

# The Arlin M. Adams Center FOR LAW AND SOCIETY

## Susquehanna University

The March 18, 2002 dialogue on “Religion, Law and Society,” by the Honorable Arlin M. Adams” is the inaugural lecture in a series sponsored by The Arlin M. Adams Center for Law and Society at Susquehanna University.

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## RELIGION, LAW AND SOCIETY:

by Arlin M. Adams\*

William Penn, the founder of the colony which became the Commonwealth of Pennsylvania, declared in 1682, in the Frame of Government of Pennsylvania, that “Government, like clocks, go from the motion men give them; and as governments are made and moved by men, so by them they are ruined too. Wherefore governments rather depend upon men, than men upon governments.” [1]

These wise words, if amended to be gender neutral, would be as true today as when they were uttered over three centuries ago. And they are as true of the judiciary as of the executive and legislative branches of government. To paraphrase Penn, ‘Courts, like clocks, go from the motion judges and the citizens give them. ... Wherefore courts rather depend upon judges and the citizens, than judges and citizens upon courts.’

Although this observation might seem self-evident, I mention it because Americans appear to have an entirely different view of the judicial power than they do of the political process. For many Americans, the courts, particularly the United States Supreme Court, seem to be impenetrable and mysterious; in this age of media “sound-bites,” the average citizen knows far less about the judicial process and the courts and judges than they do about the President and legislators.

Even though the High Court gained enormous “political” power in the twentieth century, it continues to be shrouded in mystery in the eyes of the public. Sometimes, perhaps often, this sentiment manifests itself in the idea that judges are aloof and distant “platonian guardians” who hand down decisions out of touch with the mainstream values and life of the nation.

In the midst of such attitudes, Penn's admonition brings us back to reality. Judges are also Americans; like other citizens they are influenced to a greater or lesser extent by the political, moral, religious and cultural currents of the society in which they live. Few of us will forget the 2000 presidential election; Americans woke up on November 8th not knowing who their next President would be. For the next five weeks, from the morning of November 8th until the Supreme Court handed down *Bush v. Gore* on December 11th, the nation and much of the world watched in suspense as the election drama played itself out in high stakes political and legal maneuvering.

Despite the bitterness of the controversy, this drama resulted in several positive developments. It showed the durability of our constitutional system to resolve political battles in a peaceful way and it provided a civics lesson to the American people on the nature of our government. In addition, the 2000 election controversy showed the human side of courts and of judges. One need not be cynical to concede that the judges involved in the dispute ruled in accordance with various judicial philosophies influenced by a complex array of personal, professional and jurisprudential factors.

Tonight, I will explore this theme of the interaction of courts and judges with the society in which they live. As one constitutional law professor has remarked, the Supreme Court often has a "dialectical relationship with the mood of the country." Frequently its decisions reflect the society's prevailing sentiments; at other times, cases consolidate various perspectives and prompt public movement in a particular direction. Less frequently, courts chart a bold new course considered outside the mainstream by many Americans, such as in *Brown v. Board of Education*, which in 1954 struck down racial segregation in public schools, and in *Roe v. Wade*, which held in 1973 that the right of privacy protected by the Constitution encompassed, within certain limits, a woman's decision to obtain an abortion.

In considering this topic, I will examine several lines of First Amendment precedent which illustrate the way in which courts interact with the social, cultural and religious mores of American society. These areas are the case law involving Mormons and the practice of polygamy in the latter half of the nineteenth century; Jehovah's Witnesses and the flag-salute controversy during the World War II era; and the ongoing and contentious issue of public prayer, particularly when public schools are involved.

Before considering these issues, it is appropriate to make a few comments about the First Amendment, particularly the provisions of the First Amendment known as the religion clauses, which protect religious liberty and govern the relationship between church and state.

### **Historical Background of the Religion Clauses**

After touring the United States in the 1830's, the French nobleman Alexis de Tocqueville observed that in America "the spirits of religion and of freedom are intimately linked together in joint reign over the land."

The truth of this observation can be traced to the beginnings of the Republic. Before adjourning in the fall of 1789, the First Congress manifested the close connection between religion and freedom in the new nation. On [September 25, 1789] the same day it promulgated the Bill of Rights, Congress requested the President to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God." In announcing Thursday, November 26, 1789, to be the first national thanksgiving, President Washington urged the American people to unite in prayer and to thank God for "the civil and religious liberty with which we are blessed." Thus, the Founders evidenced devotion both to freedom of religion, as guaranteed in the First Amendment, and to the role of religion in the public life of the nation.

The First Amendment, promulgated by the First Congress in 1789, established four of the pillars of American democracy--the freedoms of religion, speech, press, and assembly. The first of these freedoms--the principal topic for this evening--is protected in the Amendment's opening words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This provision, known as the religion clauses, contains two prohibitions against Congress: the first is referred to as the establishment clause, the second as the free exercise clause. While the meaning and relationship of these two clauses has sparked intense debate, there appears to be an emerging consensus among scholars that the Founders intended the clauses to be co-guarantors of the core value of religious liberty.

