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Does the Camel Have Its Nose in the Tent: Individual Religious Freedom v. Prayer in Public Schools

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Individual Religious Freedom v. Prayer In Public Schools

By Alan Kofoed and Elizabeth Brandt

> *"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."*
> —JUSTICE BRANDEIS

While American troops in Saudi Arabia must hide their Bibles, Americans at home are free to worship any deity they choose or not worship any deity at all. The First Amendment's guarantees of non-establishment of religion, and non-abridgement of the free exercise thereof, provide us with absolute freedom of conscience. We can maintain this important individual liberty only through strict separation of church and state.

Many people think that because the ACLU believes in separation of church and state, it is anti-religion and anti-God. Nothing could be farther from the truth. The ACLU has no goal of limiting private spiritual beliefs or practices. Their point is simply that government should not endorse religious activities since such practice inevitably infringes upon the rights of those citizens who have different beliefs.

The majority does not rule in spiritual matters. The very purpose of the Bill of Rights and Idaho constitutional provisions is to guarantee individual freedom against a tyranny by the majority. While democracy is based upon majority view, it can be effective and meaningful only where individual liberty is protected.

The institutionalization of spiritual beliefs often results in bureaucracy which punishes dissent and rewards unquestioning belief. As Freidrich Nietzsche said "The Church is precisely that against which Jesus preached." (*The Will to Power*, section 168.) In a free market of ideas, all individuals are free to think, believe and speak their minds.

Recent headlines across Idaho indicate that battles over separation of church and state in our public schools are being renewed. This renewed interest provides an opportunity to review the law, the policy implications and the future of religious entanglement in public institutions.

Much of the debate focuses on federal law. Surprisingly, most Idahoans and even Idaho attorneys fail to think about or discuss our state constitution, yet the Idaho constitution deals with these matters much more fully than does the federal Bill of Rights. Therefore, an understanding of Idaho law on these issues is important to a meaningful analysis of what is permissible in this state. However, under the Supremacy Clause, federal law establishes the minimum protections to be accorded individual rights, so let us first look at the state of that law before we turn to a review of Idaho's own constitutional requirements and prohibitions.

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Our federal founding fathers dealt with religious freedom in the initial clauses of the First Amendment of the Bill of Rights.

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 of the right of the people peaceably to assemble, and to petition the government for a redress of grivances.

Non-establishment and free exercise are preeminent, appearing even before freedom of speech.

Some people argue that the purpose of the anti-establishment clause was simply to prevent Congress from creating a federal church. However, that original purpose is anything but clear. In *Weisman v. Lee*, 908 F.2d 1090, 1092 n.8 (1st Cir. 1990), Judge Bownes identified three distinct lines of thought which appear to have influenced the framers of the Bill of Rights: Thomas Jefferson believed that a wall should be erected between church and state to protect the state from the church; Roger Williams wrote of a "hedge" between the church and the rest of the world to protect the church from the corrupting influence of the world; James Madison emphasized reviewing the historical record. Judge Bownes concluded, "It is unlikely that, as an empirical matter, we can ever know the original intentions of the authors of the constitution." *Id.* at 1093 (Bownes, J., concurring).

In the early 1960's the U.S. Supreme Court held that reading officially sanctioned prayers during the school day, whether composed by government officials and regardless of denomination neutrality, violated the First Amendment. This was held to be true even where participation was

voluntary. *Engel v. Vitale,* 370 U.S. 203 (1962) and *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963). The Supreme Court found that the prayer activity had the "purpose and effect" of governmental inculcation of religious principles.

In 1971, the U.S. Supreme Court established the three-part *Lemon* test: In order to pass muster under the establishment clause the state action, 1) must have a secular purpose; 2) its primary or principal effect must be one that neither advances nor inhibits religion; and 3) it must not foster an excessive entanglement with religion. *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971). The Surpeme Court has applied the *Lemon* test to most questions in this area. A notable exception is *Marsh v. Chambers,* 463 U.S. 738 (1983).

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Marsh involved the constitutionality of the Nebraska state legislature opening its sessions with a prayer led by a state paid chaplain. The Eighth Circuit applied *Lemon* and found the practice unconstitutional. The Supreme Court reversed based largely on the fact that legislative prayers were historically common at the time of the adoption of the Bill of Rights. Justice Burger wrote the majority opinion.

