

CHURCH AND STATE

Religion in our Public Schools

Ours is one of the most devout nations in the world, and it is at the same time the most religiously diverse.

More than 90 percent of Americans profess a belief in God; more than half say they pray at least once a day, and more than 40 percent say they have attended worship services during the previous week.



For a nation as large and diverse as ours to maintain a relative sense of religious harmony is a testament to the foresight of the authors of the Constitution, as well as to the tolerance and respect of our nation's people. Our nation's framers were determined to protect religion from government interference because they understood the sanctity and importance of individual faith and true religious freedom. Today, our national commitment to the separation of church and state as the best way to ensure religious liberty is more important than ever.



Commitment to the separation of church and state is not an anti-religion stance. Indeed, it is the best guarantee that each individual has the right to practice his or her religion, without coercion, hostility or violence. Keeping religion out of the hands of the government is our best guarantee for continued religious freedom and religious harmony.

The ACLU has challenged attempts by sectarians to impose their religious beliefs and practices on others through government sponsorship for nearly eighty years. Here are some examples of the ways we have defended religious freedom for all:

- In the famous 1925 "monkey trial," the ACLU defended biology teacher John Scopes against the charge that he had broken Tennessee's fundamentalist-inspired ban on the teaching of evolution.
- In the 1930s, the ACLU supported the right of Jehovah's Witness schoolchildren not to salute the American flag, which would have violated their religious beliefs.
- In 1947, the ACLU participated in the landmark case, *Everson v. Board of Education*, in which the United States Supreme Court proclaimed: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We would not approve the slightest breach."
- In the 1950s and 1960s, responding to numerous complaints from the public, the ACLU challenged official prayer and Bible reading in the nation's public schools – and won, in two landmark Supreme Court rulings, *Engel v. Vitale* and *School District of Abington Township v. Schempp*.
- In the 1980s, the ACLU successfully fought bills introduced in 23 state legislatures mandating that the public

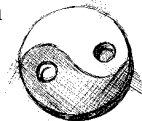
The United States has more than 1,500 different religious bodies and sects – including 75 divisions of Baptists alone.

schools teach "scientific creationism" – the biblical version of the earth's creation.

Today, once again, the main arena of struggle is the nation's public schools. As in the past, the ACLU offers legal assistance to parents, students, teachers, school board members and school administrators in resisting the efforts of religious groups to impose devotional activities in the classroom, on sports fields and at graduation exercises.

What's Wrong With School Prayer?

Because public schools are part of the government, official school-organized or school-sponsored devotional exercises are inconsistent with the principle of religious liberty. How, when, where and to whom children should pray is a decision that should be made by families, and not forced upon students by their schools. Muslim, Jewish or Hindu parents don't want their children to participate in Christian observances, for example, and atheist parents don't want their children to pray at all. Children whose religious beliefs are different from those of the majority must not be made to feel like outsiders in their schools, nor must religious participation be forced upon them.



Religious speech – like other forms of speech – is protected by the First Amendment. Public school students have the right to read the Bible, pray before meals and exams and discuss their religious views with their fellow students – as long as they do so outside of the educational process. Students do not have the right to impose their religious expression on a captive audience of other students – for example, by broadcasting religious pronouncements or prayers over the school public address system – nor to compel other students to engage in any religious activity.

Centuries of Dissent over School Prayer

The controversy over officially sponsored prayer in public schools is not merely a contemporary issue. Indeed, in the 1830s – more than a hundred years before *Engel* – one of our nation's most vicious religious conflicts erupted. It was the heyday of immigration from Italy and Ireland, and these Catholic newcomers objected to the compulsory readings of the Protestant King James Bible and the recitation of Protestant prayers in most public schools. Vicious riots, the expulsion of Catholic children from public schools, convent burnings and even fatalities ensued.

As the religious diversity of our society increased, school prayer became a divisive issue once again in the 1950s, when Jewish, Buddhist, Hindu, Muslim and atheist

This country also has 360,000 churches, mosques and synagogues, all coexisting in relative harmony.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The First Amendment contains two clauses governing church and state separation: the Establishment Clause, which guarantees the separation of religion and the government, and the Free Exercise Clause, which prohibits the government from interfering with people's right to worship as they choose. These two principles protect our freedom to practice any religion – or no religion at all.

