

RELIGION, DEMOCRACY AND THE PUBLIC SCHOOLS

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INTRODUCTION

In the six decades since it began adjudicating issues involving religion and K-12 education, the United States Supreme Court has issued numerous opinions on various aspects of that relationship. Several of the Court's viewpoints have changed over time. It explicitly reversed itself on the constitutionality of using publicly-paid specialists in parochial schools,¹ and dramatically changed its perspective on public funds flowing to those institutions.² But the Court has never wavered on issues regarding religious activities in public schools—it has struck down every policy or program it has chosen to review.³ No opinion was unanimous, and rationales changed. But no result has diverged from the Court's original perspective that the Establishment Clause's brightest line ran just outside the public school grounds.

This piece begins with first doctrinal, then policy reviews of the Court's nine school prayer decisions. Parts I and II analyze the decisions as constitutional doctrine, dividing them along parallel lines of time and quality. In Part I, I show that the holdings and rationales of the Court's early school prayer decisions are both sound and commendable as constitutional doctrine. Part II takes a longer look at the remaining later decisions however, and reveals a struggling Court often relying on specious, fabricated or *a priori* reasoning to reach the apparently inevitable, but questionable, conclusion of unconstitutionality. Part III takes up the effects of the Court's decisions on social and political policy. I argue that the early decisions, though controversial, freed America from a past of sectarian domination, while the later decisions

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1. *Compare* Agostini v. Felton, 521 U.S. 203 (1997) *with* Aguilar v. Felson, 473 U.S. 402 (1985).

2. *Compare* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) *with* Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

3. The number includes two decisions involving curricular content (*Epperson* and *Aguillard infra*), but excludes two regarding equal access of student or community religious groups to public school facilities (*Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384; *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990)).

helped sow the seeds of several related and unhappy developments, especially ones promoting the very religious divisions they purported to guard against.

Part IV moves the focus from the quality and value of the Court's school prayer decisions to whether some of these issues would be better resolved through democratic means. The centerpiece of this examination is the author's observation, and occasional participation, in a decade-long political battle in his home state of Kansas over anti-evolutionists' attempts to influence the science curriculums in K-12 public schools.⁴ While recognizing that the battles often held the state up nationally in the worst possible light, the Part concludes that there were many positive outcomes that would not have occurred had the matter been judicially decided. Part V finishes the article with a brief look at which kinds of school prayer issues might benefit from a democratic rough-and-tumble process, and which are best resolved quickly and definitely by the federal courts.

I. THE FIRST DECISIONS: A CONSTRUCTIVE BEGINNING

Four of the Court's first five school prayer cases are almost certainly correct as legal interpretations of the Establishment Clause. The first, *McCullum*⁵ held unconstitutional a school district policy of inviting members of the clergy to enter the public schools and hold religious instruction once each week. As would be the same in subsequent cases, an opt-out provision for those choosing not to participate failed to save the program.⁶

The next two decisions involved striking down state-originated, daily religious activity in all public school classrooms. *Engle*⁷ concerned a simple, non-sectarian prayer written and recommended by the New York State Board of Regents. *Schempp*⁸ involved a Pennsylvania statute requiring that "at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school day."⁹ An accompanying case from Maryland involved a very similar School Board requirement based on a state enabling statute.¹⁰

4. As I will describe, I was not only an observer but a legal and community participant in this history.

5. *McCullum v. Bd. of Educ.*, 333 U.S. 203 (1948).

6. True to its early view that compulsion is not a necessary aspect of an Establishment violation, the Court never references the opt-out provision.

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

8. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963).

9. *Id.*

10. *Murray v. Curlett*, 179 A.2d 698 (Md. 1962).

The programs had opt-out provisions, but none survived the Court's review.¹¹ *Schempp* did foretell the future in one way, however, by spawning three additional opinions, two of them worrying about whether the Court was developing a hostility toward religion.¹²

The fifth school prayer decision was *Stone v. Graham*,¹³ holding unconstitutional a Kentucky statute requiring that a privately-funded copy of the Ten Commandments be posted on the wall of every public school classroom in the state. By this point the Court had adopted the *Lemon* test, and used it in a *per curiam* opinion to strike down the statute as having been enacted with no secular purpose. There was a strong Rehnquist dissent, accusing his colleagues of going out of their way to erase any trace of religion in the public schools by ignoring the legislature's legitimate secular purpose in imposing the requirement.¹⁴

Rehnquist's and a couple of Stewart's dissents notwithstanding, it is difficult to quarrel with any of these four outcomes. In his interesting analysis of first amendment decisions, Professor Conkle terms *Engle* and *Schempp* "easy" cases because of the "worshipful" nature of the activity, the sectarian basis of the Bible choice, and the coercive setting of compulsory school attendance.¹⁵ Each of these factors was, no doubt, influential in the Court's decision. But the principal problem in all of these cases had to be the nature of the governmental involvement. If the Establishment Clause means anything, it surely means that the government should be neither composing prayers—for any situation—nor dictating the content of daily religious activities in the public schools. Indeed, it is difficult to imagine a circumstance in which either program would be constitutional.

Much the same has to be said for striking down a program that fills the public school halls with clergy once a week, or for a state statute that mandates tattooing all of its public school classrooms with the Ten Commandments. No one has disagreed with *McCullum* in the sixty years since its release, and the four concurring Justices in the case

11. Only *Schempp* directly addresses the point:

The Free Exercise Clause . . . purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment. . . . The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

374 U.S. at 223.

12. *Id.* at 246, 299.

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

14. *Id.* at 43.

15. Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 328 (2007).

merely wanted a stronger statement of separation.¹⁶ And while *Stone* was decided a quarter century before the Court's major decisions on public displays of the Ten Commandments, it fits comfortably within the "contextual" paradigm *McCreary* and *Van Orden* later used to find one display unconstitutional and a second constitutional.¹⁷

II. THE REMAINING DECISIONS: MUDDLED DOCTRINE, SUSPECT RESULTS

The Court's other five school prayer decisions, however, are far less defensible. Four, *Epperson v. Arkansas*,¹⁸ *Wallace v. Jaffree*,¹⁹ *Edwards v. Aguillard*,²⁰ and *Lee v. Weisman*²¹ are very difficult to support as doctrine, while the fifth, *Santa Fe Independent School District v. Doe*²² is sufficiently opaque that it defies analysis.

