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THE UNITED STATES SUPREME COURT'S INTERPRETATION OF THE "ESTABLISHMENT CLAUSE" AND HOW IT HAS IMPACTED TEXAS POLITICS TODAY

by

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HONORS THESIS

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Abstract

The Establishment Clause, since its creation in 1787, has worked towards creating a separation of church and state rooted in religious liberty after colonists fled England and the Church of England. In the centuries that have passed, the judiciary branch of the United States has been creating lasting precedents for how the Establishment Clause should be illustrated in the National Government and in the states. However, the long-lasting division between church and state has been decreasing, especially following a recent Supreme Court decision: *Kennedy v. Bremerton School District* (2022). The ramifications of entangling church and the state include, but are not limited to, religious coercion and a potential lack of religious liberty. This is significant in historically religious states like Texas where lawmakers have been attempting to advance their religious agenda more and more as time goes on.

The United States Supreme Court's Interpretation of the Establishment Clause and How It Has Affected Texas Politics Today

The United States Constitution, signed in 1787, established the National Government and delegated powers between three branches of government: the executive, the legislative, and the judiciary. The Constitution also separated the powers between the National Government and the States. Equally important, the United States Constitution protects the rights of the citizens of the nation. One way that the Constitution protects the rights of American citizens is through Amendments, and the first ten Amendments are listed in the Bill of Rights of the Constitution.

The First Amendment of the Bill of Rights states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," (Legal Information Institute). Within the First Amendment and pertaining to the freedom of religion for American citizens, contains the Establishment Clause and the Free Exercise Clause. When this was created, the meaning of "establishment" was quite unclear, but it was created in response to the events involving the Church of England. Now, the Court has interpreted the meaning of the Establishment Clause in different ways through a series of cases beginning in the 1940s, which have affected the division between church and state uniquely.

The Establishment Clause, which prohibits the government from establishing a religion, has made multiple appearances in the United States Supreme Court. Some monumental cases that this paper addresses include *Everson v. Board of Education* (1947), *Engel v. Vitale* (1962), *School District of Abington Township, Pennsylvania v. Schempp* (1963), *Santa Fe Independent*

School District v. Doe (2000), *Van Orden v. Perry* (2005), and *Kennedy v. Bremerton School District* (2022). All these cases have created precedents for how the Establishment Clause is to be approached in future cases and by both the lower federal courts and state courts. However, these decisions have also influenced how religion is approached by the States. While the Establishment Clause's interpretation has had multiple impacts in various state politics, this research is centered on how these interpretations affect the role of prayer and religion in Texas schools and government grounds. More specifically, this research analyzes relevant U.S. Supreme Court decisions and their influence pertaining to prayer, religious organizations, and acts of religious endorsements, in Texas schools and government grounds.

Relevant United States Supreme Court Cases

The Supreme Court has reviewed the First Amendment's Establishment Clause in multiple ways, affecting millions. However, as previously mentioned, this paper primarily focuses on the relationship between religion and the Texas government, specifically in schools and other government grounds. The following Supreme Court cases have been significant to the division between religion in schools, creating controversy regarding what role religion should play in Texas schools and on government grounds.

One of the first cases where the United States Supreme Court addressed the Establishment Clause was in *Everson v. Board of Education* (1947). *Everson* dealt with a New Jersey law that mandated reimbursements by a local school board for costs related to transportation to and from schools. This law included private schools, of which a high majority were Catholic schools. With *Everson v. Board of Education*, the Supreme Court began defining the lines of the Establishment Clause regarding religion and schools. According to case

