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Lewis, Dallin (2007) "Flaws and Repercussions of Engel v. Vitale," Brigham Young University Prelaw Review: Vol. 21, Article 9. Available at: https://scholarsarchive.byu.edu/byuplr/vol21/iss1/9

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Engel v. Vitale

FLAWS AND REPERCUSSIONS OF ENGEL V. VITALE

BY DALLIN LEWIS

I. INTRODUCTION

In 1962, the First Amendment came under increased judicial scrutiny as the Supreme Court examined the legality of prayer in public schools. The Union Free School District in New Hyde Park, New York, requested that principals invite students to recite a specific prayer every morning before class: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” This ritual was part of a state-recommended program for the students’ moral training. While participation was voluntary, the parents of ten pupils sued to stop principals from using the prayer, claiming the school district had overstepped the boundaries of the Establishment Clause of the First Amendment. In the resulting case, Engel v. Vitale, lower courts ruled consistently in favor of the school district until the issue reached the Supreme Court. Here, in a 6-1 decision, the justices overturned the lower courts’ rulings and declared that the Union Free School District’s prayer was unconstitutional.2

The Court, in its opinion written by Justice Hugo Black, concluded that this prayer “was composed by governmental officials as a part of a governmental program to further religious beliefs”3 and that such actions were impermissible under the Establishment Clause of the First Amendment. The Court’s opinion asserts that the First Amendment “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

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3 Id.
program carried on by the government.” To justify this interpretation, the Court leaned heavily on historical evidence to understand the Founder's original intent in composing the Bill of Rights.

However, an investigation of the writings of men like James Madison and Thomas Jefferson—as well as an analysis of the actual text of the Constitution—shows that the Court failed to consider substantial evidence that undermined its interpretation of the Founders’ original intent. Likewise, the Court overlooked contemporary church-state precedent that suggested government and religion were not mutually exclusive, and it also failed to recognize that certain religious practices that had previously been deemed acceptable were at that time taking place within the federal government. Unfortunately, the Court's flawed ruling in Engel has become a faulty basis for later decisions that have deviated even further from the First Amendment’s original intent. To remedy this situation, the Supreme Court needs to reevaluate the Founders’ position on church-state issues, recognize the gap between the Founders’ position and its own interpretation, and overturn Engel v. Vitale.

II. ORIGINALISM

In explaining its decision in Engel, the Supreme Court draws heavily from historical sources rather than relying on legal precedent. In fact, the Court’s opinion cites only one other Supreme Court case directly, which it uses solely to establish the court’s reason for granting certiorari. Instead, Justice Black focuses primarily on the Founding period’s religious history and the words of one of the Constitution’s key framers, James Madison. Black also says that the Court agrees with the petitioners that the Union Free School District’s prayer breached the “wall of separation between church and state,” a phrase first used by Thomas Jefferson. This approach, interpreting the Constitution by looking to the initial intent of its framers, is called “originalism.”

5 Id.
6 Id.
According to Professor Rodney K. Smith, "those who hold to the... originalist viewpoint maintain that in exercising judicial review, judges must refer to the text of the Constitution and to the intent of the framers and ratifiers of the provision or provisioners at issue on a given case." In other words, when using originalism, the Supreme Court looks directly at the Founders' intent, not precedent. If the Court wishes to take an originalist approach on a case, it must provide solid, compelling evidence that its ruling is exactly how the Founders would have interpreted the same case. An investigation of Madison's and Jefferson's own writings and actions, however, reveals a substantial amount of evidence that undermines the Court's originalist interpretation.

III. HISTORICAL ANALYSIS OF TWO FOUNDING FATHERS' POSITIONS

In defending the Court's ruling, Justice Black relies heavily on the words of James Madison. Black rebuts any notion that the Regents' prayer is too brief to be considered "a danger to religious freedom" by quoting Madison's *Memorial and Remonstrance against Religious Assessment*:

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

This excerpt of Madison's serves as Justice Black's main defense as to why a prayer that is both short and non-denominational is nonetheless unconstitutional. The slightest

“experiment” on religious liberties, the quote suggests, can lead down a dangerously slippery slope towards an established church. However, an investigation into the intent of the Constitutional Framers must also consider the events and time period in which they lived. To judge their words by contemporary situations alone can lead to misinterpretations because of differences in situations and definitions between then and now. Understanding historical context is particularly important in church-state issues because the religious landscape is much different today than it was in the 18th century. Trying to understand the context in which James Madison lived and wrote sheds greater light on his comments on church-state issues.

