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Legislative Prayer and School Prayer: The Constitutional Difference

David M. Ackerman
Legislative Attorney
American Law Division

SUMMARY

The Supreme Court has held government-sponsored prayer in the public schools to violate the establishment of religion clause of the First Amendment. In contrast, it has held clergy-led prayer in legislative assemblies such as the Congress and the State legislatures to be constitutionally permitted. Because both situations involve government sponsorship of prayer, these rulings are sometimes said to be contradictory. The Court, however, has drawn significant factual and legal distinctions between the two situations. Nonetheless, it remains true that the contrary decisions reflect different approaches to the interpretation of the establishment clause.

SCHOOL PRAYER

The Supreme Court has handed down more than a dozen decisions involving religion in the public schools,¹ but three decisions are crucial for understanding this area of the law. In *Engel v. Vitale*² in 1962 and *Abington School District v. Schempp*³ in 1963 the Supreme Court first held government-sponsored devotional activities in the public schools to constitute an establishment of religion in violation of the First Amendment.⁴ *Engel* involved a requirement of a local board of education in New York that students recite at the beginning of each school day a prayer that had been composed and recommended for use by the New York State Board of Regents:

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

¹ For a detailed summary and exposition of this area of the law, see CRS, *Prayer and Religion in the Public Schools: What Is, and Is Not, Permitted* (July 16, 1993) (Report No. 93-680A).

² 370 U.S. 421 (1962).

³ 374 U.S. 203 (1963).

⁴ The religion clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" These protections of religious liberty have been held to be applicable to State and local governments as well under the due process clause of the Fourteenth Amendment. See *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Cantwell v. Connecticut*, 310 U.S. 296 (1941).

In holding the prayer exercise unconstitutional, 6-1, the Court stated:

(T)he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

....

(G)overnment in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

370 U.S. at 425 and 430.

Abington (and the companion case of *Murray v. Curlett*) involved government requirements in Pennsylvania and Baltimore, Md., that each school day begin with readings from the Bible and the unison recital of the Lord's Prayer. In striking down those requirements as well, 8-1, the Court asserted:

[The exercises] are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.

374 U.S. at 203.

In both cases the States excused students who objected to taking part in the exercises. But the Court suggested that the exercises could not be truly voluntary in the context of compulsory school attendance laws, and, in any event, "the Establishment Clause ... does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."⁵

In the third case, *Lee v. Weisman*,⁶ the Court, by a 5-4 margin, held it to be unconstitutional for a public secondary school to include an invocation and benediction by a clergyman in its commencement ceremony. The Court explicitly reaffirmed *Engel* and *Abington* and concluded that "the prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student"⁷ Students were not required to attend the ceremony to receive their diplomas, but the Court stated that "law reaches past formalism, and to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."⁸ To "persuade or compel a student to participate in a religious exercise," the Court said, "is forbidden by the establishment clause."⁹

⁵ *Engel v. Vitale*, *supra*, at 421.

⁶ 112 S.Ct. 2649 (1992).

⁷ *Id.*, at 2661.

⁸ *Id.*, at 2659.

⁹ *Id.*, at 2661.

The Court differentiated its holding in this case from its ruling in *Marsh v. Chambers*, *infra*, concerning legislative prayer as follows:

The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh* At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit.

112 S.Ct. at 2659-60.

LEGISLATIVE PRAYER

The Court has addressed the issue of the constitutionality of legislative prayer in only one instance, and that involved prayer at the opening of a State legislature. But the reasoning of the decision gave general approval to prayer at all legislative levels, including in the Congress.