Conkle cites both *Wallace* and *Weisman* as "not-so-easy," a ranking that is quite charitable to both opinions. *Wallace*, which struck down an Alabama "moment of silence" statute suggesting the time could be spent for "meditation or voluntary prayer" is especially peculiar. No member of the Court has ever indicated that a "pure" moment of silence at the beginning of the public school day would be unconstitutional. Indeed, the clearest endorsement of the idea came from Justice Brennan, usually the Court's most watchful patrolman against prayer in public schools. Even a casual reading of the two concurring opinions and three dissents in *Wallace* brings to six—with Brennan—the members of that Court who would have held an unadulterated moment of silence constitutional.

The problem regarding that particular statute was that when it was passed there was already on the books a statute calling for a moment of silence for "meditation." The second statute merely added "or voluntary prayer," an addition the majority found reflected the absence of any secular purpose. This use of the first prong of *Lemon* in any context will be discussed below. For now, the author of *Lemon*, Chief Justice Burger, questioned the appropriateness of its use here.

There was also a very short dissent from Justice White and a very long one from Justice Rehnquist. But none of the opinions make the

16. *McCollum*, 333 U.S., at 212.

17. Compare *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) with *Van Orden v. Perry*, 545 U.S. 677 (2005).

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

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

20. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

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

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

obvious point that any objective viewing of the statute would conclude that there were clearly related secular purposes for adding “or voluntary prayer” to the original statute. The first was to resolve an obvious issue created by the word “meditation.” Does that word include prayer or not? Not an easy question, and one to which parents, teachers and school administrators might well have been seeking a definitive answer. Relatedly, by this time in the development of the country’s school prayer jurisprudence enough had been said—some true, some hysterical—about the Supreme Court “taking God out of our schools,” that many Americans, particularly Southerners, believed it was unconstitutional ever to pray inside a public schoolhouse. Informing citizens of any age of their constitutional rights is unquestionably a secular purpose, and Justice White’s brief dissent correctly states that all the statute in question did was answer beforehand a student’s question of whether she could use the minute for silent prayer. Additional proof that such questions needed to be answered can be found a decade later when the Clinton Administration issued formal instructions to all public schools in the country, explaining what kinds of religious expression or activities were constitutional.

Weisman is only slightly less difficult to digest as doctrine. Basically, the Court held unconstitutional a school district’s practice of using rotating clergy to offer nondenominational invocations and benedictions at middle and high school graduation ceremonies. The bases of the majority opinion were the degree of state involvement in the religious activity and the psychological coercion on students to participate. The state involvement included having public school officials make the decision to have the invocation and benediction, selecting that year’s presenter, and distributing suggestions to the presenter about how to make the remarks non-denominational. The psychological coercion came from a *de facto* attendance requirement coupled with the absence of an outlet for those who did not wish either to participate or be seen as participating.

After making the point that such activities had been a part of the culture as long as there had been public school graduations, Justice Scalia’s dissent for himself and three others did a highly effective job of repudiating the coercion argument. His ultimate argument was that any Establishment violations based on coercion required legal, not merely psychological, coercion—a shaky conclusion itself given earlier school prayer decisions. But he was surely correct in pointing out that merely standing while the “prayer” was being offered would not reflect the graduate’s approval of either the general idea or the content of the

prayer. Few, if any onlookers watching an eighteen-year-old stand silently during a public prayer would conclude the teen is necessarily either praying or approving of the prayer. Some probably are, but many more are likely to be thinking about their girl (boy) friend, the party after the ceremony, or how to avoid summer work. The Court's conclusion otherwise is a foolish basis on which to strike down a public activity long part of the culture and important to many citizens.

The alternative basis for the opinion of the Court rests on the school district's involvement in the process. Surely the decision simply to have the activity is an insufficient basis to find unconstitutionality in light of the hundred years of history it represented.²³ Which leaves the school officials' decision to choose the clergy on a rotating basis and handing the invitee a brochure recommending that the prayers be composed with "inclusiveness and sensitivity."²⁴ The result of this approach was, of course, to leave the composition of the texts to the presenter while maximizing the possibility that the result would not offend. The question, then, is whether these simple, open-minded acts serve to "aid all religions," an Establishment violation since *Everson*. The more precise question is whether the practice of offering tepid invocations or benedictions at high school graduations is more like school prayer (unconstitutional) or other public prayers solemnizing public events (constitutional).²⁵ It is obvious from the opinions that minds can differ on the issue, but the non-repetitive, non-denominational, non-offensive nature of the activity points more toward the second line of cases.

The truly "hard" cases are *Epperson* and *Aguillard*, involving legislative attempts to alter the science curriculum, allegedly to square it more directly with religious thought. The difficulty with these decisions does not lie with their outcomes. People of diverse political philosophies understand the danger, historically proven, of taking the power to define and teach science out of the hands of the scientists and giving it to those who do not approve of science's conclusions. As the article underscores later, when given the chance, even conservative states support keeping science in the hands of those who live and understand it.

The problem with *Epperson* and *Aguillard* is in the analysis—or lack of it—the Court brings to bear in finding the statutes unconstitutional. In each instance the majority bases its opinion on the

23. See *Lee*, 505 U.S. at 632-36 (Scalia, J., dissenting).

24. *Id.* at 581.

25. See *id.* at 631-36 (Scalia, J., dissenting).

absence of a secular purpose for the enactment.²⁶ But in neither case does the majority offer much by way of an evidentiary basis for its conclusion.

Epperson is especially bereft of evidentiary support. The closest the Court comes is in its conclusory statement that

there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious view of some of its citizens.²⁷

Aguillard is but slightly stronger, concluding that the stated secular purpose was a "sham," and discovering the concealed purpose in statements by the bill's principal sponsor and the religious affiliations of a supporting "expert."²⁸

This piece is not the first to find problems with this reasoning.²⁹ The more obvious difficulty is that the opinions reflect, as best, how one legislator (*Aguillard*) or no legislators (*Epperson*) viewed the statute when it passed. What were the "purposes" of the dozens of other legislators needed to pass the bills? What of the legislator who thought the measure bunkum but voted for it to keep his seat—secular or religious? This problem was exacerbated in *Aguillard* by the majority's willingness to reach its decision on a summary judgment record, leaving Scalia to suggest a variety of other, quite secular purposes that may have inspired legislators to support the bill.³⁰ In the end, the Court may have been right about the "purpose" in both instances. But in neither case is that conclusion based on much beyond an uncomfortably arrogant "we know what you Rednecks are up to" rationale.

