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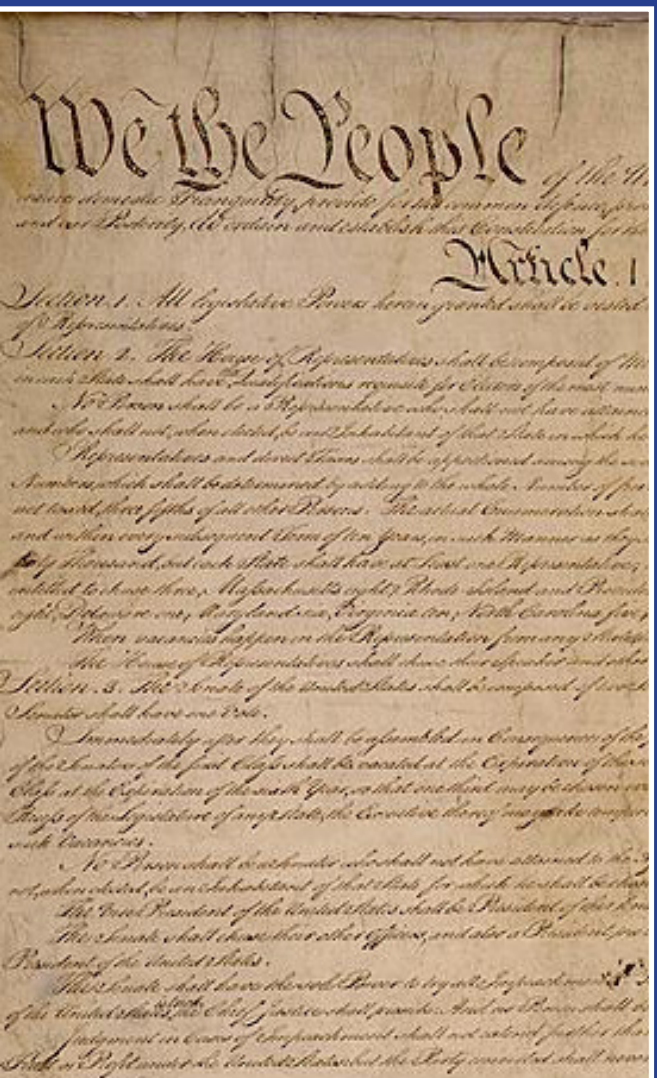
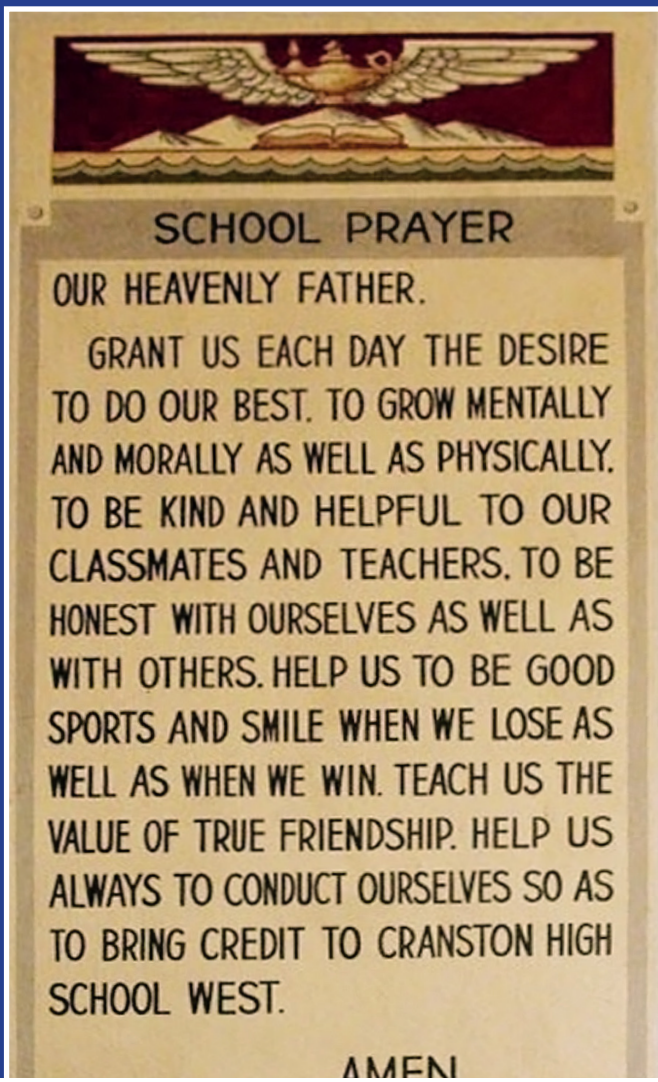
Rhode Island and the Establishment Clause

A Curriculum Guide for Secondary Educators





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WELCOME & ACKNOWLEDGMENTS

This document is a curriculum unit designed by high school teachers, for high school teachers. It is intended to take a fairly heavy and potentially dry topic (the Establishment Clause of the First Amendment of U.S. Constitution) and make it fun, relevant and engaging for students and teachers. The curriculum guide is best used when viewed on a computer or tablet because of the embedded links on many of the pages. The recent case in the city of Cranston in which high school student Jessica Ahlquist challenged the constitutionality of a prayer mural hanging in the school auditorium has provided an exciting opportunity for all of us to take a closer look at the unique role that Rhode Island has played over the years in issues related to the Establishment Clause. This multi-day curriculum unit provides resources and specific day-to-day class assignments to help students explore these important issues in a thoughtful and hands-on way. Use the entire teaching unit exactly as we have designed it or feel free to modify it and use only the parts that make sense for what you are trying to accomplish with your students. We realize how pressed for time teachers are to get through all of the material that they are expected to cover in their courses during the school year. With this in mind, you will see that both content and skills emphasized in the "Rhode Island Grade Span Expectations (GSEs) for Civics & Government and Historical Perspectives/R.I. History" are covered in this specific curriculum unit.

The authors wish to thank the Rhode Island Council on the Humanities, the Dean of Faculty at Northfield Mount Hermon, the *Providence Journal*, and the Rhode Island Historical Society for their generous support of this project. Karen Bordeleau, acting executive editor at the *Providence Journal*, generously allowed us to include a number of articles and photographs from

the *Providence Journal* and the *Providence Evening Bulletin* in the curriculum guide. We are thankful for Karen's steadfast support of the project and the speed in which she processed our reproduction request. Readers should note that all articles and photographs are under copyright from the *Providence Journal* and cannot be reproduced without expressed written permission. RICH Grant Director SueEllen Kroll and Elyssa Tardif, the new Director of Education at the RIHS, were supportive of this project from day one and provided much needed encouragement to get the curriculum guide completed in a timely fashion. SueEllen's efforts to promote civic engagement and the study of Rhode Island history often go unheralded so it is only appropriate that we take the time to acknowledge them here. Harry van Baaren graciously agreed to create the cover for the guide and Chris Landry from Providence College helped to put it all together. Finally, the authors are grateful to Dr. Patrick T. Conley, the historian laureate of Rhode Island, for his close reading of the Introduction and his willingness to pen an informative Preface. Of course the authors alone are responsible for any errors found within the guide.

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PREFACE

Nearly everyone believes that Rhode Island's famed 1663 colonial charter proclaimed religious liberty for the inhabitants of Rhode Island and its essential corollary the separation of church and state. That belief is only a half-truth. Freedom of worship, or "soul liberty," as Roger Williams called it, has never been denied to Rhode Islanders by government. Nor was there ever an established (i.e., tax supported) religious sect herein, as afflicted our sister colonies. These facts are great achievements to celebrate; they are Rhode Island's gifts to America and, indeed, the world.

However, strict separation of church and state, or religion and government, is quite a different story. During the controversy over the Cranston West prayer mural and the Woonsocket military memorial, opponents have claimed that such religious displays are unique departures from Rhode Island's unbroken 350-year tradition of separation. Such assertions are not only wrong, they are ironic when one considers the facts. Roger Williams sought separation not to free civil society from religious influences and expressions of religious faith, but to present the state (as it did elsewhere and nearly everywhere) from interfering with a person's private religious belief. In secular America this intention has been disregarded and reversed over the past three generations.

Indicative of how strongly Williams felt about state domination of the church, this polemical theologian asserted in one burst of vituperation that such a condition would render the church, "the garden and spouse of Christ, a filthy dunghill and whore-house of rotten and stinking whores and hypocrites." For Williams, "forced worship stinks in God's nostrils" because it is productive of persecution and religious wars. Obviously he did not take the issue of separation lightly.

Have Rhode Islanders adhered to the teachings of their founders by keeping religion out of politics? The simple answer is no. Most of the debates and the balloting that resulted in Rhode Island's ratification of the federal Constitution with its consequent admission to the Union as the 13th state, took place in Newport's Second Baptist Church, because the Colony House could not accommodate both the delegates to the ratifying convention and the interested citizenry.

The ratification of Rhode Island's first operative written Constitution—the one produced in the aftermath of the Dorr Rebellion that governed the state from 1843 to 1986—occurred in East Greenwich, inside that town's Methodist church, because the Kent County Statehouse could not accommodate the participants and spectators. Thus, two of the three most significant political events in Rhode Island history (the ratification of the Declaration of Independence in Newport's Colony House on July 19, 1776, being the third) took place in churches.

A history of East Greenwich reveals that its county statehouse and courthouse (Rhode Island had five capitals until 1854) hosted religious services for local Baptists and Methodists before those sects built their churches; so in November, 1842, the Methodists merely returned the favor by hosting the state constitutional convention. Religious services and sermons were also delivered in many (if not all) of Rhode Island's local townhouses. During the 1830s, Providence city authorities generously allowed Catholics the use of the municipal Town House at what is now the corner of Benefit and College Streets, for masses and lectures. In fact, Rhode Island's first public mass was one celebrated for French troops in Newport's Colony House in 1780 while our French allies occupied that town during the American Revolution. Another rebuke to the notion of

complete separation is the Rhode Island state flag and the state motto, "Hope." The inspiration for both is the Bible. In St. Paul's *Epistle to the Hebrews,* 6:18-19 we find the phrase, "Which hope we have as an anchor of the soul." In displaying both the anchor and the motto, our official stag flag flies in the face of separation.

Despite more than three hundred years of non-controversial and relatively innocuous contact by religion with the state, over the past half century Rhode Island has been in the thick of the developing church-state thicket. There is a tinge of irony to the fact that Rhode Island, the state that pioneered religious liberty and church-state separation in America, has become a leading source of major U.S. Supreme Court decisions relative to the Establishment Clause of the First Amendment.

In Rhode Island most legislative efforts to aid the state's financially troubled Catholic schools were thwarted by the Warren Court's new and expansive view of the First Amendment's Establishment clause. In 1969 the state legislature passed an act to supplement the salaries of teachers in parochial elementary schools. After an ACLU challenge, the U.S. Supreme Court, in the landmark case of *Robinson v. DiCenso* (1971), struck down the measure because it provided "substantial support for a religious enterprise" and caused "an excessive governmental entanglement with religion." Shortly thereafter the federal District Court for Rhode Island invalidated a state school-bus law requiring towns to bus private-school pupils beyond town boundaries if necessary. This decision prompted the resourceful legislature to create regional bus districts to circumvent the court's ruling.

The next church-state issue to pierce the thin veil of local ecumenism involved the use of public funds for religious displays. Here Rhode Island produced another nationally

significant case in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984). In this confrontation the ACLU challenged the City of Pawtucket's inclusion of a Nativity scene in its Christmas display. In a 5-to-4 decision Chief Justice Warren Burger, speaking for the majority, dismissed the complaint in part because "it has never been thought either possible or desirable to enforce a regime of total separation" of church and state. The Court majority felt that in the predominantly secular context of Pawtucket's display and the primary purpose and effect of the Nativity scene were not to promote religion but only to acknowledge the spirit of the holiday season.

The final major establishment case to reach the U.S. Supreme Court, *Lee* v. *Weisman* (1992), developed from a graduation ceremony at Nathan Bishop Middle School in Providence at which a student, Weisman, objected to school principal Lee's invitation to clergymen (one of whom was Rabbi Leslie Gutterman) to give the invocation and benediction. The Supreme Court ruled, in a 5-to-4 decision, that a school requirement that a student stand and remain silent during a "nonsectarian" prayer at the graduation exercise in a public school violated the Establishment Clause, even though attendance at the ceremony was completely voluntary. The student, said the court, should not be required to give up her attendance at the graduation, "an important event in her life, in order to avoid unwanted exposure to religion."

Dr. Erik J. Chaput and Jim Shea have done Rhode Island students and teachers a great service in this multi-day curriculum guide. The authors' analysis of the peculiar characteristics of modern Establishment Clause rulings and the role of federal and state judiciaries in this process is exemplary. For the first time, a comprehensive guide is available for educators who wish to discuss Rhode Island's contribution to the

Establishment Clause. The background material included in this curriculum guide will allow students to have an informative and engaging debate on the constitutional issues involved in the Cranston case. Teachers will greatly benefit from the detailed instructions provided, along with the wealth of material in the guide, including articles from the *Providence Journal*, informative case summaries, and annotated versions of the legal briefs presented in *Ahlquist v. City of Cranston*. This curriculum guide will provide students and teachers with a new and deeper understanding of modern Rhode Island history.

Dr. Patrick T. Conley
Historian Laureate of Rhode Island

MATERIALS PROVIDED FOR TEACHERS

1. "Introduction" — The Introduction provides background information about the Establishment Clause of the First Amendment and the important role that the state of Rhode Island has played in contributing numerous cases to the Supreme Court docket in the post-World War II era. Also provided here is a brief overview of the three important Supreme Court cases (*Lemon v. Kurtzman*, 1971; *Lynch v. Donnelly*, 1984; and *Lee v. Weisman*, 1990) that will be used to set up the recent case in Cranston involving Jessica Ahlquist.

2. "Supreme Court Case Materials" — Descriptions of each of the three major Supreme Court cases involved in this teaching unit (*Lemon v. Kurtzman*, *Lynch v. Donnelly* and *Lee v. Weisman*) are provided. For each case the following information is provided:

   - Case summaries for *Lemon*, *Lynch* and *Lee*. In addition to the summaries, a breakdown of how the justices voted can be viewed by clicking on the link to the OYEZ web project (www.oyez.org) at the Chicago-Kent College of Law. Also in the Case Summary section **(pp.9-23)** are links to the Voices of American Law project at Duke University Law School (www.law.duke.edu/voices) Students will find 11-minute videos on *Lynch v. Donnelly* and *Lee v. Weisman*. Unfortunately, there is no video on *Lemon v. Kurtzman*.

   - Newspaper articles **(pp.24-36)**. from the *Providence Evening Bulletin*, the *Providence Journal* and the *New York Times* are provided for each case.

   - The authors have also provided three-page excerpts from the majority opinions issued by the Supreme Court in *Lemon*, *Lynch* and *Lee* (**pp.37-49**). These excerpts will give students an understanding of the legal reasoning the justices used to reach their decisions. The excerpts also provide students with some of the important legal precedents established by the court which will help them in their thinking about the Ahlquist case. Guide questions are provided at the start of each excerpt.

3. "*Ahlquist v. City of Cranston* Materials" — The following information is provided for the students to help them understand the legal arguments in this case for both Jessica Ahlquist and the City of Cranston as well as the final decision made by the United States District Court for the District of Rhode Island:

- Newspaper articles from the *Providence Journal* and the *New York Times* **(pp.51-58)**.