documents, the nine-justice Supreme Court ruled in a five-vote majority that the New Jersey law was not unconstitutional. The Supreme Court found that, “the expenditure of tax raised funds thus authorized was for a public purpose” (*Everson v. Board of Education*, 1947). Instead, the law was in turn benefiting schoolchildren’s parents with transportation. Justice Black’s opinion for the Court cites cases like *Cochran v. Louisiana State Board of Education* (1930), which dealt with tax raised funds to supply schoolbooks, to argue that “legislation intended to facilitate the opportunity of children to get a secular education” served a public purpose and was not unconstitutional (*Everson v. Board of Education*, 1947). The Supreme Court also found that the New Jersey law did not violate the Establishment Clause because the law was not directly supporting religious schools. Justice Black goes on to address how establishing a religion entails setting up a church, passing laws to aid religion, forcing others to practice a religion, and punishing people for their beliefs, disbeliefs, or church attendance (*Everson v. Board of Education*, 1947). With this in mind, the New Jersey law was not in violation of the Establishment Clause.

Another case dealing specifically with the Establishment Clause is *Engel v. Vitale* (1962). This case was brought to the Supreme Court when a parent sued on behalf of their child because of a New York State law that required all public schools to begin each school day with the Pledge of Allegiance and a prayer: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country” (*Engel v. Vitale*, 1962). The prayer was nondenominational and had students recognize their dependence upon God. The prayer was optional, and students could excuse themselves from it. The Court decided, in a six to one decision, that the school-sponsored prayer was in violation of the Establishment Clause (Oyez). Justice Black in the majority opinion mentioned that encouraging the Regents’

prayer was "inconsistent with the Establishment Clause" and that this was a religious activity (*Engel v. Vitale*, 1962). Justice Black also mentions that this is the exact behavior which caused colonists to leave England and why they sought religious freedom in America (*Engel v. Vitale*, 1962). Justice Black also wrote the majority opinion for *Everson* but reached a different conclusion. The primary difference between these two cases is that this New York law directly advanced religion and prayer onto students. In *Everson*, the New Jersey law was intended to benefit parents of schoolchildren, which happened to include private religious institutions' students. This case is marked as the "first major effort to rid public schools of prayers backed by government authority", and the decision was faced with multiple controversies at a time where the majority of America approved of religion in schools (Driver, 2022, p. 218).

Shortly after the *Engel* controversies, the Supreme Court ruled on a Pennsylvania law in *Abington School District v. Schempp* (1963) in which schools were required to read from the Bible at the beginning of every school day. This case was combined with another case where a city rule led to public schools offering exercises that mainly consisted of Bible readings and the Lord's Prayer. In an eight to one decision, the Court ruled that public schools were not allowed to sponsor readings from the Bible or recitation of the Lord's Prayer under the Establishment Clause (Oyez). The Supreme Court refers to *Everson v. Board of Education* (1947) and *Engel v. Vitale* (1962) to mention the ways that the Establishment Clause has been interpreted in the past. Also, because the States require the prayer at the beginning of each school day, of which students are required by law to attend, and because the exercises are of a religious nature, this requirement was in violation of the Establishment Clause (*Abington School District v. Schempp*, 1963).

Stone v. Graham (1980) was another Supreme Court case dealing with the Establishment Clause. However, this case dealt with the Kentucky state law that required each public classroom

in the state to have a posting of the Ten Commandments, paid for with private donations. The Court used a three-part test to determine if this was not in violation of the Establishment Clause. The three-part test established in *Lemon v. Kurtzman* (1971) required that a state law must have a secular legislative purpose, that the effect must not advance or inhibit religion, and that it must not foster an excessive government entanglement with religion (*Stone v. Graham*, 1980). In a five to four *per curiam* decision, the Supreme Court held that the Kentucky law did not have a "secular legislative purpose" (*Stone v. Graham*, 1980). The Kentucky law required a small statement to be printed at the bottom of the poster declaring its secular nature and importance to the Nation's history. However, the Court still found it to be "plainly religious in nature" since the Ten Commandments is a Jewish and Christian sacred text, which is undeniably not secular (*Stone v. Graham*, 1980). Therefore, the Court found the Kentucky law to be in violation of the Establishment Clause.

