THE 2001 CHIEF JUSTICE JOSEPH WEINTRAUB LECTURE: THE ESTABLISHMENT CLAUSE AND THE SUPREME COURT: RELIGION IN THE PUBLIC SCHOOLS

*The Honorable Leonard I. Garth**

Rutgers School of Law – Newark
Wednesday, April 18, 2001

I am privileged tonight to deliver the Year 2001 Chief Justice Joseph Weintraub Lecture. As those of us who knew the Chief Justice or practiced before him know, he was truly a New Jersey icon and a role model for all practitioners in our profession. After almost fifty years at the bar, over thirty of which have been spent on the federal bench, I can safely say he was the most extraordinary jurist in New Jersey judicial history. To me, he was the finest member of the great institution that he chaired—the courts of our great State of New Jersey. It has been said that Chief Justice Weintraub "will stand as [a] beacon[ ] for all future judges, showing the way to keep the basic principles of justice constantly attuned to the needs of the times."[1]

While my thesis tonight is not designed as a tribute to the Chief Justice, as a member of the federal courts, I hope you will permit me a personal privilege so that I may refer for just a moment to the "Weintraubian" views that he expressed on the relationship between the federal and state courts.

Chief Justice Weintraub, in his concurring opinion in *State v. Funicello*,[2] made no secret of his displeasure with the federal courts' intrusion into what he regarded as primarily state affairs. Among other things, he said:

---

* United States Circuit Judge. Judge Garth has been a member of the Court of Appeals for the Third Circuit since 1973. Prior to 1973, Judge Garth served as a District Court Judge in the District of New Jersey.

1. [Former New Jersey Supreme Court Justice] Daniel J. O'Hern, *Brennan & Weintraub Two Stars to Guide Us: Some Reflections on the Root of the Differing Judicial Philosophies of William J. Brennan, Jr. and Joseph Weintraub*, 46 RUTGERS L. REV. 1049 (1994) (quoting Justice Francis, *Proceedings Before the Supreme Court of New Jersey in Memory of Chief Justice Weintraub, May 24, 1977*, 72 NJ XIX, XXI (1977)).

2. 286 A.2d 55 (N.J. 1972) (setting aside multiple defendants' death sentences, pursuant to the United States Supreme Court's conclusion that the death penalty, as applied under New Jersey's statutory scheme, was unconstitutional).

> As to federal issues the Federal Supreme Court is supreme and the State Supreme Court is subordinate, while as to all other matters the State Supreme Court is supreme and the Federal Supreme Court is subordinate. The Federal Supreme Court and the State Supreme Court may thus be thought to be *equally unequal*, but there is a rub, for the Federal Supreme Court has the last word with respect to what the federal jurisdiction includes. Thus the two judiciaries are *unequally unequal* . . . . This shift of power is inherently abrasive. To an ardent advocate of "State's rights," the *shift of power is of course irritating*.[3]

Funicello was written in 1972, and, a few years later, I was asked to meet and escort the Chief Justice to a *habeas corpus* seminar, which was held at the Federal Judicial Center in Washington, D.C. As you know, the Chief Justice was never shy about expressing himself, and I mention this particular instance because it was at this seminar that he aired and implemented the views he had expressed in *Funicello*. Without going into great detail, it is sufficient to say that his opening remarks included his offer to transfer to the federal courts New Jersey's *entire criminal calendar*, start to finish, and without waiting for a federal district court to overturn a Supreme Court of New Jersey ruling—a matter which he did not take lightly. Thankfully, we never took him up on his offer, but, then again, he was not averse to establishing his own judicial beachheads and doing so forcefully in all the other areas of constitutional law, both federal and state, including among others, religion in the schools—a branch of the topic that I discuss tonight.[4]

I.

My thesis tonight is limited to the Establishment Clause segment of the First Amendment, and my overall conclusion (with which some of you may disagree) is that while the Supreme Court of the United States and some inferior federal courts have drawn an indistinct line between the Exercise Clause of the First Amendment and the Establishment Clause in many "religious contexts," when it comes to schools, the courts have generally—and I stress *generally*—been consistent, at least up to now, in ruling that the Establishment Clause prevents the proliferation and the introduction of school prayer and/or programs in elementary and secondary schools.

I chose this topic because there have been never-ending challenges concerning prayer in the schools, and, more recently, religious considerations have again pre-empted the headlines—prompted by

---

3. *Id.* at 60 (emphasis added).

4. *See, e.g.*, Clayton v. Kervick, 285 A.2d 11 (N.J. 1971) (Weintraub, C.J.) (finding the New Jersey Educational Facilities Authority Law to be valid under the First Amendment).

the cutting edge issue of faith-based charities promoted by President Bush. Indeed, although I had selected this topic some weeks ago, its pertinence was evidenced again in a front-page article of this past Sunday's *Star Ledger*. The headline read "Faith Clubs Have Schools Walking a Fine Legal Line,"[5] and the purport of the article was found in its early paragraphs where the reporter wrote:

> Throughout New Jersey, students are forming clubs that meet to pray and to sing hymns, although considerable confusion remains about whether such clubs violate separation of church and state standards.
>
> Mike Yaple of the New Jersey School Boards Association says the law is fairly clear: Schools that have open-door policies to other extra-curricular groups must allow religious groups clubs too, although certain rules must be followed.
>
> "The main philosophy with church and school is that schools can't advance, inhibit or become excessively entangled in a particular religion," he said. "When it comes to student clubs, if a school district allows noncurricular clubs to meet, then it can't discriminate on the basis of the content of the speech."[6]

