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William P. Marshall

University of North Carolina School of Law, [wpm@email.unc.edu](mailto:wpm@email.unc.edu)

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# THE CONSTITUTIONALITY OF SCHOOL PRAYER: OR WHY *ENGEL V. VITALE* MAY HAVE HAD IT RIGHT ALL ALONG

WILLIAM P. MARSHALL\*

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers, and our country.<sup>1</sup>

The School Prayer decisions<sup>2</sup> have now been with us for a long time. *Engel v. Vitale*, the case that invalidated the recital of the so-called Regents' prayer in the public schools, was decided in 1962.<sup>3</sup> *Abington School District v. Schempp*, the decision striking down Bible reading and the recitation of the Lord's Prayer, was issued in 1963.<sup>4</sup>

Nevertheless, the question of the propriety of state-sponsored prayer has not gone away. Recent polling suggests that 61% of Americans still support some form of school prayer.<sup>5</sup> Legislative prayer continues to be a contentious issue throughout the country<sup>6</sup> even though the Court in *Marsh v. Chambers*,<sup>7</sup> and more recently in *Town of Greece v. Galloway*,<sup>8</sup> held that

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\* Kenan Professor of Law, University of North Carolina School of Law. Thanks to Tom Berg for his comments on an earlier draft of this article and to Jim Beattie, Joanne Brant and Rodney Smith for their helpful critiques. I am also indebted to Jon Dugan, Josh Roquemore, and Lauren Russell for their research assistance.

<sup>1</sup> This is the full text of the prayer that was at issue in *Engel v. Vitale*, 370 U.S. 421, 422 (1962).

<sup>2</sup> The term "School Prayer decisions," as used in this Article, refers to *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963), not to the later Supreme Court cases that also addressed school prayer issues.

<sup>3</sup> *Engel*, 370 U.S. at 421.

<sup>4</sup> *Schempp*, 374 U.S. at 203.

<sup>5</sup> Rebecca Riffkin, *In U.S., Support for Daily Prayer in Schools Dips Slightly*, GALLUP (Sept. 25, 2014), <http://www.gallup.com/poll/177401/support-daily-prayer-schools-dips-slightly.aspx> [<https://perma.cc/M23S-4SQR>].

<sup>6</sup> *E.g.*, *Lund v. Rowan Cty.*, 863 F.3d 268, 271–72 (4th Cir. 2017).

<sup>7</sup> 463 U.S. 783 (1983).

<sup>8</sup> 134 S. Ct. 1811 (2014).

at least some forms of the practice are constitutionally permissible.<sup>9</sup> Political and opinion leaders continue to effectively use the ban on school prayer to galvanize political opposition to the Supreme Court and to what is perceived as an overly secularized society.<sup>10</sup> The religious right, a movement that owes its existence, at least in part, to the public reaction against school prayer decisions, remains a potent political force.<sup>11</sup> Public-school prayer, my students tell me, continues to be routinely practiced in some areas of the country.<sup>12</sup>

The controversy surrounding the School Prayer decisions has not subsided.<sup>13</sup> Nor is it likely to. The intersection of state and religion is

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<sup>9</sup> The *Galloway* Court did not hold that all forms of legislative prayer were permissible. Rather, the Court indicated that prayers that “denigrate nonbelievers . . . threaten damnation, or preach conversion” could potentially violate the anti-establishment mandate. *Id.* at 1823.

The volatility of legislative prayer after *Galloway* was evident in a recent decision by the Fourth Circuit in *Lund*. In that case, the Fourth Circuit, in a deeply divided *en banc* decision, struck down the County’s practice of opening its sessions with a legislative prayer that (1) was led by elected officials, (2) who invited the attendees to the public meeting to pray with the government officials, and (3) was uniformly sectarian. *Lund*, 863 F.3d at 272.

<sup>10</sup> See Robert Costa, *Conservatives Seek to Regain Control of Republican Agenda*, WASH. POST (May 15, 2014), [https://www.washingtonpost.com/politics/conservatives-seek-to-regain-control-of-republican-agenda/2014/05/15/aaa20c80-dc6e-11e3-bda1-9b46b2066796\\_story.html](https://www.washingtonpost.com/politics/conservatives-seek-to-regain-control-of-republican-agenda/2014/05/15/aaa20c80-dc6e-11e3-bda1-9b46b2066796_story.html) [<https://perma.cc/8SCN-TZEW>]; ROBERT NORTH ROBERTS ET AL., PRESIDENTIAL CAMPAIGNS, SLOGANS, ISSUES, AND PLATFORMS 422–23 (2012); Matthew Brown, *50 Years Later: High Court’s School Prayer Ruling Still Fuels Religious Liberty Debate*, DESERET NEWS (June 24, 2012, 7:00 PM), <http://www.deseretnews.com/article/865558046/50-years-later-High-courts-school-prayer-ruling-still-fuels-religious-liberty-debate.html?pg=all> [<https://perma.cc/C4MY-U6JZ>]; Emma Margolin, *50 Years After SCOTUS Banned School Prayer, Debate Lives On*, MSNBC (Sept. 13, 2013, 8:47 AM), <http://www.msnbc.com/thomas-roberts/50-years-after-scotus-banned-school-prayer-d> [<https://perma.cc/L3LH-4JNH>]; Tierney Sneed, *School Prayer Fight Begins Anew*, U.S. NEWS (Aug. 27, 2014, 1:27 PM), <http://www.usnews.com/news/articles/2014/08/27/school-prayer-fight-begins-anew> [<https://perma.cc/5LBC-MXCV>].

<sup>11</sup> See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 320–21 (2001).

<sup>12</sup> See Corrina Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel*, 67 STAN. L. REV. 479, 552 (2015) (“Even today, school prayer remains a feature of some Southern schools.”).

<sup>13</sup> See *supra* note 10.

always a volatile mix, and that volatility only increases when the public schools and our children's upbringing are at stake.<sup>14</sup>

What may be more surprising is that after over fifty years the law underlying the School Prayer decisions is also unsettled. By this, I do not mean simply that a new set of Justices could overturn the decisions. Rather, what I mean is that later cases addressing school prayer have not relied on the justifications offered by *Engel* and *Schempp* as to why school prayer is unconstitutional.<sup>15</sup> Although the later cases are consistent *in result* with *Engel* and *Schempp*, in that they invalidate the prayer exercise at issue, those cases nonetheless appear to rest on rationales that are different than those offered in the original decisions. Specifically, while *Engel* and *Schempp* focus on societal harms caused by school prayer, such as sectarian divisiveness and the corruption of religion, the later cases primarily concentrate on individual harms such as coercion and alienation.<sup>16</sup> This doctrinal inconsistency, then, might suggest that the constitutional case against school prayer is not as straightforward as one might think.

This Article reexamines the constitutional foundations of the School Prayer decisions. Part I briefly canvasses the *Engel* and *Schempp* decisions, along with the three other school prayer cases that followed them, in order to determine their doctrinal impact. This Part demonstrates that *Engel* and *Schempp* have had surprisingly little effect on Establishment Clause doctrine even though the Court has continued to adhere to the decisions' conclusion that school prayer is impermissible. Part II attempts the hard work—asking whether, and if so why, the School Prayer decisions are constitutionally correct. This Part concludes that the Court was right in ruling that school prayer is unconstitutional but that the

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<sup>14</sup> The debate over the course of public education holds enormously high stakes. As Justice Felix Frankfurter once wrote, "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). See also Ronald R. Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1033 (1983) (public school laws embody society's "moral vision, a dream that society dreams of itself.").

<sup>15</sup> The later cases are *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985); *Lee v. Weisman*, 505 U.S. 577, 599 (1992); and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000). See also *Engle*, 370 U.S. at 421; *Schempp*, 374 U.S. at 203.

<sup>16</sup> See *infra* notes 95–119 and accompanying text.

sectarian divisiveness rationale offered in *Engel*,<sup>17</sup> rather than the individual harm justifications presented in the later cases, offers the more persuasive rationale. Part III then notes some of the ironies inherent in justifying *Engel* and *Schempp* on anti-divisiveness grounds.

One caveat before proceeding: the assertion that the unconstitutionality of school prayer rests on anti-divisiveness grounds might hold significance for other Establishment Clause issues. For example, because the anti-divisiveness rationale does not trigger individualized harm, it has clear implications for the question of who should have standing to bring challenges under the Establishment Clause.<sup>18</sup> Similarly, and even more obviously, the anti-divisiveness rationale should also have strong repercussions for the constitutionality of government-sponsored prayer outside the public-school context.<sup>19</sup> This Article, however, focuses exclusively on the role of anti-divisiveness in the context of the constitutionality of school prayer and reserves those other questions for another day.