In the nineteenth century, immigrants of various faiths settled in the United States and the nation's cultural life began to change from one dominated by Protestantism, which was the situation at the time the nation was founded, to one characterized by religious diversity.

With the advent of a more pluralistic society, tension began to develop between America's historical commitment to religious freedom and to the public role of religion. Early in the nation's history, the inclusion of overtly Christian prayers and practices in civic ceremonies provoked little controversy because America was predominantly Protestant. As the nation became more religiously diverse, however, such practices raised questions concerning the obligation of government to maintain a neutral position among the country's increasing number of faiths. To what extent did the Constitution permit the country to officially recognize its Judeo-Christian heritage? Did the First Amendment preclude government from sponsoring or permitting prayer in public ceremonies and institutions?

It is generally agreed that the establishment clause fosters religious liberty by mandating institutional separation of church and state and by requiring government to adopt a position of neutrality among religions, neither favoring nor inhibiting one faith over others. The free exercise clause augments the principles of separation and neutrality with the concept of accommodation, a doctrine that enables — and in some cases compels — government to show deference to the religious needs of citizens. One of the most prominent historical examples of accommodation is the practice— dating to colonial times and then to the Continental Congress — of exempting religious pacifists from military service.

Contrary to popular misconception, the phrase “separation of church and state” does not appear in the Constitution. Roger Williams, the Baptist minister who founded Rhode Island as a haven for persecuted dissenters, used the image of a wall of separation as early as 1644. Dedicated to protecting the church from worldly corruption and governmental interference, Williams wrote of the necessity of maintaining a “wall of separation between the garden of the Church and the wilderness of the world.” Over 150 years later, Thomas Jefferson employed the wall metaphor in a letter to the Danbury Baptists in Connecticut. Concerned primarily with insulating government from the negative influences of institutional religion, he stated that the First Amendment erected “a wall of separation between church and State in behalf of the rights of conscience.”

Seizing on Jefferson's metaphor, the Supreme Court suggested in several early cases that the chief purpose of the religion clauses was to effect strict separation of church and state. Some Justices went so far as to state that the First Amendment demanded a secular society and the broad exclusion of religion from the public square.

In more recent decisions, however, the Court has retreated from this stance. In this regard, the Court may have been prodded by a feeling among many citizens that the Court had gone too far in tilting toward a secular society.

Rather than viewing separation as an end in itself, it now appears that the Courts regard this concept as one of several means for achieving religious liberty in a free society. In this respect, the Court has moved closer to the position of Justice Arthur Goldberg, who said in 1963 that the basic purpose of the religion clauses is “to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.”

In examining the First Amendment, it deserves emphasis that the Founders intended its provisions to restrict only the actions of “Congress.” By its language, the Amendment limited only the federal government; consequently the Amendment did not originally restrain the state legislatures in the realm of church and state. As a result, several New England states were able to maintain tax-supported Congregational establishments well into the nineteenth century. It was not until the first half of the twentieth century that the Supreme Court extended certain provisions of the Bill of Rights, including the religion clauses, to restrict the scope of state as well as federal power. This development resulted from the advent of a judicial concept known as incorporation.

Under the incorporation doctrine, the Supreme Court ruled in a series of cases that the fundamental freedoms in the Bill of Rights applied against the states by virtue of the Fourteenth Amendment. Adopted in 1868 shortly after the Civil War, that brought about a feeling that the basic rights of all citizens should be protected, the Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” In giving content to this provision, known as the “due process clause,” the Court reasoned that the term “liberty” absorbed or incorporated those guarantees of the Bill of Rights essential for sustaining American democracy.

In the 1940’s, the Court concluded that the liberty protected by the Fourteenth Amendment embraced the establishment and free exercise clauses. Thus, the Court used the liberty prong of the due process clause to extend the religion clauses, originally designed to restrict only Congress, to state governmental action. Given that the vast majority of religious freedom issues occurred at the state level, the incorpora-

tion doctrine dramatically expanded the power of the federal judiciary to determine the modern interaction of church and state.

### **The Supreme Court and Polygamy**

Prior to the advent of the incorporation doctrine, the Supreme Court's role in discerning the boundaries between liberty and order and between the establishment and free exercise clauses was somewhat limited. Indeed, the Republic had existed for over a century before the Court handed down its first decision under the religion clauses. In the celebrated case of *Reynolds v. United States*, rendered in 1879, a unanimous Court mirrored the overwhelming sentiment of the time by rejecting the claim of a Mormon that his polygamy conviction violated the free exercise of his religion. The case was sensational in its day and few, if any, cases since then better illustrate the truth that the Court and the Justices who sit on it often reflect the fundamental moral, social and cultural commitments of a given era.

The dispute in *Reynolds* occurred in the territory of Utah, that had been settled in the late 1840's by a group of Mormons under the leadership of Brigham Young, the successor to the church's founder Joseph Smith. In 1852, the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church, instituted its doctrine of "plural marriage." Under this doctrine, it was a religious duty of all Mormon men meeting certain qualifications to marry more than one woman.

