Extended Controversial Issue Discussion Lesson Plan Template

Lesson Title: What is the correct interpretation of the 1st Amendment's Establishment Clause?

Author Name: Brett Barry

Contact Information: Bbarry@washoeschools.net

Appropriate for Grade Level(s): 12th

US History Standard(s)/Applicable CCSS(s): C13.[9-12].5 Analyze the United States Constitution and its amendments in protecting individual rights, including the Fourteenth Amendment's provisions for due process and equal protection of individual rights through the examination of landmark cases, i

Discussion Question(s): What is the correct meaning of the Establishment Clause?

Engagement Strategy: Small Group Scored Discussions

Student Readings (list): Engel v Vitale(majority and dissenting opinion), Lemon v Kurtzman (unanimous opinion), and Wallace v Jaffree(majority and dissenting opinion).

Total Time Needed: 225 minutes

Lesson Outline:

Time Frame (e.g. 15 minutes)	What is the teacher doing?	What are students doing?
10 minutes	Teacher will explain the lesson and go over the norms and expectations for the scored discussions.	Listening to the norms and writing down any questions they have regarding expectations.
50 minutes	Teacher will move around the room scoring students while listening to the groups engage the specific court case.	In groups, students will read *Engel v Vitale* and answer the document based questions. Students will read both the majority and the dissenting opinion.
50 minutes	Teacher will move around the room scoring students while listening to the groups engage the specific court case.	In groups, students will read *Lemon v Kurtzman* and answer the document based questions. Students are only reading the majority opinion.
50 minutes	Teacher will move around the room scoring students while listening to the groups engage the specific court case.	In groups, students will read *Wallace v Jaffree* and answer the document based questions. Students will read both the majority and the dissenting opinion.
30 minutes	Teacher will move around the room scoring students while they decide the outcome of a hypothetical court case.	In groups of 9, students discuss the simulation as members of the Supreme Court.
10 minutes	Explain the tactics for writing an FRQ.	
25 minutes	Monitor students as they write the FRQ.	Students will write an FRQ from 2007 that asks them to analyze the establishment clause.

The pages that follow the Lesson Plan Template include a detailed background paper on the topic for teachers, student readings and reading strategy/questions, source(s), handouts, assignment sheet, self-assessment/reflection and a rubric related to this lesson.

Description of Lesson Assessment: Rubric covering their participation and performance in activities during the discussion, also a separate rubric for their FRQ.

How will students reflect on the process and their learning? Students will write a post discussion reflection in which they judge the quality of discussion in their groups as well as how well they understood the establishment clause after the discussions.

The pages that follow the Lesson Plan Template include a detailed background paper on the topic for teachers, student readings and reading strategy/questions, source(s), handouts, assignment sheet, self-assessment/reflection and a rubric related to this lesson.

Engel v Vitale

Justice Black Majority Opinion

We think that by using its public school system to encourage recitation of prayer[1], the State of New York has adopted a practice wholly inconsistent with the Establishment Clause.

It is a matter of history that this very 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.

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State.

The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say that the people's religious must not be subjected to the pressures of government for change each time a new political administration is elected to office.

The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.

These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

"[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

[1] The prayer in question is exactly as follows, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country. Amen."

Engel v Vitale

Justice Potter Dissenting

With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.

The Court's historical review of the quarrels over the Book of Common Prayer in England throws no light for me on the issue before us in this case. England had then and has now an established church. Equally unenlightening, I think, is the history of the early establishment and later rejection of an official church in our own States. For we deal here not with the establishment of a state church, which would, of course, be constitutionally impermissible, but with whether school children who want to begin their day by joining in prayer must be prohibited from doing so.

Moreover, I think that the Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like the "wall of separation," a phrase nowhere to be found in the Constitution.

Questions for Engel v Vitale

Majority Opinion

1. What action is in question in this case? How did the majority rule?
2. 5-9. What historical evidence does the Court use to support its argument?
3. 10-13. What is the Court's reasoning as to why the establishment clause was added to the Constitution?
4. 14-25. Pull out two quotes that are the most powerful arguments for the Court in this section.
5. What is the point of Madison's argument?

