SUPREME COURT OF THE UNITED STATES

No. 90–1014

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF NATHAN BISHOP MIDDLE SCHOOL, ET AL., PETITIONERS *v.* DANIEL WEISMAN ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[June 24, 1992]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring.

Nearly half a century of review and refinement of Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution. The application of these principles to the present case mandates the decision reached today by the Court.

This Court first reviewed a challenge to state law under the Establishment Clause in *Everson* v. *Board of Education*, 330 U. S. 1 (1947).[1] Relying on the

[1]A few earlier cases involving federal laws touched on interpretation of the Establishment Clause. In *Reynolds* v. *United States*, 98 U. S. 145 (1879), and *Davis* v. *Beason*, 133 U. S. 333 (1890), the Court considered the Clause in the context of federal laws prohibiting bigamy. The Court in *Reynolds* accepted Thomas Jefferson's letter to the Danbury Baptist Association "almost as an authoritative declaration of the scope and effect" of the First Amendment. 98 U. S., at 164. In that letter Jefferson penned his famous lines that the Establishment Clause built "a wall of separation between church and State." *Ibid.* *Davis* considered that "[t]he first amendment to the Constitution . . . was intended . . . to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect." 133 U. S., at 342.

history of the Clause, and the Court's prior analysis, Justice Black outlined the considerations that have become the touchstone of Establishment Clause jurisprudence: Neither a State nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither a State nor the Federal Government, openly or secretly, can participate in the affairs of any religious organization and vice versa.[2] "In the words

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In another case, *Bradfield* v. *Roberts*, 175 U. S. 291 (1899), the Court held that it did not violate the Establishment Clause for Congress to construct a hospital building for caring for poor patients, although the hospital was managed by sisters of the Roman Catholic Church. The Court reasoned: "That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body." *Id.*, at 298. Finally, in 1908 the Court held that "the spirit of the Constitution" did not prohibit the Indians from using their money, held by the United States Government, for religious education. See *Quick Bear* v. *Leupp*, 210 U. S. 50, 81.

[2]The Court articulated six examples of paradigmatic practices that the Establishment Clause prohibits: "The `establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or

of Jefferson, the clause against establishment of religion by law was intended to erect `a wall of separation between church and State.'" *Everson*, 330 U. S., at 16, quoting *Reynolds* v. *United States*, 98 U. S. 145, 164 (1879). The dissenters agreed: "The Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." 330 U.S., at 31–32 (Rutledge, J., dissenting, joined by Frankfurter, Jackson, and Burton, JJ.).

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institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." *Everson* v. *Bd. of Ed.*, 330 U. S. 1, 15 (1947).

In *Engel* v. *Vitale*, 370 U. S. 421 (1962), the Court considered for the first time the constitutionality of prayer in a public school. Students said aloud a short prayer selected by the 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." *Id.*, at 422. Justice Black, writing for the Court, again made clear that the First Amendment forbids the use of the power or prestige of the government to control, support, or influence the religious beliefs and practices of the American people. Although the prayer was "denominationally neutral" and "its observance on the part of the students [was] voluntary," *id.*, at 430, the Court found that it violated this essential precept of the Establishment Clause.

A year later, the Court again invalidated government-sponsored prayer in public schools in *Abington School District* v. *Schempp*, 374 U. S. 203 (1963). In *Schempp*, the school day for Baltimore, Maryland, and Abington Township, Pennsylvania, students began with a reading from the Bible, or a recitation of the Lord's Prayer, or both. After a thorough review of the Court's prior Establishment Clause cases, the Court concluded:

> "[T]he Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Id.*, at 222.

Because the schools' opening exercises were

government-sponsored religious ceremonies, the Court found that the primary effect was the advancement of religion and held, therefore, that the activity violated the Establishment Clause. *Id.*, at 223–224.

Five years later, the next time the Court considered whether religious activity in public schools violated the Establishment Clause, it reiterated the principle that government "may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite." *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968). "`If [the purpose or primary effect] is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.'" *Id.*, at 107 (quoting *Schempp*, 374 U. S., at 222). Finding that the Arkansas law aided religion by preventing the teaching of evolution, the Court invalidated it.