James Madison lived in a time when it was a real possibility that a denomination would become the established religion of the land. He saw certain individuals call for establishing the Anglican Church as the official church of Virginia. He watched a Baptist preacher in Culpeper, Virginia discourse to his congregation behind jail cell bars. He understood that unless religious freedom was assured in the new country, a majority religion, like the Anglican Church, might gain control and establish itself above all other denominations, in which case “slavery and subjection might and would have been gradually insinuated among [all Americans].” These instances of harsh religious intolerance sharply contrast with the prayer at issue in Engel v. Vitale, a prayer completely voluntary and devoid of any reference to Christianity or any other specific religion. America during Madison’s era was not concerned with whether government could promote religion in general, but with whether government could promote one religion as superior to another.

Madison’s actions as a politician also contradict Black’s notion that Madison sought a strict division between the secular and religious parts of society. For instance, Madison was a member on the congressional committee that recommended the appointment of

11 Id. at 27.
12 Id. at 29.
of the first congressional chaplain. Madison, during his Presidency, declared several national days of prayer and fasting, proclaiming that

[a day] be set apart for the devout purposes of rendering the sovereign of the Universe...the public homage due to His holy attributes and especially offering fervent supplications...that He would inspire all nations with a love of justice...with a reverence for the unerring precept of our holy religion to do others as they would require that others should do to them.14

Here is another example of Madison emphasizing the importance of God in American society. Dedicating a day to pay "public homage" to a Supreme Being promotes religion without advancing one religion over another. This was, essentially, what the Union Free School District attempted to do with its prayer. The assertion that Madison would disapprove of the school district's practice seems to conflict with his calls for national days of prayer. Madison would certainly not set aside a national day for citizens to voluntarily gather together in prayer and then deny school children the option to voluntarily participate in a school prayer.

Additionally, when Madison had the opportunity to push for greater separation of church and state, he refrained from doing so. As an elected delegate for the Revolutionary Convention, he was directly involved in the drafting and refining of the Virginia Declaration of Rights.15 One such right was the freedom of worship, which George Mason originally proposed in the following manner:

That as Religion...can be governed only by Reason and Conviction, not by Force or Violence; and therefore that all Men shou'd enjoy the fullest Toleration in the

13 CHARLES ROBERT ALLEY, JAMES MADISON ON RELIGIOUS LIBERTY 239 (1985).
14 Id. at 240.
15 Id. at 51.
Exercise of Religion...unpunished and unrestrained by the Magistrate, unless...any Man disturb the Peace...
It is the mutual Duty of all, to practice Christian Forbearance, Love and Charity towards each other.  

When the phrase “Christian Forbearance, Love and Charity” was omitted in one draft, Madison reinserted it in a later one. Had Madison truly sought to totally divorce the secular from the religious, as the Supreme Court claims he did, he would certainly not have reinstated the language concerning a citizen’s duty to practice certain Christian virtues. Madison was concerned about a particular denomination becoming established is the official church of the land, not with whether government promoted religion in general.

But the Founders’ intent cannot be deduced based on just one man’s writings and actions. To learn more about the Framer’s intent, another famous Founder should be considered: Thomas Jefferson, who is quoted in a number of religion and state cases, including Reynolds v. United States, Everson v. Board of Education, and McCollum v. Board of Education. Though Justice Black does not specifically cite Jefferson, he does reference Jefferson’s oft-quoted phrase, “a wall of separation between church and state” when explains the Court’s decision for overturning the previous ruling. Because Black uses Jefferson’s “wall” phrase in his opinion to support the court’s decision, Jefferson’s view on the church-state issues, which has long been defined by the “wall” phrase, thus needs to be addressed.

Many conclude that Jefferson’s “wall” quote proves that Jefferson advocated a strict division between church and state. Jefferson’s actions and other writings, however, show that he saw a strong need for religious and moral education in public schools. Jefferson explained his view of education in the following words: “Can the liberties of a nation be thought secure when we have removed their only firm basis—a conviction in the minds of the people that these liberties

16 Alley, supra note 13, at 51.
17 Id. at 52.
are...the gift of God?" In a letter to another Founder, John Adams, Jefferson remarked that religion “is more than an inner conviction of the existence of the Creator; true religion is morality.” Jefferson also believed that one of the key aims of religious education was “to make men moral.” Jefferson recognized that morality was imperative for maintaining a liberal society and that morality stemmed from religious education. Because Jefferson considered religion to play an important part in moral education, he would have approved of initiatives like the school district’s prayer that promote religion in education. Also, during his presidency, Jefferson signed a treaty with the Kaskakia Indians in which he gave monetary support to the Roman Catholic church and the priest who was presiding within that tribe. Once again, Jefferson demonstrated that he did not envision a complete and total separation between government and religion. Instead, he believed that religion could be useful in promoting morality among America’s citizens, which is what the Regents’ prayer was designed to do.