The establishment of polygamy in an American territory offended the sensibilities of the nation and provoked an immediate outcry. Polygamy joined slavery as one of the major issues of the day; the Republican party platform of 1856 referred to the two institutions as the "twin relics of barbarism." [The following year President Buchanan appointed a non-Mormon to replace Young as Utah's territorial governor and, acting on erroneous information, sent federal troops to crush a nonexistent Mormon insurrection.]

Congress responded to the doctrine of plural marriage by launching a campaign to uproot the practice. Acting under its plenary power to make "all needful Rules and Regulations" for territories, Congress passed criminal legislation banning polygamy in Utah and the other territories.

The legislative history of the anti-polygamy laws enacted in the 1860's and 1870's reveal the mores and sentiment of the nation. Monogamy was declared to be

“a pillar of American society,” and polygamy was denounced as akin to the barbaric practices of non-Christian nations. Congress emphasized that polygamy had always been a crime in the Anglo-American tradition; it condemned the Mormon empire as “a new Sodom and a new Gomorrah,” concluding that the Mormon church was attempting to do in Utah “what has nowhere else been effected by any authority upon this continent--the establishment of one form of religious worship to the exclusion of all others.”

Despite the moral indignation provoked by the practice of plural marriage, Mormon leaders were convinced that the anti-polygamy laws violated the free exercise clause of the First Amendment. As a result, they initiated a test case involving George Reynolds, a prominent Mormon with two wives, who was serving as Brigham Young’s secretary. Reynolds was tried and convicted of bigamy under the act. After losing his appeals in the territorial courts, Reynolds took his case to the United States Supreme Court. He argued there that his polygamy conviction violated the free exercise clause because he had married a second wife out of religious belief.

The High Court rejected his claim. The opinion for a unanimous Court echoed the sentiments of the day. Chief Justice Waite emphasized that polygamy had “always been odious among the northern and western nations of Europe” and that the practice was strictly prohibited and severely punished at common law. This outlook was carried over intact to the colonies and then adopted by the new states. According to the Chief Justice, there had never been “a time in any State of the Union when polygamy ha[d] not been an offence against society, cognizable by the civil courts and punishable with more or less severity.”

The Court thought it impossible to believe that the constitutional guaranty of religious freedom was intended to preclude legislation outlawing polygamy and safeguarding monogamous marriage. American society was built upon the concept of monogamous marriage and “out of its fruits,” the decision stated, “spring social relations and social obligations and duties, with which government is necessarily required to deal.”

The Court summarily announced the “belief-action” doctrine in constitutional law, declaring that “laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”

Religiously motivated polygamy was akin to human sacrifice as a part of religious worship, and who, the Court asked, would “seriously contend[] that the civil government . . . could not interfere to prevent a sacrifice?”

The Reynolds case attracted widespread interest. President Hayes ignored a petition bearing some thirty-two thousand signatures requesting clemency for Reynolds. Reynolds served nineteen months in prison and then returned to his Mormon community a “living martyr”; in 1885, he married a third time.

One prominent critic of the nation’s handling of the Mormons was the English philosopher, John Stuart Mill. He thought the Mormons had “conceded to the hostile sentiments of others far more than could justly be demanded,” even to the point of establishing “themselves in a remote corner of the earth.” “It is difficult,” Mill added, “to see on what principles but those of tyranny they can be prevented from living there under what laws they please, provided they commit no aggression on other nations, and allow perfect freedom to departure to those who are dissatisfied with their ways.”

In the decade following Reynolds, Congress continued to carry out a relentless campaign against polygamy and the Mormon Church, prompting the church finally to withdraw support for the practice in 1890. Based on that withdrawal, Utah was permitted to join the Union in 1896. Its new constitution now guaranteed “perfect toleration of religious sentiment,” but forever prohibited “polygamous or plural marriages.”

Many scholars and commentators have questioned the decision’s durability, arguing that it is inconsistent with current social values and legal principles. Some modern writers, for example, maintain on the basis of sociological studies that “Mormon polygamy neither caused nor could cause the degradation of women and children nor the subversion of democracy.” Other scholars emphasize that the “Victorian age of [Chief Justice] Morrison Waite is far behind us” and that polygamy should be legalized because social attitudes and judicial precedent have dramatically changed since the late nineteenth century. The shared public values inspired by cultural Protestantism, they argue, have given way to moral relativism and to a search for consensus values sufficiently broad to provide social cohesion while accommodating cultural pluralism.

## **The Supreme Court and the Flag-Salute Controversy**

Perhaps there are a few of us in the audience who are old enough to remember December 6th, 1941, when the Japanese Empire attacked Pearl Harbor. Most of us from the World War II generation remember where we were and what we were doing when we heard about that terrible event. I suspect that few of us thought that we would live to witness another attack of such magnitude on America. Unfortunately, September 11th, 2001, shocked us all.

Despite the initial shock, Americans--with few exceptions--have responded to the tragedy with courage, compassion and resolve. September 11th galvanized the nation; we have rallied around the President, the flag and our way of life. Confronted with the repressive measures of the Taliban regime, we have gained a deeper appreciation of our own constitutional heritage of liberty and the rule of law. Yet, as in other wartime periods, the delicate balance underlying the Constitution is being tested: What is the proper balance between civil liberties and public safety during wartime? What does it mean to be patriotic when a nation is at war? To what extent, if at all, can ethnicity, physical appearance or beliefs be used in searching for potential terrorists? What rights should be afforded to suspects, detainees, criminals or POW's during wartime?

