20. Does Schempp Have a Future?

Beyond defiance, beyond those who tried to punish the courts for rulings they didn’t like, the law resulting from the Schempp case has continued its inevitable march through new circumstances. The ban on devotional readings from the Bible and recitations of the Lord’s Prayer did not end the questions involving religion in the public schools. The law announced by the U.S. Supreme Court established principles to guide future decisions, but applying these principles to different circumstances has often presented a considerable challenge.

The very principles behind the Schempp ruling have been under siege. A coalition of the religious Right and conservative politicians, most of them from the Republican Party, have litigated cases under various legal strategies designed to return devotional exercises to the public schools. At the same time, the Court itself has become far more conservative, through the inevitable turnover of justices. By 1993, every justice who had participated in Schempp was gone from the Court.

The new conservative wing of the Court is far different from the conservatives of the past who decided the Engel and Schempp cases. The bloc of William Rehnquist, Antonin Scalia, and Clarence Thomas brought far different views of the religion clauses of the First Amendment than were held by most of the conservatives who came before them. To Scalia, the Court’s work on religion in public life since the 1940s amounted to “our embarrassing Establishment Clause jurisprudence.” He and others didn’t just disagree with the results of some of the past cases; they even disagreed with the funda-
mental historical analysis that provided the foundation for the Court’s decisions in this area. The most recent additions to the Court—Chief Justice John G. Roberts, Jr., in 2005 and Associate Justice Samuel A. Alito, Jr., in 2006—will certainly have a major hand in deciding whether the Schempp principles hold up in the future.

Cases will continue to bubble up through the system, presenting various challenges to Schempp. They tend to fall into several categories, representing different strategies. Many states now require moments of silence or quiet reflection at the beginning of the school day. During this time, students can pray, meditate, or think about anything at all. As long as teachers don’t require or encourage students to pray, these moments of silence could get the legal blessing of the Court. Another strategy challenges Schempp by presenting cases in which students themselves—not school authorities, using the power of the state—have initiated prayers and other religious exercises. These situations raise issues of free exercise of religion and freedom of religious speech for the students who request such observances. Still other cases may challenge once again whether religious exercises should be permitted in public schools as long as students have the option of not participating. Questions of religion in the public schools will engage lawyers and judges well into the twenty-first century.

Even before vocal prayer in the public schools was ruled unconstitutional, rule makers began to question how the Court would view a moment of silence. Pennsylvania school officials understood the likelihood that they would lose the Schempp case. On the same day that the decision was announced, the state superintendent of public education unveiled a plan to replace Bible reading and recitation of the Lord’s Prayer with silent meditation.² The move proved to be prophetic of a strategy that would gain popularity throughout the country and a provisional green light under the First Amendment.
By 1985, a little more than two decades after the *Schempp* ruling, twenty-five states either required or permitted their public schools to involve students in a moment of silence. Many of the state laws required that the students use this time to pray, meditate, or think about the upcoming day. Tested in federal courts, some of the statutes requiring silent prayer as opposed to meditation were invalidated because, said the courts, the purpose and effect of these laws were to involve the public schools in promoting prayer.

That year, the U.S. Supreme Court heard *Wallace v. Jaffree*, a case involving silent prayer at a school in Alabama. In 1978, Alabama enacted a law requiring a one-minute moment of silence in all classrooms for the purposes of “meditation.” That law was relatively uncontroversial, but the state’s legislators didn’t let it go at that. Three years later, the state enacted a law authorizing a moment of silence “for meditation or voluntary prayer.” One year after that, it enacted a law that authorized teachers to lead a vocal prayer. The primary sponsor of the last law conceded that his main purpose was to engage willing students in prayer.

According to the Court’s majority, this legislative intent violated the first part of the establishment clause test enunciated fourteen years earlier in *Lemon v. Kurtzman.* Henry W. Sawyer III had argued that case on behalf of plaintiffs challenging the validity of a salary supplement for nonpublic schoolteachers. The “*Lemon* test,” as it came to be known, asked whether a law had a secular purpose, whether its primary effect was to advance or inhibit religion, and whether the law fostered excessive entanglement with religion. The first two prongs of the test had been set in Justice Clark’s opinion in *Schempp*; the third, “entanglement” prong was added in *Lemon*. In the Alabama case, said the justices, legislators had enacted the second law “for the sole purpose of expressing the State’s endorsement of prayer activities for one minute at the beginning of each school day.” This endorsement “is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.”