## I. THE JURISPRUDENCE OF SCHOOL PRAYER

### A. *Engel and Schempp*

It is no exaggeration to claim that the Court's *Engel* and *Schempp* decisions were, and continue to be, the most controversial cases in the entirety of religion clause jurisprudence.<sup>20</sup> It is also no exaggeration to

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<sup>17</sup> As will be discussed below, *Engel* did most of the work in setting forth the reasons why school prayer was unconstitutional. *Schempp* merely relied on *Engel*'s rationale. See *infra* notes 56–61 and accompanying text.

<sup>18</sup> See *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968) (granting taxpayers standing to challenge a federal program on Establishment Clause grounds).

<sup>19</sup> See *Lund v. Rowan Cty.*, 863 F.3d 268, 286 (4th Cir. 2017) (noting but not relying upon divisiveness, in striking down a County Board of Commissioners' practice of opening its meetings with sectarian prayers led by one of its members); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (upholding the practice of opening town board meetings with a prayer led by local clergy); *Marsh v. Chambers*, 463 U.S. 783, 795 (upholding the opening of legislative sessions with a prayer led by a paid chaplain).

<sup>20</sup> Even without limiting the category to religion clause cases, *Engel* in particular, as Thomas Berg accurately notes, stands as one of the most controversial Court decisions in history. Thomas C. Berg, *The Story of the School Prayer Decisions: Civil Religion Under Assault*, in *FIRST AMENDMENT STORIES* 193, 193 (Richard W. Garnett & Andrew Koppelman eds., 2012); BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW*

(continued)

suggest that the prohibition against school prayer that resulted from those cases defines the popular understanding of what the Establishment Clause means.<sup>21</sup> When one thinks of what the Establishment Clause means, the prohibition against school prayer comes immediately to the fore.<sup>22</sup>

Yet, from a doctrinal perspective, neither *Engel* nor *Schempp* are generally considered to be landmark decisions.<sup>23</sup> Rather, the foundational cases in the Court's Establishment Clause jurisprudence have stemmed from areas outside the public-school classroom. *Everson v. Board of Education*, a parochial aid case,<sup>24</sup> is probably the most notable in that respect, both because it incorporated the Establishment Clause to the states<sup>25</sup> and because it introduced the metaphor of the wall of separation between church and state into Establishment Clause jurisprudence.<sup>26</sup> *Lemon v. Kurtzman*, another parochial aid decision, ranks highly because it created the famous (infamous?) three-prong test that guided Establishment Clause jurisprudence for over a quarter of a century.<sup>27</sup> Justice O'Connor's

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*ENGEL V. VITALE* CHANGED AMERICA 72 (2007). See also STEVEN K. GREEN, *THE BIBLE, THE SCHOOL, AND THE CONSTITUTION* 3 (2012) ("The public outcry over the *Schempp* and *Murray* decisions was even louder than the one over *Engel*.").

For a thoughtful and insightful account that the *Engel* Court itself did not realize its decision would be so controversial, see Lain, *supra* note 12, at 484, 499-506.

<sup>21</sup> GREEN, *supra* note 20, at 3-4.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> That *Engel*, in particular, broke no new ground was recognized contemporaneously by at least one of the leading constitutional law academics of that period. See Philip B. Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."*, 1962 SUP. CT. REV. 1, 32. (1962).

<sup>24</sup> The issue was whether the state could provide bus transportation to children attending parochial schools. *Everson v. Bd. of Educ.*, 330 U.S. 1, 4-5 (1947).

<sup>25</sup> *Id.* at 15 ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.").

<sup>26</sup> *Id.* at 16. The decision is also famous for its proclamation that the Establishment Clause means that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id.*

<sup>27</sup> The three-part *Lemon* test requires that (1) the government action must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster "an excessive government entanglement with

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concurrence in *Lynch v. Donnelly*, addressing the constitutionality of a state's display of religious symbols, merits prominence because of its announcement of the "non-endorsement" test<sup>28</sup> that now occupies much of Establishment Clause doctrine.<sup>29</sup> *Mueller v. Allen*, the tuition deduction case, and *Zelman v. Simmons-Harris*, the tuition voucher case, are significant because they set forth the rule that aid to religious organizations will likely be upheld as long as the program in question does not favor religion and is available to a broad class of beneficiaries that includes religious and nonreligious entities.<sup>30</sup> In fact, the only *school prayer* case that can submit any claim to doctrinal importance is *Lee v. Weisman* and its inclusion of a coercion element into the Establishment Clause inquiry.<sup>31</sup> Yet, as will be discussed below, the jurisprudential impact of *Weisman* has yet to become clear.<sup>32</sup>

*Engel* and *Schempp*, in contrast, do not have strong doctrinal legacies.<sup>33</sup> Both cases are often cited for the proposition that the government must act with a secular purpose,<sup>34</sup> and *Schempp* (although not

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religion." 403 U.S. 602, 612–13 (1971). The test's preservation in light of constant attack has been notable. Justice Scalia once described the test as being like "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

<sup>28</sup> 465 U.S. 668, 694 (1984) (O'Connor, J. concurring) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion").

<sup>29</sup> See *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005); *Van Orden v. Perry*, 545 U.S. 677, 698–700 (2005).

<sup>30</sup> *Mueller v. Allen*, 463 U.S. 388, 397 (1983); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). See also *Mitchell v. Helms*, 530 U.S. 793, 794 (2000).

<sup>31</sup> 505 U.S. 577, 587 (1992).

<sup>32</sup> Notably, the plaintiffs in *Galloway* relied primarily on the anti-coercion rationale, rather than on *Lemon* or non-endorsement, in arguing that the legislative prayer at issue in that case was unconstitutional—perhaps suggesting that the coercion test is achieving greater prominence in Establishment Clause litigation. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825–26 (2014). Nevertheless, they did not prevail. *Id.* at 1828.

<sup>33</sup> The cases did not, for example, impact the Court's decisions on the constitutionality of legislative prayer. See *Marsh v. Chambers*, 463 U.S. 783, 791–92 (upholding legislative prayer); *Galloway*, 134 S. Ct. at 1828.

<sup>34</sup> See, e.g., *Weisman*, 505 U.S. at 584–85 ("[T]o satisfy the Establishment Clause a governmental practice must . . . reflect a clearly secular purpose . . .").

*Engel*) was, in fact, the first case to articulate that requirement.<sup>35</sup> Neither case, however, is regularly cited as authority for setting forth the constitutional justifications underlying the anti-establishment provision.<sup>36</sup>

*Engel v. Vitale*, as mentioned, was the decision that struck down the voluntary recital of the state-composed, so-called Regents' Prayer in the New York public schools.<sup>37</sup> In so holding, the Court discussed two separate justifications. The first involved a concern of religious divisiveness ("anti-divisiveness").<sup>38</sup> According to the *Engel* Court, the

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<sup>35</sup> The attribution of secular purpose to *Engel* is actually anachronistic because the secular purpose requirement was not announced until *Schempp*, which was decided one year after *Engel*. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

*Schempp* also introduced the second prong in what was to later become *Lemon v. Kurtzman*'s three-prong Establishment Clause test: the requirement that an enactment must not have the primary effect of advancing or inhibiting religion. *Schempp*, 374 U.S. at 222. As will be discussed below, however, the majority opinion in *Schempp* did not explain why the Establishment Clause demanded the secular-purpose and primary-effect inquires, nor did it set forth how school prayer violated those specific tests. See *infra* notes 56–57 and accompanying text.

<sup>36</sup> The lack of *Engel*'s impact in setting forth the justifications for the Establishment Clause is perhaps most apparent in the Court's development of the non-endorsement test. As set forth in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, the non-endorsement test requires that government not take action that "constitutes an endorsement or disapproval of religion." 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

One might think that non-endorsement and anti-divisiveness would have been seen by the Court as directly related. After all, a test that prohibits the government from endorsing religion, *id.*, would presumably discourage religion from seeking that endorsement. It would therefore eliminate the divisiveness that comes from religions competing for "the Government's stamp of approval," *Engel*, 370 U.S. at 429, because religions would no longer compete for that approval. Nevertheless, Justice O'Connor's opinion in *Lynch* did not even cite the *Engel* decision, and the Court has never explicitly recognized the relationship between non-endorsement and divisiveness. Rather, to Justice O'Connor, the harm from government endorsement is individual alienation and not the societal disruption caused by sectarian division. *Lynch*, 465 U.S. at 688.

<sup>37</sup> The prayer in *Engel* was "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Engel*, 370 U.S. at 422. For an excellent account of the factual background of the *Engel* litigation, see Berg, *supra* note 20, at 227.

<sup>38</sup> The anti-divisiveness rationale is extensively discussed in Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).