One of the interviewees, a student at Ridge High School, was quoted as saying that she was a member of a prayer group that met once a week. She said, "It would be awesome if we could become a club. We could be announced and more people would come, ... But people always say, there's no religion in the schools."[7]

The relevancy of this issue is emphasized by the case presently pending before the Supreme Court (and when I refer to the Supreme Court from hereon in, it will be the United States Supreme Court), a case that was recently argued called *Good News Club v. Milford Central School*.[8] That case presents many of the same problems that for the most part have been dealt with in the past, concerning conflicts between the Exercise Clause and the Establishment Clause of the First Amendment: for the expression of religious views in a limited public forum versus the Establishment of a religion. A limited public forum consists of state property reserved for expressive activity for a limited amount of time, for a limited class of speakers, or for the discussion of certain subjects.

I will speak about the *Good News* case later in these remarks, but I note here, that in large part, things have not changed in the last sixteen years, because much the same issue and conflict was pre-

5. Bev McCarron, *Faith Clubs Have Schools Walking a Fine Legal Line*, STAR LEDGER, Apr. 15, 2001, at 1.

6. *Id.*

7. *Id.*

8. 533 U.S. 98 (2001).

sented in an earlier case called *Bender v. Williamsport Area School District*,[9] and I suspect that the same issue sixteen years from now will still be contested in the courts.

But my focus tonight will be on the religion clauses, and more specifically, the Establishment Clause of the First Amendment. I am concerned that if my discussion were to embrace the general field of religion and the Constitution, it would be far too broad and wide-ranging for just one evening's discourse. Hence, you will forgive me if, during these prepared remarks, I skirt some of the issues and analyses presented by such cases as:

May an orthodox Jew, an ordained rabbi, who is a chaplain in the Air Force, wear a yarmulke while on duty and in uniform? The Supreme Court, interpreting the First Amendment, said that he could not.[10]

May a plasterboard wall be constructed between schoolrooms in a public school building in order to separate Hasidic children from other children? The Court of Appeals for the Second Circuit said that such an act was unconstitutional.[11]

May a school district, pursuant to the Individuals with Disabilities Education Act, provide a hearing-impaired Catholic high school student with an interpreter? The Supreme Court said yes, holding that such an act by the state did not violate the Establishment Clause.[12]

May a state vocational-assistance program fund a blind student's seminary training at a Christian college? Again, the Supreme Court held that such state assistance did not violate the Establishment Clause.[13]

---

9. 741 F.2d 538 (3d Cir. 1984), *vacated and dismissed on standing grounds*, 475 U.S. 534 (1986) (holding that compliance with constitutional obligations under the Establishment Clause is a compelling state interest sufficient to permit the Williamsport Area School to place restrictions on students' free speech right to engage in religious activity).

10. Goldman v. Weinberger, 475 U.S. 503, 508-10 (1986) (holding that the Air Force's need for uniformity and discipline allows it to regulate the wearing of visible religious apparel, and, therefore, to prohibit the wearing of a Jewish chaplain's yarmulke).

11. Parents' Ass'n of P.S. 16 v. Quinones, 803 F.2d 1235, 1242 (2d Cir. 1986).

12. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12-13 (1993) (stating that a government program under the Individuals with Disabilities Education Act distributes benefits to individuals without reference to religion, and the Establishment Clause is not a bar to providing a child with benefits that facilitate his education just because sectarian schools receive an incidental benefit).

13. Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 488-89 (1986) (holding that although petitioner used the funding for religious education, where the state aid under the Washington statute is neutrally available and is paid directly to the student, it is not appropriate to view the aid as state action sponsoring religion, and, therefore, the program is not violative of the Establishment Clause).

May federal funds be used to send public school teachers into sectarian schools to provide remedial education to disadvantaged children? Yes, according to the Supreme Court, relying on the Establishment Clause.[14]

May a school district refuse a church's request to use school facilities for a religiously oriented film series? No, the Supreme Court said, because a limited forum existed in the school, and such a refusal constituted viewpoint discrimination and violated the Freedom of Speech Clause of the First Amendment.[15]

May a public university refuse to fund a student organization's publication of a Christian newspaper? Holding that it was viewpoint discrimination and violated free speech, the Supreme Court prohibited the university, a limited forum, from refusing to fund the newspaper.[16]

May a state create a public school district along the lines of a village in which all inhabitants are members of the Satmar Hasidic sect? The Supreme Court prohibited this, saying it violated the Establishment Clause.[17]

May a school authorize a non-sectarian prayer to be given by a rabbi at a middle-school graduation ceremony? Or before football games? The Supreme Court said no in both cases, relying on the Establishment Clause.[18]

May an eruv—that is, a boundary created by using telephone poles and fences so as to permit observant Jews to carry books and food and push baby carriages on the Sabbath—be created with its boundary markers on public property? The District Court for the District of New Jersey allowed this, holding that it did not violate the Establishment Clause.[19]

---

14. Agostini v. Felton, 521 U.S. 203 (1997) (overruling Aguilar v. Felton, 473 U.S. 402 (1985), and declaring valid New York City's Title I Program, which sends public school teachers into parochial schools pursuant to a congressionally mandated program).

15. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (finding constitutional violation where the school district's stated purpose for excluding access to its forum was that the planned use "appeared to be church related").

16. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 845-46 (1995).

17. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994).

18. Santa Fe Indep. Sch. Dist. v. Jane Doe, 530 U.S. 290, 309-10 (2000) (concluding that the student-led, pre-game prayer ceremony is a "state-sponsored religious practice," rather than "private" speech, and thus is impermissible "[s]chool sponsorship of a religious message"); Lee v. Weisman, 505 U.S. 577, 586-87 (1992) (finding "[t]he government involvement with religious activity" to be "pervasive" and violative of the Establishment Clause where "[s]tate officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools").

19. ACLU v. City of Long Branch, 670 F. Supp. 1293, 1295 (D.N.J. 1987) (granting summary judgment to defendants and finding that, in authorizing the construction of

While I would like to discuss in depth all these cases and others that present similar religious problems that have arisen under the First Amendment, that complex discussion will have to await another day. Nor do I intend discussing in detail *all* of the cases and *all* of the judicial precedents that have explored and interpreted the religion clauses. Rather, I intend confining my remarks to the subject of religion in the public schools—elementary and secondary—and, in particular, the Establishment Clause—a subject which is extremely topical and which I suspect is of keen interest not only to legal scholars but also to all parents of school children. Moreover, and I believe most importantly, public schools have always held a unique place in our society, and hence in our societal values.

II.

You will recall that the First Amendment provides that "Congress shall make no law[s] respecting [the] establishment of religion."[20] That Amendment states:

> Congress shall make no law respecting *an establishment of religion*, or *prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[21]

What do I mean when I use the term Establishment Clause? At the least, it means that no government—state or federal—may favor or require adherence to any particular religion. (Parenthetically, the question of *what* is a religion has also received much attention in our courts. Does "secular humanism" constitute a religion?[22] Does MOVE (a revolutionary organization opposed to all that is wrong) constitute a religion?)[23]

The Supreme Court has stated that the purpose of the Establishment Clause is to prevent as far as possible the intrusion of either the church or the state into the precincts of the other, or, as Justice Blackmun wrote: "[A] practice which touches upon religion, if it is to be permissible under the Establishment Clause, . . . must nei-

---

the eruv, the City of Long Branch had a secular purpose in "allow[ing] a large group of citizens access to public properties").

20. U.S. CONST. amend. I.

21. *Id.* (emphasis added).

22. *See* Edwards v. Aguillard, 482 U.S. 578, 581, 593 (1987) (declaring Louisiana's "Creationism Act," which "forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science,'" to be invalid under the First Amendment because its purpose is to "endorse religion").

23. Africa v. Pennsylvania, 662 F.2d 1025, 1036 (3d Cir. 1981) (holding that MOVE is not a religion).

ther advance nor inhibit religion in its principal or primary effect."[24] This statement, of course, followed from the principle stated in *Everson v. Board of Education*[25]:

> 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 . . . . [T]he clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[26]

In 1970, in *Lemon v. Kurtzman*,[27] the Supreme Court laid down the test for determining whether state—that is government—action comports with the Establishment Clause. The three parts of that test are: (1) Does the proposed state action have a secular purpose, that is, a purpose that is not religious? (2) Would the primary effect of the state's action neither advance nor inhibit religion, that is, is it benignly neutral? (3) Would such state action avoid excessive government entanglement in religion?[28] Unless all three of these inquiries are answered affirmatively, any action taken by the state would violate the Establishment Clause, and hence the Constitution.[29]

And, even though all three parts of this test must be met to satisfy constitutional mandate, I intend centering my attention, and hence yours, on the first prong of the test, because that in my opinion has become the focal point of the Supreme Court's doctrine. Put another way, the significant inquiry is "Is there a religious purpose to the action taken by the State?" If so, then without more, that action is unconstitutional. If not, that is if the state action has a secular purpose, then it may pass constitutional muster.

A.

Well, what actions are we talking about? Does every action that has a religious purpose violate the First Amendment of our Constitution? After all, the First Amendment by its terms does not mention, and is not limited to, public school activities. For instance:

May the government engrave "In God We Trust" on its coins? And, may it use that term as an official motto?

---

24. County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989).

25. 330 U.S. 1 (1946) (holding that state-authorized reimbursement of school bus fares to parents of children, including those attending Catholic schools, does not violate the First Amendment).

26. *Id.* at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

27. 403 U.S. 602 (1971).

28. *Id.* at 612-13 (citations omitted).

29. *Id.* at 612. The Court has discussed whether the "entanglement" test has been diluted. *See* Mitchell v. Helms, 530 U.S. 793, 808 (2000) (citing the Court's "entanglement" analysis in *Agostini*, 521 U.S. at 232-34).

May the State of Ohio have as its official state motto "With God, all things are possible"? The Sixth Circuit *en banc* in *ACLU of Ohio v. Capitol Square Review and Advisory Board*,[30] over four dissents, held that this motto *does not* violate the Establishment Clause.[31]

Have you ever thought about whether it is unconstitutional to celebrate Thanksgiving Day, a day fraught with religious significance? A day on which all people, of all religions, throughout our great country, join in a service of Thanksgiving for the many blessings we enjoy. One need only read the Thanksgiving proclamations of every President, from Washington to Clinton, except for Thomas Jefferson (who apparently took the Establishment Clause seriously) to appreciate the anomaly of celebrating a holiday such as Thanksgiving in a nation whose Constitution expressly forbids the establishment of religion. To emphasize this point, let me digress for just a moment and read to you an excerpt from the first Proclamation delivered by our first President, George Washington:

> Whereas, it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor; and
>
> Whereas both Houses of Congress have, by their joint committee, requested me "to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness:"
>
> Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be . . . .
>
> And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions . . . .[32]

Can there be any doubt that Thanksgiving is a religious celebration?

