

EVERSON AND “THE WALL OF SEPARATION
BETWEEN CHURCH AND STATE”: THE SUPREME
COURT’S FLAWED INTERPRETATION OF
JEFFERSON’S LETTER TO THE DANBURY BAPTISTS

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Congress shall make no law respecting an establishment of religion, or
prohibiting the free exercise thereof . . .¹

- The First Amendment to the U.S. Constitution

I. INTRODUCTION

Following the signing of the Declaration of Independence and throughout the American Revolution, the original thirteen states were governed by the Articles of Confederation.² Under the Articles of Confederation, the states passed the Northwest Ordinance, which set forth the requirements to be met by any U.S. territory seeking admission to the Union.³ Among the provisions of the Northwest Ordinance was Article III, which provided that, in order for a territory to become a state, its schools were required to teach religion and morality in addition to reading, writing, and arithmetic.⁴ America’s Founding Fathers viewed the Northwest Ordinance as so important that, upon the dissolution of the Articles of Confederation and the subsequent ratification of the U.S. Constitution, they enacted the Ordinance again to ensure that the schools of any state entering the Union were teaching the principles they adhered to in forming that Union.⁵

The circumstances surrounding the passage of the Northwest Ordinance under the Constitution are quite noteworthy, yet they are often absent from modern discussion of the First Amendment.⁶ The Northwest Ordinance was passed by the First Congress on August 7,

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¹ U.S. CONST. amend. I, § 1.

² See DAVID BARTON, EDUCATION AND THE FOUNDING FATHERS 6 (2d ed. 1993).

³ See *id.*

⁴ See *id.* at 7.

⁵ See *id.* at 6.

⁶ Noted Founding-Era scholar David Barton provides one notable exception to this trend. His analysis of the Supreme Court’s Establishment Clause jurisprudence is cited extensively throughout this article.

1789.⁷ During the same time frame, members of Congress debated the adoption of the First Amendment from June 7, 1789 to September 25, 1789.⁸ What should be strikingly clear is that these two provisions, both inextricably linked to religion and one historically proven to require the teaching of Christianity in state schools, were drafted by the same men at the same time in our nation's history. Yet, the Supreme Court of the United States and countless lower courts have firmly ingrained within the American mindset that the First Amendment requires a strict "separation of church and State."

As a result, the provisions and history of the Northwest Ordinance are revolutionary in the minds of most modern Americans. To learn that teaching religion and morality in state schools was, at one time, not only supported by our government but required, contradicts what most Americans have come to know about the First Amendment. For in most American minds, the "separationist" jurisprudence of the twentieth-century Supreme Court is, and always has been, the philosophy underlying the ecclesiastical-governmental relationship within the United States. This understanding is simply incorrect.

The purpose of this article is to illustrate the doctrinal weaknesses of modern "separation of church and State" jurisprudence by focusing on its divergence from the original meaning of the First Amendment. Part II of this article will present a discussion of modern First Amendment Establishment Clause Supreme Court cases that advance the notion of "separation of church and State." Part III will provide a sharp contrast to modern Establishment Clause jurisprudence through a discussion of several early Supreme Court decisions concerning the importance of teaching Christian principles in the schoolroom. Finally, Part IV will discuss the point in Supreme Court history in which the original meaning of the Establishment Clause was discarded in favor of an entirely different notion: the "separation of church and State."

II. A SURVEY OF MODERN SUPREME COURT ESTABLISHMENT CLAUSE JURISPRUDENCE

The Supreme Court opened the door to an influx of "separationist" jurisprudence in its 1962 decision, *Engel v. Vitale*.⁹ In *Engel*, the Board of Education of Union Free School District No. 9 of New Hyde Park, New York, permitted the recitation of a prayer in class at the start of each school day.¹⁰ The school children were presented the opportunity, if they

⁷ See BARTON, *supra* note 2, at 7 (citing ACTS PASSED AT A CONGRESS OF THE UNITED STATES OF AMERICA 104 (Hartford, Conn., Hudson & Goodwin 1791)).

⁸ See *id.* (citing I ANNALS OF CONGRESS OF THE UNITED STATES – FIRST CONGRESS 424-914 (Washington, D.C., Gales & Seaton 1834)).

⁹ *Engel v. Vitale*, 370 U.S. 421 (1962).

¹⁰ *Id.* at 422.

so chose, to recite the following: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."¹¹ The parents of several students challenged the policy's validity under the Establishment Clause.¹²

In setting up its holding that the recitation of the prayer violated the Establishment Clause, the Court was careful to point out the governmental origin of the prayer. It commented that

[t]his daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the State Constitution to which the New York Legislature has granted broad supervisory, executive, and legislative powers over the State's public school system. These state officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools," saying: "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program."¹³

The Court also noted the rationale behind the parents' argument: "The petitioners contend . . . that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by government officials as a part of a governmental program to further religious beliefs."¹⁴ In defense of the prayer, the Board of Education argued that, though the prayer was admittedly religious in nature, it should be permitted because it was intended to focus students' attention on the nation's spiritual heritage.¹⁵ The Court rejected the Board's argument and held that "the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State."¹⁶

To explain its holding, the Court engaged in a lengthy discussion of the history and potential dangers of established churches in both sixteenth-century England and the early American colonies.¹⁷ Justice Potter Stewart commented in his dissent on the Court's foray into history:

The Court's historical review of the quarrels over the Book of Common Prayer in England throws no light for me on the issue before us in this case. England had then and has now an established church.

¹¹ *Id.*

¹² *Id.* at 423.

