity," but, of course, litigants – and maybe most importantly, jurors – were indeed required to observe the religious tract in participating in county business.

In *VanOrden v. Perry, supra*, the Court upheld the display of a Ten Commandments monument on the capitol grounds by a vote of 6-3 (Stevens, Ginsberg, and O'Connor dissented). There was no opinion joined by a majority. A plurality opinion, authored by Chief Justice Rehnquist, unsurprisingly found the *Lemon* test "not useful in dealing with the sort of passive monument that Texas has erected on its capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Id.* at 686.

The fact that this and similar displays had been used in different places within the United States for many decades was deemed very significant in upholding the constitutionality of Texas' capitol monument.

> Our opinions, like our building [i.e., the Supreme Court building], have recognized the role the Decalogue plays in America's heritage. The Executive and Legislative Branches have also acknowledged the historical role of the Ten Commandants. These displays and recognitions of the Ten Commandments speak the rich American tradition of religious acknowledgments.

Id. at 689-90 (citations omitted).

Of course, the Ten Commandments are religious – they were so viewed in their inception and remain so today.

> The [Texas] monument, therefore, has religious significance . . . but Moses was a law giver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning . . . . Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.

Id. at 690. Justice Rehnquist's opinion would appear to endorse the Supreme Court's earlier holding in *Stone v. Graham,* 449 U.S. 39 (1980), invalidating the requirement of the display of the Ten Commandants in public schools. He does so by discussing *Stone*

in a non-critical way, and writing that *Stone* stands as an example of the fact that we have been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. *Id.* at 690-91. The dissent's kind words for *Stone*, however, are most likely disingenuous. In fact, *Stone* was a *per curriam* opinion that elicited four dissents, including a separate one by Rehnquist.

3. <u>*Other Religions Displays on Public Property*</u>

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court upheld a municipal crèche display in a public park as part of a Christmas holiday display. That was justified in large part by a long history of such governmental displays by all levels of government in the United States for many years. Oddly, Chief Justice Burger's opinion for the Court also minimized the religious significance of such crèches, calling them "purely secular displays extant at Christmas" that created a "friendly community spirit of goodwill" and brought people into the city to "serve commercial interests and benefit merchants." *Id.* at 680-86.

Only five years after *Lynch*, the issue of public religious displays and crèches came before the Court again. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). The opinions of the Court were badly fractured, but the result subscribed to by a majority of the Court indicated that they would look closely at the context of the display to determine its constitutionality. Thus, the majority agreed that a crèche depicting the Christian Nativity Scene placed in the Grand Staircase of the Allegheny Courthouse – described as the main focal point and "most public part of the courthouse" – was found to violate the Establishment Clause. Not insignificantly, the crèche – which had been donated by a Roman Catholic group – bore a sign proclaiming that origin, and the crest

of the manger had an angle bearing a banner that proclaimed "Glory to God in the Highest" in Latin. The majority wrote that, while government may acknowledge Christmas as a cultural phenomenon, it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus, which is precisely what the words of the banner stated.

On the other hand, a second holiday display was found constitutional. That display was an 18-foot Chanukah menorah which had been placed just outside the city-county building next to the city's 45-foot decorated Christmas tree. In front of the tree was a sign bearing the Mayor's name and declaring the city's "salute to liberty." This display was found not to have the prohibited effect of endorsing religion given its "particular physical setting," including its juxtaposition with the Christmas tree and the sign saluting liberty. Significantly, Justice Kennedy dissented with regard to the crèche display. He believed that both displays were constitutionally permissible. As Justice Kennedy wrote: "The [majority's] view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history . . . ." 492 U.S. at 655.

4. *<u>Public School: Bible Reading and Prayer</u>*

Religion and prayer may be the subject of a legitimate class in a public school without transgressing the First Amendment in any way. The Establishment Clause comes into play, both in the classroom context and in other school contexts, when religious advocates seek not a neutral presentation or a study of religious history, comparative religious beliefs, cultural forms of worship, and the like – but to instead inject religion into the public school as a reflection of their particular beliefs.

Proselytizing and endorsing religion has been prohibited in the public school context. In *Engle v. Vitale*, 370 U.S. 421 (1962), the Supreme Court struck down a New York School Board practice of school prayer, where the prayer was purportedly "non-denominational" and had been written by government representatives.[6] The School Board required the school principals within the district to cause this prayer to be said aloud by the class in the presence of a teacher at the beginning of each day.[7] "There can, of course, be no doubt New York's program of daily classroom of God's blessings as prescribed in the Regents' prayer is a religious activity." 370 U.S. at 424. For that reason, the Court agreed that:

> The State's use of the Regents' prayer in the public school system breaches the Constitutional wall of separation between Church and State . . . [W]e think that the Constitutional prohibition against laws respecting an establishment of religion must at least mean that in this county 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.

Id. 425.

Shortly thereafter, in *School District v. Schempp*, 374 U.S. 203 (1963), the Court was faced with "voluntary" bible reading in the use of the Lord's prayer. *Schempp* involved two companion cases. In the Pennsylvania case, a statute required that "at least ten versus from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." Any student could be excused from either

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[6] Only Justice Stewart dissented, but two Justices did not participate in the decision.

[7] The entire prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teaches and our Country." 370 U.S. at 422.

participating in the reading or attending the Bible reading if she/he presented a written request of his parent or guardian.[8] In the companion Maryland case, the school board's rule provided for a morning "reading, without comment" of a chapter in the Holy Bible and/or the use of the Lord's Prayer. *Id.* at 211. At the time of trial, that rule also permitted students to be excused on the request of a parent.

Again, Justice Stewart was the only dissenter. The majority reconfirmed the *Everson* rule, that the "Establishment Clause forbids [not] only governmental preference of one religion over another," but "preference of religion over non-religion as well." *Id.* at 216. "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* As such, the intrusion of religious worship into the classroom contravened the Establishment Clause.

Following *Schempp* and *Engle*, a variety of states and local government adopted requirements or policies regarding a "minute of silence," during which time students would be allowed to think, meditate, or pray silently. One variety of those efforts came before the Supreme Court in *Wallace v. Jaffree*, 472 U.S. 38 (1985), but the statute that ultimately went before the Court in *Wallace* was more than just an "unrestricted meditation or prayer" effort. In *Wallace*, the Alabama legislature had enacted a series of statutes. The first provided for a "period of silence not to exceed one minute that should be observed for mediation." The second authorized a period of silence "for meditation

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[8] One of the parents testified that he had thought about having his child excused from the class, but then decided otherwise because of his concern that his children would be "labeled as odd balls;" that they would be labeled "Atheists" (which they were not); that they would be considered "communist" and "unAmerican;" and that being excused from class would likely cause them to miss other general announcements made immediately after the Bible reading.

or for voluntary prayer." A third Alabama statute went much further, proclaiming that any Alabama public school teacher, recognizing that the "Lord God is one," could begin any class with a prescribed prayer. As the last effort was patently unconstitutional in light of *Schempp* and *Engle*, the Court addressed the second statute. But rather than determining whether a statute providing for a moment of silence "for meditation or voluntary prayer" was generally constitutional, a majority of the Court found the statute unconstitutional because, in that instance and on the record in the case, the statute was clearly motivated by a purpose to advance religion as a matter of fact. As the Court states, the "legislative intent to return prayer to the public schools is . . . quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day." 472 U.S. at 58.