Dissenting Opinion

1. 3-6. Why does Justice Potter disagree with the majority?
2. What does Justice Potter say is the real issue in Engle v Vitale?
3. Why does Justice Potter challenge the importance of "a wall of separation?

Lemon v Kurtzman: Majority Opinion

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute, state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

The District Court concluded that the Act violated the Establishment Clause, holding that it fostered "excessive entanglement" between government and religion. In addition, two judges thought that the Act had the impermissible effect of giving "significant aid to a religious enterprise." . . . We affirm.

The language of the Religion Clauses of the First Amendment is, at best, opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead, they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion, but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment, and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." . . .

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, 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." .

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.

In *Allen*, the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were, in fact, instrumental in the teaching of religion. . . . The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract, we have no quarrel with this conclusion.

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission, and that a substantial portion of their activities is religiously oriented. They have

therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions, and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. . . . Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz*, the State had a continuing burden to ascertain that the exempt property was, in fact, being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises, since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools, rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings, the District Court concluded that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential, if not actual, hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay

teachers are of the Catholic faith. Inevitably, some of a teacher's responsibilities hover on the border between secular and religious orientation.

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions, such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious belief from their secular educational responsibilities. But the potential for impermissible fostering of religion is present.

Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular, the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

Of course, as the Court noted in *Walz,* "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues." . . . We could not expect otherwise, for religious values pervade the fabric of our national life. But, in *Walz,* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

Under our system, the choice has been made that government is to be entirely excluded from the area of religious instruction, and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that, while some involvement and entanglement are inevitable, lines must be drawn.

Questions for Lemon v Kurtzman

1. What are the laws (statutes) being challenged in Lemon doing?
2. What did the Court say regarding the constitutionality of these laws?
3. Lines 13-20 lay out the complexity in determining an interpretation of the Establishment clause. The Court's opinion is saying that there is a difference between "respecting" the establishment clause and "establishing" a state church? What is the difference?
4. Lines 21-23 lay out the so called Lemon Test. What are the three parts to the test?
5. What did the Court say regarding the Pennsylvania and Rhode Island statues regarding the first part of the test? (lines 29-34)
6. What is the conclusion of the Court in lines 40-48?
7. 49-55. Is the total separation of church and state possible according to the Court? What forms of interaction between church and state does the Court say are inevitable and acceptable? What is the Court's definition of the wall between church and state at the end of this section?
8. 59-101. What is the main point of the argument laid out by the Court in this section? Be sure to cite specific portions of the text.
9. 102-104. Why does Justice Burger compare a teacher to a book?
10. 111-115. What part of the Lemon test is violated in this portion? Do you agree with this conclusion?
11. 116-119. Are there contradictory statements in the concluding paragraph? If so, what is contradictory about them?

Wallace v Jaffree: Majority Opinion

JUSTICE STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16-1-20, enacted in 1978, which authorized a 1-minute period of silence in all public schools "for meditation"; (2) § 16-1-20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer"; and (3) § 16-1-20.2, enacted in 1982, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world."

The District Court held that there was "nothing wrong" with § 16-1-20, and that §§ 16-1-20.1 and 16-1-20.2 were constitutional because, in its opinion, Alabama has the power to establish a state religion if it chooses to do so.

The Court of Appeals held § 16-1-20.1 and § 16-1-20.2 unconstitutional. We have already affirmed the Court of Appeals' holding with respect to § 16-1-20.2. Moreover, appellees have not questioned the holding that § 16-1-20 is valid. Thus, the narrow question for decision is whether § 16-1-20.1, which authorizes a period of silence for "meditation or voluntary prayer," is a law respecting the establishment of religion within the meaning of the First Amendment.

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time, it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.

But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.

When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in *Lemon v. Kurtzman* . . . (1971), we wrote: Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our

cases. First, 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." . . .