The Court didn’t consider the validity of state laws that required a
moment of silence but did not mention prayer at all. In her concurring opinion, however, Justice Sandra Day O’Connor indicated that, at least for her, a moment-of-silence law would not violate the First Amendment. In the Schempp case, officials led what was clearly a devotional exercise that was part of the day’s curricular activities, and these official exercises were inherently coercive of students to participate. Moments of silent meditation were different. O’Connor said that they typically would have a secular—not a religious—purpose and would not involve any coercive elements, such as the Court had found in vocal classroom prayers. She wrote: “[A] moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. . . . [A] pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others.”

Justice Brennan, in his concurring opinion in Schempp, had made the same distinction. Discussing activities that he thought would remain unaffected by the Court’s decision, Brennan had mentioned moments of silent meditation. To Brennan, who strongly believed vocal prayer violated the establishment clause, a moment of silence served “the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.”

In 2001, a moment-of-silence law was upheld in Virginia on a two-to-one vote by the U.S. Court of Appeals for the Fourth Circuit. Although the law was similar in some respects to the one ruled unconstitutional in Wallace v. Jaffree, the two judges in the majority found enough difference to conclude that it passed all three prongs of the Lemon test. The statute, they said, did not have a religious purpose. It offered students a minute to use for prayer or any other nondistracting purpose. “On its face, therefore, the statute provides a neutral medium—silence—during which the student may, without the knowledge of other students, engage in religious or nonreligious
activity,” the judges said. The U.S. Supreme Court declined to hear the case.

There has been no definitive ruling on the constitutionality of state laws requiring a moment of silence for meditation alone, without mention of prayer. As O'Connor and Brennan suggested, there seems no constitutional harm in requiring students to reflect for a short time at the beginning of the day. They could engage in silent prayer or think about anything they wish without affecting their classmates. As long as the school or the teacher did not encourage students to use the time to engage in prayer, no endorsement of religious activities would have taken place, and no student would feel overt or subtle coercion to participate.

No wallflower when writing in dissent, Justice Scalia had harsh words for his colleagues on a school prayer case in 1992. The question was whether students felt coercive pressure to participate in a benediction offered at a high school graduation ceremony. The five-justice majority in Lee v. Weisman found that such pressure did exist. Scalia disagreed. To him, the so-called pressure of conformity on students amounted to “ersatz, ‘peer-pressure’ psycho-coercion.”

At least nobody had to puzzle over where Scalia stood on the question. The issue of coercion has followed the debate over public school prayer and Bible reading for a century and a half. When Protestants set the religious agenda for the public schools, Catholics protested use of the King James Bible and, failing to get it removed from the schools, asked that their children be excused from participation. Bridget Donahoe was suspended from her school in Maine for refusing to participate in 1854, and Thomas Wall was whipped with a rattan stick five years later. Each child simply wanted to be excused from the devotionals. (See discussion of both cases in chapter 8.) The government’s application of coercion in those instances surely amounted to a violation of the First Amendment’s free exercise clause, which prevents government from rewarding or punishing
individuals for their religious practices. Unfortunately for the two children, it would be nearly a century before the First Amendment’s two religion clauses were applied to the states. In their time, they had no recourse under the federal Constitution.

The strategy of denying excusal worked for a time, but Protestant hegemony was soon eroded by the increasing waves of immigrants to American shores. Catholics and non-Christians held different ideas about religion than did the Protestants, and by the mid-twentieth century, the only way for Protestants to retain their control over religion in the schools in many locales was to offer excusal to those who did not wish to participate. During litigation of both the *Schempp* and *Murray* cases, public officials added excusal provisions to the law in eleventh-hour attempts to escape possible constitutional problems.

Critics of the Supreme Court’s rulings on devotionals in public schools have argued that coercion is critical to finding any constitutional violation. Coercion has always been an element of a free exercise violation—as when the government pressures people to follow or not to follow a religious belief. But a finding of coercion was not required in order to find a violation of the establishment clause, which prohibited government support of religion. Thus, the two clauses were designed to safeguard against different violations of religious liberty. Requiring a finding of coercion for both clauses of the First Amendment would essentially make one clause redundant of the other in many ways, not something that logically follows from the constitutional framers’ articulation of two distinct clauses protecting religious freedom.