Framers were concerned with “the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government’s stamp of approval.”<sup>39</sup> The “content of [the] prayers and [the] privilege of praying,” the Court stated, was therefore not intended by the Framers to “be influenced by the ballot box.”<sup>40</sup> Notably, the divisiveness harm recognized in *Engel* does not accrue to the individual.<sup>41</sup> Rather, the injury is one that affects society generally and not specific persons.<sup>42</sup>

The second rationale offered in *Engel* was the concern with corruption of religion (“anti-corruption”).<sup>43</sup> Specifically, the *Engel* Court ruled that the Regents’ Prayer was problematic because it violated the principle that religion is inevitably corrupted when it depends upon government for its support.<sup>44</sup> As the Court stated, “The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”<sup>45</sup> Having the state first write, and then promote, a matter as religious as prayer would then be a cardinal violation of this principle.<sup>46</sup>

As with anti-divisiveness, the anti-corruption rationale is not based upon protecting against individual injury.<sup>47</sup> The concern is with the effects of the challenged action on the integrity of religion and not with its effects on particular persons.<sup>48</sup>

*Abington School District v. Schempp*, in turn, addressed the constitutionality of the recitation of the Lord’s Prayer and the practice of

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<sup>39</sup> *Engel*, 370 U.S. at 429. The *Engel* Court also expressed concern for the subsequent harm to the religious minorities who might not be able to prevail in the political debate. *Id.* at 431.

<sup>40</sup> *Id.* at 429.

<sup>41</sup> *Id.* at 430.

<sup>42</sup> *Id.* at 431.

<sup>43</sup> *Id.* at 431–32. For a detailed discussion of this rationale, see Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

<sup>44</sup> *Engel*, 370 U.S. at 431–32.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 425.

<sup>47</sup> Koppelman, *supra* note 43, at 1841.

<sup>48</sup> *Id.*

Bible reading in the public schools.<sup>49</sup> Like *Engel*, *Schempp* had an enormous practical impact, effectively invalidating the practices of thousands of school districts throughout the country.<sup>50</sup> It was also, in many respects, even more disruptive than *Engel* in that it struck down practices that had been in place in the public schools since the beginning of the nineteenth century.<sup>51</sup>

Like *Engel*, *Schempp* also has not had much influence in Establishment Clause jurisprudence.<sup>52</sup> To be sure, as noted previously, *Schempp* was the first case that set forth the proposition that in order to avoid Establishment Clause scrutiny, a government action must have a valid secular purpose.<sup>53</sup> *Schempp* also introduced what was to become the second prong of the *Lemon* test, i.e., that the challenged action must have “a primary effect that neither advances nor inhibits religion.”<sup>54</sup> But Justice Clark’s majority opinion in *Schempp* did not set forth the constitutional rationales underlying the secular purpose and primary effect test and, in effect, added little in substance to what *Engel* had already set out.<sup>55</sup> Moreover, even after announcing the secular-purpose and primary-effect tests, the *Schempp* Court never adequately explained why Bible reading or the recitation of the Lord’s Prayer violated those requirements. Rather, the Court simply held that the exercises were religious and were “intended by the State to be so.”<sup>56</sup>

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<sup>49</sup> 374 U.S. at 205–06. For an insightful background discussion of the *Schempp* litigation, see Douglas Laycock, *Edward Schempp and His Family*, 38 J. SUP. CT. HIST. 63 (2013).

<sup>50</sup> See sources cited *supra* note 10. As Thomas Berg notes, however, *Schempp* actually precipitated less controversy than *Engel*. Berg, *supra* note 20, at 221.

<sup>51</sup> See GREEN, *supra* note 20, at 13.

<sup>52</sup> Ernest J. Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 S. CT. REV. 1, 5 (“Justice Clark’s opinion for the Court [in *Schempp*] added very little to what was said in *Engel*.”).

<sup>53</sup> *Schempp*, 374 U.S. at 222.

<sup>54</sup> *Id.*

<sup>55</sup> See Stephen D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 959 (2011) (“Clark’s somewhat mechanical majority opinion offered little analysis . . .”); Brown, *supra* note 52, at 5.

<sup>56</sup> *Schempp*, 374 U.S. at 223 (concluding that the recitation of the Lord’s Prayer and the reading of Bible verses at the start of each school day are “religious ceremony[ies] and w[ere] intended by the State to be so”).

The mere conclusion that the prayers were religious, however, does not answer the questions posed by the secular-purpose inquiry. Even if the exercises were religious, the state might have had a secular purpose in supporting them, such as sending a message that the state was not hostile to religion or providing a moment of solemnity at the beginning of the school day. Alternatively, the state could argue that the prayers served the secular purposes of providing some religious counterweight to the public school's predominately secular culture and/or familiarizing students with the Bible for its literary value. Yet, while the *Schempp* Court noted these arguments, its only answer to these points was to repeat its previous assertion that the exercises were religious.<sup>57</sup>

The assertion that the exercises were religious also does not answer the primary-effect question. Presumably, the Court would need some analysis or discussion of effects to reach its conclusion that school prayer had the primary effect of advancing religion. The *Schempp* Court, however, offered no word as to how Bible readings and/or the recitation of the Lord's Prayer actually advanced religion (and, to be fair, it is not even clear from the opinion that the Court relied upon the primary-effect test in reaching its decision).<sup>58</sup>

More importantly, *Schempp* did not provide any independent explanation as to why the Establishment Clause requires a secular purpose or a primary effect that does not advance or inhibit religion.<sup>59</sup> Rather, for any actual justifications as to why school prayer was impermissible, the Court appeared to rely entirely on *Engel*<sup>60</sup> (although because the religious exercise at issue in *Schempp* was not state-authored like the prayer in *Engel*, the anti-corruption justification was less on point).<sup>61</sup> One is then left with *Engel*'s anti-divisiveness rationale as the primary justification guiding the original School Prayer decisions.

There is, of course, considerable force to the anti-divisiveness (and anti-corruption) rationales, and much of the remainder of this Article will be devoted to defending the former. Yet, in assessing the precedential

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<sup>57</sup> *Id.* at 225.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* For an in-depth analysis of the secular purpose requirement, see generally Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002).

<sup>60</sup> *Schempp*, 374 U.S. at 216.

<sup>61</sup> See Brown, *supra* note 52, at 5 (noting the fact that the prayer in *Engel* was state-composed was not considered critical by the Justices in *Schempp* for construing the earlier decision).

impact of *Engel* and *Schempp*, it is worth noting that the anti-divisiveness (and anti-corruption) rationales have not become a part of the general Establishment Clause jurisprudence. That is, although the Court has occasionally nodded in their directions, it has never held that either the anti-divisiveness<sup>62</sup> or anti-corruption<sup>63</sup> justifications have been sufficient in and of themselves to invalidate state action under the Establishment Clause.

This is true, moreover, even with respect to the later Supreme Court decisions addressing school prayer. In only one of the Court's three subsequent decisions addressing school prayer, for example, was the anti-divisiveness rationale mentioned, and even in that case, it was not the basis for the Court's ruling.<sup>64</sup> Meanwhile, the anti-corruption rationale has played no role in these cases at all. Instead, as will be subsequently

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<sup>62</sup> *Lynch v. Donnelly*, 465 U.S. 668, 689 (O'Connor, J., concurring) ("Although several of our cases have discussed political divisiveness under the entanglement prong of *Lemon*, we have never relied on divisiveness as an independent ground for holding a government practice unconstitutional.") (citations omitted). See also Garnett, *supra* note 38, at 1669–70 (stating that the anti-divisiveness rationale has not been outcome-determinative); Koppelman, *supra* note 43, at 1838 (same).

The most notable opinion since *Engel* suggesting that anti-divisiveness was a central Establishment Clause concern was Justice Breyer's concurrence in *Van Orden v. Perry*, 545 U.S. 677, 698–99 (2005) (Breyer, J., concurring). In that case, the Court was faced with an Establishment Clause challenge to a stone monument of the Ten Commandments that had been on display on the grounds of the Texas State Capitol building for over forty years. In concluding that the display of the monument survived Establishment Clause scrutiny, Breyer argued that removal of the monument might prove to be more divisive than allowing it to remain on the statehouse grounds. *Id.*

Interestingly, the Court in *Galloway* pointed to the anti-divisiveness rationale as a reason for upholding the legislative prayer at issue in that case. Citing Justice Breyer's *Van Orden* opinion, the Court stated that "[a] test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Galloway*, 134 S. Ct. at 1819.

<sup>63</sup> The anti-corruption rationale has been raised in some dissents, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 711 (Souter, J., dissenting), and has been championed by Andrew Koppelman, *supra* note 43, at 1842.