It is the first of these three criteria that is most plainly implicated by this case.

In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion." In this case, the answer to that question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of § 16-1-20.1 was not motivated by any clearly secular purpose indeed, the statute had no secular purpose.

The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools. Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated: "No, I did not have no other purpose in mind." The State did not present evidence of any secular purpose.

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. Thus, only two conclusions are consistent: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose.

We must, therefore, conclude that the Alabama Legislature enacted § 16-1-20.1 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

Keeping in mind, as we must, both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded, we conclude that § 16-1-20.1 violates the First Amendment.

Wallace v Jaffree: Justice REHNQUIST, dissenting.

Thirty-eight years ago this Court, in Everson v. Board of Education (1947), summarized its exegesis of Establishment Clause doctrine thus: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' Reynolds v. United States (1879)]."

This language from Reynolds, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).

…unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

But when we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, including Madison's significant contributions thereto, we see a far different picture of its purpose than the highly simplified "wall of separation between church and State."

The language Madison proposed for what ultimately became the Religion Clauses of the First Amendment was this: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."

Madison then spoke, and said that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.*, at 730. He said that some of the state conventions had thought that Congress might rely on the Necessary and Proper Clause to infringe the rights of conscience or to establish a national religion, and "to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit." *Ibid.*

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

If one were to follow the advice of Justice BRENNAN, concurring in *Abington School District v. Schempp, supra*, at 236, 83 S.Ct., at 1578, 10 L.Ed.2d 844, and construe the Amendment in the light of what particular "practices . . . challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent," one would have to say that the First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another.

The true meaning of the Establishment Clause can only be seen in its history. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decision-making that has plagued our Establishment Clause cases since *Everson*.

The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.

Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

The Court strikes down the Alabama statute because the State wished to "characterize prayer as a favored practice." *Ante*, at 2492. It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

The State surely has a secular interest in regulating the manner in which public schools are conducted. Nothing in the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized "endorsement" of prayer. I would therefore reverse the judgment of the Court of Appeals

Questions for Wallace v Jaffree **Majority Opinion**

1. What are the three laws being challenged? Lines 3-8
2. How did the District Court rule on 20.1 and 20.2?
3. How did the Circuit Court rule on the same issues?
4. What is the issue before the Supreme Court in this case?
5. What right is being discussed by the Court in 19-33? How has this changed over the course of our country's existence?
6. 43-62 What part of the Lemon test is applied to the law in this section? What does Senator Donald Holmes say about the intent of the law? What is the Court's conclusion in this same section?
7. Do you agree with the majority in this instance?

Questions for **Dissent** in Wallace v Jafree

1. How was the establishment clause defined in Everson v Board? 2-4
2. Who was the original creator of this definition? 5-8
3. What is Rehnquist's argument against Thomas Jefferson and the Establishment Clause?
4. How did Madison define the Establishment clause? 18-26. How does this differ from Jefferson's interpretation?
5. How did the members of Congress, during the ratification debates, define the establishment clause.? 27-32
6. How does the opinion interpret Justice Brennan's opinion in Abbington v Schemp?
7. What does Rehnquist mean when he says, "Any deviation from their intentions frustrates the permanence of that Charter…"? 39-42. Also, who is "their" In this statement?
8. What does Rehnquist disagree with in the Everson case? 46-50.
9. What would shock the Framers about the Court striking down the Alabama law? 51-58
10. What is Rehnquist's conclusion?
11. Do you agree with Rehnquist's argument?

Final Discussion Question: Are Northwest Florida schools violating the Establishment clause by allowing students or members of the clergy to recite prayers over the public address systems before football games?

Task: Your group of 9 justices must decide on the constitutionality of this issue.

Procedure:

- Have the Chief Justice of your group take a vote among each of the members of the "Court".
- If the whole group is unanimous then the whole group will write a majority opinion. If the group is divided then you will need a majority and dissenting opinion.
- In your opinions you must refer to the cases we have read a precedent to guide you. You are required to use the language from these cases as well as your own interpretation of the establishment clause in your opinion.
- Each opinion will be read to the class.