The next big school prayer case was *Lee v. Weisman*, 505 U.S. 577 (1992). The school district in *Lee* permitted high school and middle school principals to invite members of the clergy to give invocations or benedictions at graduation ceremonies. Not unlike the approach in *Engle v. Vitale*, *supra*, guidelines had been adopted in an effort to have prayers delivered that would offend the fewest people. Those guidelines came from the National Conference of Christians and Jews for public prayers at civic ceremonies.

In a 5-4 decision, *Lee* held that this practice violated the Establishment Clause. As noted below, neither the majority nor the dissent believed that the supposedly "non-sectarian" nature of the prayer advanced the school district's case. Justice Kennedy's majority opinion in *Lee* eschewed a complex *Lemon* purpose analysis. Instead, he wrote that "the controlling precedents as they relate to prayer and religious exercise in primary

and secondary public schools compelled" the court's holding. Of some interest in light of the continuing drift to more permissive treatment of religion in government, it should be noted that Justice Kennedy's majority opinion rejected the view that an Establishment Clause violation required, as a predicate, proof that either (1) individuals are forced to modify their religious beliefs or (2) that people were required to act in a way that was contrary to their beliefs. In addition, the majority held that the government may not require "anyone to support *or participate* in religion or its exercise." 505 U.S. at 586 (italics added). Furthermore, these concerns are greater in the elementary and secondary public schools, where "subtle coercive pressure" is particularly problematic. The four dissenters were Scalia, Rehnquist, White and Thomas. In addition to Kennedy, the majority included Blackmun, Stevens, O'Connor, and Souter.

Lee was reaffirmed by a 6-3 vote in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). In *Santa Fe*, the school district permitted public high school students to select one member of the class to give a "non-sectarian" prayer at high school football games. The practice was held to violate the Establishment Clause. The Court held that there was no significance to the fact that the students themselves participated in both the adoption of the rule and selecting the prayer giver. Neither was the fact the football game attendance was voluntary require a different result. As Justice Stevens' majority opinion noted, in fact, some students were required to be there, at least if they were a member of the football team or the school band. The program was unconstitutional because it had the prohibited "effect of coercing those present *to participate in an act of religious worship*." 530 U.S. at 311 (italics added).

5. *Public School Accommodation of Separate Religious Instruction*

A couple of cases have been decided concerning the possibility of public school students receiving religious instruction during the normal school day. In the first of these cases, *Illinois Ex Rel. McCollum v. Board of Ed*, 333 U.S. 203 (1948), the Court held unconstitutional a program whereby teachers came into the public school during the school day to give religious instruction. The students who participated were only those who had requested such instruction. The religious program took place during the regular school day, and for those students who were not participating in the religious activities, they were required to participate in the regular public school program during that time. This system was found to be a direct aid to religion because the school board's facilities were materially used for, and advancing, what was undisputedly a religious program.[9]

Not long after, in *Zorach v. Klauson*, 343 U.S. 306 (1952), the Court upheld a program whereby religious instruction was given to public school students at other locations, albeit during the regular school day. The school attendance requirement stipulated that students either be in school or at religious classes. The majority upheld the program, noting that government facilities and funds were not used to advance the religious purpose of the education. No religious instruction, religious dogma, or worship occurred on public property.

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[9] Only Justice Reed dissented. Reid may be most infamous for the fact that he was the last Justice to join the unanimous opinion in *Brown v. Board of Education*, and as history tells it, he did not join because of any philosophical agreement with the Court's opinion. Rather, he simply thought that, institutionally, it would be better if the Court were unanimous rather than split 8-1.

6. *Public School Access by Religious Student Groups*

In an effort to ensure a rigorous separation of church and state, some public schools prohibited the use of school facilities for religious student organizations. In *Widmar v. Vincent*, 454 U.S. 263 (1991), the Supreme Court found such a rule at the University of Missouri unconstitutional where non-religious student organizations were permitted to use school facilities.

In 1984, Congress passed the Equal Access Act, 20 U.S.C. § 4071, which requires secondary schools that receive federal financial assistance to provide equal access to a range of student groups. The statute was held constitutional in *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). This statute was passed because of "perceived discrimination against religious speech in public schools and [to] overturn two appellate court decisions that had held that allowing student religious groups to meet on campus . . . would violate the Establishment Clause." *Colin v. Orange Unified Sch. Dist.*, 83 F.Supp.2d 1135, 1142 (C.D.Ca. 2000).

Substantively, the statute requires covered schools that have a "limited open forum" to afford that forum equally to other groups. Specifically, the school may not deny access "on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a). As a matter of fact, the statute may not have had quite the impact that its congressional supporters intended. Most recently, and maybe most commonly, it has been used to compel access to gay and lesbian student organizations and gay/straight alliances. The White County Georgia school system was the subject of such an injunction last year. *White County Peers Arising in Diverse Education v. White County Sch. Dist.*, 2006 WL 1991990 (N.D.Ga. 2006). This month,

a federal judge issued a similar injunction against the Okeechobee County, Florida, School Board. *Gay/Straight Alliance of Okeechobee High School v. School Bd. Of Okeechobee County,* 2007 WL 1031701 (S.D.FL. April 6, 2007).

The issue of access to school facilities by private groups came before the Supreme Court again in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). There, the school district allowed school facilities to be used by local residents generally when school was not in session for all kinds of educational, artistic, and other activities and events. The Christian Organization for Young Children sought to use the school cafeteria under that policy for weekly meetings, singing, bible lesson, and the like. Notwithstanding the desire of the school board to avoid any apparent endorsement or support of religious activities in a good-faith effort to enforce Establishment Clause principles, a majority found that district's policy unconstitutional under the Free Speech Clause because it was deemed to be based on "viewpoint" discrimination. The majority came to that conclusion notwithstanding the fact that all religions, religious groups, and religious activities were treated exactly the same.[10]

In a related issue, the Court addressed whether a university could decline to pay for publication costs of a religious student organization where the university funded the cost of other student organization publications. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). In a 5-4 decision, the Court ruled that

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[10] Query whether there is any "breathing space" between situations that would constitute a violation of the Establishment Clause and those which violate this view of the Free Speech Clause. In other words, if a governmental entity seeks to maintain a wall of separation between church and state that is greater than the minimum requirement of the Constitution, will it be found to be committing unconstitutional "viewpoint" discrimination?

the university also violated the Free Speech Clause in this context, even though there was no discrimination among religions. All religious organizations had to be placed on the same footing as nonreligious groups.