Again, may a government pay a member of the clergy to open its legislative session with a prayer, as the State of Nebraska does,[33]

---

30. 243 F.3d 289 (6th Cir. 2001).

31. *Id.* at 291.

32. George Washington, Thanksgiving Proclamation (Oct. 3, 1789), *available at* http://elsinore.cis.yale.edu/lawweb/avalon/presiden/proclamations/gwproc01.htm (last visited April 1, 2002).

33. Marsh v. Chambers, 463 U.S. 783 (1983) (finding no constitutional violation).

and, indeed, as even the Congress of the United States does?[34]

When the crier in my court, at the court's opening, announces "God save the United States and this Honorable Court," has he, and have we, violated the Constitution?[35] (We once opened court to the cry "God save these United States *from* this Honorable Court," but that particular crier has since been replaced.)

Can a nativity scene or a crèche be permitted in a public park or on public property?[36] To digress still another time, you may have read not too long ago in the *New York Times* a full-page article about a citizen in Hyde Park, Vermont, who calls herself the "Grinch that Stole Christmas." She brought an action to remove a cross, which was atop a Christmas tree located outside a county courthouse, claiming that it violates the constitutional prohibition against the establishment of religion and calling attention to those societies in which the Spanish Inquisition flourished and the Holocaust occurred.

In my own court, we encountered a similar problem where a crèche and a menorah were displayed in Pittsburgh at the Allegheny County Courthouse.[37] We held that they constituted an impermissible governmental endorsement of both Christianity and Judaism.[38] In turn, somewhat perplexingly, the Supreme Court affirmed our decision in part and reversed in part, holding the display of the crèche unconstitutional, but also holding that the menorah on the record of the case did not have the prohibited effect of endorsing religion.[39] This situation has again surfaced but has been held not to be reviewable by the Third Circuit due to a lack of standing of the plaintiffs. The opinion in *ACLU-NJ v. Township of Wall* was filed as recently as April 3 of this year.[40]

B.

Well, the examples are countless, and I am sure you could add many more to the ones I have mentioned. But, if some or all of these practices are religious in character and in content, and are permitted by the Constitution and by the Supreme Court in its interpretation of

34. *Id.* at 787-91, 794.

35. The Supreme Court itself opens to the same cry (and presumably finds it constitutional). *See id.* at 786.

36. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (finding no violation of the Establishment Clause where the city has a secular purpose for displaying the crèche).

37. ACLU, Greater Pittsburgh Chapter v. County of Allegheny, 842 F.2d 655 (3d Cir. 1988).

38. *Id.* at 662.

39. County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 619 (1989) ("[T]he display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity.").

40. 246 F.3d 258 (3d Cir. 2001).

the First Amendment, does not this lead to still more questions and even more puzzling analysis and answers?

Consider: May a state lend instructional materials and equipment to non-public, i.e., parochial schools? At one time, the Supreme Court held that lending such materials to parochial schools was a direct and substantial advancement of sectarian education in violation of the Establishment Clause.[41] However, as recently as last year, that holding was overruled in *Mitchell v. Helms*, which held that lending such materials to parochial schools *with a clear secular purpose* does not violate the Establishment Clause.[42]

Consider: May a state provide public school classrooms and teachers to parochial school students? As late as 1985, the Supreme Court held that such provision was prohibited because it had the "primary or principal" effect of advancing religion and therefore violated the Establishment Clause.[43] But in 1997, in *Agostini*, the Supreme Court held that such a program, without more, does not result in excessive entanglement between church and state and, therefore, does not violate the Establishment Clause.[44]

Consider: May a state require public schools to display the Ten Commandments in school rooms, where the legislature insists that the purpose is not religious and requires the display to include the following language below the last commandment: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States"?[45] (I saw just last week in the *New York Times* that Alabama now wants to amend its constitution to permit such a display).[46] "No," held the Supreme Court—the statute requiring display of the Ten Commandments had a plainly religious pur-

41. Wolman v. Walter, 433 U.S. 229, 238-55 (1977) (holding that those parts of an Ohio statute authorizing aid to nonpublic schools for textbooks, standardized testing and scoring services, diagnostic services, and therapeutic services are constitutional, while declaring unconstitutional those provisions of the Ohio statute that provide nonpublic schools with funding for instructional materials, equipment, and field trips).

42. *Mitchell*, 530 U.S. at 835-36.

43. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211-12 (1948). The Court found particularly important the facts that the classes were conducted *on the premises* of the public school and that the students were released from their legal obligation to go to school for secular education. *Id.* at 209-10. The Court found this practice to be "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *Id.* at 210. *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (finding no violation of the First Amendment where public-school students were released from compulsory attendance to attend religious instruction at religious centers, which were *off-school premises*).

44. *Agostini*, 521 U.S. at 203.

