

# First Amendment Religious Freedom Rights and High School Students

*Larry L. Kraus*  
*The University of Texas at Tyler*

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, 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.

Thomas Jefferson, letter to Danbury, Connecticut Baptists, January 1, 1802

...There is no such thing as ... separation of state and church ... in the Constitution. It's a lie of the left.

Pat Robertson, God and Country Rally, Greenville, SC, November 12, 1993.

In 1943, the state of West Virginia, in an attempt to instill patriotism in the youth of the state's schools, passed a state law that required that all students salute the U. S. Flag and repeat the Pledge of Allegiance each day as part of an attempt to have the schools "... teaching, fostering and perpetuating the ideals, principles and spirit of Americanism." Any student who refused was to be considered "insubordinate" and was to be expelled. The only path to re-admission was to agree to comply with the rule. If the student refused to comply and remained expelled, they were to be considered "unlawfully" absent and were to be dealt with as delinquents. Finally, the student's parents or guardians were liable for prosecution.

Several members of the Jehovah's Witness religion, claiming their children were being forced to practice contrary to their religious ideals, challenged the rules. In the ruling issued by the U. S. Supreme Court, we are reminded that the Bill of Rights, including the First Amendment, is not a matter for making decisions based on popular opinion:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. (*West Virginia State Board of Education v. Barnett*)

While not directly dealing with the inclusion of religious instruction or school prayer, the *West Virginia State Board of Education v. Barnett* case laid the groundwork for later cases that did. In one of these, the United State Supreme Court, in a 1962 decision entitled *Abington Township School District v. Schempp*, set off a firestorm of controversy that continues to this day. The Court's ruling, which basically stated that government agencies, including schools, must be neutral in matters of religion. Although court rulings have, for the most part, been consistent since *Abington*, efforts on the part of those who opposed the ruling have continued.

Before beginning, though, perhaps a bit of history would be helpful. In June, 1789, the Constitutional Convention had come to a standstill. Several states had indicated that they would not support the new

Constitution unless a “bill of rights” was attached. James Madison had not believed such a bill necessary. However, in light of the fact that New York, upon voting to ratify the original Constitution, was calling for a new Convention to re-consider, Madison, one of the main authors of the Constitution, agreed to write the bill of rights, primarily to control how they would be written and what would be said. ([Madison Proposes](#))

Madison’s original version of the part of the First Amendment dealing with religion was somewhat more verbose than, yet remarkably consistent with, the final language in the amendment. The original version read: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.” (Understanding the History)

The final version of the First Amendment is well known:

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

Legal scholars sometimes divide the First Amendment into three separate rights: Religious Rights, Speech Rights, and the Right to Petition the government. Each of these areas is composed of two clauses that appear to modify and/or explain the main right. In two of these, the clause seems to clarify the original right. For example, Freedom of Speech is composed of the right of free speech and the right of a free press. The intent seems to be to insure that citizens could not only say what they wanted verbally, but also in written communication. The freedom to peaceably assemble includes the right to gather together and to petition for redress of grievances. Again, the intent seems to be to allow citizens to petition, in verbal or written form, when they believe the government has not acted correctly.

The clauses related to religion, however, are somewhat more contradictory and have been at the heart of conflict related to the ways that religion is dealt with in our society. The first part of the First Amendment states, “Congress shall make no law respecting an establishment of religion...” This has been called the “Establishment” clause by the courts and has been interpreted as prohibiting any government action or funding that establishes a national religion, or the preferred treatment of one religion over another, or the preference of religion over non-religion.

The second part of the clause related to religion goes on to say that Congress shall make no law related to religion “. . .prohibiting the free exercise thereof.” Known in the courts as the “exercise” clause, the intent was to insure that government could not restrict religious beliefs nor interfere with any citizen’s right to worship in their own way.