7. *Public School Bus Transportation to Religious Schools*

_____In the first case where the Supreme Court applied the Establishment Clause to the states under the Fourteenth Amendment, *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court concluded in a 5-4 decision that it was constitutional for a local school board, pursuant to state law, to reimburse the parents of students at both public and private schools for the amounts they spent on bus transportation. As a matter of fact, the only private school in the district at issue was a Catholic school. The majority was of the view that providing free transportation to all children on an equal basis constituted the provision of a general governmental service that benefitted all children, not unlike municipal services such as fire and police protection. The dissent by Justice Rutledge is noteworthy not only because of Justice Rutledge's analysis, but also because of the cataloging he provides of the many historical facts and circumstances that led to the drafting of the Establishment Clause. *See,* 330 U.S. 1, 333-43 (Rutledge, J., dissenting).

Everson is particularly interesting because one of the five Justices in the majority, Justice Douglas, later wrote that his vote in *Everson* was in error. *See Engle v. Vitale*, 370 U.S. 421, 443-44 (Douglas, J., concurring). Notwithstanding Justice Douglas' later-expressed view, *Everson* was never over-ruled and remains the law today. In light of recent developments in Supreme Court jurisprudence under the Establishment Clause, and in particular in light of the increasing hostility to the Establishment Clause evidenced by the most conservative Justices, one can reasonably assume that *Everson*

will remain the law for the foreseeable future.

8. *Tuition Tax Credits for Expenses of Religious Schooling*

Minnesota enacted a statute that permitted tax payers to deduct from their state income tax expenses incurred for "tuition, textbooks and transportation" in connection with sending their children to any public or private elementary or secondary school in the state. *Mueller v. Allen*, 463 U.S. 388 (1983). Insofar as the tax deduction was available to parents whose children attended religious schools, it was held not to violate the Establishment Clause. The statute here was different than those in earlier cases where the tax deduction was available only to parents who sent their children to ***non***public schools, thereby creating a degree of preference for private religious schools. *See, Comm. Public Education v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973).

Four dissenting Justices in *Mueller* believed the law unconstitutional because it provided an indirect financial benefit to religious schools. Because the aid was not limited to a particular, non-religious category – but rather provided general financial assistance to the parents – religious education overall was supported and advanced. That in the view of the four dissenters was "at odds with the fundamental principle that a State may provide no financial support whatsoever to *promote* religion." 463 U.S. at 417 (italics added).

9. *Other Kinds of Assistance to Religious Schools or Their Students*

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), two state programs were at issue. Rhode Island gave a 15% salary supplement to teaches who taught secular subjects in private schools where the per pupil expenditure level in the school was under that of the

public schools. Pennsylvania permitted public reimbursement to private schools of a portion of teacher's salaries and materials for secular subjects. As a practical demographic matter, it was Catholic schools that primarily received the subsidies in both states. Finding the states too involved and entangled with religious institutions, both programs were found to violate the Establishment Clause as a matter of fact.

In *Committee for Pub. Ed. and Religious Liberty v. Regan*, 444 U.S. 646 (1980), the Court upheld 5-4 a state statute that provided reimbursement to private schools for expenses they incurred in performing administrative state requirements such as conducting standardized achievement tests; forwarding student attendance data; and compiling and reporting other statistical information. The majority opinion, authored by Justice White, concluded the program had a secular purpose; that it's principal effect did not advance religion; and the reimbursement feature of the program did not excessively entangle government with religion. (If anything, it would seem that the administrative requirements themselves constituted a greater entanglement.)

10. *Tuition Subsidies and Vouchers*

Zelman v. Simmons-Harris, 536 U.S. 639 (2002), addressed Ohio's Pilot Project Scholarship Program which had been enacted in light of particularly poor academic performance among students in Cleveland's schools. In addition to providing for tutorial help for students who were in public schools, the program extended tuition subsidies/vouchers to elementary school students who chose to attend either a public or a private school that participated in the Pilot Project Scholarship program. Various community and magnet schools were designated, and it was for attendance at those schools that subsidies were available. Both religious and non-religious private schools

participated in the program.

The Court upheld this program in a 5-4 opinion authored by Chief Justice Rehnquist.[11] Among other things, the majority stated that there was no contention that the program had been enacted for a religious purpose. As to the statute's impact, the Court concluded that it did not impermissibly "advance" religion contrary to the Establishment Clause. One factor Rehnquist cited as a possible justification for the decision was that funds flowed to the religious schools not as "direct aid," but only "as a result of the genuine and independent choices of private individuals" who opted to attend those schools. 536 U.S. at 649.

11. *Financial Aid to Religious Institutions*

In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court upheld 5-4 Congress' Higher Education Facilities Act, which provided construction grants that could be used at religious schools, among others, so long as the facilities themselves were not to be used for religious activities or religious instruction. *Hunt v. McNair*, 413 U.S. 734 (1973) permitted a state to issue revenue bonds for private colleges that included schools with religious affiliations. Under the program at issue, the state actually incurred no financial obligation because the schools were required to pay the bonds with their own revenues. Still, the state's bonding issuing authority and the financial and tax benefits derived from that authority were made available to the private religious school. As in *Tilton*, any facilities constructed under the program could not be used for religious purposes. In another 5-4 decision, the Court upheld a Maryland program that provided

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[11] The four dissenters were Justices Breyer, Stevens, Souter and Ginsburg,

annual grants based on a number of factors and calculations. Only institutions that were found not to be "pervasively" religious were eligible for this assistance. In addition, as with *Tilton* and *Hunt*, the institution had to give proper assurances that funds would be used for secular purposes. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976).

Over a hundred years ago, the Supreme Court upheld government grants to church-affiliated hospitals in *Bradfield v. Roberts*, 175 U.S. 291 (1899). The rule in *Bradfield* seems alive and well today, and the case has been cited favorably by the Supreme Court in recent years. Even more than a university, a religiously affiliated hospital would generally seem to have an independent secular purpose, and purely medical functions could be more easily separated, it might seem, from religious activities and purposes.

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court upheld a federal statute that provided grants to both public and non-profit organizations that provided certain counseling and other services to pregnant adolescents. It also provided counseling to adolescents to prevent sexual relations. Generally, anything other than abortion related services and counseling were available. The statute specifically provided that religious organizations, as well as other public and non-profit organizations, could receive the statutory grants.

Given the nature of services undertaken and funded in *Bowen* – as compared to medical care provided at a hospital in *Bradfield* – the likelihood that church and state would actually remain separated under the *Bowen* scheme would appear dubious. Indeed, Justice O'Connor's concurring opinion, while joining the majority's decision that upheld the statute facially, stated the following: "This litigation raises some unusual

questions involving a facially valid statute that appears to have been administered in a way that led to violations of the Establishment Clause." 487 U.S. at 622.

While not troubled with the near inevitability of this problem, even the majority acknowledged that particular grants to "pervasively sectarian" organizations may have had the prohibited "primary effect of advancing religion." *Id.* at 622. The Court directed that, on remand, should the facts bear out that claim, the Secretary of HHS should be ordered to award grants in compliance "with the Constitution and the statute." *Id.* But in determining whether a particular grantee would be ineligible to receive funds because of its religious character, the majority wrote that it was inadequate to simply find, as the district court did, that particular grantees "were themselves religious organizations in the sense that they have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." That factor was merely "relevant" to the determination of whether an institution was "pervasively sectarian," but not conclusive. Rather, the district court should have gone further to determine whether the organization's "secular purposes and religious mission were 'inextricably intertwined.'" *Id.* at 620, n. 16.