Despite the reliance of *Marsh* on historical practice, the mere fact that a practice has taken place for a long time should not be determinative of its constitutionality. Justice Burger himself noted in the *Marsh* opinion that, "standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . ." 463 U.S. at 791.

The Supreme Court recently distinguished *Marsh* and declined to apply it in the context of public schools saying, "[s]uch a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually non-existent at the time the constitution was adopted." *Edwards v. Aquillard,* 482 U.S. 578 at 583 n. 4. (1987). *See Grand Rapids School District v. Ball,* 473 U.S. 373, 390 n. 9. (1985). While not expressed by the Supreme Court decision in *Marsh,* it may be that the court was reluctant to enter the realm of policing the internal proceedings of legislative bodies.

While the *Lemon* test has been

retained to date, there has been discussion in the Supreme Court about revising the doctrine. Changes in the Court's make-up have led to speculation about the future viability of *Lemon.* In *Wallace v. Jafree,* the Court struck down Alabama's statutory authorization of a moment of silence "for meditation and voluntary prayer." 474 U.S. 38 (1985). Justice O'Connor suggested modifying *Lemon* and Justice Rehnquist suggested that it be abandoned. Justice O'Connor wrote in her concurring opinion:

> *Direct government action endorsing religion or a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' . . . Under this view,* Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.*

472 U.S. at 69 (quoting *Lynch v. Donnelly,* 465 U.S. at 688 (O'Connor, J., concurring). Then Justice, now Chief Justice, Rehnquist, based on history, argued that the non-establishment clause was intended to prevent governmental preference of one religious denomination or sect over others. Avoiding the *Lemon* test, Rehnquist argued that the clause neither required government to be neutral on questions of religion nor did it prevent the state from

accomplishing "legitimate secular ends through nondiscriminatory sectarian means."

On the question of prayers at public school graduation ceremonies, there is no definitive Supreme Court decision and the lower court authorities are mixed.

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Applying the *Lemon* test, some courts have failed to strike down the practice based essentially on the argument that graduation prayer does not have a substantial religious effect. *Wood v. Mount Lebonon Township School District,* 342 F.Supp. 1293 (W.D. Pa. 1972). The holding in *Wood* is dicta since the court determined it did not have jurisdiction and the Third Circuit Court of Appeals later limited the application of the *Wood* reasoning in *Malnak v. Yogi,* 592 F.2d 197, 200, n. 3. (3rd Cir. 1978). Similar to the *Wood* decision, however, is *Grossber v. Deusebio,* 380 F.Supp. 285 (E.D. Va. 1974), where the court held:

> *[The invocation does not involve] the repetitive or pedagogical function of the exercises which characterized the school prayer cases. There is no element of calculated indoctrination. The overall program of which the invocation will be a part is neither educational nor religious, but ceremonial, and the total length of the invocation has been estaimated as only a few minutes. Such an occasion with such an invocation has not occurred previously before this audience and it will not occur again. The event, in short, is so fleeting that no significant transfer of government prestige can be anticipated. There is no state financial outlay and the Court cannot visualize the organs of the state government becoming infected by a divisive religious battle for control of this brief and transient exercise. Government here is not 'embroiled' in religious matters.*

Id. at 288-89. Similarly, in *Stein v. Plainwell Community Schools,* 822 F.2d 1406 6th Cir. 1987), another district court upheld graduation prayers based on the arguments that the invocation did not have the primary effect of advancing religion because graduation was voluntary, the school did not control the content of the prayers, the speaker was not a school employee, the invocation was not a daily event, graduation was not part of the educational program, and the speaker did not intend to use the invocation to proselytize. 822 F.2d at 1409.

Other federal courts have concluded just the opposite in striking down graduation prayers. An Iowa district court found the high school graduation prayer failed the first prong of *Lemon* since it had a religious purpose because prayer is an inherently religious practice. The court also found that the prayer had the effect of advancing religion:

> *[T]he invocation and benediction portions of defendant's commencement exercises have as their primary effect the advancement of Christian religion . . . "A prayer because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the establishment clause. . . . . By placing its imprimatur on the particular kind of belief embodied in any prayer, the state*

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