Defenders of school prayer and Bible reading argue that coercion is absent as long as students of minority faiths can excuse themselves, opting out of the religious exercises, and that this allows the majority who do want to participate in the devotional exercises to go ahead and enjoy their own free exercise of religious beliefs. The problem is that all of this happens in the context of a school, where direct coercion is not the only kind of coercion that exists. Coercion can also occur indirectly, through peer pressure. But that is not something...
that the four dissenterers in *Weisman*—Scalia, Rehnquist, White, and Thomas—accepted.

Benedictions have long been common at graduation ceremonies, and at one middle school in Providence, Rhode Island, a local rabbi delivered a prayer. As was the usual practice, the school advised him that the prayer should be nonsectarian and gave him a pamphlet, published by the National Conference of Christians and Jews, advising that public prayers show “inclusiveness and sensitivity.” When *Weisman*—the legal case resulting from the rabbi’s prayer—reached the Supreme Court, the justices ruled by a five-to-four majority that the practice of having clergy offer prayers at public school graduations violated the establishment clause. That conservative Justice Anthony Kennedy not only voted with the majority but also wrote the Court’s opinion was a bitter disappointment to religious conservatives, who could well have anticipated a five-to-four vote in the other direction.

Kennedy and four other justices found that the state’s participation in the religious exercise was too extensive to ignore under the establishment clause. The school had decided that prayers would be included in the ceremony, invited the rabbi, and supplied him with advice on the contents of the prayer. “The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school,” Kennedy wrote.¹⁰ Kennedy’s four colleagues would have banned the prayer on grounds of government sponsorship alone, but they agreed with Kennedy that the students had been coerced into participating in the prayer.

In dissent, though, Scalia brought up the matter of coercion and instigated a debate, still continuing today, about what coercion actually means in regard to students in school. Scalia argued that there was no coercion forcing students to participate. He seemed to concede that prayer within a classroom setting (as in *Schempp*) contained elements of coercion that made the practice illegal. Prayer in the classroom, he said, is not a public ceremony as is a benediction at graduation, and students are compelled by law to attend school. By
contrast, he argued, prayers at public events enjoy a long history in America. The Court’s invalidation of the graduation prayer, he said, “lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.”¹¹

Scalia attacked the majority’s finding that indirect government coercion forced students to attend graduation ceremonies. He argued that there is no legal compulsion for students to attend graduation exercises and no requirement to recite any prayers when they do attend. If students stand with other people during a prayer, he contended, that does not imply actual participation in the prayer—only respect. For Scalia, coercion should be limited to “acts backed by threat of penalty,” and in the Weisman case, there was no penalty to any graduating student who chose not to participate either in the prayer or in the graduation ceremony itself.¹² Scalia maintained that dissenting students could skip graduation or, if they attend, choose not to participate in the prayer, entirely without negative consequences imposed by the school.

Scalia’s concept of coercion is narrow and legalistic, showing little appreciation for the gravitational force exerted by peer pressure on children too immature to resist. It shows how a narrow coercion test can tilt heavily toward the government and inject majoritarian religious beliefs and symbols into public schools. If coercion can be found only where threats and actual penalties are involved, many religious practices in the schools would not violate the First Amendment. Coercion, of course, can involve something less than threats and penalties, especially where children are concerned. The state can place more subtle and indirect burdens on people, such as the real psychological pressure on children that Scalia denigrates as “psycho-coercion.”

Responding to Scalia’s argument that no student was forced to attend the event and thus that there was no coercion of beliefs, Kennedy and his four colleagues argued that students were not really free to avoid the ceremony. To do so, he said, would require them to
forfeit many benefits that students and their families found meaningful. Even standing and remaining silent during the prayer “was an expression of participation in the rabbi’s prayer,” wrote Justice Kennedy, who explained: “That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that, for her, the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.” Kennedy added: “Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.”

The public school devotional cases of the 1960s demonstrate just how subtle coercion can be when it involves children. Even after Pennsylvania added an excusal provision to its Bible-reading law in 1959, Ed Schempp refused to ask that his children be excused, because he was afraid that other children would regard them as “odd-balls” and that they would be subject to rejection by their peers. Likewise, in the testimony taken by Leo Pfeffer in the Chamberlin case, children and parents expressed similar fears about asking to be excused. One high school senior said she didn’t want to do anything that might jeopardize college recommendations by her teachers. It’s hard to understand how these pressures would not similarly apply to a graduation ceremony. Scalia’s attempt at legally distinguishing between prayers in the classroom and prayers at graduation seems not at all responsive to the peer pressure that students actually feel when faced with devotional exercises that are not their own.

