

**WAMC Student Town Meeting
Symposium on Separation of Church and State
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WAMC Performing Arts Studio**

Presented By:

Jay Worona
General Counsel
New York State School Boards Association
24 Century Hill Drive
Latham, New York 12110-2125



FIRST AMENDMENT RELIGION CASES

General Overview

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..." United States Constitution, First Amendment

Aid to Parochial Schools (Overview)

A pressing concern is the extent of aid a school district can provide to parochial school students. The United States Supreme Court first addressed this issue in *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947) where it held that a state statute which authorized reimbursement of transportation expenses to parents of children attending parochial schools did not violate the Establishment Clause of the Constitution. The Court reasoned that although it is constitutionally permissible to provide government benefits directly to students and/or their parents, the Establishment Clause prohibits the direct grant of government benefits to a parochial school. This rationale was followed by the Supreme Court in subsequent decisions which further defined the scope of permissible state aid to parochial schools.¹

¹See, *Board of Education of Central School District v. Allen*, 392 U.S. 236 (1968) (New York law requiring public schools to lend textbooks to parochial school students free of charge does not violate the Establishment Clause); *Waltz v. Tax Commissioner of the City of New York*, 397 U.S. 664 (1970) (statute exempting from taxation property owned by religious organizations does not violate the First Amendment when its intent stops short of establishing, sponsoring, or supporting religion); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (Rhode Island statute providing salary supplements to teachers in religious schools for secular subjects and reimbursements to such schools for salaries and instructional materials for such subjects was ruled unconstitutional; Pennsylvania program to reimburse nonpublic schools for teachers' salaries, textbooks, and instructional material; and the relationship with the state with the school in auditing financial records was deemed unconstitutional); *Levitt v. Committee for Public Education and Religious Liberty (PEARL)* 413 U.S. 472 (1973) (state statute permitting reimbursement to religious schools for expenses related to the administration, grading, compiling and reporting of certain tests held to violate the Establishment Clause); *Meek v. Pittenger*, 421 U.S. 349 (1975) (the direct loan of instructional materials and equipment to religious schools and the provision of auxiliary services such as counseling, testing, psychological services, speech and hearing therapy, teaching and related services for exceptional children to students enrolled in religious schools violated the Establishment Clause; lending textbooks without charge to children attending religious schools is constitutional); *Wolman v. Walter*, 433 U.S. 229 (1977) (statute authorizing the loan of secular textbooks to students, supplying standardized tests and scoring services, supplying speech and hearing diagnostic services in the religious schools, supplying therapeutic services at a neutral site is constitutional; Court further held that the provision of instructional materials and equipment as well as providing unrestricted transportation and services for field trips is unconstitutional); *Sloan v. Lemon*, 413 U.S. 825 (1973) (Pennsylvania statute providing for reimbursement of tuition paid by parents of students in religious schools held to violate the Establishment Clause because it had the primary effect of advancing religion); *Mueller v. Allen*, 463 U.S. 388 (1983) (Minnesota statute allowing for educational expenses incurred by parents of elementary and secondary students, including those in religious schools, does not violate the First Amendment); *Aguilar v. Felton*, 473 U.S. 402 (1985) (a New York City Board of Education program which used federal funds received under Title I of the Elementary and Secondary Education Act of 1965 to pay salaries of public school employees to teach in parochial schools in New York City violated the Establishment Clause since the scope and duration of the program would require permanent and pervasive state presence in sectarian schools receiving aid by requiring the City Board to adopt a system for monitoring religious content of publicly funded Title I classes); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985) (a school district's shared time and community education programs, which provided classes to nonpublic school students at public expense in classrooms located in and leased from the nonpublic schools had the "primary or principal" effect of advancing religion and therefore violated the dictates of the Establishment Clause of the First Amendment); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) (the creation of a separate public school district to provide residents of a municipality comprised of a single religious group with special education and related services in an exclusive religious environment violated the Establishment Clause; five members of Court indicate a willingness to revisit *Aguilar* with the possibility of reversal because *Aguilar* prohibited parochial school students from being taught by public school teachers and as a result thereof, New York State acted to confer an unconstitutional benefit upon a religious community); *Agostini v. Felton*, 521 U.S. 203 (1997) (sending public employees into parochial schools to provide Title I services, including remedial instruction and counseling, does not violate the Establishment Clause of the First Amendment to the United States Constitution. While the court's decision does not require the provision of Title I services on the premises of parochial schools, it permits such a practice. In so holding, the court reversed its ruling in *Aguilar v. Felton*, 473 U.S. 402 (1985) and a portion of its ruling in *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). The U.S. Department of Education has issued a guidance for school districts which decide to provide such services on the premises of parochial schools.)

1.. *Mitchell v. Helms*, 530 U.S. 793 (2000)

Under an agreement between a local school district in Louisiana and the New Orleans Catholic archdiocese, the school district loaned Catholic schools operated by the archdiocese secular, nonreligious materials, such as books, computer hardware, and software packages. Taxpayers challenged the school district's use of the federal funds on grounds that providing the educational materials to nonsecular private schools violated the Establishment Clause. The Supreme Court in a six to three decision held the school district's loan of federally funded educational materials to Catholic schools did not violate the Establishment Clause of the First Amendment.

Justice Thomas framed the issue, as whether governmental aid to religious schools that results in religious indoctrination can be reasonably attributed to governmental action. Noting that the principles of neutrality and private choice were crucial to the Court's analysis not only in *Agostini* but also in prior Supreme Court cases entitled *Zobrest*, *Witters*, and *Mueller*, Justice Thomas stated that the presence of private choice ensures neutrality by eliminating the possibility of attributing religious indoctrination to the state.

Scholarships and Vouchers

1. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

In a five-to-four emotionally charged decision, the United States Supreme Court ruled constitutional Cleveland's school voucher program. In so ruling, the nation's high court, in has effectively given a green light for similar voucher programs across the nation. In most cases however, legislation and/or state constitutional change may first have to be attained in order for states to adopt such voucher programs.

Chief Justice Rehnquist, writing for the majority, concluded that Cleveland's voucher plan was a program of "true private choice" and as such was not a governmentally supported program of support for religion. The contested voucher program provides vouchers directly to income-eligible parents of elementary school students to attend "participating" schools servicing the Cleveland school district which had previously been taken over by the State pursuant to a federal district court order. The parents, in turn, endorse the voucher check over to the participating school. Both public and private schools are eligible to participate. Private schools wishing to participate must be within the geographic boundary of the Cleveland school district and must be registered with the state. Only public schools adjacent to the Cleveland school district are eligible to participate. Up to the present time, no public schools have registered to do so. Of the private schools registered to participate, 82% are church-affiliated, and 96% of the students participating in the voucher program are enrolled in sectarian schools. The Sixth Circuit Court of Appeals had previously ruled that the Cleveland private school voucher program violated the Establishment Clause because the tuition voucher program provided direct financial aid to religious schools. The appeals court had based its decision upon a finding that the Cleveland voucher program's neutrality is illusory and that while both public and private schools could participate, there is a financial disincentive for public schools to participate. The per pupil expenditure in neighboring public schools who accepted students from the Cleveland district was limited to \$2,250 from the voucher program, some five thousand dollars less than the state aid for resident students.