These questions are not new; the nation has wrestled with them throughout many periods. During the World War II era, for example, the United States faced the delicate issue of how to treat Japanese Americans in the midst of growing fears of an invasion on the West Coast. In hindsight many now believe that political and military authorities failed to strike the proper balance between civil liberties and security, leading to the detention of numerous patriotic Japanese Americans.

During World War II, the nation also confronted sensitive questions arising from the beliefs and actions of a small sect known as the Jehovah's Witnesses. Just as the Mormons shaped free exercise jurisprudence in the polygamy cases of the nineteenth century, the Jehovah's Witnesses exerted a pronounced influence on the development of religious freedom in the first half of the twentieth century. Indeed, between 1938 and 1943, the Supreme Court to sixteen cases involving the Witnesses and the exercise of First Amendment rights. The most celebrated of these cases dealt with the refusal of the Jehovah's Witnesses to obey laws requiring their children to salute the flag and recite the pledge of allegiance in public schools.

To place the flag-salute controversy in context, it might be helpful to say a few words about the Witnesses and their beliefs regarding civil authority. Founded by Charles T. Russell in Pittsburgh, the Jehovah's Witnesses began in the 1870s as a small Bible study group with a zeal for evangelism. The group, also known as the Watchtower Society, became controversial because of its aggressive methods of proselytizing, defiance of civil authority and condemnation of all organized religion and government as evil. In 1917, under the leadership of Judge Joseph Rutherford, the Society published and widely distributed *The Finished Mystery*, an inflammatory work denouncing patriotism and the power of government to wage war. The following year, Rutherford and seven other Witness leaders were convicted under the Espionage Act for obstructing the draft and causing insubordination in the military. All eight spent time in prison before their convictions were reversed.

After World War I, Rutherford converted the Watchtower Society into a highly disciplined group with a renewed commitment to proselytizing. Regarding themselves as aliens in an evil world, the Witnesses attacked all institutional religion and shunned involvement in government, politics, and the armed forces. As early as 1929, Rutherford had stressed that Jehovah's Witnesses were not subject to the "earthly powers." He repudiated all temporal wars, but rejected complete pacifism, asserting that Witnesses could use force when threatened with personal injury or the destruction of their proselytizing materials.

The onset of World War II intensified social antagonism towards the Witnesses. Their difficulties during the war stemmed primarily from the conviction that obeisance to temporal authorities constituted idolatry because earthly governments were hopelessly evil. As a result, they refused to allow their children to salute the flag and recite the pledge of allegiance in public schools; in addition, they opposed the draft on the grounds that it violated God's law and interfered with their missionary work. Although the Society's active membership numbered under 100,000, over 4,000 Witnesses were imprisoned for violating selective service laws; two-thirds of all conscientious objectors in prison at the time.

More controversial than the Witnesses' opposition to the draft, however, was their noncompliance with flag-salute laws. This stance, more than any other, branded them "unpatriotic," bringing with it social stigma and the wrath of a nation at war. With the current "war on terrorism" and the resurgence of patriotism and flag-waving, we can perhaps appreciate, at least somewhat, how ostracized the Witnesses were during World War II.

The flag-salute laws found objectionable by the Watchtower Society originated in 1898, when New York passed a statute mandating the opening of each public school day with a salute to the flag and other suitable “patriotic exercises.” By 1940, every state had enacted legislation requiring public schools to foster good citizenship through courses such as civics and social studies or through patriotic exercises such as the salute and pledge of allegiance.

The Watchtower Society began to challenge the various flag-salute laws in the courts in the 1930s. Appealing to the fundamental freedoms of the First Amendment, the Witnesses argued that the compulsory ceremony violated their deeply-held religious belief that any sign of obeisance to the state is an idolatrous act jeopardizing one’s salvation. [2]

In America, Judge Rutherford thrust the Society into the flag-salute issue in 1935, when he delivered a radio address commending a Witness schoolboy for refusing to participate in the flag ceremony of a public school in Lynn, Massachusetts. The address galvanized the Witnesses to undertake a dogged campaign against flag-salute laws. Within a year, some 120 Witness children had been expelled from public schools because of their unwillingness to participate in flag ceremonies. By the close of the 1940 school year, over 200 expulsions in some sixteen states had occurred, more than half in Pennsylvania.

Witness children were not only expelled from public schools, in some instances they were adjudged to be juvenile delinquents and committed to state facilities. In addition, parents were often fined for failing to keep their non-saluting children in school in compliance with compulsory education laws. The Witnesses responded by establishing their own “Kingdom Schools,” or by enrolling their children in private schools.