- The Brief on behalf of the City of Cranston **(pp.60-63)**. Instead of providing just excerpts from this brief as was done for the three Supreme Court cases, students are provided with an annotated copy of the complete defendants' brief along with some important excerpts. These annotations describe with page numbers where important specific topics, legal

arguments and quotations can be found within the brief. This brief runs 44 pages long, so these annotations will be essential in helping to focus in on the key sections of the brief.

- Brief on behalf of Jessica Ahlquist **(pp.64-67)**. Again, instead of providing excerpts, students will find an annotated copy of the plaintiff's brief along with some important excerpts. These annotations describe where important specific topics, legal arguments and quotations can be found within the brief. This brief runs 63 pages long so these annotations will be essential in helping to focus in on the key sections of the brief.

- The "Decision and Order" **(pp.68-72)** by Ronald Lagueux, Senior United States District Judge, in the case of *Ahlquist v. City of Cranston*. A link to the final decision in this case is provided along with key excerpts from the ruling by Judge Lagueux. **Spoiler Alert**: The curriculum unit requires that students read Judge Lagueux's opinion last. We wrote the guide with the notion that many students will not be aware of the ruling. Since groups of students will be asked to present briefs for and against the position of the City of Cranston in front of another group of students pretending to be Judge Lagueux, it is imperative that the District Court ruling not be discussed until the end of the unit.

CURRICULUM UNIT INSTRUCTIONS

Homework #1:

- Students should be assigned the "Introduction" for homework **(see pp.6-18)**. They should read this carefully and click on all hyperlinks in the text. A quiz might be a good way to test the students' content knowledge.

Class #1:

- Divide the class into three groups and assign each group one of the three Supreme Court cases (*Lemon v. Kurtzman*, 1971; *Lynch v. Donnelly*, 1984; *Lee v. Weisman*, 1992)
- Each group will begin preparing in class to make an oral presentation to the class the next day about their specific Supreme Court case. Homework time should also be provided for the students to be able to complete this work. ** **See specific oral report assignment instructions on p.50.**
- After they have been assigned one of the three cases noted above, students should locate the appropriate case summary in the curriculum guide **(see pp.9-23)**. Students should also read about their case on http://www.OYEZ.org (a link to the appropriate OYEZ webpage is provided at the end of each case summary.
- Next, students should read the newspaper articles about their case **(On *Lemon* see, pp.24-25; On *Lynch* see, pp.25-30; On *Lee* see, pp.30-36).**
- Finally, after reading this background information about their case, students will now be ready to read the "Majority Opinion Excerpts" from their case **(On *Lemon* see, pp.37-40; On *Lynch* see, pp.41-44; On *Lee* see, pp.45-49).**
- Each group should decide on a division of labor (i.e. who is responsible for doing what the next day during the oral presentations) among themselves before class ends.

Homework #2:

- Students should continue the work that they started during class that day in preparation for their Supreme Court case presentations.

Class #2:

- Each group will make a 10 minute presentation to the class about their case. **(see instructions on p.50).**
- The groups may need 10 minutes at the start of class to talk among themselves to get organized before presenting.

Homework #3:

- All students should read the three background newspaper articles on the Ahlquist case **(see pp.51-58)**, along with: http://www.nytimes.com/2012/01/27/us/rhode-island-city-enraged-over-school-prayer-lawsuit.html

Class #3:

- Each of the three groups will now be assigned a new task. One group will represent Jessica Ahlquist, one will represent the City of Cranston, Rhode Island and one will play the role of Judge Ronald R. Lagueux, the United States District Court Judge who will hear and decide the Ahlquist case.

- To prepare for their presentation in front of "Judge Lagueux" the group representing Jessica Ahlquist should read the brief on behalf of Jessica Ahlquist **(see pp.64-67)**. Use the annotations and excerpts to help you make your way through this document. **See the specific instructions for this assignment on p.59.**

- To prepare for their presentation in front of "Judge Lagueux" the group representing the city of Cranston should read the brief on behalf of the City of Cranston **(see pp.60-63)**. Use the annotations and excerpts to help you make your way through this document. **See the specific instructions for this assignment on p.59**.

- The group playing the role of Judge Lagueux needs to do some preparation before hearing the two presentations the next day. Their specific assignment can be found on **p.59**.

Homework #4:

- All three groups should continue the work they started in class in preparation for the presentations the next day.

Class #4:

- The group playing the part of Judge Lagueux will hear presentations from each of the two sides in this case. Each group will have 15 minutes to make their case in front of the Judge Lagueux group and 2 minutes to make a closing statement or rebuttal.

- The Judge Lagueux group will listen carefully and take good notes on the presentations in preparation for making a ruling on this case.

Homework #5:

- There is no homework for the Ahlquist and Cranston groups.
- Each student in the Lagueux group will individually write a two page paper stating which side they think had the best argument and why.

Class #5:

- Members of the Lagueux group will gather for 5 minutes at the start of class to decide as a *group* which side made the better case. The best way to do this is to take a vote to see how many people thought the Cranston side presented the best case and how many thought the Ahlquist side presented the best case.
- The side with the most votes will issue the "Majority Opinion" and the losing side will issue the "Dissenting Opinion."
- They will then convene the class as a whole; the "majority" will announce the court's decision and why they voted the way that they did. The "dissenters" will then discuss their objections to the ruling and explain why they voted the way they did.
- With the remaining time, the entire class should read the excerpts from Judge Lagueux's actual ruling in the case **(see pp.68-72)**.

INTRODUCTION

The First Amendment to the United States Constitution:

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.

For nearly fifty years a prayer mural hung in the auditorium of Cranston West High School. The 8-foot mural, which was authored by seventh-grader David Bradley, went up in 1963 after the United States Supreme Court ruled that organized prayer in public schools violated the Constitution in the landmark cases of *Engel v. Vitale* and *Abington School District v. Schempp*.[1] In *Engel* (1962) and *Schempp* (1963), the Court rejected a narrow reading of the Establishment Clause of the First Amendment and adopted a broader reading.

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The prayer on the mural begins: "Our Heavenly Father grant us each day the desire to do our best, to grow mentally and morally as well as physically, to be kind and helpful to our classmates and teachers." It goes on for a few more lines to talk about the importance of sportsmanship and moral conduct. The prayer ends with

[1] *New York Times*, January 26, 2012. On *Engel* see *Bruce J. Dierenfield, The Battle over School Prayer: How Engel v. Vitale Changed America* (Lawrence: University Press of Kansas, 2007).

"Amen." Though the large mural had hung in the auditorium for decades, students, faculty and staff generally paid it little attention over the years. Cranston school officials never required students to recite the prayer at any school function nor was the prayer incorporated into any of the school's publications. Starting in 2010, however, objections began to be raised by the Rhode Island branch of the American Civil Liberties Union.[2] By 2011, the prayer mural entered the national spotlight when a student at Cranston West High School objected to the prayer's connection to the Christian faith. The ensuing debate that engulfed the state focused on two contending positions: whether any and all support of religion by government is a violation of the Establishment Clause of the First Amendment or whether some governmental acknowledgment of the country's spiritual heritage is constitutionally justified. Dating back to 1789 presidents have often invoked religion, specifically Christianity, in official proclamations. See President George Washington's October 3, 1789 proclamation:

http://gwpapers.virginia.edu/documents/thanksgiving/transcript.html

and President John F. Kennedy's October 28, 1961 proclamation:

http://www.presidency.ucsb.edu/ws/index.php?pid=8409#axzz1y56DPeqH

The First Amendment's Establishment Clause forbids connections between government and religion. The provision bars Congress from making any "law respecting an establishment of religion." In the late 18th century, however, the clause did more than prohibit Congress from establishing a national church. It also prohibited Congress from interfering with, or trying to disestablish, churches established by state and local governments. In 1789 at least six states had government-supported churches.

[2] Maria Armental, "Cranston West Will Keep Its Prayer and Defend It," *Providence Journal*, March 8, 2011.

Congregationalism was supported in New Hampshire, Massachusetts, and Connecticut, while Maryland, South Carolina, and Georgia each featured a more general form of establishment in their state constitutions.[3] As the late historian Leonard Levy noted, the fact that "Congress considered and rejected a prohibition on the states showed ... that so far as the United States Constitution was concerned, the states were free to recreate the Inquisition or to erect and maintain exclusive establishments of religion."[4] This all changed, however, with the ratification of the Fourteenth Amendment — the lynchpin of our modern constitutional order — in 1868. The language of the Fourteenth Amendment suggests that the Constitution prevents the states and not just the federal government from violating the First Amendment.

Modern legal doctrine concerning the Establishment Clause dates from 1947, in the controversial case, *Everson v. Board of Education*. Prior to *Everson*, the U.S. Supreme Court had decided only two cases under the Establishment Clause.[5] In a contentious 5-4 ruling, the Supreme Court upheld a New Jersey statute that provided for the public busing of students to parochial schools within the state. However, though the justices were divided on the busing issue in *Everson*, they all agreed that the Establishment Clause required a policy of strict separation of church and state. "In the words of Jefferson, the clause against establishment of religion was intended to erect 'a wall of separation' between church and state," stated Justice Hugo Black. Black adopted Thomas Jefferson's metaphor as the principal authority on the meaning of the

[3] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), 32-33.
[4] Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986), 122.
[5] James Ryan and John Jeffries, "The Political History of the Establishment Clause," *Michigan Law Review* (2001), 285.

Establishment Clause, even though Jefferson penned the phrase in his famous 1802 letter to a Baptist Association in Danbury, Connecticut a decade after the Bill of Rights was adopted.[6] The ruling in *Everson* had profound affects all across the country, but no more so than in post-World War II Rhode Island.

The sheer size and political power of the Catholic Church became the most prominent issue in Rhode Island concerning religion and public life. In the early 1960s, over 60 percent of the state's population was Catholic and 27 percent of students were enrolled in Catholic schools. Despite the availability of free public education, Rhode Island relied on non-public education more than any other state in the country. As a consequence, the worsening financial situation of many parochial schools alarmed both citizens and state legislators. Public officials were well aware of the profound state interest in ensuring that the parochial school system did not collapse. A substantial financial burden would fall on state and local governments if parochial schools shut their doors because students would flood the public school system. The financial crisis was caused by several factors: the decline in enrollment in many city parishes due to the suburban exodus, the increasing cost of maintaining school buildings, and the less competitive position of Catholic schools as a result of continually increasing government aid to public education.[7]

Throughout the 1950s and 60s, the Catholic Diocese battled for access to city-owned textbooks, busing, and tuition assistance in the form of educational grants. When a

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[6] See James Hutson, "A Wall of Separation," *Library of Congress - Information Bulletin* (1998). http://www.loc.gov/loc/lcib/9806/danbury.html (Accessed June 3, 2012).

[7] See state-sponsored report authored by Henry M. Brickell, *Non-public Education in Rhode Island* (Providence, 1969). See also See Patrick T. Conley and Fernando Cunha, "State Aid to Rhode Island's Private Schools: A Case Study of *DiCenso v. Robinson*," *The Catholic Lawyer* 22 (Autumn, 1976), 329-333.

case reached him challenging the textbook loan statute, Rhode Island Superior Court Judge Fred Perkins drew a distinction between aid in the form of busing and the loan of a textbook. "Transportation involves only the getting of the pupils to the place where the educational process takes place ... But in the case of furnishing of textbooks the expenditure of public moneys does not stop at the door to the school ... public funds are there expended for the essential functioning of the school itself, a school under religious auspices the support of which basically is banned by the First Amendment."[8] Perkins' ruling, however, was quickly reversed by the Rhode Island Supreme Court once the U.S. Supreme Court in *Board of Education v. Allen* (1968) heard a similar case from New York state and ruled in favor of the loaning of textbooks to nonpublic school students.

Battling the Catholic Diocese every step of the way in the post-World War II period was the Rhode Island ACLU.[9] Recently, the RI ACLU raised the constitutional objection to the prayer mural in Cranston West High School. The legal battle began when the ACLU asked the Cranston School Department to remove the prayer. After the Cranston School Committee voted in early March 2011 to keep the prayer mural up, a federal lawsuit was filed by the ACLU.[10] The position of the ACLU was that the opening lines of the mural clearly invoked religion, specifically the Christian God, and thus ran afoul of the Establishment Clause. The ACLU declared that by endorsing the prayer — no matter how brief, nondenominational, or voluntary it was — the Cranston school

[8] *Bowerman v. O'Connor*, RI Superior Court (1967), 28-29. File at the Rhode Island Supreme Court Judicial Records Center in Pawtucket. For more on *Bowerman* see Erik J. Chaput, "The Battle of the Books in Rhode Island: The Case of *Bowerman v. O'Connor*," *U.S. Catholic Historian* 28 (Summer 2010), 101-115.

[9] See Milton Stanzler, *Eternally Vigilant: A History of the Rhode Island ACLU* (Providence, RI: Professional Press, 1998), 83-93.

[10] Maria Armental, "Two Sides to a Banner," *Providence Journal*, March 7, 2011; Armental, "Cranston West Will Keep Its Prayer and Defend It," *Providence Journal*, March 8, 2011; Armental, "Prayer Banner - ACLU Files Suit," *Providence Journal*, April 5, 2011.

board had unconstitutionally approved the establishment of religion in a public school. The school committee's case was argued primarily on the basis that the prayer mural did not violate the Establishment Clause because the display was predominantly secular in purpose and context. The argument was that when a religious tradition is intertwined with the secular culture for so many years it has a legitimate place in the public sphere. Many Cranston residents clearly lamented the growing secularization of American society, a trend that often results in the marginalization of serious religion.

Jessica Ahlquist, a 16-year old student at Cranston West eventually agreed to serve as the plaintiff in a lawsuit sponsored by the Rhode Island ACLU against the City of Cranston. The lawsuit, which bears Ahlquist's name, brought a swift and passionate reaction from the public. Ahlquist received numerous death threats after she raised objections to the mural and requested its removal. "How does it feel to be the most hated person in RI right now?" was one message posted on the social networking website, Twitter.[11] For a video of a public debate held in Western Hills Middle School in early January 2012 see: http://news.providencejournal.com/breaking-news/2012/01/reciting-our-fa.html.