The four dissenting Justices (Blackmun, Brennan, Marshall and Stevens), found the role of the church so pervasive and inappropriate in such grants that the statute should be stricken on its face, not just reassessed "as applied." The constitutional infirmity in the statute was not an invalid purpose, which was taken to be essentially secular, but that the statute clearly had the "effect of advancing religion." *Id.* at 634. The kind of incidents that offended the Establishment Clause were discussed in the dissent. They included patently religious advocacy concerning sexuality, intercourse,

procreation, birth regulation, and the like. *See, e.g., id.* at 625-26. What is clear from the majority's opinion is that it is willing to turn a blind eye to reality and to allow disingenuous use of public money to advance religious views as such, and to do so in an area where the views of certain religious groups (the Catholic church in particular in the instances cited in *Bowen*) are dominated by religious doctrine to the exclusion of secular concerns.

III. INVOCATIONS AND PRAYER IN PUBLIC FORUMS

A. The *Marsh* decision.

There is an on-going debate over the proper use of "history" and the "historical practice" at the time the Constitution was adopted in interpreting constitutional provisions. No doubt, history is sometimes very pertinent in construing constitutional language. In other instances, history has been used disingenuously to shore up the result a particular Justice wanted in a particular case. As an extreme example, what difference can it really make in determining whether the Fourth Amendment applies to wire taps, to note that the Framers of the Fourth Amendment never thought of, and had no intention of banning wire taps? No such thing was technically conceivable at the time, so the "historical fact" is really a non-fact.

With varying degrees of legitimacy, historical practice has played a special role in deciding a series of Establishment Clause cases. For example, Chief Justice Burger's majority opinion in *Walz v. Tax Commission*, 393 U.S. 664 (1970), upheld a state law that exempted from state taxation the property and income of religious organizations. While the Chief Justice's analysis went through the three-part purpose-effect-entanglement test of *Lemon*, historical practice played a very big part in the Court's

analysis of each element of that test. The Court noted that both the federal and state governments had given tax exemptions in such circumstances not only to religious institutions, but to non-profit and socially beneficial organizations generally, and that practice existed when the First Amendment was drafted.

In a later opinion also authored by Chief Justice Burger, the Court later upheld a municipal policy pursuant to which a city park included a display celebrating the Christmas season. The display included a Christian Nativity scene. *Lynch v. Donnelly*, 465 U.S. 668 (1984). The *Lemon* purpose-effect-entanglement test was once again evaluated with a heavy eye on the historical practice in the country dating back to the adoption of the First Amendment. Chief Justice Burger reasoned that the country's long-standing history and practice of such public displays of Christmas celebrations supported the constitutional legitimacy of the practice.

The case in which history may have been most appropriately used in construing the establishment clause is *Marsh v. Chambers*, 463 U.S. 783 (1983). *Marsh* involved the issue of whether invocations or prayers at the beginning of public meetings were permissible under the Establishment Clause. The Court's opinion was again written by Chief Justice Burger, and it again relied heavily on the practice of the First Congress itself – which authored the First Amendment – in determining that legislative prayer was permissible. Since the First Congress actually conducted such prayers[12], the court concluded that it could not have been the intent of the drafters of the establishment clause to prohibit legislative bodies from opening their proceedings with an invocation

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[12] However, there was certainly not unanimous agreement about the propriety of congressional invocations either at the time or during subsequent decades.

or prayer by a clerical figure.

Marsh framed the question before the Court as follows:

> The question presented is whether the Nebraska legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.

463 U.S. at 784. The Court answered that question with an unqualified "no." The practice was constitutional.

The Nebraska legislature commenced each day's session with a prayer offered by a chaplain who was chosen bi-annually by the Executive Board of the Legislative Council and who was paid out of public funds. The same chaplain, who was a Presbyterian minister, had served for 16 years. The prayers were recorded in the Legislative Journal and, by a specific vote of the legislature, collected from time to time into prayer books which were then published at public expense. *Id.* at 785 n. 1. In determining the constitutionality of this practice, Chief Justice Burger first looked to historical practice:

> The openings of sessions of legislative and other deliberative public bodies with prayer is deeply imbedded in the history and tradition of this country. From Colonial times through the founding of the Republic, and ever since, the practice of legislative prayer has co-existed with the principles of disestablishment and religious freedom.

Id. at 786. Specifically, *Marsh* relied on the exact practices of the members of the Congress who wrote the Establishment Clause. In that regard, *Marsh* states:

> Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently and in most of the states. . . .

Id. at 788-89 (footnotes omitted).

Marsh goes on to note that history alone "cannot justify contemporary violations

of constitutional guarantees," but that there was far more than just "historical practice" at issue in interpreting the Establishment Clause in the case of legislative prayer:

> In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent. An act "passed by the First Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning."

Id. at 790 (citation omitted). Turning specifically to the practice as it existed in the First Congress in 1789, Chief Justice Burger made the point that one cannot rationally argue that the drafters of the First Amendment meant to prohibit exactly what they were actually doing at the very time that they wrote the Amendment:

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Id. at 790. The holding of *Marsh* was thus dictated by this history:

> This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.

Id. According to *Marsh,* prayer at the opening of legislative and deliberative bodies is not the "establishment" of religion. "[I]t is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792.

Having found prayer in this context constitutional, the Court turned its attention to several specific objections *Chambers* raised to the Nebraska practice: (1) that a clergyman from the same denomination had been used, without exception, for the past 16 years; (2) that the chaplain was paid with public monies; and (3) that the prayers

being offered were in the "Judeo-Christian tradition." *Id.* at 793. The Supreme Court rejected each of these objections.

As to the first, the Court reasoned that there was no basis to the assertion that "choosing a clergyman of one denomination advances the beliefs of a particular church." *Id.* at 793. "Absent proof that the chaplain's reappointment stemmed from an impermissible motive," there was no Establishment Clause violation. The second objection – a paid chaplaincy – was deemed insignificant because "remuneration is grounded in historic practice" by the Continental Congress, by "the same Congress that adopted the Establishment Clause," and by numerous states. *Id.* at 794. As for the third objection – that the prayers were identifiably "Judeo-Christian" in nature – the Court held that the religious content of the prayers was irrelevant:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Id. at 794-95.

B. Invocation and Prayer Cases Since *Marsh*.

One might think that the ruling in *Marsh* would have ended most, if not all, litigation over invocations beginning the meetings of public bodies. That has not been the case, however. There has been litigation – and what appears to be an increasing amount of litigation – over the exact context of such invocations, the content of the invocations, who can give the invocations, and the like. While the decisions of some lower courts, including federal courts of appeals, appear to have landed all over the map, a close and true reading of *Marsh* which still seem to answer many of the questions that

are still litigated vigorously. In some instances, lower federal and state court decisions are clearly not consistent with the *Marsh* decision.