While Scalia and three other justices defined coercion narrowly, some of the leading conservative justices and scholars haven’t seen it the same way. In his concurring opinion in McCollum in 1948, Justice Frankfurter understood that the pressures on children went beyond
Scalia’s narrow idea of threats of penalty. Frankfurter wrote in the context of released-time programs, but his concerns about coercion of children are broad. “The law of imitation operates, and non-conformity is not an outstanding characteristic of children,” he wrote. “The result is an obvious pressure upon children to attend.”

Michael W. McConnell, a judge on the U.S. Court of Appeals for the Tenth Circuit, has been one of the leading conservative critics of the Supreme Court’s approach to the religion clauses. McConnell, though, who believes coercion is a key element in finding an establishment of religion, wrote that it “is vital to understand the concept of coercion broadly and realistically.” He added: “I would have thought that gathering a captive audience is a classic example of coercion; participation is hardly voluntary if the cost of avoiding the prayer is to miss one’s graduation. Equally seriously, it appears that the content of the prayer was subject to indirect governmental control, which is a species of coercion. For the Court to embrace the coercion test in this form would be a small step back toward permitting the government to indoctrinate children in the favored civil religion of nondenominational theism.” McConnell has also written that he opposes prayer in the classroom, on the ground of government coercion. He believes that the government’s support of specific religious beliefs in the classroom creates indirect coercive pressure on students to conform.

The applications of the free exercise clause and the free speech clause of the First Amendment have come rather late into consideration of public school devotionals. For Leo Pfeffer, one of the main attractions of the Chamberlin case was the challenge it raised under the free exercise clause. All the religious exercises and pageantry of the Miami schools—the King James Bible, the Lord’s Prayer, the passion plays and religious hymns, and more—provided strong evidence that the schools placed children of minority religions in the position of having to participate in extensive religious practices that were not
their own. Had Chamberlin reached the Supreme Court first, it's possible that the justices would not have banned Bible reading and recitation of the Lord's Prayer based solely on the establishment clause, as they did in Schempp. They might have placed equal analytical weight on a free exercise violation, making the decision even stronger and possibly adding another layer of immunity to some of the attacks that are taking place today.

Like Pfeffer, Justice Stewart also saw devotional activities in the public schools as a free exercise problem. But his differences with Pfeffer were profound. While Pfeffer focused on the rights of children in the religious minority to be free of majoritarian devotionals, Stewart argued for the right of the majority of Abington schoolchildren to freely exercise their desire to participate in prayer and Bible reading. The government had to respect this right, said Stewart, as long as children who objected to the devotionals had the opportunity to excuse themselves.17

In addition, some critics have argued that the free speech clause should protect religious activities in the public schools. Religious expression, of course, has long been an important part of America's marketplace of ideas. It played a critical role in major historical events of this country, such as abolition and the civil rights movement. Now, though, some observers assert that religious expression in the schools deserves the protection of the free speech clause over claims that they violate the establishment clause.

For Christian conservatives eager to return devotional exercises to the public schools, placing religious speech under the wings of the free exercise clause and the free speech clause has provided plenty of airlift. Prayers required by the government—as in the Engel and Schempp cases—violate the establishment clause. But encouraging students to initiate prayer and other religious activities on their own, so the argument goes, does not involve the government but, rather, supports the free choice of children practicing their religion and should be protected by both the free exercise clause and the free speech clause of the First Amendment.

These ideas received favorable treatment by the Court in 1981,
immediately giving great hope to Christian conservatives that they had found a wedge to bring devotional exercises back to the public schools. The University of Missouri at Kansas City adopted a regulation that banned anyone from using university buildings “for purposes of religious worship or religious teaching.” Acting pursuant to the regulation, the university refused permission for a group of evangelical Christian students to meet in university buildings. The group sued, arguing that the university had violated their free exercise rights and freedom of speech. In *Widmar v. Vincent*, the Supreme Court ruled in favor of the students, applying traditional First Amendment speech doctrine. By opening its property for student groups to use for their own activities, the university had created a “public forum” and could not exclude any particular group based on the content of its speech—in this instance religious. Only by showing a compelling state interest could the university refuse the evangelical group on the basis of the content of its speech. The University of Missouri had argued that the compelling interest was to avoid violation of the establishment clause, but the Court didn’t agree.