Although the Bill of Rights was ratified in 1791, it took two centuries for a body of law on the church/state relationship to evolve. Indeed, the Supreme Court did not begin to develop modern Establishment Principles until the 1940s.

The Establishment Clause

In the year that the First Amendment was adopted, no state had a single "established" church, as England did – but five states had multiple establishments. Under the cloak of government authority, the established denominations often persecuted the members of various minority religions. Baptists, Quakers, Jews and others were denied the right to hold public office and were required to pay taxes to support the established churches.

By the time the Constitution was fully drafted, many of its framers had come to believe strongly in "disestablishment." Thomas Jefferson, for example, wrote of the need for "a wall of separation between church and state." In 1785, James Madison wrote that "religion is not helped by establishment, but is hurt by it." In 1791, this viewpoint was reflected in the Bill of Rights.

More than a century and a half later, the Supreme Court's 1971 *Lemon v. Kurtzman* decision put forth a test for determining whether a law or government policy has breached the wall between church and state. The *Lemon* test lays a basic framework for the courts by asking whether the government's action has a religious purpose; whether the primary effect of the government's action is to advance or endorse religion; and whether the government's action fosters excessive government "entanglement" with religion. As the Supreme Court put it, the principal consideration is whether or not the government is "endorsing" religion.

parents voiced objection to Christian practices in the public schools. The *Engel* Supreme Court case evolved from this conflict. In ruling against officially sponsored and organized school prayer, Justice Hugo L. Black wrote, "we think that by using its public school system to encourage recitation of the Regents' prayer [a nondenominational prayer created by the government], the State of New York has adopted a practice wholly inconsistent with the Establishment Clause." The following year, in *School District of Abington Township v. Schempp*, the Court held that Bible readings in public schools also violate the First Amendment.

President Kennedy (the country's first Catholic President) urged respect for the



Engel decision: “We have in this case a very easy remedy, and that is to pray ourselves. And I would think that it would be a welcome reminder to every American family that we can pray a good deal more at home, we can attend our churches with a good deal more fidelity, and we can make the true meaning of prayer much more important in the lives of our children,” he said after the ruling.

Agreement with the President was not universal, however. Congress introduced over 25 resolutions within a month of the Supreme Court decision, including calls for a “Christian Constitutional Amendment.” (This effort was renewed, unsuccessfully, in 1998.) Today, schools and school districts throughout the country have continued to sponsor prayer in violation of the rights of religious minorities.

The contemporary debate over school prayer entered a new dimension in 1992, when the Supreme Court ruled, in *Lee v. Weisman*, that the inclusion of prayer in a graduation ceremony sponsored or supervised by a public school violated the Establishment Clause. As Justice Anthony M. Kennedy explained: “The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.”

In the wake of *Weisman*, some religious leaders argued that while the decision disallowed clergy-led prayer, it did not bar “student-initiated prayer.” However, no matter if the prayer is initiated by students, teachers or parents, school officials are the prayer’s sponsors because they preside over that school event. Therefore, student-faculty- or parent-led prayer at school ceremonies is impermissible. The matter should not be open to vote because the mere process of a vote infringes on the religious freedom rights of those students and parents who belong to minority religions.

Justice Robert H. Jackson best explained the principle that fundamental rights are inalienable – and therefore not subject to a vote – in his 1943 opinion recognizing the right of Jehovah’s Witness children not to salute the flag: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities

and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.” (*West Virginia v. Barnette*)

The 1962 *Engel* decision, which banned organized prayer in our nation’s public schools, has been blamed by some as the cause of a “steep moral decline” in our country. The mere recitation of what would necessarily be a “watered-down,” non-denominational morning prayer is a simplistic solution to complex societal problems, however, and implies a nostalgia for a so-called “golden age” of religiosity that was far from “golden.” Before 1962, organized school prayer coexisted with segregation laws in the South, official discrimination against women in education and employment, and political repression in public life. If anything, our nation is a more moral place today – given the vigorous attempts to eradicate bigotry from our political, cultural and social institutions.

Religious clubs may hold meetings on public school grounds, in accordance with the 1984 Equal Access Act, as long as they are held during noninstructional time, and as long as other, noncurriculum-related student groups – such as political clubs, community service clubs, etc. – are also allowed to meet at a school. To guard against improper governmental support for religion, school employees may not initiate, direct or participate in religious club meetings – although a school staff person may be present to keep order and ensure safety.