¹³ *Id.* at 422-23. The highest court of the State of New York, the New York Court of Appeals, upheld the recitation of the prayer as constitutional so long as no student was compelled to participate in the prayer over his or her parents' objections. *Id.* at 423.

¹⁴ *Id.* at 425.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 425-35.

Equally unenlightening, I think, is the history of the early establishment and later rejection of an official church in our own States. For we deal here not with the establishment of a state church, which would, of course, be constitutionally impermissible, but with whether school children who want to begin their day by joining in prayer must be prohibited from doing so. Moreover, I think that the Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like the "wall of separation," a phrase nowhere to be found in the Constitution. What is relevant to the issue here is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government.¹⁸

In light of the enactment of the Northwest Ordinance and similar policies by the First Congress, Justice Stewart's view appears to be more in keeping with the original understanding of the Establishment Clause. But Justice Stewart was outnumbered, and the majority's holding that voluntary, nondenominational prayer in the classroom is unconstitutional became the law of the land.¹⁹

¹⁸ *Id.* at 445-46. Justice Stewart's dissent also noted that:

The Court does not hold, nor could it, that New York has interfered with the free exercise of anybody's religion. For the state courts have made clear that those who object to reciting the prayer must be entirely free of any compulsion to do so, including any "embarrassments and pressures." Cf. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624. But the Court says that in permitting school children to say this simple prayer, the New York authorities have established "an official religion."

With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.

Id. at 445.

¹⁹ In his book, *The Myth of Separation*, David Barton notes the following:

Court decisions always cite previous cases as precedents; citing precedent is the means by which the past is used to give credibility to the present; precedent serves as the foundation upon which current decisions are built. A significant legal note to this case is that *not one single precedent was cited by the Court in its removal of school prayer!* That the Court was able to overturn 340 years of educational history in America without citing a single precedent was an accomplishment of which it was proud, as evidenced by a comment made the following year in the *Abington v. Schempp* case:

Finally, in *Engel v. Vitale*, only last year [1962], these principles were so universally recognized that the Court, *without the citation of a single case . . .* reaffirmed them.

Soon after *Engel* came *Abington School District v. Schempp*.²⁰ In *Abington*, two parents attacked a Pennsylvania statute that required ten verses of the Bible to be read at the opening of each school day.²¹ The Bible reading was followed by a recitation of the Lord's prayer and was conducted over the school's public address system at the start of each school day. Attendance at the readings was optional.²²

The plaintiffs in the case, the Schempp family, had two children enrolled at Abington Senior High.²³ Due to their adherence to the teachings of the Unitarian Church, the Schempp's claimed that the morning Scripture reading violated their First Amendment rights in that "specific religious doctrines purveyed by a literal reading of the Bible . . . were contrary to the religious beliefs which they held and to their familial teaching."²⁴ Further, Mr. Schempp testified that simply removing his children from the Scripture reading was not an option because he believed that his children's relationship with their classmates and teachers would be adversely affected.²⁵

The *Abington* Court prefaced its discussion of its holding by citing testimony concerning the dangerous effects the Bible could have on children.²⁶ Referring to this aspect of *Abington*, David Barton has noted:

Like the prayer used in [*Engel v. Vitale*], this too seemed to be a relatively innocuous practice: it was voluntary; the Bible was read without comment by one of the students from a version of his choice; there was no instruction other than what was contained within the verses. Nonetheless, the Court produced "expert" testimony to prove that voluntary Bible reading was dangerous to the children . . .²⁷

The trial court summarized Dr. Solomon Grayzel's "expert" testimony as follows:²⁸

there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible, the most obvious of which was the absence of the New Testament in the Jewish Holy Scriptures. Dr. Grayzel testified that portions of the New Testament were offensive to Jewish tradition and that, from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was "practically blasphemous." He cited instances in the New Testament which,

DAVID BARTON, *THE MYTH OF SEPARATION* 147 (3d ed. 1991) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 220-21 (1963) (emphasis added)).

²⁰ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

²¹ *Id.* at 205.

²² *Id.* at 206-07.

²³ *Id.* at 206.

²⁴ *Id.* at 208 (quoting *Schempp v. Abington Sch. Dist.*, 177 F. Supp. 398, 400 (E.D. Pa. 1959)).

²⁵ *Id.*

²⁶ *Id.* at 209-12.

²⁷ BARTON, *supra* note 19, at 149.

²⁸ *Id.* at 149-50.

assertedly, were not only sectarian in nature but tended to bring the Jews into ridicule or scorn. Dr. Grayzel gave as his expert opinion that such material from the New Testament could be explained to Jewish children in such a way as to do no harm to them. But if portions of the New Testament were read without explanation, they could be, and in his specific experience with children Dr. Grayzel observed, had been, psychologically harmful to the child and had caused a divisive force within the social media of the school.²⁹

After recounting Dr. Grayzel's testimony, the Court wrestled with the unquestioned religious heritage of the nation.³⁰ The Court conceded, as had been previously articulated in *Zorach v. Clauson*,³¹ that Americans "are a religious people whose institutions presuppose a Supreme Being."³² The Court, however, countered that language by stating, "[t]his is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life."³³

Next, the *Abington* Court stated its need to "discuss the reach of the [First] Amendment under the cases of [the Supreme] Court" before it examined the "neutral' position in which the Establishment and Free Exercise Clauses of the First Amendment place our Government."³⁴ In so doing, the Court relied upon only *one* case, *Everson v. Board of Education*,³⁵ handed down a mere *sixteen* years earlier. Speaking in reference to that case, the *Abington* Court stated that "[a]lmost 20 years ago"³⁶ the Court had "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."³⁷ Without hesitation, the Court reaffirmed the notion that the *Everson* Court had initially laid down:

The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.³⁸

²⁹ *Abington*, 374 U.S. at 209.