An equal access policy permitting the evangelical group to use university facilities would not, the Court said, advance religion. It would not identify the university with the evangelicals any more than it would with the goals of any other groups. Writing in dissent, Justice White emphasized the danger lurking in using the free speech clause. “I believe that this proposition is plainly wrong,” he said. “Were it right, the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech.”

Nine years later, in 1990, the Court applied the *Widmar* principle to secondary schools. Congress had enacted the Equal Access Act, prohibiting public secondary schools that created a limited public forum for speech from closing the forum to students based on the content of their speech. When a high school in Omaha did exactly that in regard to a Christian club, the students sued. In *Westside Community Board of Education v. Mergens*, the Court backed the students by saying that the law did not violate the establishment clause.
It had a secular, not a religious, purpose, because it granted access to all speech. In addition, said the Court, the state had not endorsed religion. The speech in question clearly was private speech delivered by students, and both the free exercise clause and the free speech clause protected it. The Court said: “[T]here 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. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.” Then, in 1995, in *Rosenberger v. Rector of the University of Virginia*, the Court said that religious publications could not be excluded from the group of student publications eligible for financial assistance.

In these equal access cases, the Court arguably enhanced religious liberty by recognizing that schools do not endorse religion merely by allowing religious groups to meet or publish on a nondiscriminatory basis. But what about devotional exercises carried out as part of a school activity in the presence of those who do not agree with those beliefs? Such cases look more like *Schempp*, even if the praying students are ostensibly acting on their own. In 2000, in *Santa Fe Independent School District v. Doe*, the Court struck down the practice of students voluntarily delivering prayers at high school football games. The high school authorized a vote to determine whether students wanted a prayer at games and then an election to choose a student to deliver it. The U.S. district court ordered that any prayers be nonsectarian and nonproselytizing. All this maneuvering, though, did not save the practice. Contrary to the assertion that the case involved private student speech and was not sponsored by the school, the Court said that the school’s involvement was nonetheless pervasive, amounting to a violation of the establishment clause. In his dissenting opinion, Justice Rehnquist, joined by Justices Scalia and Thomas, emphasized that the students had engaged in private speech protected by the free exercise and free speech clauses.
Efforts to categorize prayer as free speech had earlier made some progress in the lower federal courts, though Santa Fe v. Doe may have effectively overruled them. In 1992, the U.S. Court of Appeals for the Fifth Circuit upheld one school district’s policy of graduation prayers.25 The Supreme Court refused to hear the case. The Clear Creek schools in Texas had the practice of allowing the senior class to vote on whether to use a prayer at graduation. After an affirmative vote of the senior class, a student volunteer would deliver the prayer, which was supposed to be nonsectarian and nonproselytizing. In Jones v. Clear Creek Independent School District, the federal court of appeals ruled that the practice did not have the purpose of effecting advancing religion. “We think that Clear Creek does not unconstitutionally endorse religion if it submits the decision of graduation invocation content, if any, to the majority vote of the senior class,” the court said.26 The judges said that students would not perceive that the government was endorsing religion. The judges also maintained that psychological pressure to participate would be minimal “because all students, after having participated in the decision of whether prayers will be given, are aware that any prayers represent the will of their peers, who are less able to coerce participation than the authority figure from the state or clergy.” The court added, “The practical result of our decision . . . is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies.”27

In 1996, the Fifth Circuit again upheld nonsectarian, nonproselytizing voluntary prayer initiated by students at graduation ceremonies, this time in the Jackson Public School District in Mississippi.28 Once again, the Supreme Court refused to hear the case, letting the lower court’s ruling stand. Another case reached a different result. A federal court in Mississippi struck down student-initiated prayer and Bible reading over a school’s intercom system—a situation that looked much like the Schempp case, except that a student Christian club acted on its own wishes rather than on the direction of school authorities.29 The judge didn’t buy the school’s argument
that it was simply providing an open forum, under the federal Equal Access Act, for any student group to say anything it wanted over the public address system.

Use of the student choice model enables a school district to do exactly what it cannot do under *Lee v. Weisman*—hold a prayer at graduation. Stopped by the Supreme Court from directing a graduation prayer in *Weisman*, the school in *Clear Creek* had merely passed a rule delegating that responsibility to the students themselves, knowing full well what the students would do. In the end, the student choice model of *Clear Creek* undermines the principle that parents in a community cannot impose their majoritarian religious prayers in the schools through law or school regulations. Their children represent exactly the same majoritarian religious practices, but they could accomplish what their parents could not by initiating prayer supposedly on their own.