On appeal, the Supreme Court reversed holding that the program does not offend the Establishment Clause because the program was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. The Court's majority stated: "the Court's jurisprudence makes clear that a government aid program is not readily subject to challenge under the Establishment Clause if it is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice. Under such a program, government aid reaches religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual aid recipients not the government, whose role ends with the disbursement of benefits." The majority found that no reasonable observer would think that such a neutral private choice program carries with it the imprimatur of government endorsement. Nor did the court find evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options. The Establishment Clause question of whether the voucher program coerced parents to send their children to

religious schools must be answered by evaluating all options Ohio provides its schoolchildren, only one of which is to obtain a scholarship and then choose a religious school.

The Court found that Cleveland's preponderance of religiously affiliated schools did not result from the program, but is a phenomenon common to many American cities. Eighty-two percent of Cleveland's private schools are religious, as are 81% of Ohio's private schools. "To attribute constitutional significance to the 82% figure would lead to the absurd result that a neutral school-choice program might be permissible in parts of Ohio where the percentage is lower, but not in Cleveland, where Ohio has deemed such programs most sorely needed. Likewise, an identical private choice program might be constitutional only in States with a lower percentage of religious private schools. The Court also rejected the taxpayers' additional argument that constitutional significance should be attached to the fact that 96% of the scholarship recipients were enrolled in religious schools. "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are religious, or most recipients choose to use the aid at a religious school." Joining the Chief Justice were Justices O'Connor, Scalia, Kennedy and Thomas. It is significant that Justice O'Connor, while filing her own concurring opinion, nevertheless, fully agreed with the majority opinion. In the past, she has demonstrated only a willingness to agree with the judgment, leaving the dimensions of the ruling somewhat unclear. Justice O'Connor did suggest that the availability of other types of public school programs among the options presented to the Cleveland students helped persuade her that those eligible for vouchers "have a genuine choice between religious and nonreligious schools." Justice Thomas filed his own concurring opinion to express his satisfaction that this decision might aid poor urban children who need school choice programs to provide them with future educational opportunities.

Justices Souter, Stevens, Breyer and Ginsburg dissented. To the dissenters, the \$2,250 cap on tuition gave an illusion of choice that in fact steered children toward the religious schools, where tuition is below that limit, and away from secular private schools, where tuition is above it. Despite the fact that the majority of the Supreme Court saw this decision as the logical, if not inevitable, extension of a series of rulings dating back to an opinion from 1983 ruling on constitutional legislation in Minnesota permitting tuition tax credits to parents, including those who sent their children to parochial schools, the dissenters saw this ruling as a sharp break from the past. To Justice Breyer, this voucher program differed "in both kind and degree from aid programs upheld in the past" because they provided public money "to a core function of the church: the teaching of religious truths to young children. Justice Breyer also predicted that this decision would prove highly divisive as the nation reacts to governmental funding for schools which take controversial religious positions on topics of current popular interest such as the war on terrorism. To this the majority saw the only divisiveness as being possible future litigation.

To Justice Stevens, "whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of democracy." Finally, Justice Souter recognized that the Court's majority dramatically changed the landscape of American church and state jurisprudence. "Hence it seems fair to say that it was not until today that substantiality of aid has clearly been rejected as irrelevant by a majority of this Court, just as it has not been until today that a majority, not a plurality, has held purely formal criteria to suffice for scrutinizing aid that ends up in the coffers of religious schools." Although the effects of the Court's decision upon public education may indeed be profound, such effects will not be manifested until and unless such time as other states, including New York, adopt legislation authorizing such programs.

2. *Locke v. Davey*, 540 U.S. 712 (2004)

In this case the United States Supreme Court, in a 7-2 decision upheld a Washington State law which specifically prohibits the use of state scholarship funds from being provided to individuals who wish to pursue a degree in theology. In upholding the state's very specific prohibition of funding the education of students pursuing degrees in theology, the Court chose not to answer the question of whether that state's broader constitutional prohibition of funding any institution under the direct control of a religious denomination was constitutional. Currently, about 36 states, including New York have these broad constitutional provisions, known as "Blaine Amendments" which erect a higher wall separating church and state than is required by the federal Constitution.

In this case, a student was awarded a state scholarship but, pursuant to state law and state constitutional provisions, was precluded from utilizing it to pursue a degree in theological studies. A lower federal court ruled against the student but a federal appeals court reversed concluding that the State had singled out religion for unfavorable treatment in violation of the First Amendment's freedom of religion clause. Upon an appeal to the nation's highest court, Chief Justice William Rehnquist upheld the state's actions as

constitutional. Dissenting opinions were filed by Justices Antonin Scalia and Clarence Thomas. It is extremely rare when Justices Rehnquist, Scalia and Thomas take opposing sides on constitutional interpretations of the religion clauses of the First Amendment. Writing for the majority, Justice Rehnquist noted that there is indeed an inherent tension which exists in separating church and state but that there is “room for play in the joints” between them. Although the Court determined that the state, consistent with the First Amendment could have funded scholarships for individuals seeking degrees in theological studies, it was not required to do so. Washington State’s prohibition against such funding was not seen by the Court as an unconstitutional disfavoring of religion. Rather, the State has merely chosen not to fund a distinct category of instruction and Court found that the state was free to draw a more stringent line than that drawn by the United States Constitution. In its decision, the Court noted the long history on the part of states in placing formal prohibitions in their state constitutions against using tax funds to support the ministry. These provisions were enacted to preclude the government from requiring state-support of religious authorities.

3. *Bush v. Holmes*, 767 So.2d 668, 2006 WL 20584 (January. 5, 2006).

In *Bush v. Holmes*, Florida’s highest court had occasion to analyze the constitutionality of a 2005 Florida law which authorized a system of school vouchers, known as the Opportunity Scholarship Program (OSP). Under this system, a student from a public school that fails to meet certain minimum state standards has two options. The first is to move to another public school with a satisfactory record under state standards. The second option (and the one challenged in this case) is to receive funds from the public treasury, which would otherwise have gone to the student’s school district, to pay the tuition at a private school. Certain taxpayers challenged the OSP program as being in violation of certain provisions of the Florida’s Constitution which set forth: “[i]t is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders... Adequate provision shall be made by law for a uniform, efficient, safe, secure and high quality system of free public schools.”