45. Stone v. Graham, 449 U.S. 39, 40 n.1 (1980).

46. *National Briefing*, N.Y. TIMES, Apr. 14, 2001, at A8.

pose and therefore violated the Establishment Clause.[47]

Why forbid high school students from meeting together in a club for religious purposes?[48] The Third Circuit held that, although the school district created a limited forum in which the students' free speech rights were implicated, allowing the students to meet at school for religious purposes constituted an impermissible Establishment Clause violation.[49] More on this case later.[50]

Can the New Jersey Legislature, or any other state government, provide for a moment of silence to start each school day? The Third Circuit prohibited such statutes because they lacked a valid secular purpose.[51]

And, why forbid a student, chosen by his peers, from leading a non-denominational prayer at graduation exercises or at a football game? Again, the Supreme Court held that the student-led prayer lacked a valid secular purpose and, therefore, violated the Establishment Clause.[52]

I think you may have anticipated the answers to these questions. Of the practices that I have mentioned, and there are many more, none of the practices which affect or have taken place in public schools have satisfied the constitutional test announced by the Supreme Court. They have not, because, in the words of the Court,

> [The] practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.
>
> . . . .
>
> [The framers of the First Amendment] knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval . . . .[53]

Thus, one of the reasons that the First Amendment was added to the Constitution was because:

> [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

47. *Stone*, 449 U.S. at 41.

48. *Bender*, 741 F.2d at 538-39.

49. *Id.* at 560-61.

50. *See infra* note 58-74 and accompanying text.

51. *See* May v. Cooperman, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed sub nom.*, Karcher v. May, 484 U.S. 72 (1987).

52. *Lee*, 505 U.S. at 577; *Santa Fe*, 530 U.S. at 290.

53. Engel v. Vitale, 370 U.S. 421, 425, 429 (1962).

program carried on by government.[54]

Accordingly, the practices to which I have referred have failed the constitutional test almost always on the ground that the particular practice had a religious purpose and thus trenched upon the Establishment Clause.

C.

Well, you might say, so does a Thanksgiving proclamation have a religious purpose, and so does the chaplain who opens the Nebraska Legislature with a prayer, and you would be quite justified in asking how such results can be reconciled with the decisions involving religion in the schools, particularly, when each of these decisions—school and non-school—has such an impact on the constitutional community in which we live. You may not agree with my answer to this question, but I will do my best to explain how I believe these matters may be reconciled.

I believe the Supreme Court approaches every establishment of religion issue that does *not* impact public schools dramatically differently than it approaches those issues that involve prayer or religion in the public schools, both elementary and secondary. The Court apparently is content to ignore, finesse, or bypass the test which it has itself constructed, and the doctrines that it has itself established, when it is faced with an establishment of religion issue in the school context. Why has it done this?

One can glean some answers from the Court's own opinions. Where a practice has been deeply ingrained in our national traditions, the Court has apparently been willing to permit it to continue as a matter of constitutional interpretation, *so long as* the practice does not touch upon or implicate the public schools. And, if you think back for just a moment, none of the nonpublic school practices that I have mentioned—the Thanksgiving proclamation, the state mottos, the opening of court, the creation of an eruv, and the display of religious symbols on public property—are matters which implicate public schools.

I believe it is because of the unique character of public schools that the Supreme Court has treated the issue of religion in the schools substantially differently from the manner in which it has dealt with other religious practices. Let me quote Justice Brennan, who wrote in *Aguillard*:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the

54. *Id.* at 425.

> classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . ."[55]

Thus, if the practice or conduct in public schools has a religious purpose, up to this point in time, the Court has held that such practice has been unconstitutional, although recently a significant narrowing has occurred between the Supreme Court majority and the minority in terms of striking down such state acts. Yet, the Court, even where a limited public forum challenge was presented, has adhered to that principle stating, "[W]e have never held the mere creation of a public forum shields the government entity [here a secondary school] from scrutiny under the Establishment Clause."[56]

I am speaking, of course, about the Supreme Court with its present composition. That Court up to now has held to the line that I have just described. What changes might occur, if any, with the addition of a new Justice or Justices, time will have to tell, although I sense that in this area, it would be most surprising if any dramatic change took place.

D.

Let me illustrate the last point that I have made. In two of the cases to reach the Supreme Court, the Court did not decide the cases on the merits. Curiously, both of those cases came to the Supreme Court from the same Court of Appeals. Even more curiously, and I think that you can trust me to say that I did not orchestrate this result just for purposes of these remarks, both cases originated from the Court of Appeals for the Third Circuit, of which I am a member.

One of these cases is known as *Bender v. Williamsport Area School District*.[57] The other case is the moment of silence case, *May v. Cooperman*.[58]

Still more curiously, particularly for those who have the perception that the Supreme Court does not want to decide the merits of either of these cases—that is, the Supreme Court wants to "avoid"

55. *Aguillard*, 482 U.S. at 583-84 (citations omitted).
56. *Sante Fe*, 530 U.S. at 303.
57. *Bender*, 741 F.2d at 538.
58. *May*, 780 F.2d at 240.

these issues—both of these cases were decided on the procedural ground of standing: The plaintiffs were found not to have the requisite legal authority to prosecute the charges. Hence, in neither case did the Supreme Court reach the crucial issue—the merits—as to whether the practices in question had a religious purpose. In both cases, I must tell you that our court did. Now let me tell you briefly about the circumstances of each of these cases.