At issue in *Marsh v. Chambers*¹⁰ was the constitutionality of the practice of the Nebraska legislature of opening each legislative day with a prayer by a chaplain paid by the State. In holding the practice constitutional, 6-3, the Court stated that the practice of legislative prayer was "deeply embedded in the history and tradition of this country" and had become "part of the fabric of our society." It stressed that legislative prayer had existed from colonial times through the founding of the Republic, had been practiced in Congress for nearly two centuries, and was a consistent practice in most of the State legislatures. But along with this historical data, the Court emphasized the fact that the First Congress in 1789 had authorized the appointment of paid chaplains to offer prayers at each legislative session only three days before it reached agreement on the language of the Bill of Rights, including the religion clauses of the First Amendment. "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees," the Court said, but here "historical evidence sheds light ... on what the draftsmen intended the Establishment Clause to mean"¹¹ "Clearly," the Court concluded, "the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment ..."¹²:

It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the

¹⁰ 463 U.S. 783 (1983).

¹¹ *Id.*, at 790.

¹² *Id.*, at 788.

States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.
463 U.S. at 790.

Soon after *Marsh* was decided by the Court, the U.S. Court of Appeals for the District of Columbia acted on a related case called *Murray v. Buchanan*. That case challenged the constitutionality of a paid chaplain's prayers not in a State legislature but in the Congress itself. After the decision in *Marsh* came down, the appellate court in an *en banc* decision dismissed *Murray* on the grounds it no longer raised a substantial constitutional question.¹³ In a brief ruling the court stated simply that "(t)he Supreme Court's decision in *Marsh v. Chambers* is dispositive of appellants' challenge to the public funding of congressional chaplains."

DISTINCTIONS

The distinctions between government-sponsored prayer in the public schools and government-sponsored prayer in legislative assemblies, thus, appear to be twofold. First, the Supreme Court has found legislative prayer, in effect, to be an historically sanctioned exception to the general proscription of the establishment clause. In *Engel* and *Abington* the Court interpreted the establishment clause broadly. The history of religion in Europe and the colonies, the Court said, demonstrated both that "a union of government and religion tends to destroy government and to degrade religion" and that "governmentally established religions and religious persecutions go hand in hand."¹⁴ Thus, it said, the meaning of the establishment clause is essentially that government must be strictly neutral toward religion, serving neither as its advocate nor as its enemy. In *Lee* it used the narrower principle that "at a minimum the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."¹⁵ In the public schools these interpretations of the establishment clause have meant that government cannot sponsor devotional exercises, either as a daily ritual or as part of such a significant event as commencement. But legislative prayer is different, the Court has said, because the First Congress that wrote the establishment clause hired legislative chaplains to offer daily prayers at the same time. Thus, no matter how broadly the establishment clause is interpreted, it cannot be read as proscribing legislative prayer.

Second, the Court has cited factual differences both in the age of participants and in the legal compulsion to attend the prayer exercises as important. It has noted that legislative prayer involves adults who are under no compulsion to be present for the exercise, while prayer in the public schools involves impressionable children who are subject both to compulsory attendance laws and to substantial social pressure to conform. It has suggested, in short, that government-sponsored school prayer is more coercive in nature than legislative prayer and thus more violative of the purposes of the establishment clause.

Finally, however, it should be noted that the differing results the Court reached in its school prayer and legislative prayer decisions reflect in part an ongoing debate on the Court about how the establishment clause should be interpreted. *Engel*, *Abington*, and to a lesser

¹³ 720 F.2d 689 (1983).

¹⁴ *Engel v. Vitale*, *supra*, at 431, 433.

¹⁵ 112 S.Ct. at 2659.

extent, *Lee* reflect a perspective that believes "a union of government and religion tends to destroy government and to degrade religion"¹⁶ and that, therefore, there must be a "wall of separation" between government and religion. *Marsh*, in contrast, reflects a perspective that government can act benignly in support of religion and, more particularly, that practices which have become part of the "fabric of our society" should be constitutionally allowed to continue. Although the decisions themselves are not necessarily inconsistent, these differing perspectives continue to frame the debate on the Court and in the society at large on the proper relationship between government and religion and the proper interpretation of the religion clauses of the First Amendment. As long as that debate persists, the Court's school prayer and legislative prayer decisions seem likely to continue to be lifted up as contradictory.

¹⁶ *Engel v. Vitale*, *supra*, at 431.