The other, even less inviting, aspect of the opinions is the narrow line they walk between purpose and motivation. Indeed, at times both seem to confuse these quite different concepts. This has led some to the reasonable inference that in each instance, the statute was unconstitutional because its supporters were motivated by their religious

26. *Epperson*, 393 U.S. 97, 107-08 (1968); *Edwards*, 482 U.S. 578, 573 (1987).

27. *Epperson*, 393 U.S., at 107.

28. *Aguillard*, 482 U.S., at 587.

29. See, e.g., MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL MORAL PERSPECTIVES (1977); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 47 (1997).

30. *Aguillard*, 482 U.S., at 627-33 (Scalia, J., dissenting).

beliefs.³¹ If true, the opinions lead to places few want to go, a hypothetical journey gleefully guided by Justice Scalia elsewhere in his *Aguillard* dissent.³² As he correctly notes, many of the country's most noble legislative accomplishments were inspired significantly by religious beliefs.³³ Viewing today's legislative agenda, it would be startling if the Court held a civil rights, immigration or abortion bill unconstitutional because of the role religion played in encouraging its passage. While we are confident this is unlikely to happen, the analogy reveals the weakness in the "purpose" prong both generally and as applied in these decisions.

There are undoubtedly less awkward approaches to these science-or-religion cases. Building a better record for appeal would be an obvious start. With that accomplished, a trial court could at least employ either the "effect" prong of *Lemon* or the endorsement test to substitute a collective judgment of the citizenry for the *a priori* judicial judgment encouraged by the purpose test. An example of this more attractive model is District Judge Jones's recent opinion in the Dover, Pennsylvania case challenging its school board's requirement that high school biology students be read a statement suggesting that Intelligent Design (ID) is an alternative explanation to the evolutionary "theory" they were about to study.³⁴ After carefully reviewing the religious foundations of ID, Jones finds that the concept is not "science."³⁵ This, in turn, leads to the logical conclusion that "[ID] is not [science], and moreover [it] cannot uncouple itself from its creationist, and thus religious, antecedents."³⁶ That being so, he holds the attempted imposition of the ID statement violates both the endorsement test and *Lemon*.³⁷

This reasoning at least gives an impression of care and fairness baldly missing in *Epperson* and *Aguillard*. Still, there are gaps. The key finding regarding both "endorsement" and "effect" comes early in the opinion when Judge Jones concludes that ". . . the religious nature of ID would be readily apparent to an objective observer, adult or child."³⁸ If that is so, it raises two interesting questions. First, if it is so apparent, why does it take the next twenty-eight pages to lay out the evidentiary

31. Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793 (1996).

32. *Aguillard*, 482 U.S., at 636-37 (Scalia, J., dissenting).

33. *Id.* at 615.

34. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp.2d 707 (M.D. Pa. 2005).

35. *Id.* at 714.

36. *Id.* at 765.

37. *Id.*

38. *Id.* at 718.

base? Alternatively, if any adult or child in the community would readily recognize ID's religious nature, what is the concern? Is not the fear underlying these cases that children will be hoodwinked into mistaking religion for science? If the court is right, the Dover ninth graders presumably would have listened half-heartedly to the one-two minute ID spiel, then correctly concluded it was the product of some religiously-motivated folks somewhere in the system. No harm beyond some wasted time. The other, basic problem with this and other decisions on "science or prayer" is that they all compare apples to walnuts. As Stephen Jay Gould pointed out in his essay *Justice Scalia's Misunderstanding*,³⁹ science/evolution does not concern itself with "origins," while that concept is an important aspect of religion. This misunderstanding, as Gould correctly pointed out, is not science's fault.⁴⁰ But it nevertheless both undermines the logic of deciding something is religious because it is "not science," and suggests ways that wily school boards could craft pre-course statements about science that would fall outside any perceived attack on its methodology or tentative results.

The Court's final school prayer decision, *Santa Fe Independent School District v. Doe*,⁴¹ strikes down "voluntary" prayers before high school football games. The case is difficult to rate on the Conkle scale,⁴² in part because of a rambling, fact-based majority opinion that holds an unimplemented, multiple-versioned school district policy unconstitutional under the *Lemon* endorsement, and coercion tests.⁴³ In a majority opinion that the dissent claims "bristles with hostility to all things religious in public life,"⁴⁴ the Court brushes by the idea of waiting to see how the policy would be implemented, then rejects a series of sometimes pale school district arguments attempting to differentiate its facts from Court precedents.⁴⁵ In the end, we know only that prayers delivered by an elected student before public school athletic events violates every major test constructed by the Court over a half century. Without doubt, the degree of school involvement in *Santa Fe* was pervasive and, therefore, constitutionally suspect. But the end product was a short "invocation" offered by an elected student under no guidance from school officials, delivered at a time when most in the

39. Stephen Jay Gould, *Justice Scalia's Misunderstanding*, NAT. HIST. 96, 14-21 (1987).

40. *Id.*

41. *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290.

42. Conkle, *supra* note 15.

43. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 304-13.

44. *Id.* at 318 (Rehnquist, C.J., dissenting).

45. *Id.* at 310.

audience were free to stand, sit, buy popcorn, or visit the washroom. So, in the end, it is probably a “not so easy” case with minimal precedential value.

III. THE SCHOOL PRAYER DECISIONS AS POLITICAL OR SOCIAL POLICY

This legal analysis of the Court’s Establishment jurisprudence on public schools reflects that while most of the early school prayer decisions are analytically sound, a similar proportion of later opinions carry serious analytical flaws. That is disturbing, of course, but less so if the collective outcomes have served the country well as strong, clear and useful political or social policy. Useful and transparent judicial opinions inform and counsel. Opinions creating sound constitutional policy promote the general good while avoiding political or social unrest. So if the school prayer decisions have aided the country in sorting out the inevitable points of contact between church and state, we should applaud the destination in spite of any mishaps in the journey.

Over the six decades of these decisions, the Court has articulated several political or social values it believed were forwarded by a strict separation in public schools. Three are the most often repeated, however. The first, especially emphasized in all early Establishment decisions, was to avoid the mistakes of the Founders’ European ancestors whose freedoms, and even lives, were so often lost to religious oppression. The second, always present but increasingly relied on, was the coercive nature of permitting religious activities a) led by adult role models, b) before impressionable children, c) who were required by the state to be present, d) when a possible result was that non-believers would feel like outsiders. And the third, usually a modernized version of the first, was to keep the country from falling into divisive and enervating religious quarrels.