In *Bender*, the plaintiff was a student at the Williamsport Area High School in Pennsylvania.[59] She, Lisa Bender, together with other students, desired to form a student organization or club known as "Petros," which would essentially meet as a club for prayer, applying, as they put it: "God's Holy Word to their problems."[60] The club would meet at school on Tuesday and Thursday mornings during the activity period, that is, after school had started, but before regular classes were scheduled.[61] No school bulletin boards, newspapers, or public address systems would be used to announce or promote the meetings.[62] The group was characterized as an "activity," such as other activities or clubs which met during this time period but which had as their interests archery, photography, poetry, future teachers, German, skiing, etc.[63] Each club had a faculty member as an advisor.[64]

The school district refused to permit the club to meet, fearing that it violated the Establishment Clause of the Constitution in that the primary activity of the group was prayer.[65] The trial court ruled against the school district and permitted the Petros Club to meet.[66] An appeal was taken by the president of the school district.[67]

The Supreme Court had earlier wrestled with this type of problem, but it had done so in a *university* context, not in a high school context. In a case called *Widmar v. Vincent*,[68] involving the University of Missouri at Kansas City, the Court, even though its eye was drawn to the Establishment Clause, held that the Constitution does not allow a state to enforce certain exclusions from a forum generally open to the public, even if the state was not required to create the forum in the first place.[69] Thus, in a public *university* environment, a

59. *Bender*, 741 F.2d at 541.
60. *Id.* at 542.
61. *Id.* at 542-43.
62. *Id.* at 542.
63. *Id.* at 543 n.8.
64. *Id.* at 544.
65. *Id.* at 541.
66. Bender v. Williamsport Area Sch. Dist., 563 F. Supp. 697 (M.D. Pa. 1983) (finding a violation of the students' free speech rights).
67. *Bender*, 741 F.2d at 541.
68. 454 U.S. 263 (1981).
69. *Id.* at 277.

group whose activity was prayer could not be excluded or discriminated against if other groups or activities were permitted.

Was the same true in elementary and secondary schools? Our court, on the school district's appeal in *Bender*, held that it was not, even though a forum—albeit a limited one—existed at the high school, which was similar to the college forum upheld in *Widmar*. We held that the Establishment Clause of the First Amendment prevented such a religious group from meeting on school premises during school time and with a school advisor.[70] We concluded that fundamental differences between elementary and high school students on the one hand, and university students on the other, in terms of the perceptions of the students and the impact of religious practices on them, required a different result than that reached in *Widmar*.[71] Moreover, because of the "excessive entanglement" with religion, the Establishment Clause was violated.[72]

The Supreme Court did not decide this issue after accepting *Bender* for review. Rather, the Court, holding that the president of the school district was not the appropriate person to appeal to our court, vacated our judgment.[73] Thus, as of today, the issue is still open as to whether a club whose primary or only purpose is religious prayer, may be permitted to meet and carry on its activity in an *elementary* or *high school*—even though it may do so in a public college or university. In light of the Supreme Court's decision, I suspect that Petros is alive and well and still subsisting and meeting in the Williamsport High School.

Another issue that remains undecided is whether, in an elementary or high school, a moment of silence can be prescribed. In January 1984, a law was enacted in New Jersey providing that:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.[74]

The Attorney General of New Jersey declared that he would not defend this law because it was his belief that it violated the Constitution.[75] The trial court struck it down on the grounds that even though the statute did not mention prayer, it was the evident purpose of the

70. *Bender*, 741 F.2d at 552-53.
71. *Id.* at 552.
72. *Id.* at 557.
73. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986).
74. N.J. STAT. ANN. § 18A:36-4 (West 2001).
75. May v. Cooperman, 572 F. Supp. 1561, 1563 (D.N.J. 1983).

statute to permit, if not promote, prayer in the public schools.[76]

Our court discussed an earlier Supreme Court precedent, which had declared as unconstitutional Alabama statutes that authorized a one-minute period of silence in all Alabama public schools for meditation or voluntary prayer.[77] A significant difference between the case decided by the Supreme Court and the New Jersey moment-of-silence case was that the New Jersey statute did not by its terms refer to meditation or prayer. Nevertheless, we concluded that the New Jersey statute, by lacking a secular purpose, could not be sustained as constitutional under the Establishment Clause.[78] Just as in *Bender*, one of the three judges on the panel of judges who decided the case dissented from the majority decision.[79]

This moment-of-silence case also was reviewed by the Supreme Court, and, again, the Supreme Court declined to reach the merits of the issue on the ground that the individuals who brought the suit—the former Speaker of the New Jersey Assembly, Alan J. Karcher, and the former President of the New Jersey Senate, Carmen Orecchio—had no standing and could not legally appeal from the judgment of our court.[80] Hence, the Supreme Court dismissed the appeal.[81]

III.

These remarks would not be complete without echoing the words of the Supreme Court that appear in *Mitchell v. Helms*:

> In the over 50 years since *Everson* [*v. Board of Education of Ewing*], we have consistently struggled to apply these simple words ["Congress shall make no law respecting an establishment of religion . . . ."] in the context of governmental aid to religious schools . . . . [C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area."[82]

The most recent case, and one that is virtually the same as *Bender*, may reveal the different views that obtain among the members of the Supreme Court in this area of tension that exists between the Exercise Clause and the Establishment Clause of the First Amendment. Put another way, if a limited public forum can be found, will religious instruction in the elementary and secondary schools be

76. *Id.*

77. *May*, 780 F.2d at 250-54 (discussing Wallace v. Jaffree, 472 U.S. 38 (1985)).