A political contest erupted among various interest groups, both religious and secular, with competing positions on the proper relation of church and state. The heated rhetoric on talk radio, on street corners, and in churches, demonstrated that the dispute was reaching the level of a culture war — the idea that two opposing world views are

[11] Quoted in Jennifer D. Jordan, "School Prayer Controversy - Threats Directed at Teen," *Providence Journal*, January 14, 2012.

locked in rhetorical combat.[12] A federal judge who heard the case remarked that the atmosphere in Cranston took on the feeling of a religious revival. Judge Ronald Lagueux:

> The Cranston School Committee and its subcommittee held four open meetings to consider the fate of the Mural. At those meetings a significantly lopsided majority of the speakers spoke passionately, and in religious terms, in favor of retaining the Prayer Mural. Various speakers read from the bible, spoke about their personal religious convictions, threatened Plaintiff with damnation on Judgment Day and suggested that she will go to hell.[13]

Tensions reached new heights when the American Humanist Association gave Ahlquist $63,000 in college scholarship funds.[14] In defiance of Ahlquist's case against the city, a local florist printed t-shirts with the language from the mural. State representative Peter Palumbo went on talk radio to chastise Ahlquist, calling her an "evil thing" for objecting to the religious language in the mural.[15]

Shortly after a federal district judge handed down the ruling, a controversy erupted in Woonsocket over a World War I memorial. Atop the memorial, which was built in 1922 and now sits outside the Woonsocket Fire Station, is a Christian cross. A Wisconsin-based atheist group

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[12] See James Davidson Hunter, *Culture Wars: The Struggle to Control the Family, Art, Education, Law, and Politics in America* (New York: Basic Books, 1992).
[13] *Ahlquist v. City of Cranston*, 11-138L, page 31.
[14] "Atheists Give R.I. Prayer-banner Teen Ahlquist $63,000 Scholarship," *Providence Journal*, March 26, 2012. See: http://news.providencejournal.com/breaking-news/2012/03/atheists-give-r.html
[15] "Student Faces Town's Wrath in Protest Against a Prayer," *New York Times*, January 26, 2012. T-Shirts were actually printed up with the phrase "Evil Little Thing" on the front by supporters of Jessica Ahlquist. See: http://news.providencejournal.com/breaking-news/2012/01/evil-little-thi.html

objected to the cross, leading to a fierce battle with Rhode Island veterans.[16]

According to the U.S. Supreme Court in *Lemon v. Kurtzman* (1971), "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." In the words of Justice Harry Blackmun, the members of the Supreme Court believe

> that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause. To that end, our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.[17]

Recent case law was firmly on the side of the ACLU. In 2005, in a 5-4 ruling, the U.S. Supreme Court upheld a circuit court on the unconstitutionality of a display of the Ten Commandments in a Kentucky courthouse.[18] In 2010, a U.S. District Court ruled that an Indiana high school could not allow a student-led prayer at the school's commencement ceremony.[19] A similar prayer mural in Bain Middle School in Cranston was allegedly taken down after the ACLU filed suit on behalf of Jessica Ahlquist, raising suspicions that city officials doubted the constitutionality of the mural in Cranston West High School.[20]

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[16] "Defense Fund of Woonsocket Memorial Raises $15,000," *Providence Journal*, May 11, 2012. See: http://news.providencejournal.com/breaking-news/2012/05/defense-fund-fo.html
[17] *Lee v. Weisman*, 505 U.S. 577 (1992), 609.
[18] *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).
[19] *Workman v. Greenwood Community School Corporation* (2010). See also Elisabeth Harrison, "R.I. Student Draws Ire Over School Prayer Challenge," NPR.org (February 16, 2012). http://www.npr.org/2012/02/14/146538958/rhode-island-district-weighs-students-prayer-lawsuit
[20] See Paul Davis, "Prayer Sparks Atheist's Fight," *Providence Journal*, October 11, 2011.

Rhode Island, the state that pioneered religious liberty and church-state relations, has been at the center the contentious battles over the nature of the Establishment Clause and the First Amendment in the post-World War II period.[21] Rhode Island was founded by Roger Williams, the great Baptist dissenter from Massachusetts Puritanism, who portrayed the true church as a garden threatened by the state and society. Roger Williams's primary concern was to preserve the church from the corrupting influences of the state. As he made clear in his 1644 work, *The Bloudy Tenent of Persecution*, the state was a purely secular entity, having no religious component to it at all, and no authority over religious matters. Thomas Jefferson employed the metaphor of a "wall of separation," a phrase Williams used in the *The Bloudy Tenent*, years later to describe church-state relations, but for different reasons. Jefferson was concerned with the corruption of the secular realm by the involvement of clergy in state government.[22]

In *DiCenso v. Robinson* (1971), which was joined with the landmark case of *Lemon v. Kurtzman* for decision, the Court invalidated a Rhode Island statute that supplemented the salaries of teachers in non-public schools.[23] The famous three-prong test, known in legal circles as the *Lemon*-test, was developed by the Court from a review of the issues in the *DiCenso* and *Lemon* cases. Under the *Lemon*-test, for a statute not to violate the Establishment Clause, (1) it must have a clear secular purpose, (2) its primary effect must be one that neither advances nor inhibits religion, and (3) it must not create a situation of excessive entanglement with religion. Two years later the Court used the

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[21] Patrick T. Conley, *Liberty and Justice*: *A Legal History of Rhode Island* (Providence: Rhode Island Publications Society, 1998), 432-434.
[22] See John M. Barry, *Roger Williams and The Creation of the American Soul: Church, State, and the Birth of Liberty* (New York: Viking Press, 2012), 321-326.
[23] On *Lemon* see Thomas C. Berg, "*Lemon v. Kurtzman*: The Parochial-School Crisis and the Establishment Clause," in Leslie Griffin, ed. *Law and Religion Cases in Context* (New York: Aspen Publishers, 2010). The article can also be accessed here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444560

Lemon-test in *Committee for Public Education and Liberty v. Nyquist* to invalidate a New York program that gave both direct monetary grants to religious schools and tax credits to parents.[24] The *Lemon*-test has been hotly contested since it was introduced. As the Supreme Court noted in 1988 in *Bowen v. Kendrick*, the test sets up a Catch-22 scenario. For aid to be valid, the state must be certain that it is not subsidizing religious instruction. However, in order to be certain, the state must survey and supervise the private school classroom. Therefore, if a state enforces the secular use of aid money, they violate the "entanglement" prong, and if they do not, they violate the "effect" prong of the *Lemon*-test.[25]

In *Lynch v. Donnelly* (1984), a divided U.S. Supreme Court upheld the city of Pawtucket's Nativity display because there was no discernible intent to promote one religious faith over another. The life-sized Nativity display had been held by U.S. District Court Judge Raymond Pettine to violate the First Amendment in November 1981. The display depicting the birth of Christ — which had been part of the city's holiday exhibit for 40 years — was, according to Pettine in his 71-page ruling, prohibited

***Providence Evening Bulletin*, November 10, 1981. Used with Permission.**

[24] However, in 1983, the Court upheld a Minnesota law allowing taxpayers to deduct some of the costs for parochial education from state taxes even though the statute was similar to one the Court struck down in *Nyquist*. See Melvin Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of the United States*, 3rd ed. (New York: Oxford University Press, 2011), 1015-1016.
[25] See Michael McConnell, John Garvey, Thomas Berg, eds., *Religion and the Constitution* (New York: Aspen Publishers, 2002), 471-472.

because it had a clear religious purpose and amounted to an endorsement of Christianity by the city of Pawtucket.[26]

As was the case with Jessica Ahlquist 30 years later, Daniel Donnelly, the RI ACLU co-plaintiff in the case, was verbally attacked by individuals who recognized him from newspaper and television coverage.[27] According to Judge Pettine, the lawsuit triggered "a horrifying (atmosphere) of anger, hostility, name-calling, and political maneuvering, all prompted by the fact that someone had questioned the city's ownership and display of a religious symbol." When the legal "challenge finally came," said Pettine, "the atmosphere in Pawtucket became charged with religious controversy and polluted by the acrid fumes of religious chauvinism."[28] The Court of Appeals for the First Circuit affirmed Pettine's ruling.

After the U.S. Supreme Court agreed to hear the case on appeal, it seemed to most observers that the Court would simply side with the lower courts. However, it was clear during oral arguments that the case was not going to be that simple. In his oral argument before the nation's highest court, William F. McMahon representing the city of Pawtucket argued that "just as common sense tells us that the Ten Commandments in the frieze of this courtroom is not promoting religion, but is symbolizing law, so on the record in this

case common sense will tell us that the city is celebrating Christmas and not promoting religious dogma."[29] The United States

[26] *Providence Evening Bulletin*, November 10, 1981.
[27] Wayne R. Swanson, *The Christ Child Goes to Court* (Philadelphia: Temple University Press, 1992), 20.
[28] Karen Ellsworth, *Providence Evening Bulletin*, November 10, 1981.
[29] William F. McMahon on behalf of the Petitioners (rebuttal argument), argued October 4, 1983. Transcript accessed here: http://www.oyez.org/cases/1980-1989/1983/1983_82_1256/

Supreme, seemingly influenced by McMahon's arguments, reversed Pettine's ruling.

In a separate concurring opinion in *Lynch*, Justice Sandra Day O'Connor attempted to place the decision on a firmer footing by proposing a clarification of the *Lemon*-test. O'Connor's proposal focused on the "endorsement" of religion. In her analysis, the secular purpose prong of the *Lemon*-test should mean that government could not act with the intent of endorsing religion or hindering its free exercise. The requirement of a what constituted a secular effect should be clarified, according to O'Connor, to mean that laws or governmental practices are invalid if they create a perception that government is endorsing or disapproving of religion. Under O'Connor's reasoning, a law which avoids creating a perception of endorsement could thus be sustained even though "it in fact causes, even as a primary effect, advancement or inhibition of religion." What was "crucial" in O'Connor's analysis, was that "government practice not have the effect of communicating a message of government endorsement or disapproval of religion."[30]

The case of *Lee v. Weisman* (1992) represented the culmination of 20-year period in which Rhode Island supplied the Supreme Court with Establishment clause cases. In *Lee*, the justices ruled that a requirement in the capital city of Providence that mandated that students stand and remain silent during “nonsectarian” prayers at graduation exercises violated the Establishment Clause. The case came on the heels of the Court’s important decision in *Marsh v. Chambers* (1983) which had narrowly upheld the right of a state to have a paid chaplain begin each legislative session with a prayer. The issue for the Court to decide in *Lee* was whether the prayer was a state endorsement of religion.

[30] *Lynch v. Donnelly*, 465 U.S. 468 at 691-692. The views put forth by Justice O'Connor were adopted by the Supreme Court in Country of *Allegheny v. ACLU*, 492 U.S. 573 (1989).

The justices reasoned that because it was a formal state sponsored activity and that students were encouraged (though not officially required) to attend, the religious nature of the ceremony was tantamount to forcing religion upon students.[31] Take a few minutes to watch this 1992 interview with Daniel Weisman, the father of Nathan Bishop Middle School student Deborah Weisman: http://www.c-spanvideo.org/program/22507-1

In the pages that follow, you will find excerpts from *Lemon*, *Lynch* and *Lee*, along with annotated briefs presented by counsel in *Ahlquist* v. *City of Cranston*. Students will be asked to study the background and rulings in *Lemon*, *Lynch*, and *Lee* and apply what they have learned to the recent controversy in Cranston over the prayer mural at Cranston West High School. Is there a way to reconcile or make sense of U.S. Supreme Court rulings relating to the Establishment Clause? At the end of the multi-day lessons, students will be broken up into small groups, with one group presenting arguments in favor of keeping the prayer mural hanging in the school auditorium, another group presenting arguments in favor of removing it, and another group playing the role of U.S. District Court Judge Ronald Lagueux.

[31] Even after the Supreme Court handed down its ruling in *Lee*, school-organized prayers continued to be a common feature in public education, especially at athletic contests in the South. See, for example, *Santa Fe Independent School Dist. v. Doe* 530 U.S. 290 (2000).

Case Summaries

1. *Lemon v. Kurtzman* (1971).

The issue of public financial support to non-public schools “was nowhere else as critical,” noted an influential 1969 study of non-public education in Rhode Island, because “the non-public population nowhere else constituted such a large proportion of the total population of school children.” Despite the availability of free public education in the 1960s, Rhode Island relied on non-public education more than any other state in the Union. As a consequence, the worsening financial situation that many parochial schools throughout the state found themselves alarmed many citizens and state legislators. Public officials were well aware of the fact there was a profound state interest in making sure that the parochial schools did not collapse for the simple reason that it would lead to a substantial financial burden for the state.

The Rhode Island General Assembly sought to defray private school teachers' salaries and other educational costs. The Teacher Salary Supplement Plan sought to relieve a grave financial crisis in Catholic parochial schools that state legislators feared could spill over into the public system. The statute authorized the state to pay teachers in private elementary schools supplements of up to 15 percent of their current salary until the supplemented salary equaled the average maximum salary of public-school teachers. The statute required teachers to be state certified, to teach only non-religious subjects, and to use the same materials used by public school teachers. The act was signed into law by the Governor Richard Licht in May 1969. Rhode Island taxpayers represented by Joan DiCenso brought suit against the Commissioner of Education William P. Robinson on the

grounds that the Teacher Salary Supplement Plan was a violation of the Establishment Clause because tax payer dollars were being used to support religiously affiliated schools and that the state was forced to oversee the operation of those institutions. In December 1969, the Rhode Island branch of the American Civil Liberties Union filed a complaint on behalf of DiCenso in district court seeking a permanent injunction against the disbursement of funds. In June 1970, the district court unanimously held that the law violated the Establishment Clause because it created an "excessive entanglement" with religion. The lower court found that the parochial school system in Rhode Island was "an integral part of the religious mission of the Catholic Church." The state of Rhode Island appealed.

In June 1971, the United States Supreme Court handed down one of its most important rulings on the Establishment Clause of the First Amendment in the 20th century. In the case of *Robinson v. DiCenso,* the Court dealt with the question of whether or not the Rhode Island statute constituted an "excessive governmental entanglement with religion." The ruling in *DiCenso* was issued in conjunction with two other cases, including one from Pennsylvania, *Lemon v. Kurtzman.* In *Lemon,* the Justices considered a law that allowed the superintendent of schools to reimburse parochial schools for books, materials, and teachers' salaries as long as the courses taught were "secular" and the books were approved by the superintendent. A group of Pennsylvania residents, including Alton Lemon, sought an injunction against superintendent David Kurtzman in federal court. The lower court upheld the Pennsylvania law as being legal and constitutional under the First Amendment. Alton Lemon, assisted by the American Civil Liberties Union, appealed the ruling. The third case to be decided by the Supreme Court

under the umbrella opinion issued by Chief Justice Warren Burger was *Earley v. DiCenso*. Earley was the president of the National Association of Catholic Educators. Earley's contention was that the Free Exercise benefits, which flow from aid to parochial education, should prevail over the Establishment clause values protected by strict separation. Earley's association were the prime backers of the 1969 salary supplement act in Rhode Island.

Link to OYEZ: http://www.oyez.org/cases/1970-1979/1970/1970_89

2. *Lynch v. Donnelly* (1984)

On December 17, 1980, eight days before Christmas, the Rhode Island affiliate of the American Civil Liberties Union challenged the Nativity scene on display in front Pawtucket city hall in a suit filed in district court. The ACLU argued that the city's use of taxpayer dollars to support a religious display that depicted the birth of Christ constituted a promotion of religion and was therefore ran afoul of the Establishment Clause of the First Amendment. The lawsuit was brought on behalf of Dennis Donnelly, a Pawtucket resident. Shortly thereafter, Pawtucket's mayor, Dennis Lynch, held a press conference from a podium adjoining the crèche, at which he vowed to fight what he saw as the ACLU's attempt to take "Christ out of Christmas." For a short video on Mayor Lynch produced by the editors at the Voices of American Law Project see: http://web.law.duke.edu/voices/lynch# (click on "party narrative")

Lynch and others argued that the crèche was only a small part of a much larger display and was therefore not the focal point. The formal proceedings in the case began in

February 1981 in federal district court with a fact-finding trial presided over by Judge Raymond Pettine. Nine months later Pettine issued his ruling siding with the position put forth by the ACLU. The district court concluded that the city's crèche violated each part of the three part purpose-effects-entanglement test set forth in *Lemon v. Kurtzman.* Pawtucket decided to appeal Pettine's decision to the First Circuit Court of Appeals in Boston. On November 3, 1982, the court of appeals affirmed the district court's ruling. The case was then appealed to the United States Supreme Court.