Given its unpopularity, the Watchtower Society was convinced that attempts to effect change through the political process would prove futile. The Witnesses therefore appealed to the courts, arguing that the compulsory flag-salute laws violated substantive due process, the religion clauses, and the free speech clause. Litigation in seven states between 1935 and 1940 led to uniformly unfavorable decisions on these constitutional claims. As a general rule, the courts concluded that the flag salute was a secular ceremony designed to promote patriotism, a legitimate and important state interest.

The Supreme Court first addressed the question in 1940 in a Pennsylvania case called *Minersville School District v. Gobitis*. The case came to the Court heightened by patriotic fervor and by volatile emotions arising from the Nazis use of a salute among the Hitler youth. Two Jehovah's Witness children were expelled from public schools for refusing to salute the flag and recite the pledge of allegiance.

To comply with Pennsylvania's compulsory education law, their parents enrolled them in private schools. Their father then filed suit, seeking to enjoin authorities from conditioning public school attendance on participation in the flag-salute ceremony. A federal district court granted the request for an injunction and the court of appeals affirmed.

By a vote of 8 to 1, the United States Supreme Court reversed the court of appeals. In an opinion by Justice Frankfurter, the Court held that compelling the salute over religious objections did not violate the liberty guaranteed by the First and Fourteenth Amendments. It assumed that government possessed the authority to require the flag-salute and pledge of allegiance and therefore framed the issue as whether the Constitution mandated excusal for those religiously opposed to such a compulsory exercise.

In reviewing "the course of the long struggle for religious toleration," the Court concluded that "[c]onscientious scruples ha[d] not . . . relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." Applying this standard, known as the "secular regulation rule," the majority decided that the school board was not required to excuse the *Gobitis* children from a ceremony designed to promote "national cohesion." Justice Frankfurter characterized the state's interest in fostering such cohesion as "inferior to none in the hierarchy of legal values"; he emphasized that the flag played a vital role in fostering civil cohesion, for it was the symbol of "our national unity, transcending all internal differences."

Justice Stone was the lone dissenter. He thought the flag-salute law to be "unique in the history of Anglo-American legislation" because it not only suppressed freedom of speech and religion, it sought to coerce children to adopt beliefs contrary to their own. Given the fundamental rights at stake, he argued that the state had an obligation to accommodate the dissenting children, and if need be to inculcate patriotism through less intrusive means such as instruction about the nation's history and institutions.

The Gobitis decision ignited a firestorm of controversy. It failed to quell mounting criticisms of the compulsory flag-salute ceremony and provoked a large volume of negative commentary in legal, educational, and religious journals.

In an article capturing the sentiment of many critics, a law professor declared that the Court's emphasis on national unity "turns sour" when one realizes it was used to justify "the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public." Another telling criticism, written by two Justice Department attorneys, asserted that the Court had failed to come to grips with the reality of widespread social violence against a small, marginalized religion. A minister writing in the *Christian Century* likened the unpopularity of the Jehovah Witnesses' to that of the early Christians, who were despised by "highly respectable and patriotic Romans" because "they refused to put their pinch of salt upon the altars of the Roman emperor."

Widespread and intense persecution of the Jehovah's Witnesses ensued in the wake of the Gobitis decision. In the weeks following the decision, "hundreds of attacks upon the Witnesses were reported to the Department of Justice." They were beaten by mobs, run out of towns, tarred and feathered, jailed without charges, and left in prison without justification. Angry citizens destroyed their personal property and burned their sanctuaries and religious literature.

Violence against the Witnesses erupted in numerous states, persisting throughout the summer and into the fall of 1940. After a brief lull, the Japanese attack on Pearl Harbor rekindled public anger toward the sect. The result was an increase in acts of violence, arbitrary arrests, and the use of questionable ordinances to suppress proselytizing. Incidents of persecution remained at a high level for another six months. Fortified by the Gobitis decision, many additional communities passed laws requiring the flag ceremony in public schools. Witness children -- perhaps as many as 2,000 by 1943 -- were expelled from schools in at least thirty-one states.

Although Gobitis had been decided by a vote of 8-to-1, it took only three years for its authority to be undermined. Most state courts and a majority of legal, religious and social commentators deplored the decision. Many regarded it as a major cause behind the increased persecution of the Witnesses. The Justices on the United States Supreme Court were not oblivious to such criticisms. They were reading the same journals, newspapers and magazines as other Americans. Mount-

ing criticism prompted Justices Black and Douglas, who had joined the majority in *Gobitis*, to announce in a 1942 Jehovah's Witness case that they no longer agreed with *Gobitis* and its rationale. In particular, they expressed concern that the decision had contributed to exposing a helpless religious minority to increased societal violence.

The defection of Justices Black and Douglas, coupled with the arrival on the Court of Frank Murphy and Wiley Rutledge, made it likely that *Gobitis* and the flag-salute question would be revisited. In 1943, just three years after *Gobitis*, the High Court did exactly that in *West Virginia State Board of Education v. Barnette*. Clearly influenced by social mores and trends and by the widespread criticisms of *Gobitis*, the *Barnette* Court overruled *Gobitis*; in the process, it took pains to repudiate every major premise of its prior decision.