The trial court found that the OSP was unconstitutional and this decision was ultimately affirmed by a state appeals court. On further appeal, Florida’s highest court also affirmed this decision finding that the Florida Constitution “prohibits the state from using public monies to fund a private alternative to the public school system which is what the OSP does.” In its decision, the court found that the OSP does “not merely supplement the public education system.” Rather, the OSP “diverts funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children.” In addition, the court found that the OSP contravened the state’s constitution through an alternative system of private schools that are not subject to the uniformity requirements of the public school system. Finding the OSP to have violated certain provisions of the State’s Constitution related to the mandate to provide an adequate system of public education, the Court did not rule on whether the OSP also violated a Florida state constitutional provision which prohibits the Legislature from permitting its revenue to be used “directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”

Devotional Activities in Public Schools

1. *Engle v. Vitale*, 370 U.S. 421 (1962).

A New York statute calling for non-denominational prayer in public schools prepared by the New York State Board of Regents was held unconstitutional.

2. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

A Pennsylvania statute requiring that "at least 10 verses from the Holy Bible be read, without comment, at the opening of each public school on each school day" was declared unconstitutional.

3. *Stone v. Graham*, 449 U.S. 39 (1980).

A Kentucky statute requiring the posting of the Ten Commandments on public classroom walls was declared unconstitutional.

4. *Collins v. Chandler Unified School Dist.*, 644 F.2d 759, cert. denied, 454 U.S. 863 (1981).

Federal appellate court enjoined voluntary prayer at school assemblies.

5. *Florey v. Sioux Falls School Dist.* 49-5, 619 F.2d 1311 (8th Cir. 1980), cert. denied, 449 U.S. 987 (1980).
The Establishment Clause is not violated by a school's observance of holidays which have both a religious and a secular basis through programs containing music, art, literature and drama having religious themes and by the temporary display of religious symbols.
6. *Sherman v. Community Consolidated School Dist.*, 980 F. 2d 437 (7th Cir. 1992), cert. denied, 113 S. Ct. 2439 (1993).
The court held that reciting the Pledge of Allegiance in public schools, including the phrase "under God," does not abridge the Establishment Clause.

Moment of Silence and Religious Miscellany

1. *Wallace v. Jaffree*, 472 U.S. 38 (1985)
Alabama statute held unconstitutional which had authorized a one-minute period of silence in public schools for "mediation or voluntary prayer." State's legislative purpose was found to be solely an "effort to return voluntary prayer to the public schools."
2. *Appeal of Passer*, 44 Ed Dept Rep 253, Decision No. 15,164 (January 31, 2005).
A school district did not act unlawfully when it allowed the local chapter of Dollars for Scholars Foundation to display single electric candles in the windows of the high school throughout the months of October through February. The petitioner in *Passer* argued that the display of a single candle in a window is an advent window and, therefore, a display of an alleged Christian symbol in violation of the First Amendment of the federal Constitution. The Commissioner dismissed the appeal on procedural grounds but also found no evidence that the display was religious. The Foundation is a network of community volunteers that raises money for college scholarships by displaying the candles in exchange for donations to the scholarship funds. Donors sponsor candles in memory of a family member, student, teacher, or other loved one.
3. *Appeal of Passer*, 44 Ed Dept Rep 239; Decision No. 15,159 (January 6, 2005).
As part of a series of activities commemorating the tragic events of September 11, 2001, on the one-year anniversary of that fateful day, the Mexico Central School District in upstate New York scheduled several moments of silence to coincide with the times of day when the planes hit the World Trade Center Towers as well as when the towers fell. After each moment of silence, a different song was played over the district's public address system, including "Where Were You When the World Stopped Turning?" a song written and sung by country music artist Alan Jackson. The parents of two children who attended the sixth and eighth grades in the district petitioned the Commissioner, complaining that the district's use of the Alan Jackson song advanced Christianity and fostered excessive government entanglement with religion in violation of the Establishment Clause of the First Amendment to the U.S. Constitution. Applying the three-pronged test espoused by the U.S. Supreme Court in *Lemon v. Kurtzman* (1971) for determining whether a particular practice offends the Establishment Clause, the Commissioner dismissed the appeal, writing: "Although the challenged song may reasonably be interpreted to reference the lyricist's own religious belief, the song was used for a secular purpose and is not a prayer or religious exercise." The Commissioner's decision in this case closely tracks an earlier decision in *Appeal of Cayot* (2002) wherein an appeal challenging another district's use of the song "God Bless America" for its 9/11 memorial was similarly dismissed.
4. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004)
Michael Newdow, the non-custodial parent of a child attending school in the Elk Grove Unified School District (EGUSD) in northern California, objected to his daughter having to listen to the daily recitation of the Pledge of Allegiance by her classmates. Mr. Newdow's objection was based on the words "under God." The class recited the pledge daily in conformity with California statutes requiring each day begin with "appropriate patriotic exercises". After finding that Mr. Newdow had standing to bring his suit in federal court, the Ninth Circuit ruled that the Elk Grove's policy instructing school administrators to lead students in a daily voluntary recitation of the Pledge violates the First Amendment's Establishment Clause. EGUSD

filed a petition for certiorari with the U.S. Supreme Court. The Court granted review, and reversed the Ninth Circuit, 8-0, on the issue of standing.

Justice Stevens delivered the Court's opinion. Justices Kennedy, Souter, Ginsburg, and Breyer joined him. Chief Justice Rehnquist, joined by Justice O'Connor and Justice Thomas as to Part I, wrote a concurring opinion. Justices O'Connor and Thomas also wrote separate concurrences. Justice Scalia took no part in the consideration or decision of the case. Justice Stevens noted that the doctrine of standing involves two separate strands:

- (1) Article III standing, which enforces the U.S. Constitution's requirement of case or controversy; and
- (2) prudential standing, which involves "judicially self-imposed limits on the exercise of federal jurisdiction." He concluded that the standing issue hinged on the prudential strand. Under that strand, he found that the Court has "customarily declined to intervene ... [into] the realm of domestic relations." He concluded that for the Court to answer the federal question at issue in the case could affect "delicate issues of domestic relations" best left to state courts. While acknowledging both California law and the First Amendment recognize Mr. Newdow's right to communicate with his child, Justice Stevens found that right a far cry from the right to represent his daughter's interests in court as "next friend."

He concluded that if the Supreme Court ruled on the Establish Clause issue it could affect the trial court's ruling by implying that Mr. Newdow had parental rights a state trial court had denied him and that are currently under dispute at the state appellate court level. Justice Stevens said, "In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law." As a result, he held on behalf of the Court that Mr. Newdow, having been deprived under California law of the right to sue as "next friend," lacks prudential standing to bring suit in federal court.