Link to OYEZ: http://www.oyez.org/cases/1980-1989/1983/1983_82_1256

3. *Lee v. Weisman* (1992)

The Providence school system for many years had a practice of inviting members of the clergy of various religious groups to offer prayers at graduation ceremonies. When Daniel and Vivien Weisman's daughter graduated from middle school in 1986, they began offended by the prayer of a Baptist minister. For a short video on the Weisman family produced by the editors at the Voices of American Law Project see: http://web.law.duke.edu/voices/lee# (click on "party narrative"). See also this interview with the attorney representing the Providence School District: http://www.c-spanvideo.org/program/Praye

When Daniel and Vivien Weisman's youngest daughter Deborah was set to graduate from Nathan Bishop Middle School in 1989, the school system, perhaps in a move to appease them, asked a local rabbi to offer the prayer at the graduation exercises.

Robert Lee was the principal of Nathan Bishop Middle School. At the disputed graduation, a Rabbi thanked God for "the legacy of America where diversity is celebrated...O God, we are grateful for the learning which we have celebrated on this joyous commencement...we give thanks to you, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion." The legal objection raised by Daniel and Vivien Weisman was not simply that they were offended as practicing Jews because a Baptist minister gave the invocation for their oldest daughter. Their argument was that any sponsored prayer at a public ceremony violated the Establishment Clause of the First Amendment because it constituted an excessive entanglement of religion and the secular realm. With the aid of the Rhode Island ACLU, the Weismans filed suit. The district court issued a permanent injunction barring various Providence public school officials from inviting clergy to deliver invocations and benedictions at future graduations. The court of appeals upheld the injunction. The petitioners' argument that the option of not attending the ceremony excuses any inducement or coercion in the ceremony itself was rejected by the lower courts. When the United States Supreme Court agreed to hear an appeal of the lower courts rulings, many wondered of the conservative majority on the Court would take the chance to overturn *Engel v. Vitale* (1962).

Link to OYEZ: http://www.oyez.org/cases/1990-1999/1991/1991_90_1014

NEWSPAPER ARTICLES ON *LEMON*, *LYNCH*, AND *LEE*

Providence Evening Bulletin

"180 Teachers Eligible"

December 18, 1969

BY: CAROL YOUNG

About 180 non-public school teachers appear to be eligible for salary supplements paid by the state, according to information by William P. Robinson, Jr., state commissioner of education.

The average salary of the applicants is approximately $6,100 including the 15-percent supplement from the state. The supplement averages about $915 for each teacher.

Total cost for the supplements during the current school year is expected to reach about $167,000, or $208,000 less than the amount appropriated by the 1969 General Assembly. The legislature approved $375,000 because the diocesan school office estimated that about 360 teachers would be eligible for the money at the time the salary supplement bill was under consideration last spring.

Under the law, aid is available exclusively to teachers of grades one through eight who are teaching only secular subjects and who are using only teaching materials that are used in public schools. To be eligible the teacher also must be working in a non-public school that is spending less per pupil than the average public school.

According to regulations governing the payment of the salary aid, the stipend will be paid through the state controller's office directly to the teacher twice a school year. The first payment is scheduled for sometime in February and the second will be sent out in June.

A suit challenging the constitutionality of the state law was filed earlier this week in U.S. District Court by a group of Rhode Island taxpayers. The complaint asks that a three-judge federal court be convened for the purpose of temporarily and permanently enjoining the payments.

Information as of yesterday, supplied by Mr. Robinson and Edward F. Wilcox, associate commissioner of education who is taking charge of the processing of applications for both teacher and school eligibility, includes:

- The 180 applicants considered eligible so far are teaching in 51 Roman Catholic elementary schools in 16 towns and cities.
- The per-pupil expenditure in these eligible schools falls below the average annual per-pupil expenditure in public schools of $502.
- Of the 180 eligible applicants, all have teaching certificates issued by the state, but 163 of them are the so-called "emergency" or provisional certificates.
- No applicant will receive a salary in excess of the average of the maximum salary—$9,680—paid to the elementary classroom teachers in the state's public schools. This average is based on 1968-1969 scales.

- One teaching nun, Sister Mary Virginia Kelly, R.S.M, of the St. Thomas parochial school in Providence, is eligible for a supplement set at $1,050.

Mr. Robinson estimated that about 30 teachers were turned down when they applied for teaching certificates, the first step toward eligibility for the supplement. This was because they did not have the educational requirements for either a provisional or a permanent certificate.

Another 18 applicants have been determined ineligible during the processing. Current practice, he said, is to give consideration only to those who have completed at least three years of college or 90 semester hours of courses and have had some teaching experience.

Using these requirements as a minimum for consideration, the state will issue a provisional certificate with the understanding that the teacher involved must show proof of having completed six semester hours of additional academic work in order to receive a renewal the next school year, he said.

The commissioner said that ideally he would prefer to have all teachers, public and private, on permanent certification, but he is not alarmed by the high percentage of teachers receiving the state aid who are being certified on an emergency basis.

He noted that 933 of the state's total public school professional force of 9,500 persons now are holding emergency certificates. This ratio compares favorably with the 163 non-public school teachers given emergency certificates out of a total teaching force of about 1,494, he said.

Mr. Wilcox said that the non-public's school expenditure, which are being used to determine per-pupil expenditures, involved the costs of administration, instruction, operation and maintenance of school plant, fixed charges and auxiliary services. These are the same items used in figuring per-pupil expenditures for public school students.

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Providence Evening Bulletin

"U.S. Court Bans Pawtucket Nativity Scene"

November 10, 1981

BY: KAREN ELLSWORTH

Providence - The life-sized Nativity scene in Pawtucket's annual downtown Christmas display violates the First Amendment's requirement of separation of church and state and must be permanently removed, Chief Judge Raymond J. Pettine of U.S. District Court ruled today.

The display depicting the birth of Christ — which has been part of the city's holiday exhibit for 40 years — is prohibited by U.S. Supreme Court decisions, because it has a religious purpose, amounts to an endorsement of Christianity by the city, and has caused political disputes along religious lines, Pettine found.

Pettine's ruling came in the controversial lawsuit filed a week before Christmas last year by the Rhode Island Affiliate of the American Civil Liberties Union.

The ACLU challenged the display as a violation of the clause in the U.S. Constitution that prohibits government "establishment of religion" and charged that taxpayers' money was being used unconstitutionally to maintain the display.

Pettine postponed his ruling until after Christmas last year because of the emotional nature of the issue. But the lawsuit spurred heated public debate and triggered what Pettine characterized "as a horrifying (atmosphere) of anger hostility, name-calling, and political maneuvering, all promoted by the fact that someone had questioned the city's ownership and display of a religious symbol.

IN HIS 71 PAGE OPINION, the judge rejected the city's argument that maintaining the Nativity display did not significantly involve the city in a religious activity, and that the Nativity scene had become primarily a secular symbol, like Santa Claus or the Christmas tree, rather than a religious symbol.

Pettine noted that according to letters and newspaper stories submitted as evidence during the trial on the case last February, many people saw the lawsuit as an attack on religious beliefs and values held by the majority.

He began his opinion by noting that the "establishment" clause is "a fundamental restriction on government power." And he concluded by noting what it "is not about."

"It is not about an infringement of the right of Christians to freely express their belief that Christmas is the day on which the Son of God was born," Pettine wrote. "This decision has nothing to do with the ability of private citizens to display the crèche in their homes, yards, businesses or churches."

"However, the right to express one's own religious beliefs does not include the right to have one's government express those beliefs simply because the believers constitute a majority," Pettine wrote.

"THE DECISON should be hailed by anyone concerned about religious freedom in this country," Steven Brown, ACLU executive director, said today.

"Judge Pettine has decisively acknowledged the religious aspects of a Nativity scene display, and in this way, he has defeated the arguments of the city and others who have tried to minimize and degrade the significance of this important symbol of Christianity," Brown said.

"We would expect that other cities and towns in the state that put up Nativity scenes would abide by Judge Pettine's decision also," Brown said, adding that several communities erected Nativity displays similar to Pawtucket's last year.

Pawtucket city solicitor Maryfrances McGinn said today that the city will appeal the decision and is "committed to continuing the Christmas display, including the Nativity scene ... in compliance with the decision." She declined to discuss how that might be accomplished.

She said the decision to appeal was made today in a discussion with Mayor William Harty. The city will ask Judge Pettine to stay the decision pending appeal, and will seek a stay for the U.S. Court of Appeals for the First Circuit, if Pettine denies the stay, she said.

THE NATIVITY SCENE is part of a Christmas display owned and erected by the city in Hodgson Park, a privately owned piece of land in the center of the downtown business area. Besides the Nativity scene, last year's display featured a live, 40-foot Christmas tree with lights, figures of carolers and musicians, a village scene, a Santa Claus who distributed candy to children, and other holiday symbols.

Former Mayor Dennis M. Lynch, who publicly supported the display after the lawsuit was filed and held a rally at the site, leading children and city workers in the singing of

Christmas carols, testified at the trial last February that the display had cultural, aesthetic, and commercial purposes.

"I've never seen people as mad as they are over this issue," Lynch testified, adding that he thought the attempt to eliminate the display was a "step towards establishing another religion, non-religion that it may be."

Before applying the U.S. Supreme Court's guidelines for "establishment clause" cases to the facts about the Pawtucket display, Pettine considered the city's argument that the case did not involve a church-state issue at all.

The city's lawyers argued that Christmas has become a secular, national holiday and symbols such as the Nativity scene have lost their purely religious meaning.

"The court does not agree," Pettine wrote. "Christmas remains a major spiritual feast day for most sects of Christians." It has not lost its religious significance, but rather has gained secular significance as well, Pettine said.

THE SUPREME COURT has never said that government cannot involve itself in any activity that includes religion, Pettine said. But it has said government cannot promote aspects that are religious, and government must take great care to draw the line between secular and religious activities, he said.

Pettine rejected the argument that the Nativity scene is merely a depiction of a historical fact — the birth of Jesus. Most people, whether or not they are Christians, recognize it as a fundamentally religious symbol, he said.

The Supreme Court has ruled that to comply with the Constitution's prohibition against governmental establishment of religion, government laws or activities must have a secular purpose, must neither promote nor inhibit religion, and must not cause excessive government involvement with religion nor spur political disputes along religious lines.

Pettine found that the purpose of Pawtucket's Nativity scene appears to be "to promote the theological message that the symbol conveys." He noted that at least two other federal district courts have approved Nativity scenes in public Christmas displays, but said he finds the reasoning behind those decisions "extremely troubling."

THE DISPLAY PROMOTES religion because "the appearance of official sponsorship of Christian beliefs that the crèche conveys confers more than a remote and incidental benefit on Christianity," Pettine wrote.

"Were the notion that it is desirable for government to support the religious views of the majority to become so ingrained as to be accepted without scrutiny and defended without hesitation, a significant breach would be made in the constitutional citadel that protects our religious liberty," he wrote.

Pettine acknowledged that by putting up the display every year, the city has not become administratively entangled with religion. But the display has caused divisiveness along religious lines, he said.

In its 40-year history, the Nativity scene apparently has not promoted any dispute, Pettine said. But this "calm history" can be viewed two ways, he said — as a sign that religious minorities were not offended, or as a sign that they were afraid to anger the majority by speaking out.

THE POTENTIAL FOR divisiveness was always there, and "when the challenge finally came, the atmosphere in Pawtucket became charged with religious controversy and polluted by the acrid fumes of religious chauvinism," he wrote.

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Providence Journal

"Pawtucket's Nativity scene debated before Supreme Court"

October 5, 1983

BY: KAREN ELLSWORTH

The controversy over Pawtucket's Nativity scene reached the marble and mahogany of the U.S. Supreme Court yesterday as two Rhode Island lawyers debated whether the creche violated the constitutional mandate of separation of church and state.

Two lower courts have ruled that the city-owned display amounts to promotion of religion, in violation of the First Amendment's ban on government "establishment" of religion.

Providence lawyer William F. McMahon, representing the city, urged the nine justices to overturn those lower courts. The city, he said, "is not promoting religion - the (city) is celebrating Christmas."

But Amato A. DeLuca, the American Civil Liberties Union lawyer from Warwick who filed the suit three years ago that led to yesterday's arguments, said the creche is a powerful religious symbol. He urged the court to make it clear that "religion is not the business of government."

THE TWO LAWYERS stood beside the counsel tables as they spoke, looking up at the nine justices seated in a semicircle in front of pillars and red velvet curtains.

Behind the lawyers in the imposing chamber sat an audience sprinkled with Rhode Islanders (including former Pawtucket Mayor Dennis M. Lynch) and packed with reporters. The court's ruling will determine what kind of holiday display municipalities all over the country can put up.

The court does not rule immediately when it hears arguments, or give any indication of when or how it will decide. But the justices' questions often reveal the issues that concern them.

In Lynch v. Donnelly - the case's formal name - the justices appeared most concerned about where to draw the line between government-sponsored displays that reflect a common cultural heritage and those that may appear to endorse a particular religion.

McMAHON BEGAN his 20-minute argument by summarizing the case. He said the Nativity scene - a manger and about 15 one- to five-foot-high figures representing the scene at the birth of

Jesus - occupies only a tiny part of the city's Christmas display, which also includes such items as Santas, colored lights and a wishing well, he said.

It was owned by the city when the suit was filed, and displayed in Hodgson Park, a privately owned parcel downtown near City Hall.

Christmas is a "secular folk festival" that has religious roots, McMahon said. Governments are prohibited from promoting religious symbols, but whether a symbol is religious depends almost entirely on the context in which it is displayed, he said.

The Pawtucket Nativity scene, he said, "is not a promotion of religion but is really an acknowledgement of the American tradition of Christmas."

WHAT IF the city displayed only a creche? asked Justice Sandra Day O'Connor.

"That would obviously be less secular" than a display that includes mostly non-religious symbols, McMahon replied, but it still would not amount to promotion of religion.

Then we can ignore the rest of the display? he was asked.

No, McMahon replied, the creche's meaning depends on the entire display.

O'Connor then posed a hypothetical question. What if the city decided to recognize Easter, and put up a display that included Easter bunnies, colored eggs and a crucifix?

That might be different, McMahon said, because Easter is not a national holiday like Christmas. But it would still depend on the context, he said. Military cemeteries in France and Hawaii have hundreds of crosses, he said.

DeLUCA BEGAN with his strongest point - that the creche, with the possible exception of the cross, is the most powerful symbol of Christianity. To display the biblical story of the birth of Jesus 100 feet from City Hall can only amount to city promotion of Christianity, he said.

The secular symbols in the display don't make the creche secular any more than the creche makes the Santas and reindeer religious, DeLuca said.

He seized upon O'Connor's hypothetical Easter display to illustrate his point. If the city is right, DeLuca said, municipalities all over the country could erect crosses in their holiday displays, and courts all over the country would be flooded with cases challenging the displays on First Amendment grounds. Any taxpayer could demand that his city use his tax money to support his religion, DeLuca said.

WHAT ABOUT the frieze on the wall above us that illustrates the Ten Commandments? O'Connor asked.

That's different, DeLuca said, because it symbolizes "the beginnings of our law."

That's the city's argument, O'Connor said - that the creche symbolizes the beginnings of Christmas

But the Ten Commandments on the wall of the Supreme Court chamber don't promote religion, DeLuca contended. Posting the Ten Commandments on the wall of a public schoolroom does, as the Supreme Court said in a 1980 decision, he said.

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Providence Journal

"Prayer at Graduation Protested"

June 17, 1989

BY: D. MORGAN McVICAR

A Rhode Island College professor filed suit in U.S. District Court yesterday seeking the prohibition of prayer at public school graduation ceremonies.