³⁰ *Id.* at 212-13.

³¹ *Zorach v. Clauson*, 343 U.S. 306 (1952).

³² *Abington*, 374 U.S. at 213 (quoting *Zorach*, 343 U.S. at 313).

³³ *Id.* at 214.

³⁴ *Id.* at 215.

³⁵ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

³⁶ *Abington*, 374 U.S. at 216.

³⁷ *Id.*

³⁸ *Id.* at 217 (citation omitted)(quoting *Everson*, 330 U.S. at 31-32).

As will be seen later, the idea that the purpose behind the First Amendment was to forbid “every form of public aid or support for religion” is insupportable from both a historical perspective and within the Court’s own jurisprudence.³⁹

Thus, after calling upon the testimony of one man who believed the Bible could psychologically damage children and appealing solely to the its ruling in *Everson*, the Court in *Abington* stated what purported to be “the common sense of the matter”:⁴⁰

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the “free exercise” of religion and an “establishment” of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other.⁴¹

The Court added:

[T]he First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*. Thus, this Court has given the Amendment a “broad interpretation . . . in the light of its history and the evils it was designed forever to suppress. . . .”⁴²

Therefore, the Court held that the practice required by the Pennsylvania statute violated the Establishment Clause because it was religious in nature and was implemented in state funded schools.⁴³ Like prayer, Bible reading was added to the list of unconstitutional public school practices.

Seventeen years after *Abington*, the Supreme Court continued its trend of removing religious influences from public school rooms in *Stone v. Graham*.⁴⁴ There, a Kentucky statute required the posting of privately-funded copies of the Ten Commandments on the wall of every public school classroom in the Commonwealth of Kentucky.⁴⁵ The

³⁹ See *infra* Section III.

⁴⁰ *Abington*, 374 U.S. at 220 (quoting *Zorach*, 343 U.S. at 312).

⁴¹ *Id.* at 219-20 (citation omitted).

⁴² *Id.* at 220 (quoting *McGowan v. Maryland*, 336 U.S. 420, 441-42 (1961)) (citation omitted).

⁴³ *Id.* at 223.

⁴⁴ *Stone v. Graham*, 449 U.S. 39 (1980).

⁴⁵ *Id.* at 39. The statute at issue read:

(1) It shall be the duty of the Superintendent of Public Instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary

plaintiffs sought to enjoin posting of the Ten Commandments as a violation of the Establishment and Free Exercise Clauses of the First Amendment.⁴⁶ The Kentucky trial court “upheld the statute, finding that its ‘avowed purpose’ was ‘secular and not religious,’ and that the statute would ‘neither advance nor inhibit any religion or religious group’ nor involve the State excessively in religious matters.”⁴⁷ The Kentucky Supreme Court affirmed.⁴⁸

The Supreme Court of the United States, “without [the] benefit of oral argument or briefs on the merits,” overturned, in a “cavalier” fashion, the highest court of Kentucky’s decision.⁴⁹ In its decision, the Court applied the three-part test it outlined in its 1971 case, *Lemon v. Kurtzman*.⁵⁰ Using the *Lemon* test, the Court held that “Kentucky’s statute . . . had no secular legislative purpose” and therefore violated the Establishment Clause.⁵¹

The primary argument made in favor of the statute’s validity was that the Ten Commandments’ secular purpose is “clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”⁵² The Court responded by stating:

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters

. . . Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have

and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”

(3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act.

KY. REV. STAT. ANN. § 158.178 (Banks-Baldwin 1980).

⁴⁶ *Stone*, 449 U.S. at 40.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 47 (Rehnquist, J., dissenting).

⁵⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (holding that, for a state regulation to pass muster under the Establishment Clause of the First Amendment, it must have a secular legislative purpose, its primary effect must not advance or inhibit religion, and it must not create excessive government entanglement with religion).

⁵¹ *Stone*, 449 U.S. at 41.

⁵² KY. REV. STAT. ANN. § 158.178 (Banks-Baldwin 1980).

any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.⁵³

As David Barton notes, “When the Court was confronted with the argument that the Ten Commandments had secular importance, it erupted in an emotional outburst of religious prejudice.”⁵⁴

In his dissenting opinion, Justice Rehnquist took the majority to task for reversing a state Supreme Court decision without accepting briefs on the merits or hearing oral arguments. He also was concerned with the Court’s rejection of a secular purpose as established by the state legislature and upheld by the state courts.⁵⁵ His argument, however, did not persuade a majority of his colleagues. The posting of the Ten Commandments in the classrooms of America’s public schools, for any purpose the Court deems to be religious in nature, became the next unconstitutional practice under the Court’s separationist First Amendment jurisprudence.⁵⁶

The Supreme Court restated its view of the legality of prayer in school with its 1985 decision, *Wallace v. Jaffree*.⁵⁷ In *Wallace*, the Court struck down an Alabama statute requiring one minute of silent meditation or silent voluntary prayer at the start of each public school day in Alabama.⁵⁸ In its opinion, the Court conceded that “voluntary

⁵³ *Stone*, 449 U.S. at 41-42.

⁵⁴ BARTON, *supra* note 19, at 154.

⁵⁵ *Stone*, 449 U.S. at 43-47 (Rehnquist, J., dissenting). Justice Rehnquist stated:

With no support beyond its own *ipse dixit*, the Court concludes that the Kentucky statute involved in this case “has no secular legislative purpose,” and that “[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.” This even though, as the trial court found, “[t]he General Assembly thought the statute had a secular legislative purpose and specifically said so.” The Court’s summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute’s purpose in Establishment Clause cases and accords such pronouncements the deference they are due. . . . The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional.