While Chief Justice Rehnquist concurred in result with the majority, he dissented from its use of standing to dispose of the case. Instead, he concluded that on the merits of the case that EGUSD's policy that requires teachers to leading willing students in reciting the Pledge, including the words "under God," does not violate the Establishment Clause. Addressing the standing issue, the Chief Justice concluded that the custodial mother's "veto power" in regard to the daughter's education "does not override [Mr. Newdow's] right to challenge the [P]ledge ceremony." Turning to the Establishment Clause issue, he concluded that the Pledge is a patriotic ceremony that is not transformed in a religious one merely because the Pledge contains the descriptive words "under God." In Chief Justice Rehnquist's view to toss out the Pledge would an unwarranted extension of the Establishment Clause, giving an objecting parent a "heckler's veto". He concluded that the only constitutional restriction on reciting the Pledge is that "schoolchildren be entitled to abstain from the ceremony if they chose to do so."

Justice O'Connor, like the Chief Justice, concluded that Mr. Newdow has standing. Her analysis of the Establishment Clause issue focused on references to God and religion as being nothing than a ceremonial acknowledgement of the role religion played in the forming the nation's founding principles of liberty. Justice Thomas also agreed that Mr. Newdow had standing. He concluded that the policy "does not expose anyone to the legal coercion associated with an established religion."

Benedictions, Invocations and Student Led Prayer

1. *Weisman v. Lee*, 505 U.S. 577 (1992).

The U.S. Supreme Court addressed the issue of whether allowing members of the clergy to offer a prayer as part of a public school graduation ceremony violates the separation of church and state guaranteed in the U.S. Constitution. In a 5-4 decision written by Justice William Kennedy, who was joined by Justices Harry A. Blackmun, John Paul Stevens, Sandra Day O'Connor and David Souter, the Supreme Court held that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the "Establishment Clause" that prohibit government from advancing religion and ruled unconstitutional the district's benediction.

2. *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

The United States Court of Appeals for the Fifth Circuit ruled constitutional a school district resolution which permitted public high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies. The Court ruled that the resolution did not have a religious purpose, a primary effect of advancing religion and would not excessively entangle the school district in matters of religion. The United States Supreme Court refused to hear the case.

3. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

The United States Supreme Court, in a 6-3 decision, struck down as unconstitutional a Texas school district policy permitting student-led prayer at football games. In its 1992 decision, entitled *Lee v. Weisman*, the United States Supreme Court previously determined it unconstitutional for school districts to invite clergy members to provide invocations and benedictions at graduation ceremonies ruling such practices to have the coercive effect of asking students to support or participate in a religious exercise. Until now, it was unclear as to whether it was constitutional for a district to have a policy permitting students to initiate their own invocations at school sponsored events. The Court's opinion does not specifically address the issue of whether student initiated prayer at graduation ceremonies is constitutional since the factual context involves high school football games. However, it is widely believed that the Court's reasoning in this decision will equally invalidate any school district policy which permits similar student initiated prayers at any future school sponsored events such as graduation ceremonies.

Court's decision in *Santa Fe* did not alter its previous ruling regarding the school board's policy. The court pointed out that "the total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say combined with the student speaker's complete autonomy over the content of the message [means] that the message delivered be it secular, sectarian or both is not state sponsored."

Teaching of Evolution/Creation Science/Intelligent Design

1. *Epperson v. Arkansas*, 393 U.S. 97 (1968)

A statute barring teaching of evolution was held to be unconstitutional.

2. *Edward v. Agullard*, 482 U.S. 578 (1987)

Alabama statute requiring that teaching of evolution be balanced by teaching of "creation science" ruled unconstitutional because it did not have a secular purpose.

3. *Kitzmiller v. Dover Area School District* 400 F.Supp.2d 707 (M.D. Pa. 2005) (Dec. 20, 2005)

The U.S. District Court for the Middle District of Pennsylvania ruled that the Dover School Board's policy requiring the teaching of intelligent design (ID) in science classes violates the Establishment Clause. The court applied both *Lemon* and endorsement tests. It rejected the argument that ID is a valid scientific alternative to evolution. It concluded that a reasonable observer would view ID as just a new form of creationism, a theory that the United States Supreme Court had long held was nothing more than a religious belief. Addressing the disclaimer read to ninth graders, the district court found that an objective student would view the disclaimer as a "strong official endorsement of religion."

Requests by Parents to Have Textbooks Removed from the Curriculum

1. *Smith v. Board of School Commissioners of Mobile County*, 655 F. Supp. 939 (S.D. Ala. 1987), rev'd, 827 F.2d 684 (11th Cir. 1987).

The United States Court of Appeals for the Eleventh Circuit reversed the decision of the United States District Court for the Southern District of Alabama which had ordered Alabama's public schools to remove 44 history, social studies and home economics textbooks for use in Alabama's public schools because the Court found such books to teach the religion of "secular humanism."

On appeal, although the Court noted that some of the material in the contested books may in fact be offensive to the religion of those bringing the lawsuit, the State's purpose in instilling in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance, and logical decision-making, outweighed any possible interference with the religious rights of those involved in the lawsuit. The Court noted that if school districts are precluded from including material in books that is offensive to any particular religious belief, "there would be very little that could be taught in the public schools."

2. *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985), cert. denied, 474 U.S. 826 (1985).
The allegation that the book, The Learning Tree, unconstitutionally advanced an antitheistic faith was rejected.
3. *Virgil v. School Bd. of Columbia County, Florida*, 862 F.2d 1517 (11th Cir. 1989).
A school board's decision to bar use of a humanities text because of its objectionable selections (including Chaucer's The Miller's Tale) was upheld because the decision was based on pedagogical concerns.
4. *Fleischfresser v. Directors of School Dist. 200*, 805 F. Supp. 584 (N.D. Ill. 1992).
Allegation was rejected that the Impressions reading series unconstitutionally advances the occult.