In light of these interests, the early decisions again look good as instruments of social policy. *McCollum* stopped in its tracks the dreadful idea of bringing clergy to the public schools to teach doctrine on a regular basis. Far more important, though, were *Engle*, *Stone* and, especially, *Schempp* in serving as change agents to rid the country of a vast accumulation of state-initiated, organized, religiously-based intrusions into the public schools. The breadth of these programs is reflected in the amicus support for the defendants in *Murray v. Board of Commissioners*, the companion case to *Schempp*. The Attorney General of Maryland appeared, of course, to defend both the state’s enabling

statute and the school board decision to require the prayer.⁴⁶ But he was hardly alone—Attorneys General from eighteen other states, from Maine to Arizona and Florida to Idaho, also joined his amicus curiae brief urging the Court to uphold the Maryland Court of Appeals decision finding the practices constitutional.⁴⁷ The reason for this outpouring was, of course, that these kinds of statutes and the practices they enabled were everywhere in a country that had for decades found the public schools appropriate places to parade Christian, usually mainline Protestant, values.

The ensuing, virtually unanimous opinions barring such practices marked a clean break from this past, and came as the country was becoming ever more religiously and ethnically diverse. In short, these opinions banning various methods of state-blessed, daily, mandatory religious activities were both in keeping with the social policies on which the opinions relied and instrumental in removing sectarian influences from the public school day. Few would wish to return to those days, and the Court deserves great credit for its strong move to eliminate the practices.

When the other five opinions are added to the political and social policy mix, however, the results become considerably less clear. There is neither time nor space enough to fully discuss the collective decisions in light of all three basic, underlying Establishment policies. The primary purpose of this article is to analyze them in light of the “avoidance of political divisiveness” cornerstone. But one should note in passing that there is substantial doubt that the “avoid the European mistakes” and the “coercion” bases have been particularly well served, either. Religious wars between and within European countries are down considerably from the eighteenth century, and many American ancestral homelands—even those that retain established churches—have become our equal as places of religious freedom and tolerance. Our political and linguistic motherland, the United Kingdom, still requires that “each pupil in attendance at a [public] school shall on each school day take part in an act of collective worship,”⁴⁸ and many of the countries that have sent millions of immigrants to the U.S. either require or allow

46. *Schempp*, 374 U.S. 203, at 310.

47. The states were Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Louisiana, Maine, Mississippi, New Hampshire, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota and Tennessee. See Brief and Appendix for Attorney General of Maryland, *Murray v. Curlett* (U.S. Nov. 30, 1963) (No. 119).

48. There are, of course, “exceptions and arrangements” for parents who do not wish their children to participate. School Standards and Framework Act, § 70-71, ch. 31 (1998).

religious instruction in the public schools.⁴⁹ This is not to say that our country with its unique history should reverse itself and follow its ancestral homelands. That would be absurd. The point, rather, is that while those homelands retain some vestigial indicia of the kinds of religious domination that lead to widespread dissent and revolt, a few prayers in school have not prevented them from becoming civilized, tolerant, Western democracies.

The coercive effects of school prayer is a more realistic concern in the modern world. And as noted above, the Court's early school prayer decisions that freed the nation's public school children from an oppressive, ritualistic Protestant indoctrination at the beginning of every school day was a favor to an entire nation.⁵⁰ But just as the clarity of the legal analysis in those decisions moved parallel with beneficial social policy, so did the highly attenuated legal analysis in the later decisions bring less favorable social outcomes. There is a huge difference between telling religiously-oriented people that they cannot require mandatory, Christian-centric prayer before a public school day and telling them they cannot require a moment of silence or have a once-a-year invocation before a graduation ceremony. ("Voluntary" prayer before a football game lies somewhere between.) There are, of course, blind-faith citizens who consider any decision that "takes God out of our schools" to be sacrilegious. But there is no reason to conclude that religiously-oriented citizens cannot be as discriminating as those with more secular outlooks. If that is so, a decision that prohibits a moment of silence because a child might use it to pray, or a decision that bans the graduation invocation because it is "coercive," becomes evidence that the less-discriminating group may be right—that it truly is the intent of the Court to erase all traces of religious thinking from the public school system.

That has happened, and the toll these later cases have taken has hardly reduced "political divisiveness." Without doubt, *Engle* and *Schempp* set off a firestorm in the country, some of it from such non-

49. See the United States Department of State's Annual Report on International Religious Freedom (2007), available at www.state.gov/g/drl/rls/irf/2007.

50. Even that attempt to make all children "better" through the Bible, the Lord's Prayer, and adding "under God" to the daily Pledge failed more often than the Court suspected. I was raised Catholic in a small Protestant-dominated town where we "did it all" every morning. At first I was a bit confused about whether to say the extra words that someone added to the Lord's Prayer I knew, but soon enough I worked that out—I don't remember how—and just went with the flow. And as far as I knew, so did the few other Catholics, Jehovah's Witnesses, Assembly of God kids, and the one Jewish boy. At some early point, it all became pointless, a dull, unmemorable way to begin each school day. All of which augers toward the early Court's position that coercion is not a necessary element in an Establishment violation.

fundamentalist sources as the Dean of the Union Theological Seminary and Francis Cardinal Spellman.⁵¹ The generated heat took political form as a variety of proposed amendments to the Constitution that would allow “voluntary” school prayer. Congress held hearings on various proposals in 1964, 1966, 1971 and four different years during the later Reagan administration.⁵² In the end, nothing was ever passed, and only the 1971 version ever reached one floor of Congress.⁵³

This quarter-century battle may not have resulted in legislation, but it unleashed a new political force. The so-called Religious Right found a rallying point in supporting the rise of the Reagan administration and its promised support for the both the school prayer amendment and a newer cause, anti-abortion legislation.⁵⁴ During that eight-year period the Court decided *Wallace* and *Aguillard*, and these decisions continued to convince the Right that the Court was the enemy of any form of religiously inspired attempts to work with the public schools.⁵⁵

Since the 1980s, the Religious Right has added gay rights to abortion and school prayer as its primary points of interest.⁵⁶ It has remained an important force in national politics, and is often given credit for both of George W. Bush’s presidential victories.⁵⁷ The development of a political movement is not a harm in its own right. Indeed, it is the essence of democracy. The irony, though, is that Supreme Court decisions strictly separating prayer and the public schools, in part because of their potential for dividing the country politically along religious lines, has played an important role in dividing the country politically along religious lines. On the way, the movement formed cohorts of single-issue voters whose ballot box support became dependent solely on a candidate’s position on one, or a very few, religiously-based tests. As a result, more serious issues of public policy were frequently pushed to the background while elections turned on contrived, or at least less important, public issues.⁵⁸

51. ROBERT S. ALLEY, *SCHOOL PRAYER: THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT 118-20* (Prometheus Books 1994).