Id. at 43-44 (citations omitted).

⁵⁶ David Barton points out that, “Madison did not believe viewing the Ten Commandments was a violation of the Constitution; in fact, he believed that obeying them was its very basis! The Court declared unconstitutional the very tenet that the “Chief Architect of the Constitution” said was our basis.” BARTON, *supra* note 19, at 154-55 (quoting James Madison in Stephen K. McDowell & Mark A. Beliles, *America’s Providential History* 221 (1988)).

⁵⁷ *Wallace v. Jaffree*, 472 U.S. 38 (1985).

⁵⁸ *Id.* at 61. The Alabama statute read:

prayer during an appropriate moment of silence during the schoolday” is, by itself, permissible under the First Amendment.⁵⁹ But the Court took issue with the statement of an Alabama state senator, made several years after the enactment of the statute, in which he described his motive for sponsoring the law. Senator Donald G. Holmes, in an evidentiary hearing at the District Court level, testified that he, as the bill’s “prime sponsor,” advanced it as an effort to return voluntary prayer to the state’s public schools⁶⁰ and to allow children to share in the spiritual heritage of Alabama.⁶¹ David Barton aptly noted the bizarre result produced by *Lemon*’s purpose prong in *Wallace*:

[h]aving established the legislator’s intent when [Holmes] authored the bill, and the intent of the people of Alabama and of the legislature by approving and passing the bill, the Court declared the statute:

Invalid because the sole purpose . . . was an effort on the part of the State of Alabama to encourage a religious activity. [It] is a law respecting the establishment of religion within the meaning of the First Amendment.

Even though the statute itself was constitutionally acceptable, it became unconstitutional because the sponsor’s motive was “wrong!”⁶²

Like *Engel*, *Abington*, and *Stone*, the Court’s decision in *Wallace* applied a separationist view of the Establishment Clause at the expense of the Clause’s intended meaning.

In *Lee v. Weisman*,⁶³ the court continued to apply its Establishment Clause doctrine to religious observances in the public schools. In *Lee*, the Providence, Rhode Island school district maintained a policy of permitting school principals to select a member from the clergy to offer a prayer and benediction at middle and high school graduation ceremonies.⁶⁴ In June of 1989, Deborah Weisman was set to graduate from a Providence middle school that had scheduled a clergyman to pray during the ceremony.⁶⁵ Deborah, through her father, Daniel Weisman, sought to stop the school from inviting the clergyman to pray by seeking a temporary restraining order.⁶⁶ The court denied Weisman’s request

At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

ALA. CODE § 16-1-20.1 (1981).

⁵⁹ *Wallace*, 472 U.S. at 59.

⁶⁰ *Id.* at 43.

⁶¹ *Id.* at 43 n.22.

⁶² BARTON, *supra* note 19, at 159 (quoting *Wallace*, 472 U.S. at 41-42).

⁶³ *Lee v. Weisman*, 505 U.S. 577 (1992).

⁶⁴ *Id.* at 580.

⁶⁵ *Id.* at 581.

⁶⁶ *Id.* at 584.

due to a lack of adequate time to consider it, and the school proceeded with its graduation according to plan.⁶⁷ Daniel Weisman then amended his complaint to seek a permanent injunction of the school district's policy.⁶⁸

In an opinion for a 5-4 majority, Justice Kennedy phrased the issue before the court as "whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment."⁶⁹ The Supreme Court answered that question in the negative by applying the precedent it had established since its 1947 decision in *Everson*.⁷⁰ In doing so, the Court rejected a sound argument made by both the school board and the United States, which supported the school as *amicus curiae*:⁷¹

these short prayers and others like them at graduation exercises are of profound meaning to many students and parents throughout this country who consider that due respect and acknowledgment for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life as a graduation.⁷²

The Court concluded that, because the school board maintained the policy of permitting school principals to invite clergymen to offer prayers and benedictions at various school graduations, any principal's choice "is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur."⁷³ Thus, the Court held that the policy failed to pass muster under the Establishment Clause because the school compelled students to be involved in a religious ceremony.⁷⁴

⁶⁷ *Id.*

⁶⁸ *Id.* at 586.

⁶⁹ *Id.* at 580.

⁷⁰ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

⁷¹ *Lee*, 505 U.S. at 583.

⁷² *Id.* at 583-84.

⁷³ *Id.* at 587.

⁷⁴ *Id.* at 598-99. It should be noted that the Court's decision in *Lee* did not ban *all* prayer at high school graduations. See *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) (holding that nonsectarian, nonproselytizing, student-led, student-initiated prayer at high school graduations was permissible). The *Lee* decision did, however, ban the practice of school officials selecting members of the clergy to offer prayers at graduations. See *Lee*, 505 U.S. at 599.

Justice Scalia, in his pointed dissent in *Lee*, took the majority to task for applying a form of "psycho therapy" in arriving at its decision: "whatever the merit of [the school prayer] cases, they do not support, much less compel, the Court's psycho-journey." *Id.* at 643 (Scalia, J., dissenting). In the final paragraph of his dissent, Justice Scalia commented on the uniting effect common prayer has on a group of believers and the senselessness of a policy prohibiting that for the sake of avoiding a "minimal inconvenience" on the part of a nonbeliever. He stated:

I must add one final observation: The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate

Finally, in 2000, the Supreme Court decided *Santa Fe Independent School District v. Doe*,⁷⁵ its most recent opinion limiting religious exercise by students in American public schools. In *Santa Fe*, the issue before the Court was whether a school board policy permitting student-led, student-initiated prayer at high school football games violated the Establishment Clause.⁷⁶ Justice Stevens, setting out the facts of the case, noted that in the years prior to 1995, the Santa Fe High School student council chaplain delivered a prayer over the school's public address system immediately before the start of every football game.⁷⁷ This practice, along with several others, was challenged as a violation of

civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration -- no, an affection -- for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

Id. at 646 (Scalia, J., dissenting).