IV. TEXTUAL EVIDENCE

An analysis of the textual history of the First Amendment itself reveals that the Founders’ original intent was to ensure that there was never a government denomination, not that the government could not promote religion generally. The First Amendment, as it is known today, reads: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” Michael Malbin, a professor of Political Science at State University of New York, says this about the amendment:

Had the Framers prohibited ‘the establishment of religion,’ which would have emphasized the generic word ‘religion,’ there might have been some reason

21 Id. at 95.
for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing ‘an establishment’ over ‘the establishment,’ they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect. Thus, through the choice of ‘an’ over ‘the,’ conferees indicated their intent.\footnote{Michael J. Malbin, Religion and Politics, The Intentions of the Authors of the First Amendment 14-15 (1978).}

In defining the Bill of Rights, the Continental Congress went through multiple drafts of the First Amendment. While each included the notion of religious freedom, the exact wording was written and rewritten time and time again.\footnote{Wallace, 472 U.S. 38.} One such draft said that “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience,” while another declared “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.” Evidently, the final language of the Establishment Clause was not accidental, but a meticulous choice that followed much deliberation. Thus, as Malbin’s analysis shows, if the Founders indeed sought to create a complete division between church and state, one that would prohibit the recitation of non-denominational prayers, the First Amendment’s language would have denounced the establishment of “religion,” not “a religion,” as it does today. This distinction reemphasizes that the Founders were not concerned about encouraging religion generally, but rather feared that a particular religion or denomination would become dominant over others. A non-denominational prayer certainly does promote religion generally, but promoting religion does not run contrary in and of itself to the current wording of the First Amendment.
V. Judicial Views of the Time

At the time when Engel v. Vitale was decided, precedent on church-state issues, while new and inconclusive, did not provide significant support for Justice Black's decision. Around the time of Engel, the Supreme Court had just barely begun to rule on state cases involving the First Amendment's Establishment Clause. Thus, there were no clear precedents before the Supreme Court on the legality of school prayer. Nonetheless, previous rulings in state Supreme Courts concerning prayer in public schools did not support the Court's decision in Engel. Prof. Chester James Antieau and others at Georgetown University note that a significant number of state Supreme Courts, like those in Colorado, Florida, Texas, Ohio, New York, and 10 others, had ruled prior to Engel that Bible-reading or in-school prayer at public schools was permissible. On the other hand, only a few—Illinois, Louisiana, Nebraska, and Wisconsin—had declared that school prayer or Bible-reading was unacceptable. Additionally, some of the Supreme Court's own decisions towards the First Amendment and the Establishment Clause around this time asserted that religion does have a place in the public sector. "We are a religious people whose institutions presuppose a Supreme Being," Justice Douglas wrote in Zorach v. Clauson, which permitted public schools to offer a release-time program to their students so they could attend religious instruction and services off-campus. While some decisions did indeed support a stricter separation of church and state at the state and federal level, there was certainly enough jurisprudence contrary to the Court's ruling in Engel to question the strength of the Black's opinion. This may well have been why the Court cited no other Supreme Court cases in its

25 Smith, supra note 8, at 133-4.
26 Chester James Antieau, Phillip Mark Carroll, Thomas Carroll Burke, Religion Under the State Constitutions 53 (1965). See also William George Torpey, Judicial Doctrines of the Religious Rights in America 244-249 (1948); Smith, supra note 8, at 171.
opinion, except to defend its decision to grant certiorari. Either way, the Court did not have clear precedent for its decision in *Engel v. Vitale*.

VI. RELIGIOUS PRACTICES IN GOVERNMENT

One of Engel’s implications is that the government cannot sponsor any type of prayer in its public buildings or during government-led events. Nonetheless, this implication stands in conflict with current federal government practices. Prayer is a mainstay in government meetings and has been for many years. For instance, the Supreme Court begins each one of its sessions with the Court Crier exclaiming: “God save the United States and this Honorable Court.” 28 This is a plea for protection to a deistic figure and is very similar to the Regents’ prayer, which acknowledges God and pleads for blessings from his hand. Likewise, the United States Congress begins each of its sessions with a paid chaplain giving a commencement prayer. 29 Thus, on the one hand, federal public servants offer a prayer to begin their meetings, but on the other, students in public schools cannot join in a public prayer to begin their day. This double standard sends an inconsistent and confusing message about government-sponsored prayer. It is unfair to limit public school students’ First Amendment rights while congressmen and Supreme Court justices freely enjoy those same rights.