52. *Id.* at 127-56 (1964), 157-68 (1966), 169-86 (1971) & 187-219 (Reagan years).

53. *Id.* at 169-80.

54. *Id.* at 220-33.

55. *Id.* at 187-214.

56. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 580 (2003); Peter Applebome, *Religious Right Intensifies Campaign for Bush*, N.Y. TIMES, Oct. 31, 1992, at 1.

57. *Special Report: The Triumph of the Religious Right—American Values*, ECONOMIST, Nov. 13, 2004, at 29.

58. Keeping it local, one good exposition of this phenomenon is Thomas Frank’s popular book, THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA* (Metropolitan Books 2004).

The growth of the Religious Right as both a religious and a political force has also come primarily at the expense of the mainline Protestant denominations that had traditionally treated Fundamentalists as poor relations. Again, school prayer was the tipping point.⁵⁹ The numbers of adherents of mainline and conservative denominations have reversed fairly rapidly, and the political clout has followed the numbers.⁶⁰ The root causes for this major shift go well beyond school prayer, of course. On the raw political front, though, the changes mark the substitution of a less-compromising, sometimes intolerant political force for one that has traditionally governed from the middle and held few issues on which it refused to seek common ground. Tone is an important part of divisiveness, and many Americans seem to agree that the tone of today's political rhetoric is markedly harsher than it once was. The change in the Protestant landscape is by no means the sole cause of that change, but it is undeniably a factor.

A third significant, negative result of the school prayer decisions on American political and social life is their effect on the rise of home schooling. Once the province of disenchanted 1960s liberals,⁶¹ the home school movement has become closely linked to a conservative antipathy to the Court's having "taken God out of the [public] schools."

The numbers are striking. The National Center for Education Statistics' (NCES) last survey of homeschooling was conducted in 2007. It found 1.5 million students being homeschooled in the U.S., a seventy-four percent increase from 1999 and thirty-six percent since 2003.⁶² Other estimates of students now schooled at home run as high as 2.4

59.

These Protestant crosscurrents collided with . . . the Engel decision. Denominational and National Council [of Churches] leaders firmly supported the Court and so testified. Simultaneously, there was a strong grass roots resistance that found a voice in Billy Graham and Norman Vincent Peale. But uncompromising Protestant fundamentalism . . . would find more dependable leadership among a cadre of television preachers who loathed accommodation with the mainstream Protestants.

ALLEY, *supra* note 50, at 222.

60. *Conservative Churches Grew Fastest in 1990s, Report Says*, N.Y. TIMES, Sept. 18, 2002, available at <http://www.nytimes.com/2002/09/18/us/conservative-churches-grew-fastest-in-1990s-report-says.html?scp=1&sq=conservative+churches+grew+fastest&st=nyt>. The story reports on a decennial study, "Religious Congregations and Membership: 2000," considered by scholars as the most comprehensive assessment of denominational populations and shifts. The 2000 Report showed an 18% increase in two principal conservative Protestant sects during the 1990s and double-digit diminutions in such mainline sects as Presbyterian and United Church of Christ. And, of course, many fundamentalist churches are non-denominational.

61. Autumn Burke, *Why Homeschooling is on the Rise*, ABOUT.COM, <http://homeschooling.about.com/od/gettingstarted/a/homeschoolrise.htm> (last visited Nov. 7, 2009).

62. M. PLANTY, ET AL., U.S. DEPT. OF EDUC., THE CONDITION OF EDUCATION 2009, AT 14 (NCES 2009-081), available at http://nces.ed.gov/programs/coe/2009/pdf/6_2009.pdf.

million.⁶³ In contrast, the estimated number for 1985 was 50,000.⁶⁴

So why is this happening? The survey reveals a number of causes, but one of the most significant is “to provide religious or moral instruction.” to children. Approximately thirty-six percent of those surveyed gave this as their chief or sole reason for homeschooling in the 2007 survey, and another twenty-one percent offered a more ambiguous “concern about the school environment” as their primary motivation.⁶⁵ Less statistically-based evidence is clearer: “Homeschooling origins began in the 1960s with a counter-culture movement that soon fizzled out and was replaced in the 1970s after the Supreme Court upheld the decision that removing school prayer was not unconstitutional.”⁶⁶

Whatever the exact numbers, the loss of several hundred thousand children from the public schools each year apparently is attributable to parental views that schools are places hostile to people of faith. That judgment may be crude or sophisticated depending on the information to which the parents have access. But the view is there, and it acts as a substantial impediment to the socializing role the public schools have historically played as, in the words of Justice Frankfurter, “the most powerful agency for promoting cohesion among a heterogeneous democratic people.”⁶⁷ More plainly, it means that every day thousands of public school and homeschooled children of different or no religions lose the opportunity to learn mutual respect and tolerance for each other. It is a great loss for them, and for the future of their country.

IV. A LESS-TRAVELED ROAD: DEMOCRACY AND SCHOOL PRAYER

If my argument in the previous two Parts is correct, most of the Court’s school prayer decisions over the last quarter century are suspect both as constitutional doctrine and instruments of social or political policy. It also seems that the Court’s interest in the topic is waning—not counting the Pledge case it ducked,⁶⁸ it has given us only one (very weak) school prayer decision since 1992, two since 1987.⁶⁹ Though its early decisions have, thankfully, done away forever with the most

63. Amanda Gefter, *Home-Schooling Special: Preach Your Children Well*, NEW SCIENTIST, Nov. 9, 2006, available at <http://richarddawkins.net/article,297,Home-schooling-special-Preach-your-children-well,Amanda-Gefter--NewScientistcom>.

64. Patricia M. Lines, *Homeschooling: An Overview for Educational Policymakers* (U.S. Dep’t of Educ., Working Paper No. 4, Jan. 2007).