Free Exercise of Religion/Schools

1. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
Applying compelling state interest/least restrictive alternative test, the Court required the state to exempt Amish children from compulsory school attendance past the eighth grade.
2. *Mozert v. Hawkins County Board of Education*, 647 F.Supp. 1194 (E.D. Tenn. 1986), rev'd, 827 F.2d 1058 (6th Cir. 1987).
The United States Court of Appeals for the Sixth Circuit reversed the decision of the United States District Court for the Eastern District of Tennessee which had ordered the Hawkins County School District to allow children who had religious objections to a certain basal reading series to be excused from, or "opt-out" of reading class whenever any of these books were taught. Under this "opt-out" plan, the students would go to a study hall or library during reading class and would study reading later at home with their parents.
The Court of Appeals held that parents and children could not successfully claim that their freedom to practice their religion had been violated by the school district's mandating that the children attend classes and be "exposed" to the basal reading series. The Court reasoned, in essence, that the right to practice one's religion is not burdened simply by mandating one to be exposed to ideas with which one disagrees.
3. *DeNoover v. Merinelli*, 12 F.3d 211 (6th Cir. 1993).
Student did not have a free exercise or free speech right in a class presentation to play a videotape of herself singing a religious song at church. The school presentation was part of the curriculum and could be censored to avoid the impression that the school was endorsing religious doctrine.
4. *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3rd Cir. Aug. 27, 2003).
The Third Circuit Court of Appeals ruled that school districts may prohibit elementary age students from distributing gifts containing religious messages at in-class holiday parties. Daniel Walz twice attempted to hand out favors with a religious message at in-class holiday parties contrary to the practice of having the parent teacher organization (PTO) hand out presents. Daniel's parents were told he could only distribute the religious themed gifts before or after class and during recess. Daniel's mother filed a civil rights action against the school board and superintendent claiming that the district violated her son's First Amendment right to freely express himself and practice his faith. A lower federal court ruled for the district and the student's mother appealed.
In its decision, the Third Circuit affirmed the decision of the lower court and upheld the actions of the school district. First the Court ruled that, "in the elementary school setting, age and context are key...." As a general matter, the elementary school classroom, especially for kindergartners and first graders, is not a place for student advocacy. To require a school to permit the promotion of a specific message would infringe upon a school's legitimate area of control." The Court found that since young impressionable students could easily misinterpret a fellow student's message, schools "must be able to restrict student expression that contradicts or distracts from a curricular activity." The Court acknowledged that individual student expression that is nondisruptive and articulates a particular view which appears in response to a class assignment or activity would appear protected. However, in this case, the Court considered many factors as having great constitutional significance in causing it to rule for the school district. First, at all times the school maintained control over the holiday activities such as by having teachers plan the holiday parties.

Secondly, the PTO controlled gift distribution. Thirdly, at no point during the holiday parties did the school solicit individual views from the young students about the personal significance of the holiday. Accordingly, the Court found that the student was not attempting to exercise a right to personal religious observance in response to a class assignment or activity, stating. "Where a student speaks to his classmates during snack time, he does so as an individual. But absent disruption, this is fundamentally different from a student who controverts the rule of a structured classroom activity with the intention of promoting an unsolicited message."

Equal Access

1. *Westside Community Board of Education v. Mergens*, 496 U.S. 226 (1990).

The Equal Access Act does not violate the First Amendment's proscription against establishment of religion. The Act requires public high schools to allow student religious and political clubs to meet on the same basis as other non-curriculum-related activities. Although the decision reinforces the constitutionality of the 1984 Equal Access Act, it expands the definition of the term "non-curriculum-related" to refer to any student group that **does not directly relate** to a school's curriculum if its subject matter is taught, or will soon be taught, in a regularly offered course; if that subject matter concerns the body of courses as a whole; or if participation in the group is required for a course or results in academic credit. Under the Equal Access Act, if a school district permits non-curriculum related student groups to use school premises, then the following rules must be observed:

- Meetings must be voluntary and initiated by students.
- There can be no sponsorship of the meetings by the school, the government, or its agents or employees.
- Employees or agents of the school or government may attend only in a non-participatory capacity.
- Meetings must not interfere materially or substantially with the orderly conduct of educational activities with the school.
- Non-school people may not direct, conduct, control, or regularly attend activities of student groups.

2. *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839, 64 U.S.L.W. 2733, 109 Ed. Law Rep. 1145 (2d Cir. 1996), cert. denied, 117 S.Ct. 608, 65 U.S.L.W. 3430 and 3432 (12/16/96).

The United States Supreme Court declined to hear an appeal of a decision from the Second Circuit Court of Appeals which held that a school district could not prohibit a student bible club from requiring that certain officers be Christians. Students challenged the district's prohibition alleging that it violated the Equal Access Act. The district argued that such a requirement violated the district's non-discrimination policy. The lower court ruled in favor of the district, finding that the non-discrimination policy allowed the club to meet on the same basis as other clubs and that an exemption to the non-discrimination policy would constitute an excessive entanglement with religion in violation of the Establishment Clause. In reversing the lower court, the Second Circuit determined that the speech protected by the Equal Access Amendment include the selection of the club's leadership positions. Furthermore, it ruled that a religious club may insist that those in certain leadership positions have a commitment to its cause in the same way that a secular club may do so.

3. *Boyd County High School Gay Straight Alliance v. Boyd County Bd. of Education*, 258 F.Supp.2d 667 (E.D.Ky. 2003).

In this case the Boyd County High School was ordered to open its doors for a gay-straight student alliance. The Gay Straight Alliance (GSA) was initially approved as a club by the district but public outcry against it caused the school board to suspend all clubs from meeting on school grounds. The GSA brought suit under the Equal Access Act (EAA) after the district continued to allow several other student groups to meet on school grounds. Under the Act, any public secondary school which accepts federal funds and provides an opportunity for one or more non curriculum related groups to meet on school grounds during non instructional time cannot exclude others based on the content of their speech. According to the court, a school cannot deny access to a student group because student and community opposition substantially interferes with the school's ability to maintain discipline. The student group's own activities must be the source of the disruption in order to overcome the right of access granted by the EAA. On this basis, the

court granted the GSA a preliminary injunction allowing it to meet on school grounds, submit announcements, and use the school newspaper to the same extent as other school clubs.

Use of School Facilities by Outside Religious Groups

1. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S.394 (1993)

Under the free speech clause of the First Amendment, a school that creates a limited public forum cannot exclude speech on a permissible subject (in this case, family value) simply because of its religious viewpoint or perspective. Allowing a film on family values from a Christian perspective to be shown on school premises after school hours would not violate the establishment clause.

2. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

The Supreme Court ruled a school district violated religious club's free speech rights when it barred the club from using school facilities after hours based on the club's religious viewpoint because the school district's actions constituted impermissible viewpoint discrimination that was not justified by any Establishment Clause concerns.

The United States Supreme Court, in a 6-3 decision reversed and remanded. Justice Thomas concluded that the club's free speech rights were violated, and that no Establishment Clause concerns justified the violation. Because both parties agreed that a limited open forum had been created, Justice Thomas, writing for the majority, began his analysis from the premise that a school district can restrict speech based upon the type of speech, provided its restriction does not discriminate against speech on the basis of its viewpoint. Using *Lamb's Chapel* and *Rosenberger* as guides, he examined whether the school district's exclusion of the club constituted viewpoint discrimination. The majority found no distinction between the presentation of films that discussed family values from a religious perspective in *Lamb's Chapel* or the student publication that addressed issues from a religious perspective in *Rosenberger* and the club's use of prayer, Bible study, games and songs with religious themes to teach character development and morals. Pointing out that teaching character development and morals was a permissible purpose under the school district's policy, he concluded that excluding the club because it proposed to teach character development and morals from a religious perspective, is the same type of viewpoint discrimination that the Court had struck down in *Lamb's Chapel* and *Rosenberger*.