Religious Symbols in Public Spaces

In recent years the ACLU has vigorously fought against state-sponsored displays of crèches, and other religious symbols, such as the Ten Commandments, in public schools, town halls and even courtrooms. Since the state cannot “endorse” any particular religion, a nativity scene cannot be the focal point of a display in a school or town hall because it sends the message that the government officially supports Christianity.

In 1997 the ACLU sued to have a display of the Ten Commandments removed from



an Alabama courtroom. And in various states all over the country including Massachusetts, New Jersey and Missouri, the ACLU has been successful in removing explicitly religious symbols from government buildings.

This in no way infringes upon the rights of individuals - private parties, after all, have the right to display religious symbols on their own private property. But maintaining the boundary between private worship and state endorsement is integral to the concept of religious freedom.

The Free Exercise Clause

The roots of the Free Exercise Clause reach back to the country’s early colonial history. Rhode Island, for example, was founded as a haven for religious minorities in 1644.

Religious intolerance has, nevertheless, threatened the freedom of worship of religious minorities throughout the years. Beginning in 1940, the Supreme Court handed down a series of decisions that formed a bulwark of protection for religious liberty. In 1940, the Court upheld the right of Jehovah’s Witnesses to proselytize on a street corner (*Cantwell v. Connecticut*). In 1943, the Court ruled that Jehovah’s Witness children could not be forced to salute the flag in public schools (*West Virginia v. Barnette*). In 1963, the Court held that a Seventh Day Adventist could not be denied unemployment insurance because she refused to work on Saturdays (*Sherbert v. Verner*). And in 1972, the Court overturned the conviction of an Amish parent who refused to send his children to school beyond the eighth grade (*Wisconsin v. Yoder*).

Not all religious practice is protected, however, even though the freedom to believe is absolute. To determine whether a particular religious practice is covered by the Free Exercise Clause, the Supreme Court developed a test: A person or group must show (1) that the practice is motivated by “sincere religious belief,” and (2) that the state has imposed a “substantial burden” on the practice. If these two criteria are met, the government must accommodate the religious practice – unless the government can show that it has a “compelling interest” in restricting the practice, and that its restriction is the most lenient way possible (the “least restrictive means”) of serving that interest.

In 1990, the Supreme Court changed the test. In *Employment Division v. Smith*, the Court upheld the denial of unemployment benefits to two members of the Native American Church who had been fired from their jobs for using peyote (a hallucinogen which has been an integral part of Native American religious practices for centuries). This ruling eliminated the requirement that the government prove a “compelling interest,” even if its general laws substantially burden a religious practice. Now the government merely has to show that, in restricting a practice, it is not singling out religion for discriminatory treatment. The Court reasoned that since peyote was prohibited for everyone, Native Americans were not being singled out and, therefore, had no free exercise claim.

The School Vouchers Debate

Today, school voucher programs are being aggressively pushed by many social and religious conservatives. As the problems confronting our nation’s education system increasingly dominate public discourse, the voucher debate is bound to heat up.

Vouchers are tuition subsidies for public school students to attend private schools. These frequently include parochial schools in which religious indoctrination comprises a significant portion of the daily curriculum. Civil libertarians oppose school vouchers for parochial schools because they take taxpayer funds away from the public school system and give them to religious institutions in violation of the separation of church and state.

This is not just a theory. Milwaukee, Wisconsin introduced one of the only voucher programs in the country in 1990. As of January 1999, out of a total of 86 private schools participating in the program, 56 were religious schools and three-fourths of the children receiving vouchers were enrolled in religious institutions.

One of the principal reasons that religious schools are the leading beneficiaries of voucher programs is economic. Most voucher proposals would provide only about \$2500 a year per child. Since most non-religious schools charge far more for tuition (in New York City, for example, the average private school tuition is \$12,000), the only schools most parents will be able to afford are parochial schools which tend to charge less. The ACLU believes that parents have the right to send their children to religious schools – and we have fought for their right to do so – but not at the taxpayers’ expense.

The ACLU has challenged the constitutionality of voucher programs in several states, including Wisconsin, Ohio, Vermont, New Jersey, Maine and Puerto Rico. We will continue to oppose what are euphemistically called “school choice” programs in the courts, in the legislatures, and in the arena of public opinion.

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