65. National Center for Education Statistics, THE CONDITION OF EDUCATION 14 (2009), available at <http://nces.ed.gov/pubs2009/2009081.pdf>.

66. BURKE, *supra* note 60.

67. *McCullum*, 333 U.S. 203, 216 (Frankfurter, J. dissenting).

68. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

69. *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290; *Edwards*, 482 U.S. 578.

egregious of the forced, daily religious activities, the remaining landscape looks reasonably bleak. We have difficult public questions pending, including but not limited to the Pledge issue, “holiday” programs, moments of silence, graduation invocations, prayers at sporting events, and the ever-present “science” issues. But we have only the crude tools the Court has left us to deal with these weighty matters. It is a daunting set of tasks, whether those crafting solutions are a school board, its attorneys, civil libertarians, parents, religious organizations, or federal or state judges. It is always easy to guess that the answer to most religious activities in public schools is “no,” but it is both difficult and confounding to explain why.

Over the past decade, the author has had a ring-side seat to a different approach to one of these issues. While it is a faithful “red” state in Presidential elections,⁷⁰ Kansas has generally been moderate on most social issues. It came late to capital punishment, has always had a reasonable abortion law, and has continuously offered decent support for public education. Its moderate-to-liberal two-term Democratic Governor was recently confirmed as President Obama’s Secretary of Health and Human Services. Her place was taken by a moderate-to-liberal Lieutenant Governor who used to be the moderate-to-conservative Chair of the state Republican Party. For decades the State was run primarily by middle-of-the-road “Eisenhower” Republicans with little taste for what have become known as “social issues.”

So imagine Kansans’ surprise in August of 1999 when we discovered that our State Board of Education (“Board”) had voted six-four to adopt statewide science testing standards for K-12 that eliminated all references to macro-evolution.⁷¹ It turns out that while the moderates and liberals in the State were paying attention to other matters, anti-evolutionists had run and elected three members to the Board, giving it a majority.⁷² This was their coming-out party.

In some ways, this turn of events should not have become a big deal. The Board has no authority to dictate either curricular choices or accompanying textbooks at the district level.⁷³ Its only influence, which it was exerting here, is to announce the standards it will use in administering statewide assessment tests.⁷⁴

70. Lyndon Johnson was the last Democrat to win Kansas’s electoral votes.

71. Pam Belluck, *Board for Kansas Deletes Evolution from Curriculum*, N.Y. TIMES, Aug. 12, 1999, at 1.

72. In fact, one member supporting the changes was supposedly a “moderate” who decided for undisclosed reasons to cast the marginal vote with the anti-evolutionists.

73. KAN. STAT. ANN. § 72-7513 (2008).

74. *Id.*

Yet by some stroke of bad luck, Kansas's venture into the evolution/ID issue was discovered by the national media. The New York Times and NPR particularly found us intriguing, as did the late night comedians. People for the American Way hurried to Lawrence, where they organized a televised, double-barreled program featuring native Kansan Ed Asner as Bryan and James Cromwell as Darrow in a re-creation of the showdown at the Scopes trial, followed by a panel discussion (which I moderated) consisting of two evolutionists, a Creation scientist, an Intelligent Design advocate and a legal historian.⁷⁵ Suddenly and unhappily, we Kansans became the poster children for what the mainline press saw as Ignorance on Parade. Painful groans arose from all over the State, none louder than from (moderate Republican) Governor Bill Graves: "This is a terrible, tragic, embarrassing solution to a problem that did not exist."⁷⁶

There was some immediate thought of a lawsuit. Though it was never disclosed publicly, the Kansas City ACLU asked a major Kansas City firm to take a look at the possibility of bringing an Establishment Clause action.⁷⁷ But as no school district in the State had changed either its curriculum or its textbooks in response to the Board's amended "Standards," the decision was that there was not yet standing for such a challenge.

In the meantime, Kansans who opposed the changes began thinking about the next Board election. Though few voters knew it previously, half of the ten-person Board seats came open every two years, and four of the five seats up for contention in 2000 were occupied by anti-evolutionists ("AE").⁷⁸ So for the first time in history, the 2000 everyday election conversations focused on not just the Presidential, congressional and local races, but the State Board of Education as well.⁷⁹

75. Erwin Sera, *Acting Out on Behalf of Evolution*, LAWRENCE J.-WORLD, July 13, 2000, at 1.

76. Kate Beem, *New Plan Softens Evolution Standards*, KAN. CITY STAR, Aug. 9, 1999, at A1. Scott Rothschild, *Evolution hearings show scope of cultural divisions*, LAWRENCE J.-WORLD, May 4, 2005, available at http://www2.ljworld.com/news/2005/may/04/evolution_hearings_show/.

77. The discussion took place between the ACLU and Stinson, Mag & Fizzell during the summer of 2000. I was Of Counsel to the firm at the time and would have been the lead attorney.

78. There is no obvious group nomenclature for those supporting the amended Standards. Terms such as "religious right" or "social conservative" are far too broad, and "pro-Intelligent Design" or "pro-Creationism" may or may not be accurate. The group would probably object to "anti-evolutionists" as well because of their alleged "support" for micro-evolution. But it seems the fairest of several bad choices.

79. Much of the following description of the back and forth of the decade-long battle over the statewide testing standards comes from my own observations, notes, file, and (declining) participation. Some of the events were covered by the national press, including the New York Times, the Los Angeles Times, and NPR. Some were covered only locally, if at all. The best

Candidates were recruited and underwritten. Local and regional news stories were frequent, as were editorials. The hard science community in the state organized to support a return to evolution-based Standards. Voters informed themselves of who was running and what “side” they supported. In the end, one AE candidate was re-elected, one did not seek re-election and her seat was taken by a moderate, and two AE supporters were defeated by moderates in the August Republican primary. So while *Bush v. Gore* was still being adjudicated in the United States Supreme Court, the new seven-three moderate majority on the Board moved quickly to replace the previous Standards with ones based on objective scientific standards. Macro-evolution returned to the Standards, as did testing on evolutionary subjects.

And so it ended, or so the moderate voters thought. As quietly as they had in the 1996 and 1998 elections, the AE supporters slipped back to the polls in August, 2002 to nominate two more Republican candidates, both of whom won the general election that November. And while the resultant five-five split on the Board produced nothing new over the next two years, the additional success of a third AE candidate in the 2004 election had those favoring change again in control. This time they were not dependent on a wavering moderate for their sixth vote, and the difference showed itself quickly.