<sup>64</sup> See *infra* notes 108–118 and accompanying text (discussing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290).

discussed, the Court based the later school prayer decisions on different justifications altogether.<sup>65</sup>

One is then left with the conclusion that, as momentous as the School Prayer decisions may have been, their actual effects on the nuts and bolts of Establishment Clause doctrine has been relatively minimal. In current Establishment Clause jurisprudence, the significance of *Engel* and *Schempp* stand mostly in their result—the conclusion that school prayer is unconstitutional.<sup>66</sup>

This is, of course, not to deny that there are major jurisprudential themes that can be gleaned from the School Prayer decisions. In *The Story of the School Prayer Decisions: Civil Religion Under Assault*, for example, Professor Thomas C. Berg discusses the effects the cases had on government attempts to sustain a so-called civil religion, meaning a general state-sponsored affirmation of the value of religion and the place of God in American society.<sup>67</sup> As Berg's title suggests, *Engel* and *Schempp* can be understood as providing the framework for civil religion's later demise.<sup>68</sup> And, in fact, as Berg points out, Justice Kennedy subsequently relied on *Engel* when he wrote in *Lee v. Weisman* that "[t]he suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."<sup>69</sup>

Dean Rodney K. Smith, in turn, suggests that the decisions were important steps in resolving the debate surrounding the First Amendment's original meaning. Specifically, in *Public Prayer and the Constitution*, Smith argues that the School Prayer decisions were significant junctures in the long-standing examination into whether the clauses should be understood to reflect the position of Justice Story that "the First Amendment was designed to recognize nondenominational and tolerant Christianity as our national religion"<sup>70</sup> or whether it should instead be

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<sup>65</sup> See *infra* notes 85–101 and accompanying text.

<sup>66</sup> But see *infra* notes 66–82 and accompanying text (discussing the views of leading commentators that the cases were jurisprudentially significant even if they had relatively little impact on doctrine).

<sup>67</sup> Berg, *supra* note 20, at 226–27.

<sup>68</sup> *Id.* The Court's decision in *Galloway*, upholding legislative prayer might suggest, however, that writing the epitaph for civil religion may have been premature. *Galloway*, 134 S. Ct. at 1829.

<sup>69</sup> Berg, *supra* note 20, at 227 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

<sup>70</sup> RODNEY K. SMITH, *PUBLIC PRAYER AND THE CONSTITUTION* 181 (1987).

understood as consonant with James Madison's view that the First Amendment could permit "state accommodation or perhaps even facilitation of religious exercise in the public sector, so long as the state acted in a non-preferential manner and provided that, in so doing, it refrained from adopting any mode of worship or doctrine as its own."<sup>71</sup> As Dean Smith explains, the School Prayer decisions can be understood as rejecting Justice Story's reading of the Establishment Clause because the prayers at issue in those cases would have been permissible under a theory, such as Story's, that allowed for state-sponsored nondenominational affirmations of Christianity.<sup>72</sup> At the same time, as Smith notes, although the cases did not formally adopt the Madisonian approach,<sup>73</sup> they could be seen as significant victories for that position because the holding that school prayer was unconstitutional would be consistent with the Madisonian vision.<sup>74</sup>

Professor Steven Smith's account of the school prayer decisions is the most far-reaching. In *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, Professor Smith argues that the School Prayer decisions, and most specifically *Schempp*, transformed "not only the jurisprudence of religious freedom but constitutional discourse generally, and indeed the American self-understanding."<sup>75</sup> This was so, according to Professor Smith, because the decisions marked a turning point in a long-standing, ongoing competition between two different conceptions on how America was constituted.<sup>76</sup> The first of these two conceptions, termed by Smith as "ecumenical providentialism" refers to the following position:

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<sup>71</sup> *Id.* at 183–84.

<sup>72</sup> *Id.* at 188–89. Smith is careful to note, however, that although Bible reading would likely be upheld under Justice Story's approach, that result would not be inevitable. According to Smith, proponents of Story's position might be concerned with the coercive aspects of state-led Bible reading and with the fact that the government would necessarily have to choose which version of the Bible to use in the public school. That divergent religions have their own versions of the Bible might mean that Bible reading might not be as easily "susceptible to nondenominational use in a . . . Judeo-Christian sense," as Justice Story's position would require. *Id.* at 183.

<sup>73</sup> As Smith points out, Justice Black's opinion in *Engel* set forth a more separationist approach than Madison would have advocated. *Id.* at 174.

<sup>74</sup> *Id.* at 189.

<sup>75</sup> Smith, *supra* note 55, at 947.

<sup>76</sup> *Id.* at 949.

America's history and institutions are subject to an overarching providence, that public morality or civil virtue need a religious foundation, and that it is imperative for citizens and for the nation itself to acknowledge their dependency upon Providence [although] government can and should remain noncommittal with respect to specific creedal differences . . . .<sup>77</sup>

The second, in contrast, termed "political secularism," stands for the proposition that "religion is and should be a private affair."<sup>78</sup> Professor Smith contends that the constitutional understanding should be agnostic between these two visions<sup>79</sup> and that the constitutional understanding, in fact, had been agnostic on this subject throughout most of the Nation's history.<sup>80</sup> He then argues, however, that the School Prayer decisions abandoned this agnosticism, replacing it with an era of political secularist orthodoxy that has since influenced other areas of constitutional law such as abortion and gay rights.<sup>81</sup> The result of this, Smith argues, is that those Americans who continue to adhere to the providentialist vision have become disaffected and resentful.<sup>82</sup> In Professor Smith's words, those subscribing to providentialist conception have "often come to view themselves as strangers in their own land."<sup>83</sup>

There is, without doubt, significant merit in the insights of Professor Berg, Dean Smith, and Professor Smith into the broader meanings of the School Prayer decisions. Nevertheless, despite the merits of their accounts, it remains true that *Engel* and *Schempp* have not resonated in the development of actual Establishment Clause doctrine.<sup>84</sup> Moreover, if, as previously explained, the key justification for those decisions (anti-divisiveness) has not been relied upon in later cases, then there exists a significant question as to whether the doctrinal bases of the School Prayer decisions, and by implication their holdings, continue to be valid at all. It is therefore necessary to examine the alternative rationales for the

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<sup>77</sup> *Id.* at 969–70 (citation omitted).

<sup>78</sup> *Id.* at 970.

<sup>79</sup> *Id.* at 988.

<sup>80</sup> *Id.* at 976.

<sup>81</sup> *Id.* at 1009.

<sup>82</sup> *Id.* at 1019.

<sup>83</sup> *Id.*

<sup>84</sup> See *supra* notes 33–55 and accompanying text.

invalidation of school prayer that have been advanced in the later school prayer cases and then to revisit the anti-divisiveness rationale itself.

### B. *The Later School Prayer Cases*

*Engel* and *Schempp* were not the Court's last words on the school prayer issue. In 1984, the Court struck down an Alabama moment-of-silence provision in *Wallace v. Jaffree*.<sup>85</sup> In 1992, the Court held in *Lee v. Weisman* that a prayer at the beginning of a middle-school graduation ceremony was unconstitutional.<sup>86</sup> In 2000, the Court ruled in *Santa Fe Independent School District v. Doe* that a student-led prayer prior to high-school football games violated the Establishment Clause.<sup>87</sup>

The question is what, if anything, did the reasoning in these cases add to or alter the understanding of the invalidity of school prayer offered in *Engel* and *Schempp*? With respect to *Wallace v. Jaffree*, the answer is clearly not much. *Wallace* involved a challenge to Alabama's moment of silence provision.<sup>88</sup> Most of the Court's analysis in the case involved its tracing the history of the law to an effort by the Alabama legislature to reintroduce prayer into the public school.<sup>89</sup> Based upon this history, the *Wallace* Court held that the moment-of-silence provision was unconstitutional as having an improper sectarian purpose.<sup>90</sup>

Notably, *Wallace* did not conclude that any moment of silence would be improper,<sup>91</sup> only that Alabama's was improper because of its particular history.<sup>92</sup> The fact that the Court singled out the purpose prong as its basis

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<sup>85</sup> 472 U.S. 38, 61 (1985).

<sup>86</sup> 505 U.S. 577, 599 (1992).

<sup>87</sup> 530 U.S. 290, 315 (2000).

<sup>88</sup> 472 U.S. at 40.

<sup>89</sup> *Id.* at 59 (suggesting that "the statute was enacted to convey a message of state endorsement and promotion of prayer").

<sup>90</sup> *Id.* at 60 (holding that the Alabama legislature created the moment of silence for the "sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday").

<sup>91</sup> In fact, as Justice White noted in his dissent, a majority of the Justices in the case opined that a moment of silence would be constitutionally permissible. *Id.* at 91 (White, J., dissenting) ("[A] majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer.").