⁷⁵ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

⁷⁶ *Id.* at 301. The policy read:

STUDENT ACTIVITIES:
PRE-GAME CEREMONIES AT FOOTBALL GAMES

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Id. at 298 n.6. The policy also stated that, "[i]f the District is enjoined by a court order from the enforcement of this policy," a new policy would go into effect. The only real difference would be changing "statement or invocation" to "message or invocation," and the addition of, "Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing" to the end of the policy. *Id.*

⁷⁷ *Id.* at 294.

the Establishment Clause.⁷⁸ While the case was pending at the district court level, the Santa Fe school board modified its policy permitting prayer at football games to the policy set forth above.⁷⁹ On appeal, the Fifth Circuit reversed and held that the football prayer policy, even as modified, violated the Establishment Clause.⁸⁰

On appeal to the Supreme Court, the school district's primary argument was that prayer offered at the games was private speech in that it was student-led and student-initiated.⁸¹ Rejecting this contention, the Court held that the prayers offered at the football games "are authorized by a government policy and take place on government property at government-sponsored school-related events."⁸² The school district responded by stating that, in accordance with the Court's holding in *Rosenberger v. Rector and Visitors of the University of Virginia*,⁸³ an individual's private speech on a government-created public forum does not necessarily constitute government-sponsored speech.⁸⁴ The Court rebuffed the district's argument and held that the pre-game ceremony in the present action involved a substantially different type of forum than did *Rosenberger*. "The Santa Fe school officials simply do not 'evince either by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use' . . . by the student body generally.' Rather, the school allows only one student . . . to give the invocation."⁸⁵

To reinforce its holding, the Court added that

the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is "one of neutrality rather than endorsement" or by characterizing the individual student as the "circuit-breaker" in the process. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both *perceived and actual endorsement of religion*. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the

⁷⁸ *Id.* at 295.

⁷⁹ *Id.* at 294.

⁸⁰ *Id.*

⁸¹ *Id.* at 302. As the Court pointed out, the school district reminded them that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990)). However, the Court added, "[w]e certainly agree with that distinction, but we are not persuaded that the pre-game invocations should be regarded as 'private speech.'" *Id.*

⁸² *Id.*

⁸³ *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

⁸⁴ *Santa Fe*, 530 U.S. at 302-03.

⁸⁵ *Id.* at 303 (quoting *Perry Ed. Assn. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)).

pregame prayers bear “the imprint of the State and thus put school-age children who objected in an untenable position.”⁸⁶

Thus, along with school prayer, daily Bible readings, and the posting of the Ten Commandments for any non-secular purpose, student-initiated and student-led prayer at extracurricular activities, which the Court determines bears the imprint of the state in any way, was held to be unconstitutional in American public schools under the Court’s interpretation of the Establishment Clause.

III. A SURVEY OF THE EARLY COURT’S ESTABLISHMENT CLAUSE JURISPRUDENCE

The Supreme Court’s First Amendment jurisprudence, as summarized above, has not always been the status quo. At one time, the Supreme Court interpreted the First Amendment with the historically accurate view that American law was based upon “general Christianity; . . . not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men.”⁸⁷ With that in mind, the following Section will outline various Supreme Court decisions, beginning with an 1844 decision entitled *Vidal v. Girard’s Executors*,⁸⁸ that contradict the First Amendment jurisprudence produced so readily by today’s Court.

At issue in *Vidal v. Girard’s Executors* was the proper probate of the estate of Stephen Girard, a French immigrant to the United States and a student of the French Enlightenment.⁸⁹ As a result of his “enlightened” background, Mr. Girard believed morality could be taught without teaching religion and therefore desired to will his entire estate, valued at over \$7 million, to the city of Philadelphia in order to establish a college in which no clergy were permitted to be on campus.⁹⁰ In arguing against “a requirement . . . unprecedented in America,”⁹¹ those challenging the will stated that “[t]he plan of education proposed is anti-christian, and

⁸⁶ *Id.* at 305 (quoting *Lee*, 505 U.S. at 590) (emphasis added).

⁸⁷ *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892) (quoting *Updegraph v. The Commonwealth*, 11 Serg. & Rawle 394, 400 (Pa. 1824)).

⁸⁸ *Vidal v. Girard’s Executors*, 43 U.S. 127 (1844).

⁸⁹ BARTON, *supra* note 2, at 25.

⁹⁰ *Id.* at 19-20. Specifically, Girard stated:

I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises. . . .
 . . . [M]y desire is, that all the instructors and teachers in the college shall take pains to instil [sic] into the minds of the scholars the purest principles of morality.

Vidal, 43 U.S. at 133.

⁹¹ BARTON, *supra* note 19, at 61.

therefore repugnant to the law.”⁹² They added, in an argument that lasted three days before the Court,⁹³ that the importance of instruction in religion is recognized in both the Old and New Testaments and that “[n]o fault can be found with Girard for wishing a marble college to bear his name for ever [sic], but it is not valuable unless it has a fragrance of Christianity about it.”⁹⁴

In his opinion for a unanimous Court, Justice Story unequivocally stated:

Christianity . . . is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. . . . It is unnecessary for us, however, to consider the establishment of a school or college, for the propagation of . . . Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country.