When citizens insist on involving the government in their religion, however, battles begin. These battles evidence themselves in ways big and small. For example, some courts have held that nativity displays on public property (city halls, court houses, etc.) at Christmas time violate the establishment clause because a religion (Christianity) is being shown a preference on property owned by a governmental agency. (e.g., *County of Allegheny v. ACLU Greater Pittsburgh Chapter* (1989)) In a somewhat more limited example, *Marsh v. Chambers* (1983), the Supreme Court ruled that legislative bodies could use tax dollars to employ clergy or chaplains.

The majority of court cases, though, that have involved high school students and First Amendment religious rights concern the issue of prayer and religious exercises in school facilities and during school hours. Other related issues that have been involved in the controversies include access to school facilities for religious groups, the inclusion of the idea of creationism in science classes, and the inclusion of “Bible” classes in the public school curriculum.

The foundation for most court cases involving religious activities in public schools is *Lemon v. Kurtzman*, which found that a 1968 Pennsylvania law providing public tax dollars to non-public schools for teachers’ salaries, textbooks, and instructional materials, was unconstitutional, based on the Establishment Clause. One of the key elements of the case was the establishment of what was to be called the “Lemon Test.” The Lemon Test was a three-pronged set of requirements detailing legislation regarding religion:

- 1) The government's action must have a secular legislative purpose.
- 2) The government's action must not have the primary effect of either advancing nor inhibiting religion.
- 3) The government's action must not result in an "excessive government entanglement" with religion.

The intent of this ruling was to attempt to reconcile the Establishment Clause and the Exercise Clause of the First Amendment. In recent years, though, the Lemon Test has come under attack as being antiquated and no longer relevant. In a 1993 opinion in *Lamb's Chapel v. Center Moriches School District*, Justice Antonin Scalia wrote:

"As to the Court's invocation of the Lemon test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches School District. . .

To this point, however, *Lemon* has not been overturned and continues to provide legal guidance. *Lemon* was cited as recently as 2005, in *McCreary County v. ACLU*.

### SCHOOL PRAYER

Of course, the main issue that arises when considering the intermingling of religion and public schools relates to the inclusion of prayer in schools. The major case in this area is *Abington School District v. Schempp* (1963), which had been consolidated by the Court with *Murray v. Curlett*. In this case, the Supreme Court held unconstitutional a Pennsylvania law requiring the reading of at least 10 Bible verses at the start of each school day. While some see this as the landmark case in this area of law, in reality it was a part of a progression that had started in 1940 with *Cantwell v. Connecticut*, continued into the later 1940's with *Everson v. Board of Education* (1947) and *McCullum v. Board of Education* (1949), and into 1962, with *Engel v. Vitale*.

*Cantwell v. Connecticut* (1940) was not a case that dealt with schools. However, the principles of the ruling became fundamental parts of subsequent rulings that did impact schools. In 1938, Newton Cantwell and his sons were arrested for not procuring a solicitation certificate from the Secretary of the Public Welfare Council in Connecticut. At the time, state law required that the Public Welfare Council must first approve any general solicitation of funds for religion, charity, or philanthropy and have a certificate of approval issued. Cantwell and his sons, who were Jehovah's Witnesses, ignored this requirement because they did not believe that any government had the right to proscribe any religious activity.

After being convicted of violating Connecticut law, the Cantwell's appealed to the U.S. Supreme Court. The findings by the Court clarified a previously murky area of law. According to the First Amendment, the Federal government was prohibited from making laws regarding the establishment or practice of religion, but there was no prohibition placed on the states. In the Cantwell case, the Court clarified that the provisions of the First Amendment also bound state and local laws.

*Everson v. Board of Education* (1947), like *Cantwell*, was not concerned with school prayer, but put into place a legal principle that would be critical to the later *Abington* case. In the 1940's, many states (including New Jersey, where Arch R. Everson lived) authorized payment of local school funds to private schools for transportation costs. Everson sued, claiming that these payments violated both state law and the establishment clause of the First Amendment. Writing for the majority, Justice Hugo Black stated:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws that aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they

may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" 330 U.S. 1, 15-16.