<sup>92</sup> *Id.* at 59 ("The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday.").



for decision gave it an ideal opportunity to expand upon the meaning and theoretical foundations of the secular purpose requirement. It chose not to do so.<sup>93</sup>

*Lee v. Weisman*, the case addressing the constitutionality of a state-sponsored prayer by a member of the clergy at a middle-school graduation ceremony, in contrast, was a serious attempt by the Court to grapple with Establishment Clause theory. Justice Kennedy, writing for the Court, purported to formally introduce a new element into the Court's Establishment Clause jurisprudence—that of coercion.<sup>94</sup> To be sure, the introduction of coercion into the Establishment Clause inquiry was not completely novel. There was, for example, a reference to the constitutional problems raised by government coercion of religious belief raised in *Engel*: “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to prevailing officially approved religion is plain.”<sup>95</sup> But *Engel* also made clear that there was no coercion component in its Establishment Clause analysis. As the *Engel* Court stated, “The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”<sup>96</sup>

Justice Kennedy, however, inserted the coercion element into the Establishment Clause inquiry and in that sense appeared to contradict the decisions in *Engel* and *Schempp*.<sup>97</sup> He then went on, however, consistent

<sup>93</sup> *Id.* Justice O'Connor, however, did use her concurrence in *Wallace* to expand upon the meaning and application of the endorsement test that she had set forth in *Lynch*. *Id.* at 69 (O'Connor, J., concurring).

<sup>94</sup> *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“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.’”) (alteration in original) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

<sup>95</sup> *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

<sup>96</sup> *Id.* at 430. See also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (“Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.”).

<sup>97</sup> *Weisman*, 505 U.S. at 587.

*in result* with *Engel* and *Schempp*, to find that the prayer was invalid.<sup>98</sup> As Kennedy explained, because the prayer placed psychological pressure upon students to “stand as a group or, at least, maintain respectful silence” during the religious invocation, it was unconstitutional.<sup>99</sup> To Kennedy, the state-sponsored prayer created an atmosphere in which objecting students might feel obligated to hide their opposition in order to avoid jeopardizing relationships with their peers.<sup>100</sup> This violated the Establishment Clause because “the government may no more use social pressure to enforce orthodoxy than it may use more direct means.”<sup>101</sup>

If *Weisman* was an effort to permanently insert coercion as a necessary prerequisite to finding an Establishment Clause violation, it has not proved successful, at least to this point.<sup>102</sup> This may be because, as *Engel* explained, requiring coercion would be duplicative of the Free Exercise Clause.<sup>103</sup> Or it may be because, as Justice Scalia argued in his *Weisman* dissent, a finding that coercion could be established by mere peer pressure, would mean the test was “boundless, and boundlessly manipulable.”<sup>104</sup> (Justice Scalia argued instead that coercion should be found only when the government support of religion was demanded “by force of law and threat of penalty”).<sup>105</sup> In any event, although the Court since *Weisman* has continued to use the coercion test in evaluating Establishment Clause

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<sup>98</sup> *Id.*, at 596.

<sup>99</sup> *Id.* at 593.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 594.

<sup>102</sup> Berg, *supra* note 20, at 227 (“The attempt to limit the Establishment Clause to cases of coercion . . . ultimately failed.”).

<sup>103</sup> *Engel v. Vitale*, 370 U.S. 421, 430 (1962). See also Ira C. Lupu and Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 135 (“State coercion of religious experience would seem to be a *prima facie* violation of the Free Exercise Clause.”) (citation omitted); Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 490 n.114 (1994).

<sup>104</sup> *Weisman*, 505 U.S. at 632 (Scalia, J., dissenting).

<sup>105</sup> *Id.* at 640. See also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

challenges,<sup>106</sup> it has found Establishment Clause violations without finding coercion.<sup>107</sup>

The final school prayer case, *Santa Fe Independent School District v. Doe*, took a different tack.<sup>108</sup> At issue in *Santa Fe* was the constitutionality of a student recital of a prayer prior to football games.<sup>109</sup> The relatively complex election process that the school district put in place leading up to the student-led prayer<sup>110</sup> steered the Court into spending significant time discussing whether the prayer in question should be construed as school-sponsored prayer and therefore constitutionally problematic, or private student speech and therefore permissible.<sup>111</sup> Concluding that the practice was state-sponsored prayer, the Court struck it down by primarily relying on the non-endorsement Establishment Clause test advanced in the government-displays-of-religious-symbols cases.<sup>112</sup> That test, as originally explained by Justice O'Connor in her opinion in *Lynch v. Donnelly*,<sup>113</sup> rested upon a theory of citizen alienation—specifically, O'Connor was concerned with protecting non-adherents from the alienation that occurs when the government is seen as endorsing a particular religious practice or belief.<sup>114</sup> Accordingly, in applying this test to invalidate the prayer at issue, the *Santa Fe* Court stated, “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

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<sup>106</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014). Although the Court applied the coercion test in *Galloway*, it did not, however, find coercion to be present in that case. *Id.* at 1828.

<sup>107</sup> *E.g.*, *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 881 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000).

<sup>108</sup> *Santa Fe*, 530 U.S. at 317.

<sup>109</sup> *Id.* at 298.

<sup>110</sup> *Id.* at 297–98. The decision to have prayers at football games was reached through a series of secret ballot votes in a procedure set up by the school district. First, students voted on whether to have an invocation before each home football game, and then a second vote was held to determine which student would give the invocation (this student was elected for the entire season). It was apparently expected by all concerned that the students would vote to have prayers before games. *Id.*

<sup>111</sup> *Id.* at 302.

<sup>112</sup> *Id.* at 309–10. *See also* *Allegheny v. ACLU*, 492 U.S. 573, 621 (1989).

<sup>113</sup> 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

<sup>114</sup> *Id.*

adherents that they are insiders, favored members of the political community.”<sup>115</sup>

The *Santa Fe* Court did not rest on alienation alone. It also found that there was no secular purpose.<sup>116</sup> Further, as in *Weisman*, it held that the student-led prayer was coercive, although, consistent with the decision in *Engel*, it did not appear to rule that coercion was necessary for there to be an Establishment Clause violation.<sup>117</sup> Finally, the Court also appeared to at least give a nod to anti-divisiveness, stating that the election process from which the student-led prayer devolved was a “mechanism [that] encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause.”<sup>118</sup>

As the previous discussion shows, the Court has not presented a unified theory as to what exactly is problematic about school prayer. Rather, it has offered competing explanations. Of course, because the cases are consistent in result, an after-the-fact reconciliation could be possible. One could go back and recast *Engel* and *Schempp*, for example, as actually being about preventing coercion (in the broad *Lee v. Weisman* sense of the term) or about protecting individuals against feelings of alienation—although that is not what they held.<sup>119</sup> Alternatively, one could simply claim that all five cases are consistent applications of the first prong of *Lemon*—the lack of a secular purpose. But mechanically reconciling the cases does not answer the basic question—just what exactly is the matter with school prayer? Part II will attempt to answer that question.

## II. JUST WHAT EXACTLY IS THE MATTER WITH SCHOOL PRAYER?

Whenever I teach the religion clauses, I start by having the class recite the words of the Regents’ Prayer. I then ask if any of them had a religious experience. To date, no one has. I do not find this surprising. Louis Pollack once described the Regents’ Prayer as little more than “a

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<sup>115</sup> *Santa Fe*, 530 U.S. at 309–10 (quoting *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)).

<sup>116</sup> *Id.* at 317.

<sup>117</sup> *Id.* at 312 (“[T]he delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.”).

<sup>118</sup> *Id.* at 311.

<sup>119</sup> Compare *Engel v. Vitale*, 370 U.S. 421, 436 (1963) and *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963) with *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

pathetically vacuous assertion of piety,” and it is difficult to imagine how even its daily recital could have much effect.<sup>120</sup>

To be sure, this exercise does not end the class discussion. Some students contend that state-sponsored recitation of the prayer is problematic because it involves a rote exercise, does not promote critical thinking, and is not a part of the teaching mission. On closer examination, however, they quickly concede that much of what occurs in the public schools involves rote exercises, does not promote critical thinking, and is not a part of the teaching mission.<sup>121</sup> Others suggest that the prayer is objectionable because religion is based on faith and is therefore on different epistemological grounds than teaching based on reason. This argument, too, is quickly abandoned. As others in the class point out, distinguishing between the epistemology of reason and the epistemology of faith is difficult because reason may be subject to the same sort of epistemological attack as faith.<sup>122</sup> After all, assertions as to the epistemological superiority of reason, like faith, are also ultimately unverifiable.<sup>123</sup>

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<sup>120</sup> Louis H. Pollack, *Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62, 63 (1963).

<sup>121</sup> One of my students did question whether it would be constitutional for the school to lead a morning recital of something like the following:

Adam Smith, we acknowledge our dependence upon the invisible hand,  
and we beg its beneficence upon us, our teachers and our Country.

My sense was that while Justice Jackson might find this unconstitutional, *see W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”), Steven Smith would not, *see* Steven D. Smith, *Barnette’s Big Blunder*, 78 CHICAGO-KENT L. REV. 625, 628 (2003) (arguing that Justice Jackson’s statement in *Barnette* was incorrect).

<sup>122</sup> *See* Frederick M. Gedicks, *The Religious, the Secular, and the Antithetical*, 20 CAP. U. L. REV. 113, 139 (1991); David R. Williams, Jr., *In Defense of the Secular Purpose Status Quo*, 102 VA. L. REV. 2075, 2087 (2016) (noting the argument that religious beliefs are on the same epistemological grounds as other beliefs); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1364 (2012) (same).