1. *"Non-Sectarian Prayer"*

In an effort to minimize public invocations as much as possible, some plaintiffs have argued that these invocations must be "non-sectarian" in order to satisfy the *Marsh* ruling.[13] What constitutes "non-sectarian" prayer should be a troubling philosophical question. While plaintiffs assume that any general expression of monotheism without a particular reference to Christ or other words specifically noting God or the Prophet may be "non-sectarian," it is difficult to understand why such monotheistic religions should be elevated over others. As will be noted later, this idea of drawing the courts into distinguishing what is "good prayer" from what is "too good a prayer" is not just philosophically problematic. As a matter of First Amendment doctrine, it is not a meaningful possibility. Courts should never have a role in looking into the content of prayer to determine whether particular content is "good" or "bad"; "too much" or "just enough"; "too religious" or "sufficiently religious lite"; etc.

In trying to weave this argument, plaintiffs and some courts have picked up on the notion of "nonsectarian prayer" that first appeared in a law review note that was

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[13] While it is beyond the scope of this paper, it should be noted that the use of the term "non-sectarian" is minimally consistent with the religious history of what has been considered a "sect." Historically, the word "sect" originated in Europe when a sect was any religious group other than the established church. In the United States, where there was no nationally established church, "sect" came to refer to minority religions that were opposed to the beliefs of the majority religion. Theologians in the United States today generally use "sect" to refer to isolationist or separatist religious groups, examples of which are the Amish or the Mennonites. If there were a constitutional rule that only "nonsectarian" prayer were permitted, that rule might well mean that explicitly Christian prayers would be permitted since they are not "sectarian."

later cited in a Sixth Circuit case. *See Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 n. 5 (6th Cir. 1987), *citing Civil Religion and the Establishment Clause*, 95 Yale L.J. 1237 (1986). Not long after *Stein*, however, the Supreme Court made it clear that courts cannot review the content of prayers to determine whether some may be permissible and others not because they are too denominationally "specific." *Lee v. Weisman*, 505 U.S. 577 (1992). The issue in *Lee* was whether a "generic" prayer that was characterized as "nonsectarian" could be presented at a public school graduation ceremony. The prayers were monotheistic; mentioned God twice and the Lord once; and concluded with Amen. *Id.* at 581-82. Not a single Justice believed that the supposed "nonsectarian" nature of a prayer lends it any additional legitimacy under the Establishment Clause. Justice Kennedy's opinion for the majority states:

> Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. . . . It is a cornerstone principle of our Establishment Clause jurisprudence that "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," *Engel v. Vitale,* 370 U.S. 421 (1962), and that is what the school officials attempted to do. . . .
>
> We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement of the Court of Appeals for the Sixth Circuit, . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. . . . If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.

Id. at 588-89 (citations omitted).

> The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

Id. at 590.

Lee goes on to specifically mention *Marsh*, and contrary to the suggestion of some litigants and courts that *Marsh* was limited years earlier in *Allegheny, Lee* gives no such suggestion. Rather, *Lee* reiterates the fundamental distinction between the *Marsh* context, where legislative prayer is permitted, and the school context, where prayer of any sort is generally prohibited. The content of the prayer had no effect on the outcome of either case, contrary to Plaintiffs' contention. *Id.* at 597.

Justice Blackmun's concurrence in *Lee* is also telling because it underscores the intractable problem of determining permissible versus impermissible prayers. Justice Blackmun notes that the supposedly "nonsectarian" prayer in *Lee* was in fact based specifically on biblical scripture:

> In this case, the religious message [the prayer] promotes is specifically Judeo-Christian. The phrase in the benediction: "We must each strive to fulfill what you require of us all, to do justly, to love mercy, to walk humbly" obviously was taken from the Book of the Prophet Micah, ch. 6, v. 8. *Id.* n. 5.

Id. at 603-04, n. 5. Mechanistically, omitting the words "Jesus Christ" may advance a particular plaintiff's religious views, but doing so hardly creates a principled "nonsectarian" prayer. Justice Souter's concurrence similarly points up the constitutional and theological quagmire invited by any rule that would permit some

prayer and prohibit others under the notion that the former were "nonsectarian." *Id.* at 617.

2. *A Review of the Decisions*

There have been only a handful of legislative prayer cases subsequent to *Marsh*, the most prominent one being the en banc decision of the Tenth Circuit, Snyder v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1999) (en banc). "Applying *Marsh*, [Snyder] hold[s] that no violation of the Establishment Clause arises when a city chooses who may offer the invocational prayer to open a city council meeting." *Id.* at 1227. Snyder is informative because, in upholding the practices of the City of Murray, Snyder also addresses what constitutes impermissible efforts to "proselytize" or to "disparage" another faith under *Marsh*.

Factually, Murray opened its meetings with prayer offered by invited "members of the religious communities." There had been no unsolicited offers to deliver the invocation until Snyder did so. However, what Snyder proposed to deliver was nothing like an invocational prayer designed to solemnize the moment. It was more of a "political harangue" to persuade listeners to abandon the practice of invocational prayers. The court gave Snyder the great benefit of the doubt by considering his proposed speech a "prayer," but held that the city could still exclude Snyder based on the content of that prayer.

> [A]s a consequence of the fact that this genre of government religious activity cannot exist without the government actually selecting someone to offer such prayers, the decision in *Marsh* also must be read as establishing the constitutional principle that a legislative body does not violate the Establishment Clause when it chooses a particular person to give its invocational prayers. Similarly, there can be no Establishment Clause violation merely in the fact that a legislative body chooses not to appoint a

> certain person to give its prayers. The act of choosing one person necessarily is an act of excluding others, and as a result, if *Marsh* allows a legislative body to select a speaker for its invocational prayers, then it also allows the legislative body to exclude other speakers.

Id. at 1233. Legislative prayer is impermissible under *Marsh* where the process is abused.

> The point at which an invocational legislative prayer falls outside the traditions of the genre and becomes intolerable occurs when the "prayer opportunity has been exploited to apostolitize [sic] or advance any one, or disparage any other, faith or belief."

Id. at 1233-34. The *Murray* court went on to note that all prayers have some religious identity that excludes other faiths, but that does not make them transgress *Marsh*.

> Of course, all prayers "advance" a particular faith or belief in one way or another. The act of praying to a supreme power assumes the existence of that supreme power. Nevertheless, the context of the decision in *Marsh* – in which the Court considered the constitutionality of a Presbyterian minister's "Judeo Christian," "nonsectarian" invocations for the Nebraska Legislature – underscores the conclusion that the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause.
>
> Rather, what is prohibited by the clause is a more aggressive form of advancement, i.e., proselytization. . . . By using the term "proselytize," the Court indicated that the real danger in this area is effort by the government to convert citizens to particular sectarian views.

Id. at 1234 n. 10 (citations omitted).