Turning to the school district's argument that even if it engaged in viewpoint discrimination, its interest in avoiding an Establishment Clause violation outweighed the Club's interest in gaining equal access to the school's facilities, Justice Thomas concluded, just as the Court had done in *Lamb's Chapel* and *Widmar*, that there was no realistic danger that the public would perceive the school's action of allowing the club to meet as an endorsement of religion.

3. *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 400 F.Supp.2d 581 (2005)

The United States District Court for the Southern District of New York permanently enjoined New York City Board of Education from denying access to a church seeking to rent school facilities for its Sunday meetings. Bronx Household claimed the refusal to rent space to the church constituted impermissible viewpoint discrimination in violation of the First Amendment. In reviewing the case, the court held that renting the space to the church would neither advance nor inhibit religion because the meetings were held when school was not in session and were not endorsed by the district. In light of the Supreme Court's decision in *The Good News Club* case the district could not prevent the church from using the premises based on a child's potential to misperceive the events. The court also agreed with *Good News* that it is impossible to divorce religious worship activities from teaching moral values from a religious perspective. As such the district's policy which required administrators to examine groups' requests and determine if the speech the group would engage in was purely religious worship fostered excessive entanglement with religion.

4. *Full Gospel Tabernacle v. Community School District No. 27*, 979 F.Supp. 214 (S.D.N.Y. 1997), *aff'd* 164 F.3d 829 (2d Cir. January 25, 1999) *Cert. Denied*, 119 S.Ct. 2395 (U.S. June 24, 1999).

The court ruled that a school district could refuse to rent its facilities to a church for religious worship services on the grounds that the Education Law and its own policies and regulations prohibited such use. The issues in this case mirror those in *Bronx Household of Faith v. Community School District No. 10*, with the exception that the district in this case had previously granted access to school facilities to other churches

for religious worship services and instruction. The district did not deny that such access had been permitted, but argued that it had been granted erroneously by an employee in the department responsible for such requests when the department's director position was vacant. The court ruled that while past practice is a relevant factor in determining if a district has opened its limited forum to religious worship, it is not determinative when a district mistakenly grants access to its facilities for religious worship and instruction. NYSSBA submitted a brief on behalf of the district in this case.

5. *Wigg v. Sioux Falls School District*, 382 F.3d 807 (S.D. 2004).

The U.S. Court of Appeals for the Eighth Circuit has ruled that an elementary school teacher can participate in an after-school religious club for children, even if the meetings are held at the same school where she is assigned to teach. A federal district court had ruled that the teacher could participate in the club at another school but not at the school where she is assigned. Barbara Wigg was denied permission by school district officials to participate in meetings of a children's "Good News Club" at her school sponsored by the Child Evangelism Fellowship. The officials cited Establishment Clause concerns. Ms. Wigg sued, alleging violation of her free speech rights. The district court denied her request to order the school district to allow her to participate in the club at her school. However, it ruled that Ms. Wigg could participate in club meetings held at other schools without raising the same Establishment Clause endorsement concerns, because a reasonable observer would not view her as a teacher conducting another class but merely as a private citizen. The Eighth Circuit agreed with the district court that once Ms. Wigg went to another school, a reasonable observer would view her as any other private citizen exercising her right to religious freedom and speech. However, the appellate court went further, finding that no reasonable observer would mistake Ms. Wigg's participation even at her own school for the school's endorsement of religion, because the school day will have ended and participation is limited to students who have parental permission to participate.

6. *Child Evangelism Fellowship of New Jersey v. Stafford Township School Dist.*, 386 F.3d 514 (3rd Cir. 2004).

The U.S. Court of Appeals for the Third Circuit has ruled that a New Jersey school district's refusal to distribute promotional materials for a religious club in elementary schools, while distributing materials for secular clubs, violated the religious club's free speech rights. The court also ruled that barring the religious club from distributing materials at "back-to-school night" events and from posting posters on school walls was unconstitutional. The court began by rejecting school district's contention that the speech at issue was school-sponsored and, therefore, governed by *Hazelwood*. The school district had no hand in writing, paying for, producing, or approving the materials, the court noted, and the materials contained a disclaimer stating that the club was "not a school sponsored activity." The court found that the speech was private speech comparable to that in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). Turning to district's argument that even if the speech were private, the district was permitted to regulate it because all three fora were closed to the public, the court concluded that a school district may not engage in viewpoint discrimination even in such a forum. On the central question of whether the district restrictions were based on permissible, viewpoint neutral criteria, the court concluded that district committed viewpoint discrimination based on religion because its criteria technically should have excluded secular groups whose materials in fact were distributed, including groups promoting anything beyond "mundane recreational activities" and groups that "proselytize" in the loose sense they are recruiting members. In particular, the district's criterion excluding all speech on "religion as a subject or category" flew in the face of U.S. Supreme Court precedent that private religious speech is afforded the same constitutional protections as private secular speech. In addition to impermissibly excluding religious speech, the district also discriminated against the club's Christian orientation, because it distributed materials for nonsectarian groups, such as the Boy Scouts and the Girl Scouts, that profess a general faith in God. Finally, the court rejected the district's argument that its restrictions were justified by the need to avoid violating the Establishment Clause. Applying the test established in *Lemon v. Kurtzman*, along with the endorsement and coercion tests, the court concluded that nothing in the access demanded would create an atmosphere of coercion, a perception of endorsement, or excessive entanglement between government and religion.

7. *Child Evangelism Fellowship v. Montgomery County Public Schools*, No. 03-162 (D. Md. 3/24/2005)

A Maryland federal district court has ruled that Montgomery County Public Schools' (MCPS) revised policy limiting classroom distribution of materials from outside groups based on the type of group, rather than the content of the materials, does not violate a religious group's free speech rights. Child Evangelism

Fellowship of Maryland (CEF-MD), which operates after-school evangelical Good News Clubs in MCPS facilities, requested that teachers distribute materials promoting the clubs in classrooms on the same basis as for other community organizations, such as the Boy Scouts and the 4-H Club. When MCPS officials denied the request, CEF-MD sued. The federal district court upheld MCPS's refusal. CEF-MD appealed to the Fourth Circuit, which reversed and remanded the case to the district court. In response to the Fourth Circuit's ruling, MCPS revised its policy to limit classroom distribution to materials from MCPS; county, state, or federal government agencies; parent-teacher organizations; licensed day care providers operating on-campus; and non-profit organized youth sports leagues. The policy places no restrictions on the content of the materials, religious or otherwise. Because CEF-MD does not fit into any of these five categories, it is barred from having its materials distributed. On remand, CEF-MD argued that the revised policy violates CEF-MD's free speech rights by effectively still excluding speakers with religious viewpoints. MCPS countered that the policy avoids any free speech problems because its restrictions are content neutral. Addressing the question of what type of forum the MCPS policy created, the district court noted that under the former policy, the Fourth Circuit had concluded that MCPS had created a limited public forum. Under the revised policy, however, the district court found that "MCPS has indicated that it does not wish to create a limited public forum and it no longer opposes [CEF-MD's] flyers on the basis of their religious content." As a result, the court concluded that the revised policy constitutes a nonpublic forum subject only to a constitutional test of reasonableness. The new policy passes this test because MCPS sought to reduce the "burgeoning number of organizations" distributing their materials in the classroom by "limit[ing] the subject matter to activities of traditional educational relevance to students and the categories of speakers to organizations involved in those activities." The court did caution that such limitations on speakers and subject matter could run afoul of the reasonableness test if the restrictions "conceal a bias against the viewpoint advanced by the excluded speakers." Based on the record, however, the court concluded that the revised policy is content neutral; the fact that the revision came in response to the current litigation does not alter this conclusion. Even under the new restrictions, CEF-MD could gain access to the classroom distribution forum if an approved group sponsored or endorsed its message. Therefore, the court ruled, CEF-MD's motion for a permanent injunction requiring distribution was moot.