The suit, filed by the Rhode Island affiliate of the American Civil Liberties Union in behalf of Daniel Weisman of Providence, contends that prayer at graduations violates the First Amendment's ban on governmental sponsorship of religion.

Weisman is seeking a temporary restraining order to bar an invocation and a benediction scheduled for his daughter Deborah's graduation Tuesday from Nathan Bishop Middle School. Steven Brown, ACLU executive director, said he expects that a hearing will be held Monday on the restraining order.

Brown said it is the first suit in Rhode Island seeking a ban on invocations and benedictions, which are common at graduations. But he said courts in Oregon, Texas and Iowa recently barred the prayers from graduations.

And several weeks ago, the U.S. Supreme Court declined to hear an appeal of an appeals court ruling that prohibited a high school in Georgia from holding prayers before football games.

"The issue is identical to that of routine school prayer during the day," Brown said. "It simply is not the business of the government or of schools to sponsor any religious activity at all."

Weisman, 42, of 107 Overhill Rd., Providence, said he first questioned the propriety of prayer at graduation when his daughter Merith graduated three years ago from Nathan Bishop.

"A fundamentalist Baptist preacher credited Jesus for her accomplishments, and included a minute of silent prayer to acknowledge Jesus' endowing of my child," said Weisman, who is Jewish. "It was one of the few times in my life it became very clear to me what a minority I'm in as a Jew, and I felt very excluded. . . . I felt victimized. He was essentially saying, 'You're not part of us.' And it hurt."

When he received a program for this year's graduation, and saw that it included an invocation and benediction, Weisman said, he called the school to complain. He said he was told, "You'll be more pleased this time. It's a rabbi, your own faith." Rabbi Leslie Y. Gutterman of Temple Beth-El is scheduled to deliver the invocation and benediction at the Nathan Bishop graduation.

"I still felt it is inappropriate for one's religious beliefs to be foisted on those of other faiths at any publicly sponsored activity," Weisman said.

Weisman said he protested to school principal Robert E. Lee, who "expressed sympathy to our viewpoint," but said graduation would proceed as planned.

Weisman said he then turned to the ACLU.

School officials express surprise

School Department officials reacted with surprise and caution yesterday.

School Supt. Joseph Almagno was at a conference on Cape Cod, and was not familiar with the specifics of the suit.

"We'll have to get an opinion from our attorney," Almagno said. "We will not violate any court order or the Constitution in any way. From a personal point of view, I've never had an objection to schools' including benedictions and invocations in graduation exercises. Last year one of our benedictions or invocations was distressing to one member of the community, who wrote to me.

"We then disseminated guidelines to all our schools, emphasizing there should be a nondenominational tone."

School Department lawyer Joseph A. Rotella declined to comment, saying he has yet to see the suit.

School Committee chairman Vincent McWilliams said that if "something is being done that is offending people, we would have to cease the practice.

"I don't know if we would totally do away with (invocations and benedictions). It's something that's become a practice over the years. But if it's become offensive to people, we have to rethink the concept."

Rabbi Gutterman said he strongly supports the separation of church and state, but said he does

not see opposition to benedictions and invocations as a logical extension of that support.

"My sentiments tend to try to express the hopes and aspirations appropriate to the ceremony, and not try to transform it into a religious occasion," Rabbi Gutterman said.

"I try to come to these occasions being as sensitive as I can to people of different faiths and people of no faith. I try to look at issues beyond my denomination, expressing hopes appropriate to parents and graduates.

"It's a principle I would not mind seeing debated in an open forum. . . . It's one of the gray areas. I was invited last year to give the invocation before the start of the U.S. Senate by the chaplain of the Senate. There are many areas in which our religious and our civic life are intertwined."

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Providence Journal

"School Ritual Includes Prayers"

June 20, 1989

BY: TOM MOONEY and JOHN CASTELLUCCI

Rabbi Leslie Y. Gutterman delivered the invocation and benediction to 127 graduates of the Nathan Bishop Middle School this morning, after a federal judge refused yesterday to bar the prayers at the request of a parent who alleged that they violated the principle of the separation of church and state.

But the invocation was phrased in a way that Rabbi Gutterman later said he hoped would overcome the potential diviseness of the controversy.

"God of the free, hope of the brave, for the legacy of America, where diversity is celebrated and the rights of minorities are protected, we thank you," he said.

"For its court system, where all can seek justice, we thank you," he said.

Chief U.S. District Judge Francis J. Boyle yesterday denied an attempt to prevent the prayers, saying although the case raises serious questions about prayer in schools, he needed more time to study it.

The Rhode Island affiliate of the American Civil Liberties Union sued Friday in behalf of Daniel

Weisman of Providence, contending graduation prayers violate the First Amendment's ban on governmental sponsorship of religion.

Weisman's daughter Deborah, 14, was graduated today from Nathan Bishop.

Boyle, upset that he was asked to rule on a case he drew only hours earlier, said yesterday that although "this is a serious question that may have merit" the court is "entitled to a little more time for reflection."

"This isn't McDonald's," he said. "We try not to serve fast food here."

Boyle said he would hear the case again next week. Although it would have no effect this year, his ruling could affect all Providence schools that have invocations and benedictions as part of their graduations.

ACLU lawyer Sandra Blanding told Boyle the ACLU could not have asked for the temporary injunction any sooner since Weisman, a Rhode Island College professor, came to them only after attempting to settle the issue out of court.

Weisman, who is Jewish, said last week he first questioned the propriety of prayer at graduations when his older daughter, Merith, graduated three years earlier from Nathan Bishop and a Baptist preacher credited Jesus for his daughter's accomplishments.

When Weisman learned this year's graduation would also include an invocation and benediction, he protested to school Principal Robert E. Lee, who expressed sympathy but said the graduation would proceed as planned.

School Supt. Joseph A. Almagno agreed with the ACLU that the case raises serious questions about prayer in schools, but he said such speeches are traditional and designed to be more "inspirational messages" than prayers.

To emphasize that point, he said, school officials will contact schools planning to give invocations or benedictions to ensure that their talks are non-denominational.

Meanwhile, Weisman said he received more than a dozen calls over the weekend regarding his suit. Most were supportive, he said, but about a third of the callers used "invective, unprintable language" to express their displeasure.

"Somebody called and told me, 'Go back to Israel,' " Weisman said. "I had someone else call me 'scum bag' repeatedly, and another say 'I'm sick and tired of Jews telling Christians what to do.'

But he said some callers bolstered him.

"A lot of people have communicated to me that they were equally affronted and felt brutalized" by prayers said at their children's graduation, but that it didn't occur to them to do something about it, he said.

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Providence Journal

"Prayers Barred at School Rites"

January 10, 1990

BY: JUDY RAKOWSKY

In a ruling he found "difficult but obligatory," Chief U.S. District Judge Francis J. Boyle yesterday barred prayer at public school graduation ceremonies because it promotes religion.

The decision effectively outlaws prayer at any graduation ceremony of a Rhode Island public elementary or secondary school. It affects a widespread, but not universal practice at commencement exercises around the state.

Boyle said prayers delivered last June by Rabbi Leslie Y. Gutterman at graduation ceremonies for Nathan Bishop Middle School in Providence violated a student's constitutional rights under the establishment clause of the First Amendment.

Rabbi Gutterman's invocation was a prayer, Boyle said, because he addressed a deity in the first line and concluded with "Amen." His benediction also was a prayer, he said, because "it opened with an appeal to a God, asked God's blessings,gave thanks to a Lord and concluded with 'Amen.' "

Such prayers are unconstitutional, Boyle found, because they "convey a tacit preference for some religions, or for religion in general over no religion at all."

The judge pointed out that "on every other school day, at every other school function, the Establishment Clause (of the First Amendment) prohibits school-sponsored prayer." Therefore, "prayer on graduation day is also inappropriate under the doctrine currently embraced by the Supreme Court."

The decision, Boyle wrote, does not prohibit clergy "from giving a secular inspirational message at the opening and closing of the graduation ceremonies."

Boyle granted a permanent injunction to Daniel Weisman of 107 Overhill Rd., Providence, whose daughter Deborah was set to graduate from Nathan Bishop last June when Weisman sued school officials to ban prayer from the ceremonies, then four days away. But Boyle denied the

restraining order, allowing graduation to proceed as planned, saying he did not have enough time to consider the important issues involved and could not be sure what Rabbi Gutterman was going to say.

Steven Brown, director of the Rhode Island affiliate of the American Civil Liberties Union, which represented Weisman in the suit, praised Boyle for ruling in accord with a long line of U.S. Supreme Court cases.

"(The ruling) recognizes that in a society that is as pluralistic as ours, it is simply inappropriate for public schools to be taking positions on particular religious viewpoints," Brown said.

School officials and Rabbi Gutterman himself lauded the ruling for clarifying the issue. Rabbi Gutterman said he expects that it "will be deemed appropriate by many in the religious community who often find such situations awkward in trying to respond to various religious beliefs in an audience."

Providence School Supt. Joseph Almagno said he is "personally delighted" by the opinion because it allows schools to continue to invite clergy to participate in graduation exercises.

Almagno said it is up to the Providence School Board to decide whether to appeal the decision. He said he is recommending that the decision not be appealed, and that the School Board install a policy to make sure that clergy do not violate it when they give invocations and benedictions at commencement. They might be asked to sign a form in advance that says they understand and plan to abide by Boyle's decision, he suggested.

Rhode Island is not the first federal court to address prayer at public school graduation. Boyle's ruling agrees with a similar federal case in Iowa and one in Texas that contested the reciting of a prayer posted over a school gym at pep rallies and athletic games, said Sandra Blanding, the Weismans' lawyer.

Federal appellate courts previously have outlawed prayers at public school assemblies and football games.

In their defense, the Providence schools had cited a 1987 federal appeals court ruling that found the specific prayer involved in the case unconstitutional but left open the possibility that some other prayer might not be.

Boyle said that would mean federal judges could rule on individual prayers, a prospect he found "unworkable."

The schools also urged Boyle to apply a 1983 U.S. Supreme Court ruling that upheld the practice of the Nebraska Legislature to open each session with a prayer led by a state-paid chaplain. The high court found the practice to be so "deeply embedded in the history and tradition of this country" that the Constitution could not have intended it to be barred.

But Boyle found that the Nebraska case does not apply to school prayer.

Boyle acknowledged his personal reluctance in making the decision. He said that school-sponsored prayer might be helpful to young people undergoing difficult times. But, he said, "The Constitution as the Supreme Court views it does not permit it."

He said "those who are anti-prayer thus have been deemed the victors. That is the difficult but obligatory choice this court makes today."

Blanding, Weisman's lawyer, said she sees it differently.

"The issue is where prayers are appropriate." The law, she said, clearly says that "Prayer in a public school setting is just not allowable."

MAJORITY OPINION EXCERPTS

Lemon v. Kurtzman (1971)

Questions to consider: Under the Rhode Island statute, who was eligible for the salary supplement? What is the three-prong test the Supreme Court outlines in terms of measuring whether a statute violates the Establishment Clause?

NOTE: This opinion has been edited for classroom use. No indication has been made of deleted material and case citations. For the full text of all the opinions in the case see: http://www.law.cornell.edu/supct/html/historics/USSC_CR_0403_0602_ZS.html

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

The Rhode Island Statute:

The Rhode Island Salary Supplement Act was enacted in 1969. It rests on the legislative finding that the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The Act authorizes state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. As supplemented, however, a nonpublic school teacher's salary cannot exceed the maximum paid to teachers in the State's public schools, and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a nonpublic school at which the average per-pupil expenditure on secular education is less than the average in the State's public schools during a specified period. Appellant State Commissioner of Education also requires eligible schools to submit financial data. If this information indicates a per-pupil expenditure in excess of the statutory limitation, the records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity.

The Act also requires that teachers eligible for salary supplements must teach only those subjects that are offered in the State's public schools. They must use "only teaching materials which are used in the public schools." Finally, any teacher applying for a salary supplement must first agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act.

Appellees are citizens and taxpayers of Rhode Island. They brought this suit to have the Rhode Island Salary Supplement Act declared unconstitutional and its operation enjoined on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment. Appellants are state officials charged with administration of the Act, teachers eligible for salary supplements under the Act, and parents of children in church-related elementary schools whose teachers would receive state salary assistance.

A three-judge federal court was convened. It found that Rhode Island's nonpublic elementary schools accommodated approximately 25% of the State's pupils. About 95% of these pupils attended schools affiliated with the Roman Catholic church. To date some 250 teachers have applied for benefits under the Act. All of them are employed by Roman Catholic schools.

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was "an integral part of the religious mission of the Catholic Church."

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.

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."

The broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment

was intended to protect ... To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

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.

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. The Rhode Island District Court found that the parochial school system's "monumental and deepening financial crisis" would "inescapably" require larger annual appropriations subsidizing greater percentages of the salaries of lay teachers. Although no facts have been developed in this respect in the Pennsylvania case, it appears that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program.

We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of

these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. 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.

Lynch v. Donnelly (1984)

Questions to Consider: Does including the nativity scene in the holiday display in front of Pawtucket City Hall constitute an "endorsement" of religion? Did the other elements in the display change the religious nature of the display? Consider the following hypothetical situation: A judge places a large copy of the Ten Commandments in a prominent position in the courtroom right behind the bench. Around the courtroom in less visible places are hung copies of the Code of Hammurabi, the Magna Carta, the Mayflower Compact, and the Declaration of Independence. Is the display of constitutional?

NOTE: This opinion has been edited for classroom use. No indication has been made of deleted material and case citations. For the full text of all the opinions in the case see: http://www.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZO.html

CHIEF JUSTICE WARREN BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a creche, or Nativity scene, in its annual Christmas display.

Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R. I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation - often on public grounds - during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the city.

The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5'. In 1973, when the present creche was acquired, it cost the city $1,365; it now is valued at $200. The erection and dismantling of the creche costs the city about $20 per year; nominal expenses are incurred in lighting the creche. No money has been expended on its maintenance for the past 10 years.

Rather than taking an absolutist approach in applying the Establishment Clause and mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith, this Court has scrutinized

challenged conduct or legislation to determine whether, in reality, it establishes a religion or religious faith or tends to do so.

In the line-drawing process called for in each case, it has often been found useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. But this Court has been unwilling to be confined to any single test or criterion in this sensitive area.

In this case, the focus of our inquiry must be on the creche in the context of the Christmas season.

When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated. The city, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.

The narrow question is whether there is a secular purpose for Pawtucket's display of the creche. The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes. The District Court's inference, drawn from the religious nature of the creche, that the city has no secular purpose was, on this record, clearly erroneous.

The dissent asserts some observers may perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion. We can assume, arguendo, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an `indirect,' `remote,' or `incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

The Court has acknowledged that the "fears and political problems" that gave rise to the Religion Clauses in the 18th century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.

JUSTICE SANDRA DAY O'CONNOR, concurring.

I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine.

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines.

Our prior cases have used the three-part test articulated in *Lemon v. Kurtzman,* as a guide to detecting these two forms of unconstitutional government action. It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause.

In this case, as even the District Court found, there is no institutional entanglement. Nevertheless, the respondents contend that the political divisiveness caused by Pawtucket's display of its creche violates the excessive entanglement prong of the *Lemon* test. In my view, political divisiveness along religious lines should not be an independent test of constitutionality.

[T]he constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the *Lemon* test is properly limited to institutional entanglement.

The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the creche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the creche and what message the city's display actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action.

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Applying that formulation to this case, I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche, but celebration of the public holiday

through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

Pawtucket's display of its creche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the creche. Although the religious and indeed sectarian significance of the creche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display -- as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood. The creche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.

Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind 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. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.

The city of Pawtucket is alleged to have violated the Establishment Clause by endorsing the Christian beliefs represented by the creche included in its Christmas display. Giving the challenged practice the careful scrutiny it deserves, I cannot say that the particular creche display at issue in this case was intended to endorse or had the effect of endorsing Christianity. I agree with the Court that the judgment below must be reversed.

Lee v. Weisman (1992)

Questions to Consider: Why is it important in the minds of the justices on the United States Supreme Court that it was a public ceremony at issue in *Lee v. Weisman* and not a private ceremony? Would the issues in the case have changed if a teacher at Nathan Bishop Middle School, rather than a rabbi had delivered the invocation? Would *Lee v Weisman* have been decidedly differently if the principal made it an option to stand for the prayer.

NOTE: This opinion has been edited for classroom use. No indication has been made of deleted material and case citations. For the full text of all the opinions in the case see: http://www.law.cornell.edu/supct/html/90-1014.ZS.html

JUSTICE ANTHONY KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

Deborah's graduation was held on the premises of Nathan Bishop Middle School on June 29, 1989. Four days before the ceremony, Daniel Weisman, in his individual capacity as a Providence taxpayer and as next friend of Deborah, sought a temporary restraining order in the United States District Court for the District of Rhode Island to prohibit school officials from including an invocation or benediction in the graduation ceremony. The court denied the motion for lack of adequate time to consider it. Deborah and her family attended the graduation, where the prayers were recited. In July, 1989, Daniel Weisman filed an amended complaint seeking a permanent injunction barring petitioners, various officials of the Providence public schools, from inviting the clergy to deliver invocations and benedictions at future graduations. We find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.

It had been the custom of Providence school officials to provide invited clergy with a pamphlet entitled “Guidelines for Civic Occasions,” prepared by the National conference of Christians and Jews. The guidelines recommended that the public prayers at nonsectarian civic ceremonies be composed with “inclusiveness and sensitivity,” though they acknowledge that “[p]rayer of any kind may be inappropriate on some civic occasions.” The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be nonsectarian. Rabbi Gutterman’s [invocation was] as follows:

> God of the Free, Hope of the Brave:
>
> For the legacy of America where diversity is celebrated and the rights of the minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.
>
> For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.
>
> May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
>
> Amen…

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." Lynch, supra, at 678; see also County of Allegheny, supra, at 591, quoting Everson v. Board of Ed. of Ewing, 330 U.S. 1, 15 -16 (1947). The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and, from a constitutional perspective, it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases. The potential for divisiveness is of particular relevance here, though, because it centers around an overt religious exercise in a secondary school environment

where, as we discuss below, subtle coercive pressures exist, and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions" and advised him that his prayers should be nonsectarian. Through these means, the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that 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 program carried on by government and that is what the school officials attempted to do.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint ... If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten, then, that, while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture, standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that

she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that, for her, the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention ... To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights. That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian, rather than pertaining to one sect, does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst, increases their sense of isolation and affront.

Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. But these matters, often questions of accommodation of religion, are not before us. The sole

question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring:

When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However "ceremonial" their messages may be, they are flatly unconstitutional.

SUPREME COURT ORAL PRESENTATION INSTRUCTIONS

Instructions for Students

When presenting the case you have been assigned be sure to:

1. Explain the details of your case to the class from its very beginning all the way through to the U.S. Supreme Court's ruling.

2. Point out the original dispute, issue or question (who is suing whom and why?). Indicate the grounds for appeal and mention the lower court's decision. In some cases there may be two lower courts which rule on the case before it reached the Supreme Court.

3. What did the have Supreme Court have to decide in the case? Conduct a mock vote asking the class how they think the court voted on this case.

4. Finally, tell the class the Supreme Court's decision (what was the vote) and the rationale for it (found in the majority opinion). You are encouraged to read key excerpts from the majority opinion which show that you understand the reasons the court voted they way they did. This is an important part of your report.

*** These presentations should be 10 minutes in length.

To prepare for your presentation, all students should do the following things:

- read about your case at http://www.oyez.org
- read the case summary material **(pp.19-23).**
- read the newspaper articles about your case **(On *Lemon* see, pp.24-25; On *Lynch* see, pp.25-30; On *Lee* see, pp.30-36).**
- read the "Majority Opinion Excerpts" **(On *Lemon* see, pp.37-40; On *Lynch* see, pp.41-44; On *Lee* see, pp.45-49).**
- watch the mini-documentaries at the Voices of American Project (www.law.duke.edu/voices). Note: This applies only to *Lynch v. Donnelly* and *Lee v. Weisman*.

NEWSPAPER ARTICLES ON *AHLQUIST* v. *CITY OF CRANSTON*

Providence Journal

"Cranston West Will Keep Its Prayer and Defend It"

March 8, 2011

BY: MARIA ARMENTAL

CRANSTON - They applauded those who expressed their views, and booed those who didn't.

They talked of majority rule and minority rights.

They praised tolerance and respect, and threatened legal action.

"I say we fight the good fight," said Peter Paolella, a Cranston High School West graduate whose children attend the city's public schools. He urged the School Committee to keep a prayer at Cranston West, even if that meant going to court. "America needs a hero. Let's be the hero."

After more than two hours of impassioned discussion, the School Committee voted Monday night, in a special meeting, to keep and potentially defend the prayer in court.

The vote also applies to a second banner at Hugh B. Bain Middle School.

The vote was 4 to 3. School Committee members Andrea M. Iannazzi, Frank S. Lombardi, Paula McFarland and Michael A. Traficante voted in favor. Voting against were Stephanie A. Culhane, Janice Ruggieri and Steven Bloom.

"I cannot in good conscience, on hope and a prayer," said Culhane, "put that burden on another School Committee member."

Calling the decision to go to court "a Foxwoods gamble," Culhane said Cranston students cannot afford the educational cuts that may be made to pay for the litigation. "It's a gamble that my three children [would] have to pay the cost of in the end."

The constitutional squabble broke in July when the Rhode Island Affiliate of the American Civil Liberties Union asked the district to remove the prayer, saying it violates the First Amendment and the constitutional principle of separation of church and state.

The prayer, which calls on "Our Heavenly Father" to guide students, has been posted in the Cranston West auditorium since the it opened in 1963.

Only one previous complaint had been lodged, school Supt. Peter L. Nero and former Cranston West principal Edmund J. Lemoi have said, but school officials resolved the conflict without going to court and the prayer remained put.

Monday night, more than 150 people stormed the auditorium at Western Hills Middle School, a stone's throw away from Cranston West.

Overwhelmingly in support of the prayer, speakers pleaded on the School Committee members to "do the right thing" and not to "ruin our way of life" and to remember their role as elected officials - officials who must run for reelection.

More than 4,000 Cranston taxpayers have signed a petition that calls for the prayer to remain in place, said Christopher F. Young, a well-known face on the Rhode Island campaign circuit.

"These are people who vote and they want the prayer to remain," Young said.

Moreover, said his fiancée, Kara D. Russo, speaking to the panel members' public struggle over their personal religious faith: "You can't have it both ways. You can't vote to take it down and say you are standing up for God."

Speaking out for the prayer, David Bradley, of Stonington, Conn., said he was the student who in 1960 wrote the prayer and school creed.

A 1965 Cranston West graduate, Bradley said he and other members of the student committee were tasked at the time to create a tradition in a school still in its infancy.

The students picked the school colors and the mascot and, following models from other schools in the district, a prayer and creed.

Originally, Bradley said, the prayer banner and creed were stored in the school building. In 1962, Bradley said, students started reciting the prayer instead of "Our Father" as part of their morning exercises. And, in 1963, when the auditorium opened its doors, the prayer and creed were affixed to the walls of the auditorium as a gift from the first graduating class.

The message, supporters say, is a good one, one needed in today's society.

But the prayer, critics say, stands in direct violation of the country's laws.

Cranston West sophomore Jessica Ahlquist said, "In America, we have the right to believe or not to believe."

"This prayer endorses religion. It endorses a specific religion," said Ahlquist, who is an atheist. The prayer, she says, "is discriminating against us."

For "a majority to say that you can take away a minority right, it's wrong," Ahlquist said. "It's also un-American."

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Providence Journal

"CRANSTON - PRAYER BANNER -ACLU Files Lawsuit"

April 5, 2011

BY: MARIA ARMENTAL

The Rhode Island Affiliate of the American Civil Liberties Union Monday filed a federal lawsuit against the City of Cranston challenging the constitutionality of a prayer banner displayed in the Cranston High School West auditorium.

The suit, filed on behalf of Jessica Ahlquist, a Cranston West sophomore, asks the courts to order the prayer removed on the grounds that the city, through the School Department, violated Jessica's First and Fourteenth Amendment rights making her feel "excluded, ostracized and devalued by her school because she does not share or agree with the religious expression conveyed by the prayer." Jessica is an atheist.

The suit also asks the court to award compensatory damages, including interest, for Jessica's injuries along with attorney's fees and related costs.

Until a decision is reached, the suit asks the court to prohibit the prayer from being displayed in the presence of students; the city would have to cover the banner in such a way that it could not be easily removed, said Lynette Labinger, cooperating counsel with the ACLU who would litigate the case along with Thomas R. Bender.

The legal storm over the roughly 8-by-3-foot prayer banner broke in July when the local ACLU asked school officials to remove the prayer, saying it violates the First Amendment and the constitutional principle of separation of church and state.

"Indeed, as Cranston school district policy succinctly notes: 'The proper setting for religious observance is the home and the place of worship,' " wrote Steven Brown, executive director of the local ACLU.

The prayer, which summons "Our Heavenly Father" to guide students so that they bring credit to the school, was a gift of the school's first graduating class. Written in 1960 by David Bradley, a member of the student council at the time, it's been displayed since 1963 in the Cranston West auditorium, across from the school creed. For a few years, Bradley said, the school prayer replaced the Lord's Prayer during morning assembly. Students no longer say a prayer at the

beginning of the school day.

The school prayer "was an attempt at being broader, but it was not broad enough," said the Rev. Donald Anderson, a Baptist pastor who graduated from Cranston West in 1966 and now heads the Rhode Island State Council of Churches.

Anderson and Rabbi Peter Stein of Temple Sinai in Cranston - who sat by Jessica during a Monday afternoon news conference to announce the suit - said the prayer banner has an "exclusionary effect" on those who are either not religious or hold different religious beliefs than those expressed on the banner. Anderson said it "crosses the line to state-sponsored religion," the very reason that brought Baptists, Quakers and other "religious dissidents" to Rhode Island in the first place, Anderson said.

Brown said a Cranston parent, whom he would not identify, complained to the ACLU in June after attending a school event at Cranston West. Several people, he said, have since called, objecting to the prayer display.

"The fact that there were no formal complaints in x number of years, it's not an indication that people don't care," Brown said. "It requires a great amount of courage to step forward."

Jessica and another student were removed from their regular classroom schedule last month after some students said they intended to harm her.

Jessica, who for months has led the charge to have the prayer removed, said she was "disappointed, but not entirely surprised" that school officials had voted to keep the prayer and defend it in court.

The School Committee has enlisted local lawyer Joseph V. Cavanagh Jr. and The Becket Fund for Religious Liberty to defend the district.

Under the agreement, lawyers for the Becket Fund would serve as lead counsel, and Cavanagh would handle local work, such as court appearances and depositions. The School Committee would reimburse the Becket Fund for out-of-pocket expenses.

Cavanagh, a Cranston East graduate, frequently represents The Providence Journal and other media outlets on libel, public access and Freedom of Information matters.

Mayor Allan W. Fung said he was disappointed the ACLU was bringing the city into the legal clash.

"We can't tell the schools what to do," said Fung. "I feel that we are the deep pockets that they are going after."

Fung, who said, in principle, he supports the prayer, said city officials haven't decided if they will seek separate counsel, and could not comment on legal strategy.

Bishop Thomas J. Tobin, head of the Roman Catholic Diocese of Providence, last month called for "restraint and common sense, rather than litigation."

"Surely no one's preventing that free exercise of religion," Bishop Tobin wrote last month in the diocese's weekly newspaper. "... The rise and fall of religious faith, Christian or otherwise, in our nation, or even in Cranston, doesn't depend on the fate of the banner. If it has to be removed, so be it. Faith will survive and the free practice of religion will go on."

A decision on the case would affect a similar banner display at Hugh B. Bain Middle School.

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Providence Journal

"CRANSTON - SCHOOL PRAYER CONTROVERSY"

January 14, 2012

BY: JENNIFER D. JORDAN

"How does it feel to be the most hated person in RI right now? Your [sic] a puke and a disgrace to the human race."

That message, posted on Twitter, is an example of a stream of vitriol and threats that have been directed at 16-year-old Jessica Ahlquist, following a federal judge's decision Wednesday to order the immediate removal of a school-prayer banner at her school, Cranston High School West.

The Cranston police have launched a "proactive investigation" into threats on social media sites, saying some of the messages could constitute "cyber-bullying," a criminal act.

"Police investigators are combing through the social networking message boards, and those messages that are construed as extremely threatening in nature will be identified and their authors called in for questioning," the department said in a news release Friday afternoon.

And on the radio Thursday, a state representative from Cranston called Ahlquist "evil."

On Friday some school officials condemned the attacks. When asked to comment, the city's mayor and the bishop of Providence defended her right to free speech, without such harassment.

But Steven Brown, executive director of the Rhode Island Affiliate of the American Civil Liberties Union, said that "the deafening silence" by city leaders earlier was "appalling."

"I think it's incumbent upon Cranston officials to publicly denounce the vituperation being directed at Jessica, which is well beyond the bounds of appropriate debate, and the fact that has not happened is shameful," Brown said.

"Jessica has exhibited remarkable poise and strength throughout this. And leaders have let a 16-year-old show more maturity than all the adults."

Ahlquist has already endured some harsh criticism in the 18 months since her father, Mark Ahlquist, and the local ACLU filed a lawsuit on her behalf saying the prayer banner violated the Constitution and should be taken down.

In his decision, U.S. District Judge Ronald R. Lagueux criticized the Cranston School Committee for being "excessively entangled with religion" to the point where "a loud and passionate majority encouraged it to vote to override the constitutional rights of a minority."

The judge detailed the harassment and "disrespect for her feelings" that Ahlquist has endured over the past year. He noted that after a particularly rancorous public meeting, Ahlquist and her friend had to be "escorted from the meeting by the police because of concerns for their safety."

The judge also wrote: "Plaintiff is clearly an articulate and courageous young woman, who took a brave stand, particularly in light of the hostile response she has received from her community."

Ahlquist said Friday she nearly cried when she read Lagueux's decision.

"It was an authority figure validating what I had been fighting for the last year and a half," she said. "It was amazing to hear what he had said and for him to be so understanding. He didn't need to say all that, but he did."

Ahlquist said apart from her sister and a few close friends, she has not felt similarly supported at school.

"One teacher expressed private support but couldn't express support publicly," she said.

She said she was "devastated" last year at an all-school assembly on diversity when Cranston Mayor Allan W. Fung, who had been invited to speak, told the students he wanted the mural to remain. Students jumped up, clapping and cheering.

"I felt more alone than I already did," Ahlquist said.

Thursday, two honor roll students at Cranston West, using their own names, posted on social media websites their plans to beat and humiliate Ahlquist when she returns to school.

They also threatened to "sabotage" her Facebook account.

Another Facebook message said, "May that little evil athiest [sic] teenage girl and that judge BURN IN HELL!"