In 1971, Chief Justice Burger reviewed the Court's past decisions and found: "Three . . . tests may be gleaned from our cases." *Lemon* v. *Kurtzman*, 403 U. S. 602, 612. In order for a statute to survive an Establishment Clause challenge, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster an excessive government entanglement with religion." *Id.*, at 612–613 (internal quotation marks and citations omitted).[3] After *Lemon*, the Court

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[3]The final prong, excessive entanglement, was a focus of *Walz* v. *Tax Comm'n*, 397 U. S. 664, 674 (1970), but harkens back to the final example in *Everson*:

"Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religion organizations or groups and *vice versa*." *Everson*, 330 U. S., at 16. The discussion in *Everson* reflected the Madisonian concern that secular and religious authorities must not interfere with each

continued to rely on these basic principles in resolving Establishment Clause disputes.[4]

Application of these principles to the facts of this case is straightforward. There can be "no doubt" that the "invocation of God's blessings" delivered at Nathan Bishop Middle School "is a religious activity." *Engel*, 370 U. S., at 424. In the words of *Engel*, the Rabbi's prayer "is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious." *Ibid.* The question then is whether the government has "plac[ed] its official stamp of approval" on the prayer. *Id.*, at 429. As the Court ably demonstrates, when the government "compose[s] official prayers," *id.*, at 425, selects the member of the clergy to deliver the prayer, has the prayer delivered at a public school event that is planned, supervised and given by school officials, and pressures students to attend and participate in the prayer, there can be no doubt that the government is advancing and

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other's respective spheres of choice and influence. See generally, The Complete Madison 298–312 (S. Padover ed. 1953).

[4]Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of *Marsh* v. *Chambers*, 463 U. S. 783 (1983), has the Court not rested its decision on the basic principles described in *Lemon*. For example, in the most recent Establishment Clause case, *Westside Community Bd. of Ed.* v. *Mergens*, 496 U. S. 226 (1990), the Court applied the three-part *Lemon* analysis to the Equal Access Act, which made it unlawful for public secondary schools to deny equal access to any student wishing to hold religious meetings. *Id.*, at 248–253 (plurality opinion); *id.*, at 262 (Marshall, J., concurring). In no case involving religious activities in public schools has the Court failed to apply vigorously the *Lemon* factors.

promoting religion.[5] As our prior decisions teach us, it is this that the Constitution prohibits.

I join the Court's opinion today because I find nothing in it inconsistent with the essential precepts of the Establishment Clause developed in our precedents. The Court holds that the graduation prayer is unconstitutional because the State "in effect required participation in a religious exercise." *Ante*, at 14. Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.

But it is not enough that the government restrain from compelling religious practices: it must not engage in them either. See *Schempp*, 374 U. S., at 305 (Goldberg, J., concurring). The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion. See, *e.g.*, *id.*, at 223; *id*., at 229 (Douglas, J., concurring); *Wallace* v. *Jaffree*, 472 U. S. 38, 72 (1985) (O'CONNOR, J., concurring in judgment) ("The decisions [in *Engel* and *Schempp*] acknowledged the coercion implicit under the statutory schemes, but they expressly turned only on the fact that the government was sponsoring a manifestly religious exercise" (citation omitted)); *Comm. for Public Ed.* v. *Nyquist*, 413 U. S. 756, 786 (1973) ("[P]roof of coercion . . . [is] not a necessary element of any claim under the Establishment Clause"). The Establishment Clause proscribes public

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[5]In this case, the religious message it promotes is specifically Judeo-Christian. The phrase in the benediction: "We must each strive to fulfill what you require of us all, to do justly, to love mercy, to walk humbly" obviously was taken from the Book of the Prophet Micah, ch. 6, v. 8.

schools from "conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*," *County of Allegheny* v. *ACLU*, 492 U. S. 573, 593 (1989) (internal quotations omitted) (emphasis in original), even if the schools do not actually "impos[e] pressure upon a student to participate in a religious activity."[6] *Westside Community Bd. of Ed.* v. *Mergens*, 496 U. S. 226, 261 (1990) (KENNEDY, J., concurring).

The scope of the Establishment Clause's prohibitions developed in our case law derives from the Clause's purposes. The First Amendment encompasses two distinct guarantees—the government shall make no law respecting an establishment of religion or prohibiting the free exercise thereof—both with the common purpose of securing religious liberty.[7] Through vigorous enforcement of both clauses, we "promote and assure the fullest possible scope of religious liberty and tolerance for all and . . . nurture the conditions which secure the best hope of attainment of that end."

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[6]As a practical matter, of course, anytime the government endorses a religious belief there will almost always be some pressure to conform. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962).

[7]See, *e.g.*, *Everson*, 330 U. S., at 40 (Rutledge, J., dissenting) ("`Establishment' and `free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom"); *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 227 (1963) (Douglas, J. concurring); *id.*, at 305 (Goldberg, J., concurring); *Wallace* v. *Jaffree*, 472 U. S. 38, 50 (1985).