9. *Kiesinger v. Mexico Academy and Central School*, --F.Supp.2d--, 2006 WL 936143 (N.D. N.Y.,2006).

A school district sold bricks to community members to be placed in a walkway in front of the high school to raise money, in part, to fund a senior class trip. Community members were permitted to have certain personal messages inscribed into the bricks as long as they were not "obscene, vulgar or contained love interest messages." After certain bricks were purchased, inscribed with the words: "Jesus Saves!", "Ye Must be Born Again, Jesus Christ", "Jesus Christ The Only Way!" "Jesus Loves You" and "Jesus Christ is Lord." and placed in the ground, the district, in responding to the threat of a lawsuit from the ACLU, removed the bricks. A lawsuit was brought by an individual who argued that the removal of the bricks violated his First Amendment rights. The United States District Court for the Northern District of New York agreed and ordered the district to replace the bricks. In its decision, the Court ruled that the district's removal of the bricks containing religious messages constituted viewpoint discrimination. The Court did not accept the district's argument that the messages contained on the bricks would place students and community members in the position of perceiving that the district was unconstitutionally advancing religion. The Court found that an objective observer, aware of the history of the walkway, the district's purpose in installing the walkway as well as the great number of bricks which did not contain religious messages, would not perceive the effect of the walkway to be an endorsement of religion by the district.

Public Display of Religious Symbols

1. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

The city of Pawtucket's inclusion of a nativity scene in its Christmas display does not "taint" an otherwise constitutional display because, overall, the display had legitimate secular purposes of celebrating Christmas holiday and depicting origins of that holiday. In addition to the creche, the display included a Santa Claus, a Christmas tree, a reindeer, a clown, a teddy bear and other holiday items. Display may advance religion "in a sense" but any benefit conferred is "indirect, remote and incidental." A concurrence by Justice O'Connor propounds that even if a governmental practice has the "primary effect" of advancing or inhibiting religion, "what is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." Compare this case with *Allegheny County*

v. *Greater Pittsburgh American Civil Liberties Union* where the display of a nativity scene by itself in a public building was held to violate the First Amendment.

2. *Allegheny County v. Greater Pittsburgh American Civil Liberties Union*, 488 U.S. 815 (1989).

A nativity scene in the county courthouse, which included a message from a local religious society, violated the Establishment Clause because it had the primary effect of endorsing Christianity. However, a display outside the city county building of a 45-foot decorated Christmas tree, an 18-foot Chanukah menorah and a "salute to liberty" message from the mayor was upheld as merely acknowledging the cultural diversity of this country and the "different traditions for celebrating the winter-holiday season." Compare *Lynch v. Donnelly* where the Court held that the inclusion of a nativity scene did not "taint" an otherwise constitutional display which celebrated the holiday season and included a number of secular items.

3. *McCreary County v. American Civil Liberties Union of Kentucky*, 125 S.Ct. 2722 (U.S. June 27, 2005).

The U.S. Supreme Court has ruled that two courthouse displays of the Ten Commandments violate the Establishment Clause. When two Kentucky counties posted large displays of the Ten Commandments in their courthouses, the American Civil Liberties Union of Kentucky (ACLU) sued. In response, the counties adopted identical resolutions calling for a more extensive exhibit designed to demonstrate that the Ten Commandments are the state's "precedent legal code." The displays were expanded to include other historical documents, all containing religious references, and later were further expanded to include other documents. The district court granted the ACLU's motion, concluding that the displays ran afoul of the secular purpose prong of the Establishment Clause test set forth in the *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Sixth Circuit Court of Appeals affirmed on the same grounds. The U.S. Supreme Court affirmed. Justice Souter wrote the Court's opinion, joined by Justices Stevens, O'Connor, Ginsburg, and Breyer. Justice O'Connor also contributed a separate concurring opinion. Justice Scalia wrote a dissenting opinion, which Chief Justice Rehnquist and Justice Thomas joined and which Justice Kennedy joined in part. The Court rejected the counties' argument that the secular purpose prong of *Lemon* should be abandoned because "true 'purpose' is unknowable" and its use as a criterion is "merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent." As for the counties' suggestion that the purpose prong be modified so that any governmental claim of secular purpose would be accepted without resorting to context or history, the Court found that this would render the purpose inquiry meaningless; deference is owed a government's stated purpose, but *Lemon* requires that the purpose not be a sham or be merely secondary to a religious purpose. The Court also rejected the counties' argument that inquiries into purpose should be limited to viewing each government action in isolation. Reasonable observers of government action are assumed to view that action in light of the context and history surrounding the action. At no stage of the litigation or prior to it, the Court concluded, had the counties taken a course of action that would survive the secular purpose prong. Rather, each successive change reinforced the dominant religious nature of the displays. The Court found that counties' displays shared many similarities with the classroom Ten Commandments display invalidated in *Stone v. Graham*, 449 U.S. 39 (1980). Justice O'Connor argued in her concurrence that the Establishment Clause has served the nation and its religious communities very well and, acknowledging that "many Americans find the Commandment in accord with their personal beliefs," noted that "we do not count heads before enforcing the First Amendment." Justice Scalia's dissent asserted that the Establishment Clause does not require government neutrality between religion and irreligion and, given other religious expression that the Court has upheld in the public forum, "permits the disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."

4. *Van Orden v. Perry*, 125 S.Ct. 2854 (U.S. June 27, 2005).