. . . .
Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college – its general precepts expounded, its evidences explained and its glorious principles of morality inculcated? . . . Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?⁹⁵

Concerning the Court’s holding, David Barton notes that the “opinion of the Supreme Court was delivered by Justice Joseph Story – appointed to the Court by President James Madison, the ‘Chief Architect of the Constitution,’”⁹⁶ Thus, the case of *Vidal v. Girard’s Executors* provides a clear example of the once unanimous opinion of the very Supreme Court that now subscribes to a separationist view of the Establishment Clause.

Following *Vidal*, in 1892 the Supreme Court heard *Church of the Holy Trinity v. United States*,⁹⁷ which involved a federal law prohibiting the importation of, or assistance in the importation of, immigrants to the United States that were under contract to perform services.⁹⁸ In 1887, a

⁹² *Vidal*, 43 U.S. at 143.

⁹³ BARTON, *supra* note 2, at 20.

⁹⁴ *Vidal*, 43 U.S. at 175.

⁹⁵ *Id.* at 198, 200.

⁹⁶ BARTON, *supra* note 19, at 62.

⁹⁷ *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

⁹⁸ The statute read:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under

New York church, the Church of the Holy Trinity, employed an Englishman to serve as the church's pastor and was charged with violating the statute.⁹⁹ In striking down the church's alleged violation of the statute, Justice Brewer's majority opinion stated that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."¹⁰⁰ Justice Brewer continued an elegant discourse on the intent of the Founders in their drafting of the First Amendment when he cited an 1824 case of the Pennsylvania Supreme Court, *Updegraph v. The Commonwealth*.¹⁰¹ There, the court stated "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men."¹⁰² Further, citing an 1811 case from the highest court in New York, Justice Brewer commented that:

Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: "The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. . . . The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community; is an abuse of that right."¹⁰³

Finally, in concluding his opinion, Justice Brewer cited *Vidal*:

contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.

Id. at 458.

⁹⁹ BARTON, *supra* note 19, at 48.

¹⁰⁰ *Church of the Holy Trinity*, 143 U.S. at 465. As David Barton points out, "[t]he first half of the Court's decision dealt with what it termed 'absurd' application of laws," referring to "cases where an interpretation by the letter of the law and not by the spirit or intent of its framers would lead to absurd results." BARTON, *supra* note 19, at 48. Thus, the Court reviewed the Congressional records of the law and found that it "was enacted solely to preclude an influx of cheap and unskilled labor for work on the railroads." *Id.* Therefore, Barton concludes, "the church's alleged violation was . . . within the letter of the law, [but] it was not within its spirit" and "[t]he Court concluded that only an 'absurd' application of the Constitution would allow a restriction on Christianity." *Id.*

¹⁰¹ *Updegraph v. The Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824).

¹⁰² *Church of the Holy Trinity*, 143 U.S. at 470 (quoting *Updegraph*, 11 Serg. & Rawle at 400).

¹⁰³ *Id.* at 470-71 (quoting *People v. Ruggles*, 8 Johns. 290, 294-95 (N.Y. Sup. Ct. 1811)).

And in the famous case of *Vidal* . . . this court . . . observed: “It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania.”

If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, “In the name of God, amen;” the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing every where under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances *that this is a Christian nation*.¹⁰⁴

Three years prior to *Church of the Holy Trinity*, the Court heard *Davis v. Beason*,¹⁰⁵ a case dealing with Samuel Davis, a Mormon man convicted of the crimes of bigamy and polygamy.¹⁰⁶ As David Barton points out, “[u]nder United States laws, bigamy and polygamy were crimes, but an Idaho statute went further and made it illegal for anyone who even taught or encouraged it, much less committed it, to vote or to hold any public office within the Territory [of Idaho].”¹⁰⁷ In appealing his conviction, Davis argued that the laws against bigamy and polygamy violated the Free Exercise Clause.¹⁰⁸ The Court, led by Justice Field, upheld Davis’s conviction and stated that the crimes of bigamy and polygamy:

are crimes by the laws of all civilized and *Christian* countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of

¹⁰⁴ *Id.* at 471 (quoting *Vidal*, 43 U.S. at 198) (emphasis added). Regarding the argument that modern First Amendment jurisprudence is incorrect and that the Founders intended for “general Christianity” to be fostered, David Barton notes that Justice Brewer’s opinion in *Church of the Holy Trinity*, “quoted from eighteen sources, alluded to over forty others, and acknowledged ‘many other’ and ‘a volume’ more from which selections could have been made.” BARTON, *supra* note 19, at 50 (quoting *Church of the Holy Trinity*, 143 U.S. at 471).

¹⁰⁵ *Davis v. Beason*, 133 U.S. 333 (1889).

¹⁰⁶ *Id.* at 341.

¹⁰⁷ BARTON, *supra* note 19, at 67.

¹⁰⁸ *Id.*

society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind.¹⁰⁹

Justice Field's majority opinion continued:

There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States.¹¹⁰

In stark contrast to the Court's statements in *Davis*, under the doctrines of the modern Court, "[l]iterally hundreds of magazine, film publishers, and other groups 'advocating promiscuous intercourse of the sexes' now operate under the Court's 'constitutional' protection."¹¹¹ David Barton rightly concludes:

The contemporary Court is a party to the decline of America's morality. It has upheld the "rights" of groups to propagate teachings on immorality and has prohibited schools from presenting Biblical teachings on morality. With the Court protecting groups who "advocate promiscuous intercourse," immorality has become . . . much a part of our society . . .¹¹²

In *Murphy v. Ramsey*,¹¹³ the Supreme Court dealt with another case involving bigamy and polygamy. The issue before the Court in *Murphy* was the validity of a statute that stripped any bigamist or polygamist, and any woman cohabiting with a bigamist or polygamist, of their right to vote.¹¹⁴ Justice Matthews, writing for the Court, commented on the validity and importance of legislation, like the statute at issue, which is intended to protect the moral union of the family:

For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that

¹⁰⁹ *Davis*, 133 U.S. at 341-42 (emphasis added).