Depending on one’s point of view, the first six months of 2005 were the acme or nadir of Kansas’s experiment with democratic solutions to possible First Amendment problems. Prior to the 2004 election, the Board had created a twenty-five-member committee to revise the science standards, giving eight seats to AE supporters. In December, 2004 the majority of the committee recommended traditional, science-based criteria, but the eight AE supporters submitted a minority report calling for more limits on evolutionary standards. In January the writing committee rejected all but one of the minority’s recommendations. There followed a series of public forums held throughout the State, offering ordinary Kansans the opportunity to give two-minute comments to the committee. Nearly a thousand people attended, and more than two hundred gave comments that were fairly evenly divided between pro- and anti-evolutionary views. Many of the “antis” proved somewhat of an embarrassment to the minority report advocates, however, as they emphasized a religious-based perspective

sources for additional information include the archives of the Topeka Capital, the Kansas City Star, and the Lawrence Journal-World. Other helpful cites include www.kcfs.org (Kansas scientists), www.tv.ku.news (University of Kansas), www.talkorigins.org (private website of a close observer of the 2005 hearings).

on the issues that AE supporters had been contending were all about science. The eventual upshot was a proposal from AE supporters, adopted by the new Board, that there would be “hearings focused on the areas of disagreement in the majority and minority positions of the Science Writing Committee.”⁸⁰ A three-member, all AE supporter committee was appointed to hold a quasi-legal set of hearings, offering each side three days to present their views.

But the Kansas hard science community, which had been well-organized since 1999, refused to play by the Board’s rules. Specifically, on March 8, the Kansas Citizens for Science Resolution Regarding the State Board Science Hearing Committee resolved, in part, that:

The specific proposals in the minority report have been rejected by the writing committee and by the science community at large. The science community should not put itself in the position of participating in a rigged hearing where non-scientists will appear to sit in judgment and find science lacking. Science should not give the anti-evolution members of the board the veneer of respectability when they take their predictable action.⁸¹

Thus was a boycott born.

The committee held its hearings on May 5-12 in Topeka, the state capital. Counsel for the AE perspective—the same Kansas City law firm partner who had represented the ID position in the People of the American Way panel back in 2000—offered twenty-four witnesses, including members of the Intelligent Design Network and the Discovery Institute to support their position.⁸² In keeping with the resolution, the majority called no witnesses, but a high-profile Topeka attorney did cross-examine the minority’s witnesses, and eventually gave a two-hour closing argument. The national press was back, of course, and gave it all a full airing.⁸³ About the same time, the Kansas Legislature decided that it needed to enter the issue, though its proposed “objectivity in science education” resolution died quietly in committee. In June, the Board committee approved proposed standards containing language

80. Jack Krebs, Kansas Evolution Hearings: Summary of the Background to the Kansas “Science Hearings” at May, 2005, July 1, 2005, www.talkorigins.org/faqs/Kansas/evolutionhearings.html.

81. Kansas Citizens for Science, *Resolution Concerning The “Science Hearings,”* Mar. 8, 2005, www.kcfs.org/standards05/KCFS.resolution.html.

82. The Talk Origins Archive: Exploring the Creation/Evolution Controversy, *Summary of the Background to the Kansas Science Hearings of May, 2005*, July 1, 2005, <http://talkorigins.org/faqs/kansas/evolutionhearings.html>.

83. See, e.g., Jodi Wilgoren, *In Kansas, Darwinism Goes on Trial Once More*, N.Y. TIMES, May 6, 2005, at A15; P.J. Huffsetter, *Evolution Isn’t A Natural Selection Here*, LOS ANGELES TIMES, May 6, 2005.

sought by the AE advocates, and in November, the full Board concurred. This version of the Board's official Standards expected "students to study doubts about modern Darwinian theory. . . ."⁸⁴

The last act in the drama was both predictable and relatively quiet. In March 2006, an AE member announced she would not seek re-election, and that summer a moderate won the Republican primary for her seat. Another AE member was defeated head-to-head by a moderate in the same primary, and both moderates won election in November. The defeated AE member let her guard down in the bitterness of her defeat, noting that "[i]t's a shame, and I feel bad for them when they face God on Judgment Day," adding that the new Standards would permit "government schools [to] teach children that we are no more than chaotic, random mutants."⁸⁵ On February 13, 2007 the Board passed its fourth set of Standards in eight years, which "reflect mainstream scientific views of evolution."⁸⁶ Unlike after the 2000 election, however, the 2008 elections brought no change in the moderate majority, and the current composition of the Board would seem to give them control for at least through the 2010 election.⁸⁷

V. REFLECTIONS ON THE KANSAS EXPERIENCE AND THE ISSUE OF WHO DECIDES

The obvious question emerging from the Kansas experience is whether we are better off for having resolved the legal problem as we did through the democratic process. The first answer, of course, is that because of the nature of the problem, there was no choice—assuming the lawyers (and I was one) were correct that there was no standing to challenge the School Board until something happened at the local level in response to the changes in the Standards, the judicial option simply was not available. Which is a lesson in its own right. Some issues may have to be decided democratically.

But the more intriguing issue, of course, is whether the Kansas solution had merits beyond its necessity. Most Kansans, dismayed by

84. John Hanna, *Education Board to Revisit Debate over Evolution*, LAWRENCE J.-WORLD, Feb. 11, 2007, at 1, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/08/AR2005110801211.html>.

85. Jim Brown, *Official Cries Foul as Liberals Take Over Kansas Board*, Aug. 14, 2006, http://www.gopusa.com/news/2006/august/0814_kansas_educationp.shtml.

86. Associated Press, *Kansas Board Boosts Evolution Education: Guidelines Backed by Conservatives Skeptical of Darwin Repealed*, Feb. 14, 2007, <http://www.msnbc.com/id/17132925>.

87. Carl Manning, *Gay Candidate Loses in Board of Ed Contest: Campbell leading Meissner for 4th District Seat*, LAWRENCE J.-WORLD, Nov. 5, 2008, available at http://www2.ljworld.com/news/2008/nov/05/gay_candidate_loses_board_ed_contest/.

the trauma of persistent, negative attention from the national press, would undoubtedly say the game has not been worth the candle. That conclusion would encompass adherents of both sides, as AE supporters were often portrayed as atavistic buffoons and evolution supporters often found the continuing exercise annoying, tedious and disheartening. Indeed, there was enough negative feeling generated over the eight- or nine-year story that it is difficult to view what occurred outside that light.