VII. MISLEADING PRECEDENT

Unfortunately, not only did the Court misinterpret the Framers’ intent of drafting the First Amendment in *Engel v. Vitale*, it also established a precedent that has misled the judicial system in later church-state cases. Engel’s stance on church-state issues has become the foundation upon which the Supreme Court has decided many church-state cases. This stance has, over time, slowly become ever more slanted towards a strict, uncompromising separation between government and religion.

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In *Wallace v. Jaffree*, the Supreme Court, relying on *Engel* as precedent, struck down an Alabama statute that prescribed a one-minute moment of silence in schools for meditation and voluntary prayer.\(^{30}\) In *Engel*, the Supreme Court found fault with government prescribed prayer, stating that the Establishment Clause 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...”\(^{31}\) However, under the Alabama statute, the government did not compose any specific prayers for students to recite; rather, it is merely allocated time to do so if students wish. In *Wallace*, the Court said that *Engel* “prohibits a State from authorizing prayer in public schools.”\(^{32}\) It also cited *Engel* directly as saying that “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 non-observing individuals or not.”\(^{33}\) But setting aside a one-minute period for students to pray on their own accord neither authorizes a prayer nor establishes an official religion. Since the time period is free for students to pray or not pray as they wish, the government in no way establishes an official religion or “[composes] official prayers.”\(^{34}\) In *Wallace*, then, while using *Engel* as precedent, the Court strayed even further from *Engel*’s original holding. Likewise, in *Lee v. Weisman*, which also cited *Engel* as a precedent, the Supreme Court barred a prayer that was not composed by government officials. In this case, the Court ruled that allowing principals to invite clergyman to give graduation commencement prayers is unconstitutional.\(^{35}\) In its opinion, the Court looked to Justice Black’s words in *Engel* that “it is no part of the business of government to compose official prayers for any group of the American people to


\(^{32}\) Wallace, 472 U.S.

\(^{33}\) *Engel*, 370 U.S., as cited in id.

\(^{34}\) Id.

recite as a part of a religious program carried on by government.” Yet the government does not compose prayers when it invites a man of faith to speak at a school celebration. In fact, this situation is almost identical to having a chaplain open a congressional session with a prayer. In both cases, a prayer—one not officially composed by the government—is offered freely at a government event by a person of faith. The prayer given is not the established creed of the government, but instead the prayer of a clergyman. If there is no implication that the congressional chaplain by offering a prayer at the start of each session of Congress is establishing a religion, then no such implication should be inferred when a clergyman offers a prayer at a high school graduation. In *Lee*, as well as in *Wallace*, the Supreme Court misconstrued *Engel* to set an overly strict definition for improper legal involvement between church and state.

**VIII. Conclusion**

In its ruling in *Engel v. Vitale*, the Supreme Court banned school prayer on the basis of the Court’s interpretation of the Framers’ original intent in drafting the Constitution. Yet, strong evidence that the Founders would have ruled differently on this issue undermines the Court’s decision. Since this ruling, however, the new precedent *Engel* created has been further misconstrued as the Court has deviated further and further not only from the Founders’ original intent, but from *Engel* itself. Supreme Court cases citing *Engel* have moved towards an increasingly stringent division between religion and government, as shown in *Wallace v. Jaffree* and *Lee v. Weisman*.

Before the Court wanders even farther from the original intent of the First Amendment, it needs to revise and overturn its ruling in *Engel*. Since *Engel* has established precedent based on false presumptions, it is not enough for the Supreme Court to try and realign its rulings with the Founders’ intent by looking to recent cases. Instead, the Court needs to return to its originalist approach in *Engel*, this time focusing on what the Framers’ true intent was in declaring that “Congress
shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Indeed, the conclusion should be clear: America's Framers did not intend for a complete and total separation of church and state, as seems to be the prevailing norm in today's society. James Madison and others worried that a single denomination would become the established religion of the U.S. government. Their intention in the Establishment Clause was to prevent any one denomination from becoming the official state religion, not prohibit public schools from leading ten-second prayers. The Supreme Court thus needs to carefully re-examine the First Amendment, paying particularly close attention to the final clause: "or prohibiting the free exercise thereof."