¹¹⁰ *Id.* at 343.

¹¹¹ BARTON, *supra* note 19, at 69 (quoting *Davis*, 133 U.S. at 142).

¹¹² *Id.* at 70 (quoting *Davis*, 133 U.S. at 142).

¹¹³ *Murphy v. Ramsey*, 114 U.S. 15 (1885).

¹¹⁴ *Id.* at 38.

reverent morality which is the source of all beneficent progress in social and political improvement. And to this end, no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.¹¹⁵

The Court's holding in *Murphy* provides another clear example of what once was the predominant view of Christianity and morality in American law and society. Unfortunately, as evidenced by modern First Amendment jurisprudence, that view no longer prevails.

The Supreme Court decided two cases during the twentieth century in which it used language reminiscent of the earlier Court's jurisprudence, providing some hope that a return to a proper interpretation of the First Amendment's Establishment Clause is possible. First, in 1931, the Court heard *United States v. Macintosh*.¹¹⁶ In *Macintosh*, a Canadian born man sought citizenship in the United States but was denied "upon the ground that, since [he] would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified, he was not attached to the principles of the Constitution."¹¹⁷ On appeal, the Circuit court reversed and directed the District court to admit the man as a U.S. citizen.¹¹⁸

The U.S. Supreme Court granted *certiorari* and stated that

[t]he burden was upon the applicant to show that his views were not opposed to "the principle that it is a duty of citizenship, by force of arms when necessary, to defend the country against all enemies, and that [his] opinions and beliefs would not prevent or impair the true faith and allegiance required by the [Naturalization] Act." We are of the opinion that he did not meet this requirement.¹¹⁹

Of significance to the present issue is a statement the Court made in arriving at its decision, an insight into the reasoning the Supreme Court adhered to less than 75 years ago:

We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a Nation with the duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.¹²⁰

¹¹⁵ *Id.* at 45.

¹¹⁶ *United States v. Macintosh*, 283 U.S. 605 (1931).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 626 (quoting *United States v. Schwimmer*, 279 U.S. 644, 653 (1929)).

¹²⁰ *Id.* at 625 (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470-71 (1892)).

David Barton, commenting on the Court's language in *Macintosh*, stated, "[t]his case . . . occurred more than 140 years after the ratification of the Constitution, yet the Court was still articulating the same message"¹²¹

Finally, in 1952, the Supreme Court decided *Zorach v. Clauson*.¹²² *Zorach* involved a "released time" program in New York City's public schools, which permitted students, contingent upon parental approval, to be released from school at a specified time during the school day in order to attend "religious centers for religious instruction or devotional exercises."¹²³ Though *Zorach* was decided after *Everson*, the case announcing the strict "separation between church and State" doctrine,¹²⁴ the *Zorach* Court set forth language that reads in stark contrast to *Everson*:

The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other -- hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths -- these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."¹²⁵

The Court further noted:

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That

¹²¹ BARTON, *supra* note 19, at 76.

¹²² *Zorach v. Clauson*, 343 U.S. 306 (1952).

¹²³ *Id.* at 308.

¹²⁴ *See infra* Section IV.

¹²⁵ *Zorach*, 343 U.S. at 312-13.

would be preferring those who believe in no religion over those who do believe.¹²⁶

The Court, despite its strong language in *Zorach* apparently consistent with more traditional Supreme Court precedent, did not overturn the decision it handed down in *Everson* only five years prior.

Rather, it attempted to clarify that holding by acknowledging that

[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the “free exercise” of religion and an “establishment” of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.¹²⁷

The Court then added that “[t]he First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other.”¹²⁸

Thus, the Supreme Court in *Zorach* appeared to strike a compromise between the Court’s earlier precedent and the strict “separationist” doctrine it set forth in *Everson*. The language the *Zorach* Court used in reaching that apparent compromise helps to show that the Court, even after *Everson*, maintained a strong understanding of the religious foundation of this country and “was still light-years away from the position” it now holds.¹²⁹

IV. A SURVEY OF THE “FORK IN THE ROAD”

Having considered the state of modern Supreme Court Establishment Clause jurisprudence as well as the Court’s earlier approach to such cases, it is necessary to examine where the proverbial “fork in the road” occurred. The analysis in this Section will focus on *Everson v. Board of Education*.¹³⁰

In *Everson*, the Supreme Court reviewed a New Jersey statute that authorized state school districts “to make rules and contracts for the transportation of children to and from schools.”¹³¹ Acting pursuant to that statute, one school district passed a resolution authorizing a “reimbursement to parents of money expended by them for the bus transportation of their children on regular buses operated by the public

¹²⁶ *Id.* at 313-14.

¹²⁷ *Id.* at 312.

¹²⁸ *Id.*

¹²⁹ BARTON, *supra* note 19, at 77.