In *McCollum v. Board of Education* (1948), the Supreme Court extended its previous finding by striking down the Champaign, IL, school board's use of "released time" for religious instruction. Beginning in 1940, various religious leaders in Champaign sought, and received, permission from the Board of Education to offer voluntary classes in religion for students grade 4-9. These classes were led by clergy and lay members of local churches (including Protestant, Catholic, and Jewish congregations) in public school classrooms during normal school hours. Although "voluntary," Vashti McCollum believed her son was being pressured to attend and was being ostracized for not doing so.

McCollum filed suit on behalf of her son. After losing in both the lower court and the Illinois Supreme Court, she appealed to the U. S. Supreme Court, which found that

[The facts] show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released ... in part from their legal duty upon the condition that they attend the religious classes.

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not ... manifest a governmental hostility to religion or religious teachings. ... For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.

The 1992 Supreme Court ruling in *Lee v. Weisman* further upheld previous rulings. In this case, the principal of Bishop Middle School in Providence, Rhode Island, invited a Jewish rabbi to deliver the invocation at the graduation ceremony in 1989. The parents of one student, Deborah Weisman, requested a restraining order from a local court to keep the rabbi from participating in the ceremony. The court refused to grant the order and the Weisman family attended the ceremony. However, they did not stop their legal actions against the school. After the Court of Appeals found in favor of the Weisman's, the school district appealed to the U. S. Supreme Court, stating that the ceremony was voluntary (attendance was not mandatory and no punishment would be incurred if a student did not attend) and that the prayer was non-sectarian.

In a 5-4 decision, the Supreme Court upheld the Court of Appeals ruling and found in favor of the Weismans. Justice Anthony Kennedy, writing the majority opinion, created what became known as the "coercion test":

"As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in *Engel* and *Abington* recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."

In *Santa Fe Independent School District v. Doe* (2000), the Supreme Court used *Weisman* as precedent in finding that prayers at high school football games were illegal. In this case, Justice John Paul Stevens, writing for the majority, stated that these prayers were delivered on school property, over the school's

public address system, by a speaker representing the student body, with faculty supervision, and in compliance with a district policy that explicitly and implicitly encourages public prayer.

While rules requiring school-led prayer in schools have consistently been overturned, approximately 25% of all states now require a “moment of silence,” in which students are allowed to reflect, pray, or contemplate. While this has not been tested in the U.S. Supreme Court, it has been upheld by both a U.S. District Court and the U.S. Fourth Circuit Court of Appeal (*Brown v. Gilmore, 2001*).

In summary, public schools may not require students to pray or require them to listen to others pray at school sponsored activities. However, individual student prayer, as exemplified in the idea of a “moment of silence,” is allowed.

### ACCESS TO FACILITIES

A second area in which pre-college public schools have been targeted to include religious activities is in the use of school facilities by religious groups. The U.S. Supreme Court, in *Widmar v. Vincent* (1981) had ruled that public colleges and universities could not bar religious organizations from using facilities based on a perceived impermissible benefit to religion. The Court found that university students were not as “impressionable” as younger students and that the religious use of facilities posed little hazard of entanglement of church and state. Based, at least in part, on this ruling, the U.S. Congress passed the Equal Access Act (1984), which required that any school receiving public funding allow student religious groups to meet in school facilities during non-curricular time to the same extent as other student groups (including chess club, or any other club not directly related to the school curriculum).

In 1990, the U.S. Supreme Court upheld the Equal Access Act in *Westside Community College v. Mergens*. In this ruling the Court found that the Act did not violate the Establishment Clause, because the accommodation of religion, even though mandated, is neutral. Membership and participation in such a school club was seen as voluntary. Activities of the club were, in theory at least, under the direction of the student members and were not dictated nor directed by school personnel.