Snyder also discusses what may constitute an "impermissible motive" under *Marsh*:

> As a second constitutional restriction on legislative prayer, the Court in *Marsh* also warned that the selection of the person who is to recite the legislative body's invocational prayer might itself violate the Establishment Clause if the selection "stemmed from an impermissible motive." See *Marsh*, 463 U.S. at 793. The Court implicitly indicated that the particular motive that is "impermissible" in this context is a motive in selecting the prayer-giver either to "proselytize" a particular faith or to "disparage"

> another faith, or to establish a particular religion as the sanctioned or official religion of the legislative body.

159 F.3d at 1234.

> Snyder's prayer both proselytizes for his own particular brand of religion, and disparages other contrary religious views. As such, it falls outside the genre of invocational legislative prayer authorized by *Marsh* . . . .

Id. at 1236.

In *Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005), the County maintained a list of religious leaders from congregations taken from the local phone book. The Chesterfield clerk would then send an invitation to those congregations, addressed to "the religious leader," and those who replied were scheduled on a first come, first serve basis. The court of appeals opinion in *Simpson* mentions "nonsectarian" prayer a number of times. As a matter of fact, however, it is clear from the district court's findings – whatever the court of appeals meant by a "nonsectarian" prayer – that there had been repeated, explicit references to the Judeo-Christian divinity and "Jesus Christ" in "most of the invocations given" before the Chesterfield County Board of Supervisors. 292 F. Supp. 2d 805, 807-08 (E.D. Va. 2003). The County had a policy of requiring that "invocations containing elements of the American Civil Religion," but that policy had been "applied by the Board to allow only representatives of the Judeo-Christian tradition (Protestant, Catholic, and Jewish religions) and, on one isolated occasion, the Islamic faith." *Id.* at 807. While most invocations contained explicit references to "Jesus Christ," there was "no evidence that invocations had been utilized to proselytize or advance any religion." *Id.* at 807-08.

Simpson was an adherent of Wicca, a polytheistic and pantheistic religion that

focuses on "change of seasons and other natural phenomena." *Id.* at 808. She requested the opportunity to present a "nonsectarian invocation espousing basic values consistent with general themes about 'life, death, and creation, and about how to live a good and ethical life.'" *Id.* The Board denied her requests for the following reason:

> Chesterfield's nonsectarian invocations are traditionally made to a divinity that is consistent with a Judeo-Christian tradition. Based upon our review of Wicca, it is neo-pagan and invokes polytheistic, pre-Christian deities. Accordingly, we cannot honor your request to be included on the list of religious leaders that are invited to provide invocations at the meetings of the Board of Supervisors.

Id.

The court of appeals gave short shrift to Simpson's contention that her First Amendment rights were violated, notwithstanding the fact that the County's decision was based on her particular religious faith. The court simply reasoned that the power to appoint the person giving the invocation necessarily included the power to exclude representatives of any particular faith.

> In noting the Presbyterian identity of the chaplain in *Marsh*, the Court recognized the reality that any choice of minister would reflect, if not denominational preference, then at least denominational awareness. *Id.* at 793. A chaplain by definition is a member of one denomination or faith. Yet this did not cause the Court in *Marsh* to void the practice of the Nebraska legislature. A party challenging a legislative invocation practice cannot, therefore, rely on the mere fact that the selecting authority chose a representative of a particular faith, because some adherent or representative of some faith will invariably give the invocation.

404 F.3d at 285.

The case of *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), illustrates the kind of abuse of legislative prayer that transgresses the bounds permitted by *Marsh*. City council meetings in Great Falls were infused with religion and even

religious requirements for effective participation in city meetings. Invocational prayers were not given by members of the clergy in Wynne for the purpose of inspiring the councilmembers. Rather, the prayers were conducted by the Mayor and councilmembers themselves, and the environment was more that of a "church environment" than a council meeting.

Plaintiff was a Wiccan, and she requested that the City change its practices so that either (1) representatives of different religions be invited to give prayers or (2) explicit Christian references be omitted. Wynne's request triggered an uproar of religious fervor but directly involving the City Council itself. One councilmember posted a message on the City's website stirring up opposition to Wynne's request and urging citizens to call their councilmembers about the matter. Wynne became targeted as a "professed witch" and Satanist. A petition was initiated by the Council in response to her request, requesting the Council "not stop praying to our God in Heaven." At a Council meeting scheduled to address the issue, 20 times the usual number of citizens attended. Councilman Broom delivered a rousing prayer punctuated with Amens and Hallelujahs from the crowd. Wynne asked again for an alternative prayer and was refused. It "began to get hard" for her to attend meetings, and when she did not stand during the Christian invocation, Councilman Broom criticized and embarrassed her. Stirred up as they were by the Council, fellow citizens told her that she was not wanted; that she should leave town; that she was a Satanist; and she was threatened with being burned out. She became scared and extremely uncomfortable. *Id.* at 295.

As a result of all of these events, Wynne's ability to "participate in town council's meetings as a member of the public [were] adversely affected by her refusal to accept the

Christian prayer tradition." *Id.* at 295. When Wynne would excuse herself to avoid the prayer, the Council punished her by limiting her participation on the pretense that she was then a few minutes "late," even though she had signed up to speak and was listed on the agenda before she briefly excused herself to avoid the prayer. The Council limited her allotted speaking time, "ostracized her," and "treated her differently" than other members of the community. The Mayor "attempted to intimidate her" on account of her religious beliefs. *Id.* at 295-96.[14]

Based on these facts, the district court enjoined the Defendants from invoking the name of a "specific deity associated with any one specific faith or belief in prayers given in town council meetings." *Id.* at 296. The court of appeals affirmed because Great Falls had attempted to "proselytize or advance . . . one or disparage [an]other, faith or belief." 376 F.3d at 297. Great Falls wrongly "'exploit[ed]' this prayer opportunity to 'affiliate' the Government with one specific faith or belief in preference to others." *Id.* at 298.

> In view of the record in this case, and particularly the district court's factual findings, one can only conclude that the Council crossed [the constitutional line established in *Marsh*]. Rather than engaging in the sort of "legislative prayer" approved of in *Marsh*, the Council has improperly "exploited" a "prayer opportunity" to "advance" one religion over others.

Id. at 298.

The injunctive relief in *Wynne* – deletion of explicit Christian references – was

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[14] Just before trial, the town council adopted a resolution that its invocations "shall not contain or address any specific beliefs of any specific religion." However, one councilmember told Wynne that none of their practices would be changed by that resolution, and the Mayor testified that the resolution did not prohibit reference to Jesus. There was nothing wrong with that because the Mayor himself believed that "Christ *is* God." *Id.* at 296 n. 2 (italics in original).

not really the most appropriate relief under the law. Because of the abuses by the Great Falls Mayor and Council, the district court correctly concluded that the level of religious "intensity" and involvement by the government officials themselves needed to be restrained. But a more appropriate injunction and one more consistent with what *Marsh* permits and prohibits, may have been an injunction that permitted use of the word "Christ," but greatly restricted the related conduct of the Defendants that had made their Christian prayers an all-enveloping act of government that led to non-adherents being disfavored, punished, and threatened.