I am using the **Small Group Scored Discussion**(Chapter 10 in Controversies and Conversations reader) strategy. There will be five students per group. One student will be assigned as the group leader. The groups will be addressing the text based questions together for about 50 minutes for each document. I will be scoring the small group discussions on the "quantity and quality of participation by sampling the discussion in each group". Specifically, I will be looking for:

1. Students commenting on the reading.
2. Students asking each other for clarification or explanation
3. Students building on each other's comments
4. Students posing their own questions from the readings to the group.
5. Student body language and hand movements that indicate the students are engaged with each other.

FRQ

The First Amendment includes to clauses regarding the freedom of religion.

(a) Select one of the following cases and identify the First Amendment clause upon which the US Supreme Court based its decision.

- Engel v Vitale
- Lemon v Kurtzman

(b) Describe the Supreme Court's decision in the case you selected in (a).

(c) Select one of the following cases and identify the First Amendment clause upon which the US Supreme Court based its decision.

- Reynolds v US
- Oregon v Smith

(d) Describe the Supreme Court's decision in the case you selected in (c).

(e) Many of these decisions have caused controversy in the US. Describe two ways in which other political institutions might limit the impact of Supreme Court decisions.

The Establishment Clause in the American Political System

"Congress shall make no law respecting an establishment of religion…"

Brett Barry

The 1st Amendment's Establishment Clause was designed by the Framers to help America avoid the political-theological problems that had impacted post-Reformation Europe. By creating this clause the Framers had hoped to separate civil and religious life into distinct spheres to avoid conflict. While avoiding the bloodshed of Europe, American jurisprudence has been filled with precedents that stand on a slippery slope while interpreting the Establishment Clause. "What, exactly, and with what justification are judges deciding establishment clause cases doing when they invalidate or approve the actions of governments and officials in the name of complex, often conflicting values?"(Garnett 273). What is the appropriate definition of the relationship between religion and government? Is it there an absolute wall between church and state as Jefferson desired? Or is there a much more tolerant view of the clause that allows some degree of interaction? This paper will look at three cases to address these questions: *Engel v Vitale(1962), Lemon v Kurtzman(1971), and Wallace v Jaffree(1981).*[2]

In 1962 the Supreme Court heard the case of *Engel v Vitale.* A New York statue required that students start their day with a prayer. In the Engel case the prayer in question read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country. Amen."(Hall and

[2] These three cases by no means cover the full complexity of the Establishment Clause in American jurisprudence.

Huebner 453). The Court struck down the New York statute in a 7-1 decision.[3] In his majority opinion, Justice Black believed that the prayer had the potential to lead to the establishment of an official church. "…[G]overnments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to."(*Engel v Vitale 1962*) Additionally in his opinion, Black linked his argument to the author of the first amendment James Madison. "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?". Justice Black continued, "it is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves." Justice Black created a precedent that seemed to draw a clear and distinct line between government and religious activities. The dissenting opinion in *Engel* contrasted sharply with the majority.

The prayer in question was in fact in Justice Potter's mind harmless. "I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it." Thus, the opinions in *Engel* crystallize the two contrasting interpretations of the establishment clause. On the one

[3] Justices Frankfurter and White did not take part in the Engel case.

hand, the majority viewed it through the Jeffersonian[4] lens as a distinct wall between church and state. Conversely, the dissent saw it as clearly guarding only against an official government religion being created.