78. *Id.* at 253.

79. *See id.* at 253-66. (Becker, J., dissenting).

80. Karcher v. May, 484 U.S. 72 (1987).

81. *Id.*

82. *Mitchell*, 530 U.S. at 807 (quoting Tilton v. Richardson, 403 U.S. 672, 678 (1971)) (footnote omitted).

tolerated? Or, if religion is *found* to be the predominant purpose of the instruction or presentation, will the Establishment Clause prohibit programs such as "Petros"?

Coming down to the present, we have come almost full circle since *Bender* in consideration of what will or will not be deemed permissible in the public schools. In *Good News Club v. Milford Central School*, the Court of Appeals for the Second Circuit upheld a school district's exclusion from elementary school premises of a Christian youth organization called the "Good News Club."[83] The school district had permitted other organizations such as the 4-H Club, the Boy Scouts, and the Girl Scouts to meet on its premises.[84] The Good News Club members were between the ages of six and twelve, and the club took its name from the "good news" of Christ's Gospel and the "good news" that salvation is available through belief in Christ.[85] Meetings were opened with a prayer read by the Reverend Stephen Douglas Fornier, and the meetings centered around verses and instruction from the Old and New Testaments.[86]

The Second Circuit opinion recites the biblical and religious nature of the meetings in substantial detail.[87] The "Good News" meetings were scheduled to take place on the school premises just before, and continuing after, the conclusion of the school day in the early afternoons and were to be led by adults.[88]

The Second Circuit, recognizing that restrictions on space in a limited public forum will withstand First Amendment challenge if they are reasonable and viewpoint neutral, held that the meetings constituted the "equivalent of religious instruction itself" and rejected the Club's arguments that the school district was unreasonable in concluding that the Club's use of the school facilities would be taken as a school endorsement of the religious teachings.[89] Moreover, the Club contended that the Milford School policy of excluding the Club from the school facility was not viewpoint neutral—a contention not accepted by the Second Circuit.[90]

In holding for the school district, the Second Circuit rejected the Eighth Circuit's earlier holding in *Good News/Good Sports Club v. School District*,[91] which had reached a completely contrary conclusion

83. Good News Club v. Milford Cent. Sch., 202 F.3d 502 (2d Cir. 2000), *rev'd*, 533 U.S. 98 (2001).

84. *Id.* at 504.

85. *Id.*

86. *Id.* at 504-06.

87. *See id.*

88. *Id.*

89. *Id.* at 507, 509.

90. *Id.* at 509-10.

91. 28 F.3d 1501 (8th Cir. 1994).

on nearly identical facts. The Eighth Circuit held that the denial of the club's access to school district property was a violation of the First Amendment.[92] In so holding, the Eighth Circuit had followed the Supreme Court's decision in *Lamb's Chapel v. Center Moriches Union Free School District,* where the Court had concluded that a school district's refusal to permit the use of school facilities for a religious-oriented film series violated the Freedom of Speech Clause of the First Amendment.[93]

It will not surprise you to learn that in both the Second and Eighth Circuit cases, dissents were registered. The tensions that I had mentioned earlier are reflected in the differing views expressed and the separate opinions in those cases as well as in the Supreme Court's decisions.

In March of this year, however, there was "good news" for the Good News Club. The Supreme Court heard argument on the Second Circuit's decision, and as could be anticipated, counsel for the Good News Club stressed the presence of a limited public forum, which would afford the Club access to the school, and argued that the Free Exercise Clause had been violated when the Club was denied access to the school premises.[94] In so arguing, the *Widmar v. Vincent* case was predominantly discussed as the authority that should afford a necessary forum for the Club.[95] Questioning that argument, let me quote from an inquiry made to counsel for the Club by one of the Justices. The question, of course, was taken from the transcript of the oral argument and fleshed out the Justice's concern that "don't we have a substantial Establishment Clause issue, which we simply didn't have in *Widmar*, so that you can't take *Widmar* as being direct authority for what was going on here [in an elementary school]?"[96]

> Isn't the nub of the problem in this case that you're not dealing with college students, you're dealing with grade school kids, kids from, I think it was ages starting at six going up to 12. You're doing it—in this particular case, the meeting was being held immediately after the school and the meeting sounds to me as it was described as Sunday school. They pray. They sing sort of children's religious songs, and they have a teaching lesson and I guess some discussion, but it sounds like Sunday school, and isn't the problem in this case that you don't have a sophisticated group of people of college age who know that the university is not proselytizing them or ap-

92. Id. at 1510 (finding the district's Amended Use Policy resulted in "impermissible viewpoint discrimination").

93. 508 U.S. 384 (1993).

94. *Good News Club*, 533 U.S. at 98.