In a landmark opinion written by Justice Jackson, the Court ruled 6 to 3 that a law "compelling the flag salute and pledge [of allegiance] transcends constitutional limitations ... and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." Remarkable in its breadth, the decision transformed the question from whether government must excuse dissenting children from a compulsory patriotic exercise to whether government possessed any authority at all to impose such a compulsory exercise. In a revealing sentence, the Court declared that in a democracy, "Authority . . . is to be controlled by public opinion, not public opinion by authority."

Given this new, broader understanding of the flag-salute controversy, the Court stressed the historical dangers and ineffectual nature of governmental attempts to promote national unity through force and coercion. "Ultimate futility of such attempts to compel coherence," the Court said, "is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means of religious and dynastic unity, the Siberian exiles as a means of Russian unity, down to the fast failing efforts of our present totalitarian enemies." Justice Jackson underscored the breadth of the Court's rationale in memorable language: "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."

While the *Reynolds* decision demonstrates the significant degree to which individual Justices and the Court are shaped by the fundamental social mores of a given

era, the flag-salute controversy illustrates that the “dialectical relationship” between the Court and the “mood of the country” can sometimes be extremely fluid and dramatic. Indeed, the criticism of *Gobitis* was so intense that it took the Justices only three years to overrule. In *Barnette*, the Court made it clear, in “subtext” so to speak, that it had heard the academic and social commentary on the flag-salute controversy “loud and clear.”

The next topic we shall consider--that of the Supreme Court and public prayer--also illustrates this “dialectical relationship”; however, the public prayer question has proven to be not only dramatic, but persistent and enigmatic as well.

### **The Supreme Court and Public Prayer**

Few areas of constitutional law have created as much interest as the Court’s decisions on public prayer, particularly when the cases involve public schools. During national election years, candidates invariably address this question with heated rhetoric. This was the case, for example, in 1992 in the wake of the Supreme Court’s decision in *Lee v. Weisman*. In *Lee*, the Court concluded that an invocation and benediction offered by a Rabbi at a public school graduation violated the establishment clause because the exercise provided coercive support for religion. Political candidates in that election year either denounced or praised the decision. As we shall see, the debate and the cases continue on this sensitive topic. Although time only permits a review of some of the Court’s major decisions involving public prayer, it will become apparent that the Justices themselves are divided and, in some cases, the Court appears to have vacillated in accordance with social currents and moods.

From the mid-twentieth century the United States Supreme Court has emerged as an important institution in addressing these questions and in determining the relationship between church and state. Since 1962, the Court has rendered several notable decisions involving public prayer. These decisions have considered such questions as the constitutionality of including prayer exercises in public schools, opening legislative sessions with invocations, permitting high school students to gather voluntarily for prayer and Bible study, and offering invocations and benedictions at public occasions such as graduation ceremonies.

The importance of the incorporation doctrine, discussed earlier tonight, is illustrated by the Supreme Court’s cases in the 1960’s on prayer and Bible reading in

the public schools. Prior to these decisions, such practices had been the subject of debate at the state and local levels for well over a century. The high courts of over twenty states had ruled on the question of religious exercises in the public schools, with most approving of Bible reading and related activities. In light of this precedent, it is not surprising that the Supreme Court's intervention in the area triggered widespread controversy.

In *Engel v. Vitale*, a New York school district directed classes to open each school day by reciting a brief prayer composed by state officials: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Parents opposed to the prayer exercise could arrange to have their children excused from the recitation. The Supreme Court ruled in 1962 that the school district had breached the wall of separation between church and state.

The establishment clause, Justice Black declared, must at least mean that "it is no part of the business of government to compose official prayers for any group of the American people to recite." One of the reasons many of the colonists left England, he added, was to escape governmental control over prayer and other religious practices. While most colonies initially preferred the Congregational or Anglican churches, by the time of the Revolution many had recognized the dangers of enforcing religious uniformity and had granted liberty of conscience. History had demonstrated that "a union of government and religion tends to destroy government and to degrade religion." Acknowledging the important role played by religion in the nation's history, the Court emphasized that its decision did not extend to "patriotic or ceremonial" references to the Deity.

The lone dissenter, Justice Stewart, argued that the Court was denying school children the opportunity to share "in the spiritual heritage of our Nation." History disclosed numerous instances of governmental dependence upon God, he pointed out. For example, Congress began each of its daily sessions with prayer; all the Presidents had invoked God's assistance in their inaugural addresses; and for over one hundred years the Court crier had opened its sessions with, "God save the United States and this Honorable Court."

A year after *Engel*, the Court confronted the socially volatile issue of Bible reading in public schools. In *Abington School District v. Schempp*, parents of school

children challenged Pennsylvania and Maryland laws requiring Bible reading or recitation of the Lord's prayer at the beginning of each public school day. Under the Pennsylvania law, parents who objected to the devotional practices could arrange to have their children excused. The Schempps testified that they had decided not to use the excusal provision because of fear that their children would be labeled "oddballs" by their classmates.