Yet, even in these worst of circumstances there were enough hopeful and positive outcomes to encourage a more thoughtful analysis. On the prevailing side, the Kansas “hard science” community organized itself quickly, and communicated frequently and effectively with the voters. Because of that, a much higher percentage of Kansas voters today understand why that community is so dedicated to evolution as a baseline for several areas of scientific learning. Moderates from both major parties, including both a Republican and Democrat Governor, are united in the political effort to win back control on the Board for supporters of evolution. Voters and contributors discovered the Board and took time to inform themselves of candidates’ positions before going to the polls. Ultimately, evolution supporters learned that they needed to be as persistent as AE supporters if they were to keep control of the Board after they had won it back. And, in the end, evolution supporters proved that if all voters had their eyes on the ball, there was a strong majority supporting the teaching of evolution model in what is usually seen as a conservative state.

The positives were no doubt fewer for the AE supporters, but they were there whether recognized or not. First and most important, the AE proponents had a chance to tell their story and put their position to the voters. And, with some positive results—while their 1998 and 2002 victories were probably of the “stealth” variety, the AE community had individual candidates prevail in 2000, 2004 and 2006 while the whole world was watching. Occasional national characterizations notwithstanding, they also had the opportunity to explain their positions to their fellow Kansans in a relatively objective atmosphere. Press coverage within the state was generally respectful and balanced. While some AE fanatics hurt their own cause with “young earth” and other Biblically-based positions, there were articulate AE supporters who earned a grudging respect from their opponents for an obvious effort to blend science and faith. And at the very least, AEers lost solely because a majority of their neighbors did not agree with their positions, rather than because someone in a black robe told them their idea was

unconstitutional. A decade from the beginning of their crusade, many Kansans in the AE camp have to feel they had a fair shot.

Those are the positives for the each “sides.” But there are non-partisan benefits as well. The most important for this article is that despite the awful circumstances, Kansas seems to stand for the proposition that the “political divisiveness” such a hot-button issue naturally creates for a political body is more favorably resolved by allowing the matter to play out through the democratic process than by bombing one side with a quick and often perplexing judicial opinion. First, of course, such opinions lead the AE leadership and membership to draw the kind of conclusions about the courts, the legal system and the public schools that simply breed more divisiveness. Also, the opinions, specific as they must be, encourage those seeking change to modify the request and try again. After a judicial decision, evolution morphs to Creation Science which morphs to ID. Bans morph to stickers which morph to pre-course “statements.” And so it goes. At least in Kansas, those promoting the AE agenda know that 1) their ideas have been rejected at the ballot box by their neighbors, and 2) the same result is likely regardless of how the “issue” is shaped. Finality is unquestionably hard to find in these controversies, but the democratic process offers at least the possibility of finality through either retreat or compromise.

The political divisiveness lesson is an important one that can be drawn from the Kansas experience. Are there others? It depends. This article attempts to demonstrate that the United States Supreme Court has struggled to find a rational analysis for adjudicating school prayer issues, and that those struggles have spawned unfortunate social consequences. It also identified at least four different kinds of those issues: 1) old fashioned frequent (daily), often sectarian prayer;⁸⁸ 2) moments of silence; 3) science v. religion; and 4) occasional, usually non-sectarian prayer at graduations, sporting events, etc. The paper also suggested that controversies regarding recurring prayer and moments of silence are typically ready for judicial resolution the moment the issue is raised. There is little need for a record in those cases, and, more important, there are fairly obvious answers to whether the practices violate the Establishment Clause (yes and no). It would make little sense to have democratic battles over whether to allow daily recitation

88. Whether this classification includes the Pledge of Allegiance will determine the outcome of that eventual decision. Justices Rehnquist and O'Connor's argument that it is primarily a “patriotic exercise, not a religious one” seems to make sense. But neither will be there when the matter is finally decided. *Newdow*, 542 U.S. 1, 31, (Rehnquist, C.J., concurring).

of the Lord's Prayer, or whether an instructor could require a daily moment of silence. The answers should be constitutionally clear.

But such is not the case with either science versus religion or "occasional prayer" controversies. Some more recent District Court cases deciding curriculum issues have suffered from the same jurisprudential problems as *Epperson* and *Aguillard* because of the absence of a sound record that might reveal either the purpose or effect of the alleged offending act.⁸⁹ And the now-famous *Dover Pennsylvania Intelligent Design* case reflects the difficulty of creating such a record from scratch—Judge Jones' opinion is sixty pages long.⁹⁰ So at the very least, one good reason to permit some democratic discussion of this kind of issue is to develop a reasonable predicate for adjudication. More important, though, both the Kansas and the Dover experiences suggest that the voters in most places will eventually "get it right," with all the attendant benefits of deciding important social and political issues by open process and free debate.⁹¹ No longer would it be the courts who take, or keep, "God out of our schools." It would be the voters after a full and fair outing of the arguments pro and con. And for places where the majority would persistently substitute what appears to be religious belief for hard science, a far fuller record would be available when the issue finally came to the courthouse.

A similar set of benefits would seem applicable to the "occasional prayer" issues. Those vary so much in nature and frequency, it is more difficult to generalize. Surely the kind of high school graduation invocation at issue in *Lee* would be an appropriate topic for democratic resolution at the local level. Issues of whether, when, who, or how long, these exercises can occur, whether standing or sitting is coercive, etc. cry out for deliberation and compromise. Less solemn occasions such as "holiday programs" or sporting events present more fundamental problems. But even there, local boards of good will and reasonable counsel will best understand their own culture, diversity, history and sensitivities. They will, consequently, formulate a far better solution for their community than an individual federal judge with a limited record and a single "incident" could possibly create.

And as the controversies in both Kansas and Dover, Pa. demonstrate, even if a rogue group takes the issue to a narrow, sectarian

89. These are chronicled in an excellent new article by Paul Carrington, *Freedom to Err: The Idea of Natural Selection in Politics, Schools and Courts*, 17 WM. & MARY BILL RTS. J. 1, 31-35 (2008).

90. *Kitzmiller*, 400 F.Supp.2d 707.

91. By the time Judge Jones's opinion was issued, the Dover voters had cashiered all eight members of the school board who had supported the policy at issue.

extreme, there will quite likely be voters in the community to set things right again. Failing that, the court will have a greatly improved basis on which to render an opinion that fair-minded citizens will both understand and accept.