Another message on Twitter: "U little brainless idiot, hope u will be punished."

"What an evil little thing," state Rep. Peter G. Palumbo called her on WPRO's "The John DePetro Show" Thursday.

Ahlquist said she has "hardened" herself to the personal attacks.

"What is difficult is when it comes from my classmates, from kids I've known for years and who I see every day," she said. "And I've never said a mean word to any of them. That does hurt."

Still, the level of wrath and fury has surprised Ahlquist, particularly from adults.

"I'm extremely disappointed in the reaction of so many adults who have made nasty comments," she said. "I grew up thinking adults would always be kind and fair and say the right thing. This has been such a learning experience. Sometimes, adults don't know what to say either."

Ahlquist has also received messages of support on her Facebook page in recent days.

"I'm proud of you Jessica! Stay strong and know that lots of people support you and thank you for standing up for what is right!"

"Just wanted to say you're a hero. The next year or so may be rough, but I promise you that it only gets better after that."

"Congrats! from so. [sic] Cali young lady...you give me great hope for your generation...stay strong, stand your ground...peace."

On Friday, some Cranston officials came to Ahlquist's defense, including the three School Committee members who voted to remove the banner last year. "As a mother of three, I could not imagine anyone speaking about my child like they are about Jessica, from private citizens to General Assembly representatives," said Stephanie Culhane, who is serving her fourth year on the committee. "I am disgusted by the comments."

Culhane said she, too, has been on the receiving end of personal attacks after she cast her vote.

"Some people told me I would burn in hell," she said. "And I'm a practicing Catholic. I teach CCD at my church and have sung in a church choir."

Committee member Steven Bloom said his prime concern is Ahlquist's safety.

Bloom said the outcry against her needs to be addressed "but it needs to be addressed in a thoughtful manner. This state was founded on religious tolerance and freedom and we need to prepare a response that is consistent with that."

Committee member Janice Ruggieri said she is particularly dismayed that the message of the

prayer mural - to be kind, helpful and "conduct ourselves so as to bring credit to Cranston High School West" has been ignored.

"The message of the prayer banner is not being adhered to," Ruggieri said. "For someone to say they are a person of faith and then to act in the way we have seen … They are not acting in a way that would honor any faith I know of."

Officials at the School Department said Friday they were aware of the online bullying and threats, and were working with the police.

"We don't want to inflame the situation," said Ray L. Votto Jr., the district's chief operating officer. (School Supt. Peter Nero was out of the state at an educational conference.) "Our number one concern is the safety and security of students."

Ahlquist, a junior, stayed home from school Friday because she was "exhausted" but she plans to return to Cranston West next week.

"I want to show them that the negative comments and hatred won't stop me," she said. "I have every right to be at that school."

After being contacted by The Journal on Friday, Mayor Fung said what is happening to Ahlquist "is not right."

"I will not tolerate any kind of intimidation or harassment … whether it's done on the radio or on Facebook or anywhere," Fung said. "No individual should ever be intimated or harassed for exercising their First Amendment right, whether I agree with them or not."

When asked to comment, Bishop Thomas J. Tobin said in an e-mail: "When cultural icons, religious symbols or traditional moral values are challenged, it is understandable that individuals will respond in a very intense and emotional way.

"Nonetheless, resorting to personally insulting and even threatening language in such public controversies is totally unacceptable, especially when it is directed at a young person such as Jessica Ahlquist who has every right to promote her beliefs and express her opinion."

With reports from Maria Armental

AHLQUIST v. CITY OF CRANSTON ORAL PRESENTATION INSTRUCTIONS

Assignment for the Ahlquist (the Plaintiff) and Cranston (the Defendant) Groups:

In class and for homework each group should prepare to make a 15 minute presentation in front of the group playing the role of United States District Court Judge Ronald Lagueux. Your task is to convince him that your side has the stronger legal argument regarding the constitutionality of the Cranston West prayer mural.

To prepare for your presentation you will rely heavily on the brief written on behalf of your side. You will want to look at the entire brief, but the annotations and key excerpts that are provided for you should help focus your attention.

A few things to remember:

- Be organized and be clear!
- Be passionate and persuasive, but remember that it will be sound legal reasoning that will win the day.
- Be knowledgeable about the argument that the other side is going to make. The ability to not only make your points effectively, but also to rebut those that might be made by the opposing side will be essential.
- Be sure to decide on a division of labor for the members of your group because everyone will be expected to participate in the presentation.

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Assignment for the Judge Lagueux Group:

While the Ahlquist and Cranston groups are preparing their presentations to you, you will need to prepare for them as well. Your assignment in class and for homework is to do the following:

1. Create a timeline of all the key Supreme Court rulings in the post-World War II era regarding the Establishment Clause of the Constitution. Make note of the name and the year of the case (in chronological order) and write down one sentence which states what the issue was and how the court ruled. This information can be found in the "Introduction" that you read the first day.

2. Create a list of all the facts that you know regarding the Ahlquist case. While it is essential that you know these basic facts before hearing the presentations, try to keep an open mind and avoid making any judgments before hearing the two sides present.

BRIEF ON BEHALF OF THE CITY OF CRANSTON

Here is the link to the 46 page brief submitted on the behalf of the City of Cranston, Rhode Island (Defendant) on September 9, 2011: http://www.becketfund.org/ahlquist-v-city-of-cranston-rhode-island-2011-present/

Due to the length of this brief we have annotated it and included some sample excerpts so teachers will know where to easily find certain key sections and passages which they might want to use with their students. This should also help steer students towards the essential sections of this brief.

Pages 1-17 are primarily introductory and background information which help set up the actual legal arguments made later in the brief beginning on page 17.

Page 1: Introduction

"This case asks one basic question: does the Establishment Clause permit schools to keep historical references to religion? Plaintiff asks this Court to, quite literally, scrub the school clean of historical religious statements. The School Committee of the City of Cranston, after a long and thoughtful deliberative process, decided not to erase history for the sake of political correctness. The mural at issue was a gift from Cranston West High School's first graduating class. It hung undisturbed for nearly fifty years. After the ACLU discovered it last year, it started making much ado about a mural that had been nothing. The School Committee, after a long and heated debate, decided to do nothing. Their vote to leave the mural alone was based not upon some desire to inject religion into the public schools, but on their belief that school history and tradition should be maintained. The mural remains as an example that our world is not made new every day, that our public spaces are shaped by something more than the whims of the moment."

Pages 2-10: A lengthy description of the history of the prayer mural going back to 1959 and the important role that history and tradition play at Cranston West High School.

The mural has the heading "School Prayer" and includes the following text:

"Our Heavenly Father,
Grant us each day the desire to do our best,
To grow mentally and morally as well as physically,
To be kind and helpful to our classmates and teachers,
To be honest with ourselves as well as with others,

Help us to be good sports and smile when we lose as well as when we win,
Teach us the value of true friendship, Help us always to conduct ourselves so as to bring credit to Cranston High School West.
Amen"

"The text of the Mural has not been recited publicly at the school since in or about 1962… The Mural has been in place for nearly 50 years. Except for the complaint that is the subject of this case, the record is devoid of any complaints about the Mural."

Pages 13-16: A description of the Plaintiff (Jessica Ahlquist) and why she brought the lawsuit against the City of Cranston. Included here are several quotations from Ahlquist about how she did not find the prayer mural offensive.

Page 17: The actual legal argument on behalf of the City of Cranston begins here and goes right through until the end of the brief.

Pages 17-26: These pages go into great deal about the issue of "standing". Here the brief emphasizes that the plaintiff must demonstrate that she was offended by the mural and suffered some sort of "concrete and particularized injury" in order to have the proper standing to sue. Since she did not successfully show this, the brief concludes that she has no standing to bring this suit and the case should be dismissed.

"Neither Plaintiff nor Mark Ahlquist, her father, have standing to sue Defendants over the Mural. Plaintiff cannot claim what is commonly known as 'offended Observer' standing because her own statements demonstrate that she was not actually offended by the Mural. Nor has she taken additional actions, such as attempting to avoid the Mural, which are necessary components of such standing. Mere philosophical disagreement is insufficient to confer standing."

**Page 27: Here begins the real legal arguments on behalf of the city of Cranston; these are the pages that will be most important for the students' understanding of this side of the case.

Page 27: "The Defendants have not violated the Establishment Clause."

Pages 27-40: Argument #1- "The Mural passes the *Lemon* test." These pages are very important in understanding how the city's actions did not violate the three prong test established in the 1971 Supreme Court case *Lemon v. Kurtzman.*

"Under the *Lemon* test, the challenged government action '[f]irst . . . must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [action] must not foster an excessive government entanglement with religion.'"

The brief then goes through each of these three aspects of the *Lemon* ruling ("purpose", "effect" and "excessive entanglement") and demonstrates how the prayer mural does not violate any of these provisions.

Pages 28-33: The issue of "purpose" is addressed.

"The School Committee's purpose in deciding to take no action with respect to the Mural despite Plaintiff's complaints was entirely secular. In order to show a violation of the purpose prong of the *Lemon* test, a plaintiff must prove that 'the government acts with the ***ostensible and predominant*** purpose of advancing religion.'"

"The Defendants' purpose was to retain the Mural in order to recognize the history and tradition of Cranston West and respect the students and student artists who donated it. As they explained in their resolution, such displays are 'maintained out of respect for the student artist, to help guarantee that student works of excellence be protected and conserved for current and future generations, and for historical and cultural reasons without promoting any ethnic, political or religious content, element or elements contained or perceived to be contained therein.' This is a wholly secular purpose, perfectly constitutional under *Lemon*."

"The School Committee did not attempt to foist some new religious display on students, but instead simply decided not to paint over a mural that had hung undisturbed for decades."

Pages 33-39: The issue of "effect" is addressed.

"The School Committee's decision not to remove the Mural at Plaintiff's request does not advance religion. In order to determine whether leaving the Mural in place advances religion, the Court 'must consider the text as a whole and must take account of context and circumstances.' Given the proper context, a seemingly religious display—even one whose text is composed entirely of Scripture— can have a secular effect because it sends a secular message."

"In order to determine what message is being sent, it is particularly important to consider the context in which the display is presented: the 'circumstances surrounding the display's placement,' the 'physical setting,' and, perhaps most important, the presence or absence of controversies surrounding the display. Here, all three of these factors show that the Mural does not endorse religion."

"The Mural's long history, standing undisturbed and almost entirely without comment, further demonstrates that it is a benign expression of school history and student art. Its message expresses neither exclusion nor favoritism, but history and tradition. Its effect is simply to recognize student artists and school history. The Establishment Clause does not require that decades-old displays be continually reviewed and replaced, because 'the world is not made brand new every morning.'"

Pages 39-40: The issue of "excessive entanglement with religion" is addressed.

"Finally, the Mural is also constitutional because it does not create excessive entanglement

with religion. The excessive entanglement prong, developed in religious school funding cases, is primarily an issue when government funding requires intrusive oversight of religious recipients. Government displays are generally dealt with under the purpose or effects prongs, not excessive entanglement."

Hence, "For all these reasons, the Mural satisfies the *Lemon* test, and therefore does not violate the Establishment Clause."

Pages 40-43: Argument #2- "The Mural passes the endorsement test." The brief emphasizes that not only does the mural pass the three prong *Lemon* test described above, it also passes the "endorsement test." Despite the Plaintiff's claim, the fact that the mural's setting is a public high school where "impressionable" students are being taught does not mean it needs to be held up to a higher standard.

"The Mural is also constitutional under the 'related endorsement analysis' of *Lynch* v. *Donnelly*. But the mere fact that a display is in a public school is not determinative. Here, the Mural is perfectly constitutional in its historic setting. 'Under the related endorsement analysis, courts must consider whether the challenged governmental action has the purpose or effect of endorsing, favoring, or promoting religion.'"

"The challenged language in the Mural is situated in a secular context. The religious text of the prayer—the words 'Heavenly Father,' 'Amen,' and the phrase 'School Prayer' itself—are balanced by the secular content of the message, which does not praise God or ask for mercy, but instead states ordinary moral aspirations such as 'be[ing] kind and helpful to our classmates and teachers,' 'be[ing] good sports,' and 'smil[ing] when we lose.' Even more important, the Mural occurs in a larger secular context—a school auditorium,"

Pages 43-44: Argument #3- "The Mural passes the coercion test." This brief section emphasizes the fact that there was never any coercive action taken against Jessica Ahlquist by school officials.

"Because Plaintiff has not been pressured to participate in any religious ritual, she has not experienced unconstitutional coercion. The Mural therefore passes the coercion test."

Page 44: Conclusion

"For the reasons stated above, Plaintiff is not entitled to either preliminary of permanent injunctive relief. Her lack of concrete injury demonstrates that she has not and will not suffer irreparable harm if the Mural remains. The facts surrounding her Establishment Clause challenge demonstrate that she is unlikely to succeed on the merits. Therefore the Court should deny her motion for preliminary injunction and enter judgment on behalf of the defendants."

BRIEF ON BEHALF OF JESSICA AHLQUIST

Here is the link to the 63 page brief submitted on the behalf of Jessica Ahlquist (Plaintiff) by the Rhode Island Affiliate of the ACLU on September 9, 2011: http://www.riaclu.org/documents/Plaintifftrialbrief.pdf

Due to the length of this brief we have annotated it and included some sample excerpts so teachers will know where to easily find certain key sections and passages which they might want to use with their students. This should also help steer students towards the essential sections of this brief.

Pages 1-24 are primarily introductory and background information which help set up the actual legal arguments made later in the brief beginning on page 24.

Page 1: Introduction

"Plaintiff objects to Cranston's installation and maintenance of a religious prayer in the auditorium of Cranston West as a violation of her constitutional rights as protected by the Establishment Clause of the First Amendment to the United States Constitution."

Pages 4-9: Description of the prayer mural as well as the Plaintiff (Jessica Ahlquist) and her feelings about the prayer mural in the auditorium of Cranston West High School.

"Plaintiff entered Cranston West as a freshman (9th grade) in fall 2009. At the time the law suit was filed, she was finishing her sophomore year. She is now starting her junior year. Plaintiff is an atheist. She has known that she has been an atheist since she was about 10 or 11 years old."

"The School Prayer reads as follows:

SCHOOL PRAYER
OUR HEAVENLY FATHER
GRANT US EACH DAY THE DESIRE TO DO OUR
BEST, TO GROW MENTALLY AND MORALLY AS WELL
AS PHYSICALLY, TO BE KIND AND HELPFUL TO OUR
CLASSMATES AND TEACHERS, TO BE HONEST WITH
OURSELVES AS WELL AS WITH OTHERS, HELP US TO BE
GOOD SPORTS AND SMILE WHEN WE LOSE AS WELL AS
WHEN WE WIN, TEACH US THE VALUE OF TRUE
FRIENDSHIP, HELP US TO ALWAYS CONDUCT
OURSELVES SO AS TO BRING CREDIT TO CRANSTON

HIGH SCHOOL WEST.
AMEN"

"Plaintiff objects to the school sanctioned display of the 'School Prayer' in her high school auditorium. From the first time Plaintiff read and comprehended the School Prayer display, it upset her. 'When I saw the prayer in the school for the first time, it made me feel excluded, ostracized and devalued. I belong to that school as an equal student, except it was excluding me from its request from God. It says Our Heavenly Father. And I wasn't included in that Our 'cause I don't believe in a Heavenly Father.' 'The first time I saw the prayer, I felt excluded 'cause my … school didn't include me. I felt left out.'"