With only Justice Stewart dissenting, the Supreme Court struck down the Bible reading laws under the establishment clause. While recognizing that "our national life reflects a religious people," Justice Clark's opinion stressed that religious freedom is "strongly imbedded in our public and private life" and "indispensable" in a pluralistic society. By requiring pupils to participate in Bible reading and prayer, the public schools had impermissibly advanced religion "in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion." Although the establishment clause prohibited state-sponsored devotional exercises, the Court stated that nothing in the Constitution precluded the objective study of the Bible and religion in the public schools. To preserve religion's exalted place in society, Clark declared that the nation must continue to rely on the private sector, "on the home, the church and the inviolable citadel of the individual heart and mind."

Forty years after *Engel* and *Schempp*, many Americans take these decisions for granted. At the time, however, they produced a storm of controversy, generating widespread debate among politicians, religious leaders, educators, and journalists. Former Presidents Hoover and Eisenhower denounced *Engel* and President Kennedy, prompted by great public outcry, urged the American people to obey the Supreme Court's rulings even when they disagreed with them. The "very easy remedy," he proclaimed was for families to "pray a good deal more at home" and to "make the true meaning of prayer much more important in the lives of all of our children." Regarding *Engel* and *Schempp* as tragic mistakes, numerous members of Congress sought to abrogate the decisions through a constitutional amendment. Despite repeated attempts Congress has never approved such a course. [3]

Two decades after its school prayer decisions, the Supreme Court considered the constitutionality of legislative prayer in *Marsh v. Chambers* (1983). Since 1965, the Nebraska legislature had paid a Presbyterian minister to serve as its chaplain and to open its daily sessions with prayer. In rejecting the contention that Nebraska's

legislative chaplaincy contravened the establishment clause, the Court emphasized that the opening of public bodies with prayer was “deeply embedded in the history and tradition of this country.”

Writing for a 6-3 majority, Chief Justice Burger noted that the Continental Congress opened its sessions with prayer in 1774 and that the First Congress appointed paid chaplains for each House in the same week it promulgated the First Amendment. In light of the views of the Founders and an “unbroken history of more than 200 years,” legislative chaplains and prayers had become “part of the fabric of our society.” As such, a legislature’s invocation of Divine guidance was “a tolerable acknowledgment of beliefs widely held among the people of this country.” The Chief Justice added that unlike impressionable school children, legislators are not as susceptible to indoctrination and peer pressure.

In dissent, Justice Brennan criticized the Court for relying almost entirely on history. Arguing that “the Constitution is not a static document, whose meaning on every detail is fixed for all time by the life experience of the Framers,” he stressed that Americans had become a vastly more diverse people since the time of the Founders. Given modern America’s pluralism, Brennan thought it clear that legislative prayer violated the principles of separation and neutrality secured by the establishment clause.

While the school prayer decisions banned devotional activities as part of the public school curriculum, they did not forbid children from voluntarily praying in school. Certainly *Engel* and *Schempp* did not preclude a pupil from offering thanks over lunch or from sharing a religious experience as part of a classroom exercise at Thanksgiving. But what about students gathering together during free time to pray and discuss spiritual matters? The Supreme Court cast light on this question in 1990 in *Westside Community Board of Education v. Mergens*; this case considered a claim that the Equal Access Act violated the establishment clause.

Congress passed the Equal Access Act in 1984 because it believed school boards were excluding student religious groups from high schools on the basis of a mistaken interpretation of the establishment clause. The law sought to end such discrimination by prohibiting public high schools with forums for non-curriculum student clubs from denying “equal access” to clubs desiring to meet for religious, political, or philosophical purposes. In *Mergens*, eight Justices rejected the contention

that the Equal Access Act impermissibly advanced or endorsed religion. Instead, the Act afforded student religious groups the same opportunity to meet as a host of secular clubs, such as chess, dramatics, choir, or photography, or an honor society.

A custom that appeared to fall somewhere between the school prayer forbidden in *Engel* and the legislative prayer sustained in *Marsh* was the inclusion of invocations and benedictions in graduation ceremonies. Did commencement prayers impermissibly advance religion, or were they a tolerable acknowledgment of religion's traditional role in public life?

Under a policy adopted by the public school system of Providence, Rhode Island, principals were permitted to invite members of the clergy to offer commencement prayers. When the principal of a middle school invited a Rabbi to deliver the invocation and benediction at the school's graduation, a parent of a graduating pupil filed a lawsuit alleging that the exercise transgressed the establishment clause. In *Lee v. Weisman*, decided in 1992, the High Court agreed with the parent.

Speaking through Justice Kennedy, the Court stated that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." The school board violated this precept by entangling itself with graduation prayer to such an extent that it was essentially sponsoring a religious activity at a school function. In reaching this conclusion, Kennedy pointed out that a public official, Principal Lee, decided to include prayer in the commencement, chose a clergyman for this purpose, and attempted to control the content of the prayers by advising the Rabbi that they should be nonsectarian.

As a result, the Rabbi's invocation and benediction bore the imprint of the State and exerted subtle yet significant psychological pressure "on attending students to stand as a group or, at least, maintain respectful silence during the prayers." This indirect coercion, which could be as real as "overt compulsion," left objecting pupils with no realistic way to avoid the appearance of participation in the commencement prayers. [According to the majority, "the injury caused by the government's action ... [was] that the State, in a school setting, in effect required participation in a religious exercise."] Declaring that religious expression is too precious to be proscribed or prescribed by the State, Kennedy concluded that "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."