95. *Id.*

96. [Oral argument on Feb. 28, 2001, Good News v. Milford, 2001 U.S. Trans. LEXIS 17, at *8]

> proving of their particular religious practice, whereas in this case you have a bunch of kids who just don't make those kinds of distinctions, and isn't that the nub of the Establishment Clause problem here, which didn't exist in *Widmar*?[97]

As anticipated, the Good News Club claimed a limited forum, which should permit the club to use Milford facilities on the same basis as other youth clubs, asserting that such use would not constitute an endorsement of the club's message.[98] On the other hand, the Milford school charged an Establishment Clause violation for the proposition that the mere presence of a public forum does not shield the government, i.e., the school, from scrutiny under the Establishment Clause.[99]

That decision, of course, has not been rendered by the Supreme Court, but in reviewing the transcript of oral argument and the thrust of the Court's questions, which did not focus on the Establishment Clause but rather on the *Widmar* case, it would not surprise me if, despite the thesis that I have explicated tonight, the Supreme Court might very well hold that the balance in this case—the *Good News* case—even in an elementary school context, favored the Good News Club, which therefore could not be denied access to the school premises.[100]

---

97. *Id.* at 6.

98. *Good News Club*, 533 U.S. at 98.

99. *Id.* at 113-14.

100. I take an author's privilege of updating this lecture to add the latest ruling of the Supreme Court in Establishment Clause and school cases. After the Weintraub lecture I gave on April 18, 2001, the Supreme Court decided the *Good News* case, which I have discussed in Section III, *supra*, and, notwithstanding the emphasis I placed in my thesis on Establishment Clause school cases, the Court has come down on the side I thought it might—favoring the expression of religious views in a limited public forum over the Establishment Clause. Essentially, the Court held that the school's exclusion of the Good News Club violated the Club's First Amendment rights, and that such a violation was not justified under the Establishment Clause. Justice Thomas, over strong dissents by Justices Stevens, Souter, and Ginsburg, wrote for the majority that:

> The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel*, the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar*, Milford made its forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar*. Thus, Milford's reliance on the Establishment Clause is unavailing. Good News Club v. Milford Cent. School, 533 U.S. 98, 113 (2001). The majority was not persuaded that the students in *Good News*, unlike those in *Lamb's Chapel* and *Widmar*, were younger elementary students, and reemphasized that the club's conduct was to be engaged after school hours, that parental consent was required, and that there was no evidence that small children would be more likely to perceive the club's meetings as the school's endorsement of religion. *See Good News*, 533 U.S. at 114. For a brief discussion of *Lamb's Chapel*, see *supra* note 15 and accompanying text and Section III. For a brief discus-

The different viewpoints found in the school cases—viewpoints expressed by district court judges, court of appeals judges, and the Supreme Court justices—should not surprise us. This conflict has raged for some time, and I expect that even with a decision—no matter on which side it falls in the *Good News Club* case—we will have differing decisions in the years to come. I am still left with the impression, however, and it is a strong one, that school cases will continue to be treated differently than the other religious challenges that occur from time to time and that even with the strong arguments made as to limited public forums, the Supreme Court will still hold that establishment principles predominate, particularly in the elementary and secondary school contexts.

IV.

I have not attempted to address the other school prayer religion cases that have flooded our courts. If I were to do so, my remarks would turn this gathering into a classroom of constitutional law and you would be obliged to return week after week to get credit for the course. What I have attempted to do is to indicate that although to date, our schools have withstood the onslaught of religious challenges to their secular integrity and to our Constitution, these challenges have not diminished either in number or ingenuity.

As I have taken pains to point out, up to this time, of course, the Supreme Court has turned back each such challenge that seeks to breach the wall between church and state or to climb over that wall, by applying a more rigid and strict test than it has applied to other religious practices.

Nor, due to the lateness of the hour, have I sought to address in detail the other half of the First Amendment, which reads, "Congress shall make no law . . . prohibiting the free exercise [of religion]."[101]

---

sion of *Widmar*, see *supra* note 70 and accompanying text.

While the *Good News* case is the Supreme Court's latest analysis in Establishment Clause jurisprudence when competing limited forum doctrines are presented, it remains to be seen what will happen in the school voucher case recently argued before the Supreme Court, which again presents an Establishment Clause issue, albeit in a public funds context rather than in a limited forum posture. *See* Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 122 S. Ct. 23 (2001). The question presented before the Court in *Zelman* is whether Ohio's experimental tuition program, which provides tax-funded voucher checks to low-income families in Cleveland to pay for tuition to private and religious schools, is prohibited by the Establishment Clause. *Id.* at 958. While many of the issues raised in *Zelman* exceed the scope of my lecture—and very well may be decided by the Court's interpretation of its seminal decision in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)—it nevertheless raises to the fore the potential conflict with the Establishment Clause whenever public funds are spent on arguably religious activities, especially where that activity involves the education of our children.

101. U.S. CONST. amend. I.

I have tried to explain as best I can why I believe that constitutional decisions concerning religion or prayer in the public schools are construed as they are by our Supreme Court. In doing so, I hope you have not been confused by the distinctions to which I have adverted between school and non-school cases or the apparent inconsistency of Supreme Court decisions or of courts of appeals rulings construing the Establishment Clause. Those apparent inconsistencies have many times baffled not only lay persons, but those at the bar, as well as those, such as myself, on the inferior courts. Indeed, it could hardly be otherwise, for in each instance the various decisions of the courts, as I have noted, have hardly been unanimous.

V.

Well—my assignment tonight was to speak about forty minutes and yours was to listen for the same time. I think you have done admirably well, for we have both finished together. So, let me thank you for honoring me and permitting me to deliver the annual Chief Justice Joseph Weintraub Lecture. I hope I will always live up to the great honor that you have bestowed on me this evening.