While *Engel* may have represented a summary of the argument surrounding the establishment clause it was *Lemon v Kurtzman* that attempted to create a framework for the Court to provide a clear legal reasoning for its interpretation.[5] *Lemon v Kurtzman* ruled on the constitutionality of state aid to parochial schools. In an 8-0 decision the Court struck down a Pennsylvania statue that provided funding for materials that aided in the instruction of secular subjects and a Rhode Island statue that was subsidizing 15% of the salaries for teachers of in parochial schools. In the process the Court created what has become known as the "Lemon" test. Specifically, the Court created a three pronged test to determine the constitutionality of a statute or action by the government. The three parts of the Lemon test are as follows. First, the law must have a secular 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. If a law violated any individual part of the test it would be struck down as a violation of the Establishment clause. To get an understanding of the "Lemon" test is it interesting to look at the third case, *Wallace v Jaffree.*

[4] There are contrasting interpretations of the meaning behind the letter Jefferson wrote to the Danbury Baptist Church regarding his famous, "wall between church and state". One such interpretation is that Jefferson was concerned with keeping the federal government out of an issue that he believed to be reserved for the states. This contrasts sharply with the Court's use of the phrase as well as conventional wisdom among the public (McElory).
[5] Jeffries (2001) has written an interesting essay in which he claims the establishment clause can only be viewed in the political context of the Court. He essentially argues that the meaning of the clause will always be defined by the political values of the existing majority. In other words, one sees what one wants in the establishment clause.

In *Wallace v Jaffree* the Court was asked to rule on the constitutionality of an Alabama statute that called for "meditation or voluntary prayer" in public schools. In an 8-1 decision the Court struck down the law as a violation of the establishment clause. In his majority opinion Justice Stevens concluded that the law had no secular intent and therefore violated the Lemon test. "[K]eeping in mind, as we must, both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded, we conclude that § 16-1-20.1[6] violates the First Amendment"(*Wallace v Jaffree 1985*). It is this fear of the subtle erosion of the establishment clause that is at the heart of Justice Steven's opinion. In Justice Steven's legal reasoning, just as in Justice Black's *Engel* decision, it seems that any interaction between government and religion will ultimately lead to the creation of an establishment religion. This contrasts starkly with the dissent written by Justice Rehnquist in the *Wallace* case.[7]

From his originalist perspective, Justice Rehnquist's dissent begins with an assault on the idea that Jefferson's "wall between church and state" should play any role in understanding the establishment clause.[8] Rehnquist wrote, "…unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the

[6] § 16-1-20.1 was the Alabama statue in question.

[7] Justice O'Connor attempted to modify the "Lemon" test in Lynch v Donnelly (1984) by "…focusing on whether government action is an endorsement or disapproval of religion. Defining endorsement as an action that "sends a message to nonadherents that they are outsiders . . .and an accompanying message to adherents that they are insiders."

[8] The discussion of originalism is always at the heart of Constitutional interpretation. In the context of religion Levy notes, "at the adoption of the Bill of Rights, and therefore the establishment clause, government and religion were much closer than they are today" (472).

States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." Justice Rehnquist instead finds a better source for the meaning of the Establishment clause in James Madison at the first Congress leading up to the ratifying convention. "Madison then spoke, and said that he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." (Wallace v Jaffree 1985) Therefore, Justice Rehnquist agrees with Justices Potter's dissent in *Engel* that the Establishment clause was not intended to stop all interactions between government and religion but simply to ensure that no national church is created. In *Wallace* Rehnquist concludes, "As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."

The Court's interpretation of the Establishment clause in the three cases above is a reflection of the religious pluralism that exists in America. No definition of it will ever satisfy the various elements within our society. The next 200 years of American jurisprudence will most likely continue to be as Larson states, "largely an exercise

in subjective interpretation by judges." In other words, the Court is in essence using a case by case contextual discussion of each issue to determine its constitutionality.[9] Therefore, both secular and non-secular members of the American society will continue to press the Court to engage in a discussion of the meaning of the Establishment clause.

[9] Engel, Lemon, and Wallace all produced results that were more likely to satisfy those that believed in a greater separation of church and state. However the current court, with a conservative majority, as Cherminsky states," are likely to change dramatically the law of the Establishment Clause." (16)

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The pages that follow the Lesson Plan Template include a detailed background paper on the topic for teachers, student readings and reading strategy/questions, source(s), handouts, assignment sheet, self-assessment/reflection and a rubric related to this lesson.