Whether a school or students initiate prayer in a school context, the fact remains that a majority of students is imposing prayer on a minority. The government provides support for religious beliefs by accommodating student requests to pray before classmates who do not share their religious practices. Individual students should not have to either brave peer pressure to ask for excusal or go along and participate in the prayer. This remains the essence of a First Amendment violation. Part of the reason the *Schempp* decision barred prayer and Bible reading was because the Abington school district had imposed the dominant Protestantism on students, such as Ellery Schempp, who objected to many of its teachings. Delegation of that decision to the students themselves produces exactly the same majoritarian imposition. The Bill of Rights protects all of us, but as it often has been observed, it most particularly protects the minority against any overreaching by the majority.

Yet another way in which *Schempp* and *Engel* stand on shifting sands involves a sharply different view of the establishment clause by some
conservative justices. When the two cases were announced in the early 1960s, only Justice Stewart dissented from the two decisions. *Engel* and *Schempp* had the full support even of Justice Harlan, the conservative standard-bearer of the time. The two leading conservative justices before him, Frankfurter and Jackson, both supported the concept of “a wall of separation” between church and state. However, the more recent conservatives on the Court—Chief Justice Rehnquist and Justices Scalia and Thomas—have offered different ideas about the interpretation of the religion clauses.

The broadest and most fundamental attack on *Engel* and *Schempp* has come from Rehnquist, who argued that the Court’s constitutional analysis for more than forty years has been fundamentally wrong, based on a faulty understanding of the intent of those who drafted the First Amendment. The chief justice, who died in 2005, argued for a narrow interpretation of the establishment clause. Everyone agrees that the establishment clause prohibits the government from recognizing a national religion—that is, from creating the equivalent of the Church of England in the United States—or from promoting one religious sect over another. But Rehnquist believed that’s all the establishment clause prohibits. The Court and most legal scholars go further, however. The justices have consistently said that the First Amendment also prohibits government from promoting religion in general, not just one religion over another, and that it must take a neutral stance between religion and no religion.

The difference in the two positions is no scholarly dispute carried out in a windowless back room of a law library. In fact, it makes all the difference in the adjudication of real-life disputes over the government and religion. As a practical matter, Rehnquist’s interpretation would reverse many First Amendment religion cases, including some on religion in the public schools. Under his interpretation, there might be no constitutional bar against the state promoting religious exercises in the schools, so long as the justices were satisfied that it did not favor one denomination’s doctrine over another’s.

Rehnquist set out his thoughts most fully in his dissenting opinion in *Wallace v. Jaffree*, the case that struck down the Alabama law
authorizing one minute of silence for meditation or prayer in schools. Rehnquist attacked the Court’s acceptance of Thomas Jefferson’s “wall of separation” as a metaphor to describe its approach to analysis of the guarantees of religious freedom. Despite Jefferson’s considerable contributions during the founding period—he was the author of the Virginia Statute for Religious Freedom and a key thinker on the right of conscience—Rehnquist dismisses him because he was “of course in France” when the constitutional amendments were ratified and thus “a less than ideal source of contemporary history” on the First Amendment.30

Rehnquist’s argument centered on James Madison’s initial proposed language for the religion clauses. His proposal said: “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.”31 For Rehnquist, the key word was national. Based on that language and some exceedingly sparse notes from the debate, which Rehnquist admitted did “not seem particularly illuminating,” he went on to draw conclusions that evidenced no uncertainty whatsoever.32

Rehnquist concluded that Madison meant the clause to apply to the establishment of a single national religion, not to government promotion of religion in general. He argued that even if Madison and Jefferson had favored a much broader interpretation of establishment of religion when they pushed enactment of the Virginia Act for Establishing Religious Freedom in the battle over tax support of clergy in Virginia, the Court had been “totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.” Rehnquist went on:

None of the other Members of Congress who spoke during the August 15 debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as
between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly.33

As further evidence of what the framers of the Constitution intended, Rehnquist cited the various Thanksgiving proclamations and prayers offered by early presidents, including George Washington after Congress adopted the constitutional amendments. Rehnquist pointed out that Congress had numerous times appropriated money for churches and clergy to provide religious education for Native American Indians. Applying his analysis to the Jaffree moment-of-silence case then before the Court, Rehnquist thought that Alabama was constitutionally justified in endorsing prayer in the public schools, because the law promoted religion generally and not any denomination in particular. “It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from ‘endorsing’ prayer,” he wrote.34