<sup>123</sup> *See* Frederick M. Gedicks & Roger Hendrix, CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE 123 (1991) (“In postmodern thought, the Enlightenment project is a failure, having only succeeded in replacing worship of God with

(continued)

Finally, still other students suggest that the Regents' Prayer might be problematic because it could be perceived as offensive to some. Yet even these students are reluctant to suggest that such offense amounts to a cognizable constitutional injury. As they point out, much of what government does is offensive to many; but that alone has never been grounds for constitutional invalidation of government action. Moreover, as they further note, other First Amendment readings strongly hold that preventing offense to sensibilities is generally not a matter of constitutional concern.<sup>124</sup>

My faux-empirical work in this area is also buttressed by my own experience. I experienced public-school prayer as a member of a religious minority when I was growing up, and I can report back that I and, as far as I know, all of my classmates, survived the ordeal.<sup>125</sup> No one converted, and if any of us felt like outsiders (which some may have) in our predominately Catholic town, it was more likely because of the way the community celebrated Christmas and Easter than it was the reading of a prayer at the beginning of a school day. Paul Horwitz is right when he notes that in religiously homogenous communities it matters little whether one's sense of being a minority comes from public or private action.<sup>126</sup>

Maybe it is because of this experience, or maybe it is because of the free-speech cases rejecting offense to sensibilities as a justification for curbing expression,<sup>127</sup> but I have some trouble accepting either Justice O'Connor's alienation rationale or Justice Kennedy's social pressure coercion theory as justifying the school prayer prohibition.<sup>128</sup> I do not

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worship of science."); David Hume, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* 37 (Prometheus Books 1988) (1748) (scientific knowledge is based on the belief that what happened in the past determines what will happen in the future).

<sup>124</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (holding that preventing offense does not support restricting speech).

<sup>125</sup> Some of us, in fact, used the opportunity to become outstanding rubber band sharpshooters.

<sup>126</sup> For a particularly moving account of how painful some of these injuries were in the *Santa Fe* case, see Paul Horwitz, *Of Football, "Footnote One," and the Counter-Jurisdictional Establishment Clause: The Story of Santa Fe Independent School District v. Doe*, in *FIRST AMENDMENT STORIES*, *supra* note 20, at 481, 510.

<sup>127</sup> See sources cited *infra* note 147.

<sup>128</sup> William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 *IND. L.J.* 351, 357 (1991).

doubt some may feel some level of alienation or coercion.<sup>129</sup> Nevertheless, I question whether such injuries should be considered constitutionally significant.<sup>130</sup>

There are, of course, more significant reasons to be skeptical of the anti-alienation and anti-coercion rationales beyond my own idiosyncratic experiences. Both the alienation and coercion injuries, for example, are highly amorphous and elastic concepts. As Andy Koppelman argued with respect to the alienation rationale, “In a pluralistic culture, alienation is inevitable.”<sup>131</sup> Similarly, anti-coercion, as interpreted by the Court in *Weisman*, does not fare better as a limiting concept. In a pluralistic culture, social pressure fostered by government action is unavoidable.<sup>132</sup>

Either rationale, moreover, if taken seriously, could lead to rather dramatic results outside the school prayer context—including, for example, placing in doubt the constitutionality of much of the public-school curriculum. Fundamentalist children, after all, may be alienated or made to feel like outsiders when the public schools teach them, against their deeply held beliefs, that morality may be derived from sources other than a literal reading of the Bible.<sup>133</sup> Does that mean that a school’s use of the Holt

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<sup>129</sup> Nor do I doubt that some school districts could turn even as vacuous as a prayer as that at issue in *Engel* into a true religious exercise.

<sup>130</sup> *Contra* Horwitz, *supra* note 126.

<sup>131</sup> Koppelman, *supra* note 43, at 1840. See also Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 712 (1986) (“[I]t is not clear why symbolic exclusion should matter so long as ‘nonadherents’ are in fact actually included in the political community. Under those circumstances, nonadherents who believe that they are excluded from the political community are merely expressing the disappointment felt by everyone who has lost a fair fight in the arena of politics.”); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 307 (1987) (arguing that because not all beliefs can prevail in the political process, those whose positions are not accepted will necessarily feel like outsiders).

<sup>132</sup> See Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, SAINT LOUIS U. L.J. 417, 422–23 (2009) (“[I]n many cases involving alleged violations of Establishment Clause guarantees, the requirement that there be proof of indirect coercion may not pose much of a bar.”).

<sup>133</sup> See Nomi Maya Stolzenberg, “*He Drew a Circle that Shut Me Out*”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581, 609 (1993).

Rinehart readers is unconstitutional?<sup>134</sup> Similarly, the teaching (and the testing) of the theory of evolution may have coercive effects on those who do not accept evolution's tenets on religious grounds. Does that mean that the teaching of evolution in the public schools is impermissible?<sup>135</sup>

Whether the alienation and coercion justifications should remain a part of Establishment Clause jurisprudence is beyond the scope of this Article. But the weaknesses in those approaches and, in particular, their implications for public-school teaching overall, suggest that the later school prayer cases may have taken a wrong turn when they began focusing on the effect of the prayers on nonadherents. It is therefore necessary to return to *Engel* and reexamine whether the anti-divisiveness justification offered in that decision may be more helpful.<sup>136</sup>

#### A. *Engel and Anti-Divisiveness*

*Engel*, as we have seen, was concerned with the divisiveness that arises when religions compete for the government's stamp of approval.<sup>137</sup> At least as a descriptive matter, there seems little doubt that *Engel* was exactly

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<sup>134</sup> *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987) (rejecting the claim of fundamentalist plaintiffs who contended that reading of certain secular texts in the public schools violated their free-exercise rights).

<sup>135</sup> I expect that some might object to comparing school prayer with the teaching of morality and science on grounds that prayer is religious while the teaching of morality and science are secular activities and therefore not subject to Establishment Clause restrictions. But that, of course, depends upon whose perspective one adopts to answer the question of what is religious. To some believers, the teaching of morality and evolution are activities with deep theological content and are as religiously-laden as the purest form of prayer. See *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968). To such believers, the public schools *are* teaching religion.

Some might then respond that just because some may view the activities of the public schools as "religious" does not make those activities religious. Maybe. But the anti-establishment mandate should suggest that it is at least problematic for constitutional law to create a privileged standpoint from which to make universal observations about what is religious and what is not.

<sup>136</sup> There may also be an anti-corruption argument at issue. Even if the exercise is not state-authored, there is an argument to be made that having secular teachers lead prayer or Bible-reading recitals in public-school classrooms fosters disrespect for religion. *Engel v. Vitale*, 370 U.S. 421, 431–32 (1962); Koppelman, *supra* note 43, at 1846.

<sup>137</sup> *Engel*, 370 U.S. at 429.



right in suggesting school prayer is religiously divisive.<sup>138</sup> After all, the question of whether there should be school prayer is inextricably bound up with the secondary question of if so, whose prayer? The “whose prayer” question, in turn, cannot be answered without the government choosing among, and thereby favoring, selected religious beliefs.

And that is exactly where the dangers of religious divisiveness become the most manifest. The issue of whose religion the state will favor is one that has provoked, and continues to provoke, endless discord throughout the world.<sup>139</sup> It has fostered endless controversy in the United States—from debates over which religion’s version of the Ten Commandments should be recognized by the State<sup>140</sup> to the creation of parochial schools as a reaction to the recital of Protestant prayer in the public schools.<sup>141</sup>

Indeed, one need look no further than the contemporary American experience surrounding legislative prayer for proof of the merits of the divisiveness claim.<sup>142</sup> As Christopher Lund has demonstrated, divisiveness arising over the question of “whose prayer” has proven to be an actuality rather than an unfounded fear.<sup>143</sup> Controversies over whose prayer should be recited at legislative sessions have led not only to sectarian divisions but also to occasional violence.<sup>144</sup> Debates over school prayer would likely be even more contentious given that the upbringing of children is at stake.

The question is not whether school prayer leads to divisiveness; it assuredly does. The question is whether that divisiveness is a matter of constitutional concern. Some leading commentators argue that it is not. Andrew Koppelman argues, for example, that “political division is an

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<sup>138</sup> See Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 981–82 (2010).

<sup>139</sup> See *Engel*, 370 U.S. at 429.

<sup>140</sup> Persons have been killed over the question of whose version of the Ten Commandments (Protestant or Catholic) should be the one displayed by the government. RAY ALLEN BILLINGTON, *THE PROTESTANT CRUSADE 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* 222 (Rinehart & Co. ed., 1952) (1938) (noting that in 1844, riots erupted in Philadelphia between Catholics and Protestants over whose version of the Bible should be used in the public-school setting).