The U.S. Supreme Court has ruled that a Ten Commandments display on the grounds of the Texas state capitol does not violate the Establishment Clause. Chief Justice Rehnquist delivered a plurality opinion, joined by Justices Scalia, Kennedy, and Thomas. Justice Breyer filed a separate opinion concurring in the judgment but disagreeing with the plurality's reasoning. Justice Stevens filed a dissenting opinion in which he was joined by Justice Ginsburg. Justice O'Connor also filed a dissenting opinion. Justice Souter filed a dissent in which Justices Stevens and Ginsburg joined. The plurality opinion, while conceding that Ten Commandments conveys a religious message, argued that the context in which the Ten Commandments is used demonstrates that the display also conveys a secular moral message about proper standards of social conduct and a message about the historical significance those standards and the law. Chief Justice Rehnquist concluded that the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is not useful for evaluating

the kind of passive display at issue in the case and that the Texas display, amidst numerous other nearby monuments and considering similar representations throughout the country, reflects the Decalogue's historical and cultural significance. The Chief Justice distinguished the Court's holding in *Stone v. Graham*, 449 U.S. 39 (1980), which disallowed a classroom Ten Commandments display, as the "consequence of the 'particular concerns that arise in the context of public elementary and secondary schools.'" Nothing in *Stone*, he argued, would extend its holding "beyond the context of public schools." Justice Scalia's concurrence emphasized his belief that "there is nothing unconstitutional in a State's favoring religion generally." Justice Thomas's concurrence called for the scrapping of all Establishment Clause tests save the coercion test. Justice Breyer's concurrence in the judgment agreed with the plurality's conclusion that the Texas display serves a "mixed but primarily nonreligious purpose" that satisfies the purpose, advancement, and entanglement prongs of the *Lemon* test, but he argued that, in such fact-specific cases, none of the various Establishment Clause tests can substitute for the "exercise of legal judgment." Justice Stevens's dissent took issue with the plurality's notion that the Establishment Clause principle of religious neutrality compels government to favor religion in general. He argued that the display's clear Judeo-Christian religious message oversteps the principle of neutrality by favoring religion. Justice Souter's dissent also emphasized that the Ten Commandments "constitute a religious statement, that their message is inherently religious, and that the purpose of singling them out in a display is clearly the same." Like Justice Stevens, he concluded that a "governmental display of an obviously religious text cannot be squared with neutrality, except in a setting that plausibly indicates that the statement is not placed in view with a predominant purpose on the part of government either to adopt the religious message or to urge its acceptance by others."

Religious Release Time

1. *McCollum v. Board of Education*, 333 U.S. 203 (1948).
A public school may not provide release time for religious instruction on public school property.
2. *Zorach v. Clauson*, 343 U.S. 306 (1952).
A public school may provide release time for students to attend religious classes off of its premises.
3. *Pierce v. Sullivan West CSD*, 379 F.3d 56 (2d Cir. (N.Y.)) (2004)

The manner in which the district released students from instruction to enable them to obtain religious education eligible education off school premises was consistent with Education Law section 3210(2)(b) and with the Commissioner's regulations at 8 NYCRR §109.2. Therefore, the district did not violate the constitutional rights of students who chose not to participate, according to a three-judge panel of the United State's Court of Appeals for the Second Circuit, headed by Chief Judge, John M. Walker, Jr. The law and regulations require public school districts to release students, upon written parental request, for up to one hour each week, for religious observance and education, off school premises, in a program operated or controlled by a "duly constituted religious body." Absence from school for such release time must occur either at the close of the morning or afternoon session, or both, as determined by school authorities. Notably, the U.S. Supreme Court upheld the constitutionality of New York's religious release time law in 1952 in *Zorach v. Clauson*, finding the law facially valid. However, two students who attended the Sullivan West's schools attempted to make an "as applied" challenge based on the particular manner in which the district operated its program. The plaintiffs claimed that the district's implementation of its release time program violated their constitutional rights, because, among other things, as non-participants, they were subjected to "abusive religious invective" from students who participated in the program. This happened, they alleged, because teachers and principals were not adequately trained to handle the situation. The Second Circuit panel rejected each of the students' claims, finding that their lawsuit attempted to re-litigate the facial validity of the statute and was not really an "as applied" challenge at all. According to the court, the Pierces had not distinguished their claims in "any meaningful way" from those made in *Zorach*. As in *Zorach*, the Second Circuit panel found no evidence that Sullivan West expended any public money in support of its religious release time program. Participation in the program was purely voluntary; the district did not in any way pressure or coerce students to participate. In addition, to the extent that "hurtful things" were said to the Pierces because they did not participate, the court found that these things were said by other students, not the district. The court did not specifically address the Pierces' claim that this occurred because of the district's alleged failure to adequately train teachers and principals. Notably, the district admitted that

it had violated the Commissioner's regulations in one technical respect, which it has since corrected, inasmuch as it previously scheduled release time in the middle of the morning instead of at the end of the morning or afternoon session, as required.

FIRST AMENDMENT FREE SPEECH CASES

“Congress shall make no law ... abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. “

First Amendment, United States Constitution.

Landmark Rulings of the United States Supreme Court

Free Speech

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

The United States Supreme Court ruled that students are entitled to first amendment free speech protections even within the walls of the school house building but that these rights may be subject to reasonable time, place and manner restrictions. In addition, the Court held that student free speech protections do not extend to speech which would materially and substantially disrupt the educational process of the school environment or that would impinge on the rights of others. In this case, three students were suspended for wearing black armbands to symbolize and publicize their objections to the hostilities of the Vietnam War. The Court determined that such suspensions were unconstitutional.

Student Assemblies

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

The United States Supreme Court upheld the suspension of a high school senior who gave a nominating speech at a school assembly laced with sexual innuendo. The Court distinguished this case from *Tinker* holding that the school district acted within its authority in response to the use of vulgar or indecent speech in a school sponsored activity.

Student Publications

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

The United States Supreme Court ruled that school officials did not violate the free speech rights of students by removing materials deemed objectionable from a school-sponsored newspaper for legitimate educational reasons. In so ruling, the Court limited its earlier ruling in *Tinker* to situations involving the regulation of a student's "personal expression" which occurs on school premises and held that the substantial disruption standard did not apply to school-sponsored activities.

RECENT CASES

Student Free Expression Rights

1. *Bannon v. School Dist of Palm Beach Co.*, 387 F.3d 1208 (11th Cir. 2004).

A public high school did not violate a student's free speech rights when it ordered her to remove her religious messages from hallway murals she painted as part of a school beautification project. The student's mural contained a bible verse, an inspirational statement and a depiction of the sun with a cross and the words Jesus and God. The principal directed her to remove the cross and the words Jesus and God. The 11th Circuit found that the project was a non public forum because the school specifically prohibited murals containing obscene or offensive messages, school officials maintained supervisory control over the project and the principal never opened the murals to student expression of any religious views. The speech in question was found to be school sponsored because the public would reasonably believe the murals bore the school's imprimatur. The court applied *Hazelwood* and determined the project was a curricular activity and

the school could restrict the content for legitimate pedagogical concerns. The court also rejected an argument that the restrictions constituted impermissible viewpoint discrimination finding the principal's restrictions were content based and sought to avoid religious arguments disruptive to the school environment.