Rehnquist’s position on the establishment clause has some scholarly support, dating back to the nineteenth century and continuing to this day. But his position has been repeatedly rejected by the Court itself and by most First Amendment scholars for the past half century. The reality is that nobody knows for sure what the framers meant by their wording of the religion clauses—a problem that applies to those on both sides of the establishment clause divide. Neither is it entirely clear what the state legislators who ratified the Bill of Rights thought the religion provisions meant. Tape recorders, twenty-four-hour cable news, and careful transcription of debate would be the fruits of another day. Records from that time are sparse and unreliable, and no source is clear enough to be definitive. The historical evidence of the period—what took place at the First Con-
gress and what Madison and Jefferson are known to have believed—
does seem to point in the direction of a broader reading of the reli-
gion clauses than Rehnquist supported.

Given the importance of his dissenting opinion in Jaffree, Rehn-
quist’s analysis was surprisingly sparse. He based his analysis most
heavily on Madison’s draft of the First Amendment that said no
“national religion be established.” Rehnquist’s position would be
much stronger if Congress had actually enacted such a limitation, but
it did exactly the opposite. Congress rejected this draft and entirely
dropped “national” as the descriptive term for religion. In fact, four
separate drafts of the religion clauses came before the First Congress
proposing the national religion position, and all were rejected—evid-
ence that Congress did not want the religion clauses limited to ban-
nng only a national church and favored a broader meaning. Rehn-
qust left out this compelling piece of history. Douglas Laycock, a
University of Michigan law professor and one of the preeminent
scholars on ratification of the First Amendment, explains:

The establishment clause actually adopted is one of the broadest ver-
sions considered by either House. It forbids not only establishments,
but also any law respecting or relating to an establishment. Most
important, it forbids any law respecting an establishment of “reli-
gion.” It does not say “a religion,” “a national religion,” “one sect or
society,” or “any particular denomination of religion.” It is religion
generically that may not be established. . . . An approach to interpre-
tation that disregards the ratified amendment and derives meaning
exclusively from rejected proposals is strange indeed.35

Rehnquist and others who argue for a narrow reading of the reli-
gion clauses also make much of the fact that the framers accepted or
at least tolerated certain practices involving public support of religion
generally. Congress appointed chaplains who offered prayers before
sessions. Most presidents, starting with Washington, issued
Thanksgiving proclamations invoking prayer, and Congress funded
missionaries to help educate Indians. Proponents of a narrow reading argue that nothing analogous today can therefore be a violation of the First Amendment. But Laycock answers that these earlier practices did not constitute a general support of religion but rather the support of specific denominations that all agree today is impermissible. Missionaries came from specific denominations, and Congress did not hire a chaplain from every faith or even many faiths.

The framers’ behavior after ratification of the Bill of Rights cannot be an unerring guide to how they interpreted it. They were politicians, after all, and were subject to the same flames of partisanship as any legislators today. The young nation had a strong Protestant orientation, and in legislating various prayers, the politicians may have been trying to please their constituents in ways that are familiar to Americans in the twenty-first century. The way politicians of the founding period acted in complete violation of the First Amendment’s free speech and free press clauses serves as an apt example. Just seven years after ratification of the First Amendment, Congress enacted the infamous Sedition Act of 1798, perhaps the most flagrant violation of the freedom of political expression in the nation’s history. In passing the Sedition Act, the Federalist Party was trying anything politically possible to gain the upper hand over their Republican opponents, even if it contravened the Bill of Rights that had been added to the Constitution earlier in that very decade. Jefferson pardoned all those convicted under the law when he became president. Laycock writes:

The argument cannot be merely that anything the Framers did is constitutional. The unstated premise of that argument is that the Framers fully thought through everything they did and had every constitutional principle constantly in mind, so that all their acts fit together in a great mosaic that is absolutely consistent, even if modern observers cannot understand the organizing principle. That is not a plausible premise. Of course the state and federal establishment clauses did not abruptly end all customs in tension with their implications. No innovation ever does.36
As for Madison, the most important single figure behind the religion clauses, his extensive public record shows that he firmly opposed all types of governmental support of religion. He and Jefferson led the seminal battle in Virginia against general tax assessments to support all religions, and opposition to government support of religion was the central theme of his incomparable Memorial and Remonstrance against Religious Assessments. Madison did not approve of Congress appointing chaplains paid through taxes. In retirement, in 1822, he lamented that development in a letter to Edward Livingston. “As the precedent is not likely to be rescinded,” he wrote, “the best that can now be done, may be to apply to the Constn. [Constitution] the maxim of the law, de minimis non curat [the law does not concern itself with trifling things].” In the same letter, Madison wrote that proclamations of fasts and festivals involving prayer were “another deviation from the strict principle.” In terms of the “perfect separation” of church and state, Madison wrote to Livingston: “Every new & successful example therefore of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that religion & Govt. will both exist in greater purity, the less they are mixed together.”