Schempp, 374 U. S., at 305 (Goldberg, J., concurring).

There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience. Even subtle pressure diminishes the right of each individual to choose voluntarily what to believe. Representative Carroll explained during congressional debate over the Establishment Clause: "[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." I Annals of Cong. 757 (August 15, 1789).

Our decisions have gone beyond prohibiting coercion, however, because the Court has recognized that "the fullest possible scope of religious liberty," *Schempp*, 374 U. S., at 305 (Goldberg, J., concurring), entails more than freedom from coercion. The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community—both essential to safeguarding religious liberty. "Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate." Religious Liberty, in Essays and Speeches of Jeremiah S. Black 53 (C. Black ed. 1885) (Chief Justice of the Commonwealth of Pennsylvania).[8]

The mixing of government and religion can be a threat to free government, even if no one is forced to

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[8]See also *Engel*, 370 U. S., at 431 (The Clause's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion"); *McCollum* v. *Board of Education*, 333 U. S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere").

participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs.[9] A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some. Only "[a]nguish, hardship and bitter strife" result "when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval." *Engel*, 370 U. S., at 429; see also *Lemon*, 403 U. S., at 622–623; *Aguilar* v. *Felton*, 473 U. S. 402, 416 (1985) (Powell, J., concurring).[10] Such a struggle can "strain

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[9]"[T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Wallace* v. *Jaffree*, 472 U. S., at 69 (O'CONNOR, J., concurring) (internal quotations omitted).

[10]Sigmund Freud expressed it this way: "a religion, even if it calls itself the religion of love, must be hard and unloving to those who do not belong to it." S. Freud, Group Psychology and the Analysis of the Ego 51 (1922). James Madison stated the theory even more strongly in his "Memorial and Remonstrance" against a bill providing tax funds to religious teachers: "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance." The Complete Madison, at 303. Religion has not lost its

a political system to the breaking point." *Walz* v. *Tax Commission*, 397 U. S. 664, 694 (1970) (opinion of Harlan, J.).

When the government arrogates to itself a role in religious affairs, it abandons its obligation as guarantor of democracy. Democracy requires the nourishment of dialogue and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. When the government appropriates religious truth, it "transforms rational debate into theological decree." Nuechterlein, Note, The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause, 99 Yale L.J. 1127, 1131 (1990). Those who disagree no longer are questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach.

Madison warned that government officials who would use religious authority to pursue secular ends "exceed the commission from which they derive their authority and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves." Memorial and Remonstrance against Religious Assessments (1785) in The Complete Madison 300 (S. Padover, ed. 1953). Democratic government will not last long when proclamation replaces persuasion as the medium of political exchange.

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power to engender divisiveness. "Of all the issues the ACLU takes on—reproductive rights, discrimination, jail and prison conditions, abuse of kids in the public schools, police brutality, to name a few—by far the most volatile issue is that of school prayer. Aside from our efforts to abolish the death penalty, it is the only issue that elicits death threats." Parish, Graduation Prayer Violates the Bill of Rights, 4 Utah Bar J. 19 (June/July 1991).

Likewise, we have recognized that "[r]eligion flourishes in greater purity, without than with the aid of Gov[ernment]."[11] *Id.*, at 309. To "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary," *Zorach* v. *Clauson*, 343 U. S. 306, 313 (1952), the government must not align itself with any one of them. When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being "taint[ed] . . . with a corrosive secularism." *Grand Rapids School Dist.* v. *Ball*, 473 U. S. 373, 385 (1985). The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation.[12] Keeping religion in the hands of private groups minimizes state intrusion on religious choice and best enables each religion to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach*, 343 U. S., at 313.

It is these understandings and fears that underlie our Establishment Clause jurisprudence. We have believed that religious freedom cannot exist in the absence of a free democratic government, and that

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[11]The view that the Establishment Clause was primarily a vehicle for protecting churches was expounded initially by Roger Williams. "[W]ordly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained." M. Howe, The Garden and the Wilderness 6 (1965).

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"[B]ut when a religion contracts an alliance of this nature, I do not hesitate to affirm that it commits the same error as a man who should sacrifice his future to his present welfare; and in obtaining a power to which it has no claim, it risks that authority which is rightfully its own." A. de Tocqueville, Democracy in America 315 (H. Reeve transl. 1900).

such a government cannot endure when there is fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause. To that end, our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.

I remain convinced that our jurisprudence is not misguided, and that it requires the decision reached by the Court today. Accordingly, I join the Court in affirming the judgment of the Court of Appeals.