Pages 9-17 : Historical origins of the school prayer and mural dating back to the early 1960s and a brief look at the mural today and what role it plays in the life of the school.

Pages 17-21 : Details about the 2011 decision by the Cranston School Committee to maintain the school prayer display despite the threat of a lawsuit challenging its constitutionality. Some very interesting quotations from the School Committee members regarding their feelings about the mural.

"After a lengthy public hearing with numerous witnesses, and statements by each committee member as to how they would vote and why, the resolution to maintain the School Prayer display passed 4 to 3."

"In response to the Plaintiff's law suit, the Defendants have asserted the March 7, 2011 vote 'had nothing to do with religion.' They have asserted the School Prayer display is a 'secular passive monument' with 'historical significance' as a 'student created project.' . They claim that the display does not necessarily contain a message to pray, and that the decision to maintain it was not for the purpose of conveying a religious message, but simply to commemorate 'a historical point in time'".

Page 24: The actual legal argument on behalf of Jessica Ahlquist begins here and goes right through until the end of the brief.

Pages 24-32: These pages address the issue of "standing" and whether or not Jessica Ahlquist has the legal right to bring a suit against the city of Cranston over this issue. The brief concludes that she does have legal standing to sue the city of Cranston. This is not as important a section as the pages that follow and can probably be skipped.

"Plaintiff's sense of spiritual injury, her sense of exclusion and ostracism, and her psychological injury, constitute injury-in-fact … for purposes of the Establishment Clause. Moreover, that injury 'is fairly traceable' to Defendants' decision to display the School Prayer and to continue its display, and a permanent injunction requiring removal of the display will redress her injury. Plaintiff has standing to bring this claim".

**Page 32- Here begins the real legal arguments on behalf of Ahlquist; these are the pages that will be most important for the students' understanding of this side of the case.

Pages 32-36: Argument #1- "The Establishment Clause embodies a principle of government neutrality towards religion."
These pages are very important in helping the students understand the reasoning behind the "neutrality principle" as laid out in the Establishment Clause.

This section makes numerous references to *Lee v. Weisman* (1992.

"In McCreary (a 2004 Supreme Court case) a majority of the Supreme Court reaffirmed the long-standing view that the 'touchstone' underlying the Establishment Clause is 'government neutrality between religion and religion, and between religion and nonreligion.'"

Pages 36-41: Argument #2- "Courts vigorously apply the principle of religious neutrality in primary and secondary schools because of a parent's fundamental right to direct the religious upbringing of their children without the competing influence of the state."

This section emphasizes the need for a "heightened sensitivity for the Establishment Clause in the context of primary and secondary schools" in particular and stresses that it is "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children." Here the brief mentions the "subtle, coercive pressures" that exist in schools which threaten parents' rights in this area. Again, there are references in this section to *Lee* as well as *Lynch v. Donnelly* (1984).

"The government-sanctioned permanent installation of Cranston West's official 'School Prayer' for its students … conveys the message that religious belief and prayer to 'Our Heavenly Father' are integral to achieving the aspirations the students are asked to live up to as members of the Cranston West community and tradition. It conveys approval of the importance of religious belief and prayer, and the message that religious belief and prayer to 'Our Heavenly Father' are, in the official school view, a vital part of becoming a good Cranston West citizen-student. From any objective perspective, that is the predominant, if not the sole, purpose and effect of displaying and continuing to display the School Prayer in the school auditorium."

Pages 41-60 : Argument #3- "Both the purpose and the effect of displaying the School Prayer is to communicate official approval of student prayer as part of the educational experience and tradition." This section relies heavily on the precedent established in *Lemon v Kurtzman*. There is a lengthy section that deals with the issue of the school's "purpose" in displaying the School Prayer (pages 43-55) followed by a shorter section which on the issue of the "effect" of the hanging of this Prayer (pages 55-60). These pages are very important to the understanding of some of the main legal arguments made by Jessica Ahlquist's lawyers.

"Establishment Clause analysis has historically focused on inquiry into the *purpose* and *effect* of a governmental act with respect to religion, factors first articulated in *Lemon v. Kurtzman*."

" The Court has 'particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children.' Consequently, *Lemon's* purpose and effect analysis should be the framework under which the Cranston West School Prayer display must be evaluated."

"…the 2011 decision to continue to display the School Prayer occurred in the context of substantial, earnest public sentiment in favor of keeping God in school, and that at least three of the four School Committee members spoke of the display's *present* ability to convey a message to students about a 'code of being' and morals. In this context the objective observer would have little trouble determining that the government's purpose in continuing to display the School Prayer was religious – not historical and not secular."

"And even if the objective observer could somehow find that the School Committee's actual *purpose* in displaying the School Prayer was not to favor and endorse religion, that observer would certainly determine, based on the above context, that was the *effect* of the decision."

"When combined with the past history of the use of the prayer; the manner in which it has been, and is being, displayed; and the School Committee members' explanation of their votes; it is clear that the principal and primary effect of the School Prayer's continued display is to favor and endorse religion. 'When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause[, and h]owever, 'ceremonial' their messages may be, they are flatly unconstitutional.' (from *Lee v. Weisman*) Cranston West's School Prayer display fails this test."

Pages 61- 63: This very brief concluding section discusses the type of relief being sought by Jessica Ahlquist.

"Plaintiff seeks a declaratory judgment declaring that the maintenance and display of the 'School Prayer' at Cranston High School West by the Defendants have deprived Plaintiff of rights secured by the First and Fourteenth Amendments to the United States Constitution. Plaintiff further seeks a permanent injunction directing Defendants to remove the School Prayer from public display at any public school building attended by students of the City of Cranston. No relief other than the removal of the Prayer will redress Plaintiff's injury under the First Amendment, but its removal will do so."

RULING BY JUDGE RONALD R. LAGUEUX (KEY EXCERPTS)

Note: This opinion has been edited for use by students and teachers. For ease of reading, no indication has been made of deleted material or case citations. Any legal or scholarly use of this case should refer to the full opinion.

JUDGE RONALD R. LAGUEUX delivered the opinion of the Court (January 11, 2012).

Defendants argue that Plaintiff does not have standing to bring this lawsuit. Defendants point out that Plaintiff must demonstrate a real and actual injury-in-fact in order to establish proper standing; a mere philosophical or political disagreement is insufficient. Defendants argue that neither Plaintiff nor her father, co-Plaintiff Mark Ahlquist, can show an actual injury.

This Court is satisfied that the Supreme Court, were it to analyze Plaintiff's standing herein, would determine that her status as a student enrolled at Cranston West is sufficient to confer standing in a dispute about a prayer displayed at her school. Like the student in **Lee v. Weisman**, she is a captive audience. Beyond that, Plaintiff has stated that the presence of a Christian prayer on the wall of her school has made her feel ostracized and out of place… While her injuries might be characterized as abstract, those injuries are consistent with the injuries complained of by other plaintiffs in Establishment Clause litigation….

The Constitutionality of the Prayer Mural

Having determined that Plaintiff has standing to bring her lawsuit, it remains for the Court to explain why her challenge prevails. The Establishment Clause of the First Amendment of the U.S. Constitution requires that "Congress shall make no law respecting an establishment of religion..." This mandate was extended to the states with the enactment of the Fourteenth Amendment. Though the words are simple, their application to the circumstances of our evolving nation has been complex and contentious. The guiding principle of Establishment Clause jurisprudence has been government neutrality.

"The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." (McCreary County v. ACLU) Fortunately, the First Circuit recently analyzed an Establishment Clause dispute, and has provided a clear analytical framework for this Court to follow… the First Circuit explained the "three interrelated analytical approaches" articulated by the Supreme Court, including the three-prong **Lemon** "analysis," as well as: [t]he "endorsement" analysis, first articulated by Justice O'Connor in her concurrence in **Lynch v. Donnelly** … and the "coercion" analysis of **Lee v. Weisman….**

The Lemon test

According to the **Lemon v. Kurtzman** analysis, a governmental practice, or legislative act, must satisfy three tests in order to survive an Establishment Clause challenge. It must: "(1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive government entanglement with religion."

To examine the secular-ness of Cranston West's Prayer Mural, one must reflect upon almost fifty years of history. The purposes of the Prayer, when drafted, and the Prayer Mural, when installed, were clearly religious in nature.

No amount of debate can make the School Prayer anything other than a prayer, and a Christian one at that. Its opening, calling upon the "Heavenly Father," is an exclusively Christian formulation of a monotheistic deity, leaving out, *inter alia*, Jews, Muslims, Hindus, Buddhists, and atheists alike. The Prayer concludes with the indisputably religious closing: "Amen;" a Hebrew word used by Jews, Christians and Muslims to conclude prayers. In between, the Prayer espouses values of honesty, kindness, friendship and sportsmanship. While these goals are commendable, the reliance on God's intervention as the way to achieve those goals is not consistent with a secular purpose.

To determine the present purpose of the Prayer Mural, it is necessary to examine the School Committee's motivations and its March 2011 vote to defend the Mural. While the tenor of the School Committee's open meeting at times resembled a religious revival, the reasons articulated by the four School Committee members who voted to keep the Prayer Mural up, even in the face of anticipated litigation, were nuanced and varied. Two Committee members were clearly motivated by their adherence to strong Catholic religious beliefs.

The Court refrains from second-guessing the expressed motives of the Committee members, but nonetheless must point out that tradition is a murky and dangerous bog. While all agree that some traditions should be honored, others must be put to rest as our national values and notions of tolerance and diversity evolve. At any rate, no amount of history and tradition can cure a constitutional infraction. The Court concludes that Cranston's purposes in installing and, more recently, voting to retain the Prayer Mural are not clearly secular.

Lemon's second prong prohibits government action that has a primary effect of advancing or hindering religion. To the extent the installation, 46-year-long maintenance and March 2011 endorsement of the Prayer Mural has an effect, its impact is to advance religion. The Prayer Mural espouses important moral values, yet it does so in the context of religious supplication.

The third prong of **Lemon** requires that the government action "avoid excessive entanglement with religion. It is on this prong that Cranston West's Prayer Mural reveals its most troubling aspect. The Cranston School Committee and its subcommittee held four open meetings to consider the fate of the Mural. At those meetings a significantly lopsided majority of the

speakers spoke passionately, and in religious terms, in favor of retaining the Prayer Mural. Various speakers read from the bible, spoke about their personal religious convictions, threatened Plaintiff with damnation on Judgment Day and suggested that she will go to hell. The atmosphere was such that the Superintendent of Schools felt compelled to discuss his own religious beliefs at length when he made his recommendation to the Committee that they vote to retain the Prayer Mural. Similarly, five of the seven School Committee members expressed avowals of their own religious beliefs at the meeting, including two of those who voted against retaining the Mural. This is precisely the sort of "civic divisiveness," that the Supreme Court's Establishment Clause cases repeatedly warn against.

"… political divisions along religious lines was one of the principal evils against which the First Amendment was intended to protect."(**Lemon v. Kurtzman**) When focused on the Prayer Mural, the activities and agenda of the Cranston School Committee became excessively entangled with religion….

The endorsement test

Pursuant to the endorsement analysis, the Court must determine if the actions of the Cranston School Committee have the "purpose or effect of endorsing, favoring, or promoting religion." The Government must not appear to take sides on issues of religious beliefs.

"School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are 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." (quoting **Lynch v. Donnelly**)

It is incontestable that at the end of the lengthy School Committee meeting on March 7, 2011, those in support of the Prayer Mural believed that they had won the day, and that Plaintiff and her few friends were the losers. A similar message was conveyed to Plaintiff when Mayor Fung told the students assembled at Cranston West for Diversity Day that the Prayer Mural should stay. While Plaintiff recalls feeling ostracized and alone, the constitutionality of the Prayer Mural turns not on Plaintiff's feelings, but rather on the Court's assessment of how a reasonable and objective observer, fully aware of the background and circumstances, would view the Prayer Mural and the conduct of the School Committee.

The coercion analysis

The final test employed by the First Circuit … is referred to as the "coercion analysis." In **Lee v. Weisman**, the Supreme Court refrained from relying on Lemon, because, as the Court wrote, the government's involvement with religious activity was so pervasive that the analysis was unnecessary. A Rhode Island case**, Weisman** involved the inclusion of prayer at the graduation ceremony at Classical High School in Providence. Although it was possible for a student to

graduate without attending the ceremony, and it was possible to attend the ceremony without participating in the prayer, the Court found that there was "subtle coercive pressure" to participate, particularly in the setting of a school activity. "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." (**Lee v. Weisman**) Weisman involve(s) public schoolchildren, where the Supreme Court has always demonstrated a heightened sensitivity to any perceived coercive pressure. Applying the coercion analysis to the present dispute, the Court determines that any coercive pressure exerted by the sight of the Prayer Mural on the wall would have been subtle indeed. Nonetheless, the high school setting in the present case does invoke the highest scrutiny employed by the Supreme Court in Establishment Clause cases.

Public schools

The Supreme Court has traditionally drawn a clear line between government conduct which might be acceptable in some settings and the conduct which is prohibited in public schools… The Court elaborated on its concerns in **Weisman**, explaining the impact on high school students that can be exerted through peer pressure, public pressure and the effect of the opinions of respected teachers and administrators.

" 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 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. (*Edwards v. Aguillard*)

"There goes many a ship to sea..."

It remains for this Court to attempt to soothe those who may believe that this decision represents a harsh result over a minor Constitutional infraction. The Supreme Court offers two pertinent lessons. First, the Supreme Court urges us to remember that "insistence upon neutrality, vital as it surely is for untrammeled religious liberty, may appear to border upon religious hostility. But in the long view the independence of both church and state in their respective spheres will be better served by close adherence to the neutrality principle." (*Abington v. Schempp*). Second, later in the same opinion, the Supreme Court addresses the circumstance … where … the complaints of a few overcame the beliefs and desires of the majority: "Nor did it matter that few children had complained of the practice, for the measure of the seriousness of a breach of the Establishment Clause has never been thought to be the number of people who complain of it." Plaintiff is clearly an articulate and courageous young woman, who took a brave stand, particularly in light of the hostile response she has received from her community.

This Court has tried to resist the temptation of injecting lofty rhetoric into this opinion, but nonetheless was moved by the words … of Roger Williams, the founder of our state, who left the Massachusetts Bay Colony in pursuit of religious liberty:

“There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or human combination, or society. It hath fallen out sometimes, that both Papists and Protestants, Jews and Turks, may be embarked on one ship; upon which supposal, I affirm that all the liberty of conscience I ever pleaded for, turns upon these two hinges, that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship’s prayers or worship, nor compelled from their own particular prayers or worship, if they practice any.”

Conclusion

For all these reasons, this Court grants Plaintiff’s motionfor a mandatory permanent injunction, and orders the immediate removal of the School Prayer mural from Cranston High School West.

AUTHOR BIOS

Erik J. Chaput received his doctorate in early American History from Syracuse University in 2011. His dissertation was the first full-scale history of the 1842 Dorr Rebellion in Rhode Island in nearly four decades. Chaput teaches United States History at Northfield Mount Hermon and serves as an instructor in the History Graduate Program and the School of Continuing Education at Providence College. Chaput's research has appeared in numerous publications, including *Rhode Island History*, *Common-Place*, *American Nineteenth Century History*, *The New England Quarterly*, the *U.S. Catholic Historian*, *The Catholic Historical Review*, and the *Historical Journal of Massachusetts*. Chaput is currently editing a digital edition of the letters of Thomas Wilson Dorr which will be posted to: http://library.providence.edu/dorr.

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