Properly applied, the outcome reached in *Schempp* and *Engel* shouldn’t change no matter how one views the framers’ intentions. Rehnquist’s conclusion that the establishment clause permits the government to endorse religion generally but not an individual church or set of beliefs should not enable prayer and Bible reading to return to the public schools. The testimony in *Schempp* demonstrated that all prayer and Bible reading is a sectarian practice that promoted some sects and discriminated against others.

The Bible has different versions that have been the basis of persecution and violence between sects for many hundreds of years, even in the United States. Solomon Grayzel, the expert witness for the Schempps, identified some of the many passages in the King James Version that conflict with Jewish teachings. Even Luther Weigle, Abington’s expert witness, admitted that the King James Bible is
specifically the Protestant Bible to which Catholics and Jews do not subscribe. He said that the King James Bible is nonsectarian only for Protestants. But it’s not clear that the King James is even nonsectarian for all Protestants. Ellery Schempp, although a Unitarian Protestant himself, believed that the devotional use of the Lord’s Prayer and the Protestant King James Bible violated his own religious faith. In fact, he designed his protest—reading silently from the Koran during the Bible exercise—to demonstrate the existence of alternative religious traditions.

Prayer is inherently sectarian and has no other purpose than for worship. Even Philip H. Ward III, Abington’s attorney, conceded, in his oral argument before the Supreme Court, that the Lord’s Prayer violated the establishment clause. The Lord’s Prayer is one of the most sacred in all of Christianity and is most certainly not a prayer of non-Christians. Even a prayer written to be “nondenominational”—the Regent’s Prayer in Engel, for example—discriminates against children who belong to nontheistic religions. Christian conservatives often complain that catering to nontheism amounts to surrender to the atheism, agnosticism, and humanism that they oppose. But Buddhism and Confucianism do not have a theology that includes a god, so “nondenominational” prayers would be sectarian for them. Buddhism was a faith unknown in the colonies, but by 1985, a group of Buddhists in San Francisco objected to school prayer because their faith did not subscribe to the concept of God known in Judeo-Christian religions. Prayer in the classroom, they said, “would be an assault on the religious freedom of Buddhists.”

The controversy will no doubt continue for many years to come. The religious freedom bestowed by the Bill of Rights in 1791 created a free market that enabled religion to thrive in America. Madison and the founding generation clipped the ties that had long bound civil and ecclesiastical authority. Bound to the state, religion had long sought adherents with fire, sword, and legislative fiat. Unbound, it renewed
itself through free competition based on its ability to connect with the human soul, one soul at a time.

The tens of millions of connections made have brought enormous success to America’s great experiment in religious freedom. Free to pray and free to proselytize, people of faith came to America and there planted hundreds of denominations to grow. In 1776, the beginning of the Revolutionary period, only 17 percent of the population was affiliated with any denomination. By the time of the Schempp case, more than 63 percent of the American population were adherents to some faith. In 1962, a total of 252 religious denominations reported membership for a survey on faiths in the United States, with tremendous diversity even within major churches. There were twenty-eight Baptist and twenty-two Methodist denominations alone, among 222 Protestant bodies.

In 1822, Madison had occasion to look back at his and his fellow constitutional framers’ two greatest achievements, the dual blessings of democratic government and the separation of government and religion into separate spheres. “I cannot speak particularly of any of the cases excepting that of Virga. [Virginia] where it is impossible to deny that Religion prevails with more zeal, and a more exemplary priesthood than it ever did when established and patronised by Public authority,” he wrote. “We are teaching the world the great truth that Govts. do better without Kings & Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of Govt.” As freedom produced a proliferation of faiths as well as adherents, so, too, it made prayer and Bible reading in the public schools an idea that no longer worked in a pluralistic society. By the middle of the twentieth century, Americans could no more have devised a nonsectarian devotional exercise for their schoolchildren than Madison could have imagined a new land that welcomed the excessive religious zeal of the Old World.