Another case where the issue was raised is *Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999), but that case ultimately has little to do with legislative prayer and the *Marsh* doctrine. The court concluded that the school board defendant did not function in a traditional legislative/deliberative body capacity. Rather, school board meetings were an integral part of the operation of the school system itself, with students participating and appearing in many aspects of the board meetings. "[S]tudents not only attend school board meetings, but actually participate in the board's agenda." *Id.* at 372. The Cleveland School Board was responsible for "managing the myriad of day-to-day problems . . . in the operation of a public school system." *Id.* at 371. With that finding and the fact that the public educational environment was directly involved, prayer was necessarily excluded under established First Amendment law. *See also*, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); Lee v. Weisman, *supra*.

A perfunctory opinion in *Bacus v. Palo Verde School Dist.*, 52 Fed. Appx. 355, 2002 WL 31724273, (9th Cir. 2002), incorrectly adopts the "nonsectarian prayer"

application of *Marsh*. However, the opinion is not even considered precedent under the Ninth Circuit's own rules. "Unpublished dispositions and orders of this Court are not binding precedent." Ninth Cir. Rule 36-3(a). The *dictum* in *Bacus* clearly goes far afield insofar as it discussed legislative prayer under *Marsh*.

A recent *Marsh* decision is *Dobrich v. Walls*, 380 F.Supp.2d 366 (D.Del 2005). As to the content of invocations before meetings, the court held that *Marsh* leaves nothing to be litigated and, accordingly, dismissed those claims of the plaintiffs:

> In light of [*Marsh*], the Court cannot conclude that prayer is not part of legitimate, legislative processes. However, even if the Court were to adopt Plaintiffs' contention that prayer is a ministerial action such that it is not covered by the doctrine of absolute immunity, the Court concludes that Plaintiffs cannot prevail on a claim based on a prayer being said before a School Board meeting. As the *Marsh* decision makes clear, the practice of opening legislative sessions with a prayer is acceptable under the Constitution. . . . To the extent that the conduct of opening a session of the School Board with a prayer can be considered a separate action not covered by the doctrine of absolute immunity, the Court concludes that, in light of the Supreme Court's decision in *Marsh*, Plaintiffs cannot prevail on this claim.

Id. at 377.

Litigation is also ongoing in the Seventh Circuit. In *Hinrichs v. Bosma*, 400 F.Supp.2d 1103 (S.D.Ind. 2005), the court found that the invocations in the Indiana General Assembly transgressed *Marsh*. In so holding, the court incorrectly viewed "non-sectarian" prayer that were not deity-specific as the only type of prayer that *Marsh* permitted. This case has been argued before the Seventh Circuit Court of Appeals. On March 1, 2006, the court of appeals denied a stay of the district court's injunction, and, in an unusual action, issued a published opinion on the stay motion. The order was 2-1, with the dissenting judge correctly pointing out that the purported "non-sectarian"

nature of the invocation was not part of the *Marsh* requirement. The Department of Justice filed an *amicus* brief on May 19, 2006 supporting the defendants' position. One might speculate that the relatively long time the case has been pending since argument could indicate that the court is considering taking the case *en banc* before issuing a decision.

3. *Cobb County Litigation*

This same issue has been pending in the Northern District of Georgia in a case before Judge Story. *See, Pelphrey v. Cobb County*, 440 F.Supp.2d 1357 (N.D.Ga 2006); 410 F.Supp.2d 1324 (N.D.Ga. 2006). In *Pelphrey*, the plaintiffs' initial argument was based entirely on the non-sectarian prayer theory. This theory was rejected by the district court both in its preliminary injunction order and in a later order on summary judgment.[15] Judge Story's discussion of the issues is very thorough and erudite, and the court gives a thorough and accurate reading of *Marsh*.

An interesting aspect of the *Pelphrey* litigation concerns the development of the historical record. As noted above, *Marsh* is one of the cases that has focused very heavily on the contemporaneous practice of the First Congress itself – with regard to legislative prayer – when it drafted and adopted the Establishment Clause. Because invocations were used in the First Congress – albeit with some objection and dissent – Justice Burger's opinion in *Marsh* held that that invocation practice must, necessarily, be permitted by the Establishment Clause as it was conceived of by the First Congress.

[15] No appeal has yet been taken. The plaintiffs did not appeal from the denial of the preliminary and permanent injunction orders. A final judgment under Rule 58 has not yet been entered because of some still-pending subsidiary issues addressing how the selection of persons to give invocations was administered in the past.

What is absent from *Marsh* and the record in previous litigation is precisely what kind of prayers were given as invocations in the First Congress. Were they some kind of "generic, non-sectarian" prayer? Or did the invoke a specific deity, namely, Jesus Christ?

There are, of course, no verbatim court reporter type of transcripts of the proceedings of the First Congress. But Cobb County determined through historical experts what prayer was in fact given by the chaplain of the Senate of the First Congress. As it turns out, the exact prayers given in the First Congress explicitly refer to Jesus Christ. They were the very kind of "sectarian" prayer that some courts (and the plaintiffs in *Pelphrey*) contend cannot be given. But following the historical rationale of *Marsh*, such invocations are necessarily permissible.

The historical facts here are interesting. In 1789, the United States Senate appointed its first chaplain, the Episcopal Bishop Samuel Provoost. Probably, the world's expert on the subject of Bishop Provost and his invocations before the Congress is by Professor Mullin who is at the General Theological Seminary in New York City (the most renown of the Episcopal seminaries). His many books and other writings address both the historical epoch at issue here and Bishop Provoost in particular. As Professor Mullin relates in his expert Affidavit in *Pelphrey*, the text of the prayers that Bishop Provoost used before Congress in 1789 are contained in the 1789 *Book of Common Prayer* of the Episcopal Church:

7.

> . . . The *Book of Common Prayer* prescribes the exact text of prayers to be said at various occasions. The Episcopal Church still uses the *Book of Common Prayer* today. The current *Book of Common Prayer* has evolved directly from the 1789 version. The evolution of the text of the prayers

> within the *Book of Common Prayer*, including the 1789 version and the current version, is documented in the book *Prayer Book Parallels*.
>
> 8.
>
> . . . In 1789, Episcopal doctrine required that every individual must adhere to the Ordination Oath on becoming a member of the Episcopal Clergy. Episcopal clergy take a similar oath today. Article VIII of the Constitution of the Episcopal Church, as adopted in 1789, states: "I do solemnly engage to conform to the doctrines and worship of the Protestant Episcopal Church in these United States." This sentence, which was part of the Ordination Oath used in 1789, requires that Episcopal clergy adhere to the *Book of Common Prayer*.

One of the specific prayers included in the 1789 *Book of Common Prayer* addressed by Professor Mullin is *A Prayer for Congress*. The closing sentence of that prayer reads as follows:

> These and all other necessities, for them, for us, and thy whole Church, we humbly beg in the Name and mediation of Jesus Christ, our most blessed Lord and Savior. *Amen*.