<sup>141</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 628 (Douglas, J., concurring) (noting that Catholic schools came into existence because of Protestant prayer in the public schools).

<sup>142</sup> *Marsh v. Chambers*, 463 U.S. 783, 793 (1983) (holding that legislative prayer was permissible); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014).

<sup>143</sup> See Lund, *supra* note 138, at 993.

<sup>144</sup> *Id.* at 974–75.

unavoidable part of life in a democracy.”<sup>145</sup> Richard Garnett goes further. In his comprehensive treatment of the divisiveness argument in religion clause jurisprudence, he shows how the argument that divisiveness is unconstitutional is inconsistent with the idea of a robust democracy.<sup>146</sup> I agree with the accounts of both authors and would further emphasize that the call to end political divisiveness is flatly inconsistent with much of First Amendment speech jurisprudence that celebrates division and robust debate.<sup>147</sup>

That said, I do not think this observation ends the inquiry. The divisiveness-as-part-of-democratic-politics point may be well taken with respect to the political give and take that arises when religious organizations enter the political fray on issues involving funding or the adoption or rejection of substantive policies, even when those policies have theological overtones such as abortion or gay rights. But in those cases, the organization that wins or loses the legislative debate has not put itself up for political approval or disapproval and, more importantly, has not put itself up against other religions for political approval or disapproval. The same cannot be said with respect to the question of “whose prayer?” When that question is put to the political process, the perceived existential validity of the religion itself may be seen as up for legitimization. For this reason, I would suggest that when the political process places at stake the government’s stamp of approval of religion, the divisiveness that results is of a completely different breed than is the divisiveness created by other political disputes.

There are strong explanations for this. As I have written elsewhere, the reason why conflicts among religions are so combustible stems from

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<sup>145</sup> Koppelman, *supra* note 43, at 1838. Koppelman may actually come closer to accepting the anti-divisiveness rationale than he lets on. In his article on secular purpose, Koppelman argues that one of the reasons the government should be prohibited from declaring religious truth is because to do so would disrupt civil peace. Koppelman, *supra* note 59, at 110.

<sup>146</sup> Garnett, *supra* note 38, at 1711.

<sup>147</sup> See *Cohen v. California*, 403 U.S. 15, 26 (1971); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964). Richard Garnett also makes this point quoting at length from Justice Brennan’s opinion in *Texas v. Johnson*: “As Justice Brennan observed—a ‘function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.’” Garnett, *supra* note 38, at 1671 (quoting *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989)).

the inherent nature of religious belief.<sup>148</sup> Because for some, religious belief serves as a defense to existential fear and anxiety (what the theologian Rudolph Otto referred to as the *tremendum*), the believer may form a particularly strong attachment to those beliefs and the subsequent need to validate her belief system to the exclusion of others.<sup>149</sup> For these believers, the attachment to religion is one that can lead them to deny the legitimacy of other religious beliefs because the existence of those other beliefs is perceived as a challenge to their own.<sup>150</sup> For such believers, attacking the beliefs of others is a natural reaction to a perceived assault on their own beliefs.<sup>151</sup> Accordingly, believers, to the extent they can, will want to use whatever process they have available (including the political process) to validate and confirm the legitimacy of their own beliefs over the beliefs of others. In short, to use the language of *Engel*, believers may feel compelled to do all they can to gain the government's "stamp of approval."<sup>152</sup>

At the same time, adherents of other religions will likely see the attacks of the believer as just that: attacks. Accordingly, they will likely respond by leveraging their own political power to assert the dominance of their belief system. The result is a political battle among religions with the highest stakes possible.<sup>153</sup> Moreover, since this is a battle for dominance, it is something that cannot be settled and cannot be compromised. The

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<sup>148</sup> William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 858 (1993).

<sup>149</sup> Rudolf Otto called the fear produced by a religious encounter "*mysterium tremendum*." RUDOLF OTTO, *THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR IN THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL* 12–13 (John W. Harvey trans., 2d ed. 1950). See also ERWIN RAMSDELL GOODENOUGH, *THE PSYCHOLOGY OF RELIGIOUS EXPERIENCES* 7 (1965) (suggesting that the paradox of religion is that it allows the believer to avoid the *tremendum* by ostensibly confronting it).

<sup>150</sup> See MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* 47–48 (Willard R. Trask trans., 1959).

<sup>151</sup> See *id.* ("Since '[the Believer's] world' is a cosmos, any attack from without threatens to turn it into chaos.").

<sup>152</sup> *Engel v. Vitale*, 370 U.S. 421, 429 (1962). Justice Holmes comes at this point another way. As Holmes wrote in his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), the logical result of deep conviction is often intolerance: "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."

<sup>153</sup> Smith, *supra* note 55, at 1017–18.

possibility of “anguish, hardship and bitter strife”<sup>154</sup> along religious lines, therefore, is likely and manifest.<sup>155</sup> *Engel*, I would submit, was therefore on point in seeing the value of anti-divisiveness as a central Establishment Clause concern.

*B. Difficulties Within the Anti-Divisiveness Approach*

Reinvigorating *Engel*'s concern with religious divisiveness as an animating Establishment Clause principle is not without its weaknesses. It does not tell us outside the realm of school prayer, for example, when a government action should be deemed as conferring “the stamp of approval” on religion. It does not answer, to use Michael McConnell's dichotomy, whether a state action such as exhibiting a religiously-laden symbol should be perceived as a mirror of the public culture or an example of the sort of religious triumphalism against which *Engel* spoke.<sup>156</sup> It therefore raises many of the same concerns of subjective application inherent in Justice O'Connor's non-endorsement test.<sup>157</sup> Furthermore, any distinction between matters such as school prayer that place at stake the validity of the religion itself and government actions that merely reflect a religious organization's theological positions will likely be difficult to apply. The approach in *Engel*, in short, is not likely to be a recipe for a new era of clarity in Establishment Clause jurisprudence.

More fundamentally, the question of whether religious divisiveness should be a matter of constitutional concern is certainly still debatable even if limited along the lines suggested above. Is there any reason, as some have argued, to believe that divisiveness along religious lines is any more problematic than divisions along racial, gender, or ethnic lines?<sup>158</sup> Certainly, there is truth to the notion that any form of identity politics can

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<sup>154</sup> *Engel*, 370 U.S. at 429.

<sup>155</sup> In contrast, removing the prize of the government's imprimatur from the political process minimizes this danger because the avenue of politics as a process to legitimize one's religious faith is not an option. Prevailing in the political arena, then, is no longer a test of one's religious beliefs. Marshall, *supra* note 148, at 861–62.

<sup>156</sup> Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 193 (1992). See also Koppelman, *supra* note 59, at 151.

<sup>157</sup> See Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 276 (1987) (discussing the inherent subjectivity of the non-endorsement test).

<sup>158</sup> Koppelman, *supra* note 43, at 1838.

be particularly divisive.<sup>159</sup> In fact, as Reva Siegel has shown, an anti-divisiveness component has recently seemed to enter equal-protection analysis in the cases addressing affirmative action for precisely this reason.<sup>160</sup>

Nevertheless, there are reasons to believe that religious divisiveness is, and should be, of particular constitutional significance. One has already been discussed. Because religious belief addresses matters of existential concern and anxiety, political battles over whose religion should receive government approval are likely to be particularly acrimonious and volatile.<sup>161</sup>

Second, as a historical matter, there is little doubt that the acrimony and volatility created by sectarian divisions were on the Framers' minds when they enacted the Establishment Clause.<sup>162</sup> They were well aware of the violence and persecution that results when religions compete for the government imprimatur.<sup>163</sup>

Third, religion is distinguishable from other types of identity politics because religion has an ideological, as well as an identity component.<sup>164</sup> Preferring a certain religion, then, does not only prefer a class based on its identity; it also prefers a certain set of views. Sectarian disputes thus combine the vitriol of ideological clashes along with the acrimony of identity politics in a manner that potentially transcends the divisiveness caused by either ideological or identity conflict taken alone.<sup>165</sup>

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<sup>159</sup> See *id.* at 1838–39.

<sup>160</sup> Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1356–57 (2011) (“Justice Kennedy is clear that government may act in race-conscious ways to promote equal opportunity for all, so long as government pursues these ends in ways that do not make race so salient as to affront dignity and threaten divisiveness.”).

<sup>161</sup> See *supra* notes 148–155 and accompanying text.

<sup>162</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting).

<sup>163</sup> *Id.*

<sup>164</sup> William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 395 (1996).

<sup>165</sup> *Id.*

### III. THE IRONIES IN RELYING ON ANTI-DIVISIVENESS AS GROUNDS FOR INVALIDATING SCHOOL PRAYER

#### A. *The Divisiveness of Engel and Schempp*

There is, of course, as Steven Smith suggests, a major irony in defending the non-divisiveness rationale in the contexts of *Engel* and *Schempp*.<sup>166</sup> If one of the central purposes of the Religion Clauses is lessening divisiveness, then the School Prayer decisions, one could argue at least in hindsight,<sup>167</sup> were exactly the wrong methods to go about it.