### CREATIONISM

In 1925, the legislature of the State of Tennessee passed the Butler Act, which prohibited teachers from denying the literal Biblical account of man’s creation and from teaching that man evolved from lower orders of animals. The law did not prohibit teaching about evolution related to plants or animals other than humans. The American Civil Liberties Union quickly financed a test case, in which John Scopes, a teacher in Dayton, intentionally violated the Butler Act. The trial that followed, commonly known as the Scopes Monkey Trial, was an international event, primarily because of the confrontation of the two main attorneys. Former U.S. Secretary of State (and presidential candidate) William Jennings Bryan represented the State, while Clarence Darrow, a well-known civil liberties advocate and agnostic, represented Scopes.

After all of the testimony was completed, John Scopes was found guilty of violating the Butler Act and was fined \$100. Upon appeal, however, the Tennessee State Supreme Court found that the fine should have been imposed by the jury, not by the judge, and overturned the trial court findings. Rather than go through the drama of a second trial, however, the Tennessee Supreme Court dismissed the case. In 1967, threatened with another lawsuit over the constitutionality of the Butler Act, the Tennessee Legislature repealed the Act.

In 1968, one year after the repeal of the Butler Act, the U.S. Supreme Court ruled, in *Epperson v. Arkansas* (393 U.S. 97 (1968)) that an Arkansas state law prohibiting the teaching of evolution was unconstitutional. The ruling, based primarily on the Establishment Clause, found that the prohibition against teaching evolution, while allowing the teaching of creation, advanced religion. In the majority opinion, Justice Abe Fortas stated:

Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.

The State of Louisiana, in an overt attempt to circumvent the findings in Epperson, passed a “Balanced Treatment Act” in 1987. Parents challenged this law later that year in *Edwards v. Aguillard*. The U.S. Supreme Court found that the Louisiana statute

. . . impermissibly endorses religion by advancing the religious belief that a supernatural being created humankind. The legislative history demonstrates that the term “creation science,” as contemplated by the state legislature, embraces this religious teaching. The Act’s primary purpose was to change the public school science curriculum to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety. Thus, the Act is designed either to promote the theory of creation science that embodies a particular religious tenet or to prohibit the teaching of a scientific theory disfavored by certain religious sects. In either case, the Act violates the First Amendment.

Since *Edwards v. Aguillard*, states have tried to introduce the teaching of the Biblical account of creation by giving it fancier names (for example, Creation Science or Intelligent Design). Courts have repeatedly rebuffed these attempts (e.g., *Tammy Kitzmiller, et al. v. Dover Area School District, et al.*).

Other states have also tried to circumvent U.S. Supreme Court rulings, using a variety of laws aimed at undermining evolution. For example, textbooks mentioning evolution that are used in Alabama must have a sticker containing a disclaimer. The State Board of Education in Kansas changed the statewide science education standard to remove any mention of evolution and prohibited questions about evolution on the statewide, standardized tests. And, in 2002, the Ohio Board of Education adopted a proposal that permitted, but did not require, the teaching of “Intelligent Design,” which is basically another name for Creationism.

#### BIBLE CLASSES

Another method used to include religious teachings in the public schools is through the use of “Bible Courses.” According to most guidelines set out for these courses, they are to be taught in such a fashion as to not promote religion, but rather to study the influence of religion, and, specifically, the Bible in American life and culture. However, these courses often “fail to meet minimal academic standards for teacher qualifications, curriculum, and academic rigor; promote one faith perspective over all others; and push an ideological agenda that is hostile to religious freedom, science, and public education itself.” (Chancey, 2006)

In a study done by the Texas Freedom Network in 2006, four major categories of findings were reported. First, the study found that teachers who were teaching the Bible classes generally did not possess even minimal qualifications in terms of certification and preparation. Additionally, most of the classes were found to be less rigorous academically. For example, a work sheet in a high school Bible course in the Houston area asked students “Approximately how many animals were on [Noah’s] ark the size of a rhesus monkey?” (Chancey, 2006, p. 7)