Thus, the undisputed historical facts permit both deity-specific prayer as well as "non-sectarian" prayer. This does not mean, of course, that *Marsh* does not continue to impose limits on invocations at public legislative bodies. Prayers cannot be used for proselytizing and the opportunity to have invocations cannot be abused. Judge Story discusses those factors in his opinions. The *Wynn* case, discussed above, is a text-book example of abusing the opportunity to have invocations.

IV. THE FUTURE OF THE ESTABLISHMENT CLAUSE

The American constitutional experiment has proved reasonably durable. It has lasted over two centuries and, at least with regard to religious issues, most would agree that our constitutional principles have done reasonably well – certainly much better than preceding history in Europe.

The relative degree of success in the past, however, gives no assurance that our constitutional future will be as successful. Difficult religious issues and religious conflicts remain pervasive throughout most of the world, though they are manifested differently than they were in the eighteenth century when the First Amendment was adopted. Europe is much more areligious today than it was when our Constitution sought to chart a new course from that of Europe. France has an aggressively secular state, with laws not just precluding the government from participating in religion, but prohibiting many personal displays of religious symbols, as well, by private individuals at certain public places. Legislation to ban religious symbols in public schools – such as crosses, skull caps, Sikh turbans, and head scarves – is a recent example of the country's effort to maintain a strict division between church and state.

In the Islamic world, theism remains the predominate mode of government. Islamic principles are generally incorporated in the organic laws of such countries and, in some cases, religious figures themselves reign over the civil government.[16]

No doubt, the principle of separation of church and state has eroded in recent years in the United States in a series of Supreme Court decisions. In the Court's earlier decisions, separation of church and state was considered a bedrock principle. Not only was the government supposed to stay out of religion for the sake of persons who did not

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[16] Ironically, Iraq was one of the most secular of the predominantly Muslim countries in the world until the U.S. invasion. Rather than "bringing democracy" to the mid-east, Iraq's governmental and private life is less secular and more religion-dominated now than it was pre-invasion. In what would seem to be another irony from a western perspective, Turkey's secular civil government was essentially made secular by the military, and the military has continued to be the principal force guarding these particular civil liberties in Turkey.

adhere to what religious elements might be advanced by the government, it was also believed that religion itself would suffer with government "support." Only when operated privately – and freely within the private domain – was religion believed to be safe from the untoward effects of government.

Those fundamental principles have no longer been shared by all of the Justices of the Supreme Court over the last two decades. While no coherent Establishment Clause philosophy has been articulated by the Court's most conservative Justices, much less one that would command a majority of the Court, the overall trend is unmistakably clear – namely, public support of religious views and a real "co-mingling" of government and religion is perceived much less skeptically today than in the past. Where that will lead in the long run is a good subject for speculation. On one hand, a small minority of American theists would like to see a complete evolution to a "Christian nation," one where Christianity was openly espoused in most, if not all, the halls of government, including the public schools. Less radical steps hostile to separation of church and state have become more common.

Bowen v. Kendrick, *supra*, illustrates how far the Court has retreated. Direct subsidies and grants can now be given to religious organizations to advocate to individuals about matters that are highly personal, moral, and laden with religious doctrine. Any serious notion that financial support to such institutions is constitutional only where secular activities are advanced, would seem largely obsolete – in fact if not in theory – in light of the *Bowen v. Kendrick* decision.

In the immediate future, it is tempting to assume that most if not all 5-4 decisions that imposed limitations on government support of religious activities could soon be

reversed where Justice O'Connor was in the dissent. One can assume with fair confidence that Justice Alito will be a substitute for Justice Rehnquist on these issues, and Justice Roberts is certainly more likely than Justice O'Connor to vote with the advocates of lowering the wall of separation further.

But where might these issues arise? The extremely important area of subsidies and financial support to religious schools, organizations, and even churches has already been muddled since *Bowen*. Further litigation in these areas may focus largely on the facts and particulars of how financial support is actually used. If a purportedly secular activity receives government grants and subsidies, one can expect plaintiffs to closely scrutinize exactly what activities ensue. As in the family planning and abortion counseling case, are the activities of the organization dominated by religion? "Merely" consistent with religious tenets? Or are they predominately secular, and motivated more by a religious mission to simply help people, as was the case in the original hospital funding case, *Bradfield v. Roberts*? Whether Justice Roberts and even Justice Alito would allow organizations to promise that they would use government funds to promote only secular activities where the facts showed something very different – as the plurality was willing to do in *Bowen v. Kendrick* – is not something one can predict quite so easily just from then philosophical predilections.

One can reasonably predict that *McCrary County v. ACLU, supra*, would come out differently today with Justice O'Connor off the Court. Whether Justice Roberts would vote to allow the Ten Commandments to be much more pervasively displayed in important public facilities, such as courthouses or even schools, is less clear. That they may be displayed in "less sensitive" environments is apparent in light of the ruling in

VanOrden. Although *VanOrden* relied heavily on the specific history of the monuments in Texas, there is most likely a majority on the Court now who would uphold such displays regardless of the history.

Public school prayer has always been one of the most important Establishment Clause subjects. Although *Lee v. Weisman* was decided by only a 5-4 vote in 1992, *Lee* was reaffirmed by a 6-3 vote in the *Santa Fe* case in 2000. The *Santa Fe* dissent railed against the majority and its alleged "hostility" to religion. Rather incredibly, the dissent would have permitted the school prayer program there as having a "secular purpose" – solemnizing a football game – contrary to the plain facts of the case. In *Lee v. Weisman*, Justice Scalia's dissent is so thoroughly dismissive of the inappropriateness of subjecting persons to government-required prayer, even in the school context, that one could safely predict that he would cast his vote to support prayer in a wide variety of public school contexts, including the classroom. But while there were four dissenters of that view in *Lee*, one was Justice White, and there still are probably no more than four votes on the Court favoring school prayer today.

In short, one can safely predict that in those areas where the wall of separation between church and state has eroded, the wall will remain at least as diminished as it is today. In some important areas, like school prayer, existing law will likely stay essentially the same.

How the Intelligent Design cases might have faired in the new Court would have been a matter of interesting speculation, but in all likelihood the compelling record developed in the *Dover* case may have resolved that dispute and those issues for the time being. As a matter of institutional integrity, the Supreme Court is not likely to

favor the supporters of Intelligent Design where the factual record is so embarrassing to that position.

In areas of future litigation where the precedents are less clear, one can assume that religious activity in government will be treated more solicitously. One of the topics that has received a significant amount of attention over the past year is the conversion of military chaplains from their traditional role of ministering to members of the military to aggressive proselytizers. The issue presents an interesting conflict between the Establishment and Free Exercise Clauses. See generally, Note, *Military Chaplains: Federally Funded Fanaticism and the United States Air Force Academy*, 8 RUTGERS J. L. & RELIGION 5 (2006). The defense of these new chaplains asserts that they are simply exercising their Free Exercise rights, and that critics of such Christian proselytizing are effectively trying to "take religion out of religion." Whether these issues will ever get to the Supreme Court is anyone's guess. But if so, one could expect that plaintiffs challenging such aggressive chaplaincy would have a more difficult time before this Court than they would have in the past.