Justice Scalia wrote a strident dissent joined by three colleagues. The dissenters charged the Court with depriving public schools of the opportunity to participate in the nation's long tradition of "public ceremonies featuring prayers of thanksgiving and petition." Describing the concept of psychological coercion as "boundlessly manipulable," Scalia regarded as fanciful the belief that merely standing or sitting in respectful silence during the commencement prayers constituted psychologically forced participation in a religious ritual.

This overview of some of the Court's major decisions involving public prayer reveals that "[t]he spirit of religion and of freedom," referred to by Tocqueville over a century and a half ago, still continue to be closely related. The Supreme Court cases on public prayer illustrate the relationship between these two forces in a society made up of many faiths. On the one hand, the Court has recognized the vital role of religion in history and culture by sustaining legislative prayer and the right of student religious groups to meet voluntarily in public high schools. On the other hand, it has ruled that the establishment clause forbids state-sponsored prayer in the public schools and coercive invocations and benedictions at graduation ceremonies.

## **Conclusion**

Tonight's topic -- "Religion, Law and Society" -- implicates many of the themes of human existence, including the duties owed to the Creator and to Caesar, the relationship between religion and government, the authority of civil government, civic virtue and the limits of human freedom, the quest for the common good in a free society and the role of liberty of conscience and civil disobedience. We have explored some of these themes in the context of the Supreme Court's decisions involving polygamy, the flag-salute controversy and public prayer. From these three lines of First Amendment precedent, we have seen how judges and courts have interacted with the social, cultural and religious mores of society.

The Reynolds decision illustrates the degree to which judges reflect the fundamental moral ethos of a given era. No matter how compelling the Mormon claim might have been in Reynolds, it was not very probable that a nineteenth-century Court influenced by Victorian morality would have sanctioned the practice of polygamy, whether motivated by religious convictions or not.

The flag-salute controversy shows how influential social currents and commentary can be in changing the course of the Supreme Court. That the Justices were listening carefully to societal voices is exemplified, for example, by the changed attitudes of Justices Black and Douglas.

The Court's decisions on public prayer reveal sharp divisions among the Justices and a Court which appears to vacillate in light of the "mood of the country."

Irrespective of the holdings in particular cases, most Justices seem to agree that religion is a vital, public force in the life of the nation. In this respect, they have apparently rejected the view that religious symbols and ceremonies in public life are largely vestiges of the supposed civil deism of the Founding generation. The Court now seems more willing to recognize a legitimate public role for religion in maintaining a free society.

Underlying many of the issues is the fundamental concept, expressed by Justice Douglas: "We are a religious people whose institutions presuppose a Supreme Being."

It is helpful to remember that many judges, like many other American citizens, are religious; they pray, read scripture, try to live charitably in accordance with their beliefs and bring their consciences, as informed by religious convictions and other factors, to their duties on the bench.

In 1628, Edward Coke, Chief Justice of England, declared that, "The known certainties of the law is the safetie of all. [4]" He was suggesting that it was necessary for citizens to understand what was acceptable conduct and what was not. Almost two hundred years later, in 1819, John Marshall, then Chief Justice of the United States, stated, "We must never forget that it is a constitution that we are expounding." [5] What Marshall was suggesting was that in Constitutional interpretation a certain amount of flexibility is required in order that this great document reflect changes in our society and in our evolving nation.

This, then, seems to be one of the important lessons of the interpretation of the religion clauses of the First Amendment to our Constitution.

## Notes

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Arlin M. Adams is a retired judge of the U.S. Court of Appeals for the Third Circuit. He gratefully acknowledges the assistance of Charles Emmerich in the preparation of this paper.

[1] Penn, William. "Excerpts from Frame of Government of Pennsylvania" 1682. <http://www.constitution.org/bcp/frampenn.htm> (15 Apr. 2002).

[2]The Watchtower Society's stubborn refusal to pay homage to temporal authorities provoked Hitler to ban the sect in Germany in 1933, and about 10,000 German Witnesses eventually ended up in concentration camps because they defied the Fuehrer, condemned his regime and refused to give the Nazi salute.

[3]The opposition to Schempp was so widespread and intense that Justice Tom Clark, the author of the majority opinion in Schempp, felt compelled to address the controversy publicly. In a 1963 law review article, he took the extraordinary step of personally defending the decision. According to Clark, his mail disclosed that "the whole gamut of denominations," objected to state-sponsored devotional exercises. He added: "[T]he fact remains that a 'trickling stream' of encroachment today might well be a 'raging torrent' of 'establishment' tomorrow. [History reveals nothing more clearly. In any event, the Court has no choice--whether the encroachment be small or monstrous, the First Amendment prohibits all.]"

[4]The First Part of the Institutes of the Laws of England by Sir Edward Coke (his commentary upon Littleton) Section 395a.

[5]John Marshall, *McCulloch v. Maryland*, 17 US 316 (1819).