The second finding was that most of the Bible courses in Texas, while theoretically being taught from a cultural/historical perspective, were in fact teaching the courses as religious and devotional courses that promoted one view of faith (typically, that view found most commonly in the community) over all others. In fact, many of the schools surveyed were using curriculum materials developed by the National Council on Bible Curriculum In Public Schools (NCBCPS), which have been shown to overwhelmingly favor views held by fundamentalist protestants. Many of the NCBCPS materials assert, for example, that Christianity supersedes or “completes” Judaism. (Chancey, 2006, p. 8)

The third finding of the study was that most Bible courses, as they were taught, were hostile to religious freedom, science, and public education. In many of the courses, specifically those relying on materials from NCBCPS, the American identity was presented as being distinctively Christian. Many of the course materials presented information based in creationism (including frequent mention that the Earth is 6,000 years old. Many of the materials used were openly critical of public education and characterized it as being “anti-religious.” (Chancey, 2006, p. 8)

Finally, the study found three school districts (out of 25 surveyed) that were presenting their Bible courses in an “objective and nonsectarian manner, appropriate to public school classrooms.” (Chancey,

2006, p. 8-9) The fact that only 12% of schools who self-reported having Bible classes, and who agreed to participate in the survey, were presenting the course in the manner it was supposed to be offered is indicative of the status of the conflict between religion and non-sectarian instruction in schools.

The disagreement between those who wish schools to be an extension of the church, and those who wish that schools and churches be separated, has been active since the Scopes Trial in 1925. Major players in the dispute have been state legislatures and local school boards, who have attempted to find “creative” ways around court rulings. Although court rulings have been pretty much consistent, the battle continues. As shown by the Texas Freedom Network (Chancey, 2006), school districts continue to include religious studies in ways that run contrary to the intent and the letter of the First Amendment.

## Notes

*Abington Township School District v. Schempp*, 374 U.S. 203 (1963)

*Brown v. Gilmore*, 533 U.S. 1301 (2001)

*Cantwell v. Connecticut*, 310 U.S. 296 (1940)

Chancey, Mark A. (2006) *Reading, Writing and Religion. Teaching the Bible in Public Schools*. (Austin: Texas Freedom Network)

*County of Allegheny v. ACLU Greater Pittsburgh Chapter* 492 U.S. 573 (1989)

*Edwards v. Aguillard*, 482 U.S. 578

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

*Everson v. Board of Education*, 330 U.S. 1 (1947)

Equal Access Act (Pub. L. 98-377, title VIII, 98 Stat. 1302 (1984))

*Lamb’s Chapel v. Center Moriches School District* 508 U.S. 384 (1993)

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

*Lemon v. Kurtzman*, 403 U.S. 602 (1971)

Madison Proposes Bill of Rights. Retrieved November 28, 2008, from <http://www.jmu.edu/madison/gpos225-madison2/madprobl.htm>

*McCollum v. Board of Education*, 333 U.S. 203 (1948)

*McCreary County v. ACLU*, 545 U.S. 844

*Marsh v. Chambers*, 463 U.S. 783 (1983)

*Murray v. Curlett*, 228 Md. 239, 179 A. 2d 698 (Md. 1962) (Consolidated with

*Abington Township v. Schempp* (1963))

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

*Tammy Kitzmiller, et al. v. Dover Area School District, et al.*. 400 F. Supp. 2d 707 (M.D. Pa. 2005)

Understanding the History of the First Amendment. Retrieved November 28, 2008, from

[http://k12subjectguides.suite101.com/article.cfm/understanding\\_the\\_history\\_of\\_the\\_firstamendment](http://k12subjectguides.suite101.com/article.cfm/understanding_the_history_of_the_firstamendment)

*Westside Community College v. Mergens*, 496 U.S. 226 (1990)

*West Virginia State Board of Education v. Barnett*, 319 U.S. 624 (1943)

*Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981)