¹³⁰ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

¹³¹ *Id.* at 3.

transportation system.”¹³² The resolution, however, included in its plan reimbursements to parents of children that were bused to and from parochial schools.¹³³ The issue before the Court was the validity of the New Jersey statute and the school district resolution under the U.S. Constitution.¹³⁴

Though the Court in *Everson* held that the statute was constitutional, its holding marked the start of a shift in the Court’s First Amendment jurisprudence. It was in *Everson* that the Court institutionalized the phrase “a wall of separation between church and State” by using “the Fourteenth Amendment as a tool to apply the First Amendment *against* the individual states. Never before had the Fourteenth Amendment been used to forbid religious practices from the public affairs and public institutions of the individual states. This action by the 1947 Court was without precedent.”¹³⁵

In discussing the origin of the phrase “separation of church and State,” David Barton has noted:

At the time of the Constitution, although the states encouraged Christianity, no state allowed an exclusive state-sponsored denomination. However, many citizens did recall accounts from earlier years when one denomination ruled over and oppressed all others. Even though those past abuses were not current history in 1802, the fear of a recurrence still lingered in some minds.

It was in this context that the Danbury Baptist Association of Danbury, Connecticut, wrote to President Jefferson. Although the statesmen and patriots who framed the Constitution had made it clear that no one Christian denomination would become the official denomination, the Danbury Baptists expressed their concern over a rumor that a particular denomination was soon to be recognized as the national denomination. On January 1, 1802, President Jefferson responded to the Danbury Baptists in a letter. He calmed their fears by using the now infamous phrase to assure them that the federal government would not establish any single denomination of Christianity as the national denomination:

I contemplate with [sovereign] reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church and State.¹³⁶

Barton goes on to note that the “wall of separation” was “originally introduced as, and understood to be a one-directional wall protecting the

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 5.

¹³⁵ BARTON, *supra* note 19, at 13.

¹³⁶ *Id.* at 41 (quoting THOMAS JEFFERSON, JEFFERSON WRITINGS 510 (Merrill D. Peterson ed., Literary Classics of the United States, Inc. 1984) (1802)).

church from the government,”¹³⁷ an understanding shared by Jefferson as evidenced by several statements he made regarding the First Amendment.¹³⁸ However, contrary to 150 years of precedent and Jefferson’s own interpretation of the First Amendment, the *Everson* Court held that federal courts have the power, via the Fourteenth Amendment, to rule on state decisions concerning religion, a duty both prior courts and the Founding Fathers had intended to leave squarely to the states.¹³⁹ The Court’s misapplication of Jefferson’s “separation” statement in *Everson* set the stage for its widespread use in subsequent Establishment Clause cases.

Jefferson’s “separation” statement had been largely forgotten until 1878 when the Supreme Court referred to it in *Reynolds v. United States*.¹⁴⁰ In *Reynolds*, the Court faced a challenge by Mormons to the federal prohibitions on polygamy and bigamy.¹⁴¹ The plaintiffs claimed that the “First Amendment’s ‘free exercise of religion’ promise and the ‘separation of church and state’ principle should keep the United States . . . from making laws prohibiting their ‘religious’ exercise of polygamy.”¹⁴² David Barton points out that

[u]sing Jefferson’s address [in its correct context], the Court showed that while the government was not free to interfere with opinions on religion, which is what frequently distinguishes one denomination from another, it was responsible to enforce civil laws according to general Christian standards. In other words, separation of church and state pertained to denominational differences, not to basic Christian principles. Therefore, and on that basis, the Court ruled that the Mormon practice of polygamy and bigamy was a violation of the Constitution because it was a violation of basic Christian principles.¹⁴³

The *Everson* Court, however, failed to consider the context in which the “separation” phrase was used by the *Reynolds* Court and, as a result, used the phrase to set the groundwork for a predominantly “separationist” jurisprudence.

In sum, the blame for modern separationist Establishment Clause jurisprudence falls on the *Everson* Court:

Nearly 70 years after the *Reynolds* case . . . the Court excerpted eight words out of Jefferson’s address (“a wall of separation between church and state”) and adopted that phrase as its new battle cry. It announced for the first time the *new* meaning of separation of church

¹³⁷ *Id.* at 42.

¹³⁸ *Id.* (citing the Kentucky Resolutions of 1798, Second Inaugural Address, 1805, and Letter to Samuel Miller, 1808).

¹³⁹ *Id.* at 42-43.

¹⁴⁰ *Reynolds v. United States*, 98 U.S. 145 (1878).

¹⁴¹ *Id.* at 161-62.

¹⁴² BARTON, *supra* note 19, at 43.

¹⁴³ *Id.*

and state – a separation of basic religious principles from public arenas. When the Court excerpted Jefferson’s words in the *Everson* case, it did not bother to present the context in which the phrase had originally been used, nor reveal that it had been applied in an opposite manner in previous Supreme Court cases. Those eight words, now taken out of context, concisely articulated the Court’s plan to divorce Christianity from public affairs.¹⁴⁴

V. CONCLUSION

A survey of modern Supreme Court Establishment Clause jurisprudence reveals that little by way of religion, let alone Christianity, may be introduced into public schools in America. In stark contrast, however, a survey of earlier Supreme Court cases reveals that the Court played a vital role in “preaching” the importance of Christianity in American culture and the need for the American youth to be educated in the tenets of Christianity. The divergence between these two schools of thought, the proverbial “fork in the road” of Establishment Clause jurisprudence, had its birth in the Supreme Court’s 1947 decision in *Everson v. Board of Education*. There, rather than adhering to the precedent many courts before it had laid down, the Supreme Court altered the course of American legal thought with a flawed interpretation of a letter written by Thomas Jefferson. In so doing, the Court laid the foundation for a “separationist” jurisprudence that has resulted in a largely impenetrable “wall of separation between church and State.”

¹⁴⁴ *Id.* at 43-44.