It is a fair point. After all, this Article began with the observation that *Engel* and *Schempp* stand as two of the most controversial cases in Supreme Court history and that the social and cultural tremors caused by the decisions still intensely reverberate.<sup>168</sup> It is therefore difficult to maintain that the School Prayer decisions themselves should not be subject to their own divisiveness critique.

Further, Steven Smith's observation that the societal effects of *Engel* and *Schempp* have extended far beyond school prayer alone and have served to disfavor a major part of the American polity—thus increasing social divisions more broadly—must also be considered.<sup>169</sup> If, as Smith argues, *Engel* and *Schempp* ushered in an era of secularist primacy,<sup>170</sup> then there would seem to be little doubt that they have also had the effect of provoking serious cultural resistance. Accordingly, given this role that the School Prayer decisions have played in fomenting the culture wars, it might seem a stretch to now defend the decisions as vehicles that foster social cohesion.

Nevertheless, there is a difference between a general culture war and sectarian strife. While the former certainly can be divisive, it is not the same as pitting specific religions against one another in ongoing contests for government approval. The religious wars of Europe were between sects, not between amorphous groups having amorphous views about the role of religion in society.<sup>171</sup> Moreover, the harm to the providentialist

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<sup>166</sup> Smith, *supra* note 55, at 1017–20.

<sup>167</sup> *But see* Lain, *supra* note 12, at 484, 499–506 (arguing that the Court did not expect the decision to be so divisive).

<sup>168</sup> *See supra* notes 3–4 and accompanying text.

<sup>169</sup> Smith, *supra* note 55, at 1019.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1017–18.

vision that Smith identifies<sup>172</sup> seems far closer to the injury of individual alienation than it does to the social harms caused by sectarian division, again suggesting that the comparison between culture wars and sectarian strife are at least somewhat inapposite.

This does not mean that the matters identified by Professor Smith are not significant. They surely are. Moreover, although I would argue that constitutional law has actually not imposed the type of secularist orthodoxy that Smith describes,<sup>173</sup> I do agree with his central assertions that secularism is not neutral and that a too rigid application of secularist principles creates its own constitutional concerns.<sup>174</sup> Those concerns are not so great, however, as to outweigh the concerns with sectarian divisions that inevitably attend state-sponsored school prayer. After all, as Smith himself notes, “[P]ublic schools have an especially central and even mythic place in American democracy.”<sup>175</sup> That religious sects would be particularly driven to battle with other sects over the content and nature of religious liturgies performed in the public schools should therefore be expected. History bears this out. After the wave of Catholic immigration in the nineteenth century, the question of whose prayer should be used in the public schools bitterly divided Protestants and Catholics for decades.<sup>176</sup>

There is every reason to believe that a similar dynamic would have occurred in the latter part of the twentieth and the first part of the twenty-first centuries had *Engel* and *Schempp* not been decided as they were. Without the School Prayer decisions, new waves of immigrants with divergent religious traditions would have wanted their own prayers in their public schools or, alternatively, would have wanted the cessation of prayers from outside their own religious traditions. Political conflict along religious lines would therefore have been inevitable, and that conflict

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<sup>172</sup> *Id.* at 1019–20.

<sup>173</sup> See *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (upholding legislative prayer); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1828 (2014) (same). The Court has also consistently rejected separationist claims in a line of free-speech and parochial-aid cases extending from *Widmar v. Vincent*, 454 U.S. 263, 276–77 (1981) (holding that prayer groups were entitled to have the same access to public facilities as other groups), to *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002) (upholding school vouchers). The record does not suggest that an orthodoxy of political secularism has actually been established.

<sup>174</sup> See William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11, 16–17 (2002).

<sup>175</sup> Smith, *supra* note 55, at 993. See also *supra* note 14 and authorities cited therein.

<sup>176</sup> See GREEN, *supra* note 20, at 96–97.

would likely have been particularly severe as demographics changed and new religious coalitions emerged to challenge the existing religious establishment. In short, no matter how divisive the School Prayer decisions may have been, they were likely far less divisive than the sectarian battles that would have occurred without them.

*B. The Anti-Divisiveness Rationale and the Regents' Prayer*

There is yet one other possible irony in looking to *Engel* as the genesis of the anti-divisiveness rationale. Does the anti-divisiveness rationale support striking down the prayer in *Engel* itself? While the Bible readings and the Lord's Prayer at issue in *Schempp* were clearly part of a specific religious tradition, thereby directly implicating concerns about sects competing for government imprimatur,<sup>177</sup> the same cannot be said of the prayer at issue in *Engel*. The Regents' Prayer was not taken from any specific religion's liturgy and was, in actuality, an attempt at ecumenicalism rather than a reflection of sectarian triumphalism.<sup>178</sup> It is therefore not easily condemned as the product of "zealous religious groups struggl[ing] with one another to obtain the Government's stamp of approval."<sup>179</sup> For that reason, then, it could be argued that the actual result in *Engel* might be more soundly based on the case's alternative rationale—the anti-corruption of religion—than on the anti-divisiveness rationale offered here.<sup>180</sup> Perhaps. Certainly, the argument that "respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government"<sup>181</sup> could be, in and of itself, a sufficient justification to invalidate the Regents' Prayer.

Nevertheless, the constitutional concern with religious divisiveness also justifies invalidating an ecumenical effort like the Regents' Prayer. To begin with, ecumenicalism is not ecumenical. To some believers, religious ecumenicalism is completely contrary to their deeply-held religious principles. As Timothy Hall has noted, ecumenicalism is "a religious vision with respectable credentials. It is, nevertheless, a particular religious vision [that is] the implacable foe of religious

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<sup>177</sup> See *Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203, 210–11, 282–83 (1963).

<sup>178</sup> Berg, *supra* note 20, at 196, 199.

<sup>179</sup> *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

<sup>180</sup> See *supra* note 63 and accompanying text.

<sup>181</sup> *Engel*, 370 U.S. at 425.



sectarianism.”<sup>182</sup> The choice by government to select an ecumenical prayer, therefore, is religiously divisive.<sup>183</sup>

Further, the potential for sectarian divisiveness is also inherent in the decisional process of how any ecumenical prayer should be composed. In the case of the Regents’ Prayer, the state of New York apparently assembled, to write the prayer, “a team of ministers, priests, and rabbis” selected to reflect the religious composition of the state.<sup>184</sup> Yet, how can specific sects or specific religious leaders be recognized by the government as appropriate to sit at the drafting table without the government bestowing its legitimacy on those chosen and without thereby exciting religious jealousies and religious tensions among those seeking recognition? Accordingly, although the anti-corruption rationale may provide one basis for the decision in *Engel*, it is equally apparent that the anti-divisiveness justification provides another.

#### IV. CONCLUSION

In *Engel v. Vitale*, the United States Supreme Court relied on the interest in limiting religious divisiveness for its rationale in striking down public-school prayer.<sup>185</sup> Later Court decisions addressing prayer, however, have veered from *Engel*’s original understanding. Rather, these later cases have tended to focus on harms to individuals, such as coercion or alienation, that purportedly result from public religious exercise, as their grounds for decision.<sup>186</sup> *Engel*, however, may have had it right. The harms of alienation and coercion may simply be too amorphous and elastic in this context to base First Amendment doctrine on them. The concern with religious divisiveness, on the other hand, is more soundly based.

To begin with, it reflects the historical record. The European religious wars, of which the Framers were acutely aware, provide graphic examples, for both then and now, of the harms that result when religions compete

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<sup>182</sup> Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 88 (1993).

<sup>183</sup> Ken Klukowski, *9/11 Services Show Liberal Politicizing of Memorials*, WASH. EXAMINER (Sept. 8, 2011, 12:00 AM), <http://www.washingtonexaminer.com/911-services-show-liberal-politicizing-of-memorials/article/40900> [https://perma.cc/Q8VA-K36V] (expressing dissatisfaction that the religious leaders invited to a ten-year 9/11 memorial service at the National Cathedral only represented 6% of the U.S. population).

<sup>184</sup> Berg, *supra* note 20, at 196.

<sup>185</sup> 370 U.S. at 429.

<sup>186</sup> See *supra* Section I.B.

with each other for the government's "stamp of approval."<sup>187</sup> Even more fundamentally, the divisiveness concern also reflects the inherent dangers that exist in the dynamic of religious belief. Placing the prize of a religion's primacy as something that can be won through the political process is an invitation for believers to test the strength of their religious belief through political activity, and, as such, it inevitably leads to the most troubling forms of sectarian strife. The *Engel* Court was correct in asserting that government actions that could reflect a religion's dominance are matters that are best taken off the political table. The constitutional concern with school prayer, in short, is less about "prayer" than it is about "whose prayer?"

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<sup>187</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting).