Years later, *Santa Fe Independent School District v. Doe* (2000) which originated in Texas is of great importance to this research. Before home football games in 1999 at Santa Fe High School, a student-elected student council member of the high school would deliver a Christian prayer over the speaker system. This was challenged by Mormon and Catholic families, so the district changed its policy and allowed students to elect a spokesperson and a prayer to be delivered at the beginning of their home football games (Oyez). Justice Stevens in the majority opinion relied mainly on *Lee v. Weisman* (1992), which dealt with a rabbi who delivered a prayer at a public-school graduation ceremony that was found to be in violation of the Establishment Clause (*Santa Fe Independent School District v. Doe*, 2000). With the decision in *Lee v. Weisman*, schools "must not 'coerce anyone to support or participate in' a religious exercise" *(Santa Fe Independent School District v. Doe*, 2000). While this case dealt with a

different type of prayer, Justice Stevens used the holding in *Lee v. Weisman* all the same. Regardless of whether the prayers and spokesperson were student-led, the Court found that it violated the Establishment Clause. The prayers were considered public speech, but they were sponsored by the school on government property (Oyez). With this decision, the Supreme Court ruled that public school districts permitting student-led/initiated prayers at football games were in violation of the Establishment Clause.

Still dealing with an entanglement of church and state, *McCreary County v. American Civil Liberties Union of Kentucky* (2005), similar to *Stone v. Graham* (1980), dealt with two Kentucky counties who first displayed copies of the Ten Commandments in their courthouses, then displayed statements based partly in the Ten Commandments, and lastly displayed the Ten Commandments and other documents that were marked "as the foundations of American law and government" (*McCreary County v. ACLU of Ky.*, 2005). In a five to four decision, the Supreme Court found that these displays were in violation of the Establishment Clause because of their purpose to advance religion. Justice Souter, who authored the majority opinion, wrote that the government should be neutral with religion. The Court found that the displays were "separated from a secular context and furthered a religious purpose" in their own ways (*McCreary County v. ACLU of Ky.*, 2005).

Van Orden v. Perry took place in 2005, also in Texas, but this case deals with the displaying of the Ten Commandments on state capitol grounds. This case differs from the previous ones, but it also pertains to Establishment Clause. Van Orden sued the State of Texas on the basis that the government was endorsing religion by displaying the Ten Commandments on the state capitol grounds. In particular, Van Orden argued that this action violated the Establishment Clause and how a government was not able to pass laws that followed establishing

a religion. The Court ruled, in a five to four decision, that displaying the Ten Commandments in the Texas capitol building was not in violation of the Establishment Clause. It is also important to mention that the current Governor of Texas, Greg Abbott, argued for Perry, who was the Governor of Texas at that time (Oyez). Greg Abbott has been the Governor of Texas since 2015 and has since been at the center of religion and state issues in Texas. Chief Justice Rehnquist remarks on the importance of the role religion and its traditions have played in our Nation's history, which was established in *School District of Abington v. Schempp* (1963) (*Van Orden v. Perry*, 2005). While Chief Justice Rehnquist acknowledged limits to the display of the Ten Commandments and similar religious symbols, the Court found that the display at the Texas State Capitol was passive and used an analysis "driven both by nature of the monument and by our Nation's history" (*Van Orden v. Perry*, 2005). Therefore, the Court found this display of the Ten Commandments at the Texas State Capitol to have a dual significance in both religion and government" (*Van Orden v. Perry*, 2005).

The previous cases set definitive lines for the separation of school and religion. However, for one scholar, *Kennedy v. Bremerton School District* (2022) "invited the scourge of religious coercion to reenter the nation's public schools" (Driver, 2022, p. 213). Kennedy, a high school football coach in Washington State, delivered religious messages with players in the locker room and at midfield directly after the game. Kennedy was asked by the Bremerton School District to stop his prayers, citing the Establishment Clause, but he continued to offer prayers at midfield after games instead of leading players with him. He also engaged with the media to gain support for his actions. In response, the school district reprimanded Kennedy, and he was put on administrative leave, preventing him from engaging in team activities. Kennedy sued the

Bremerton School District for violating his First Amendment Rights and Title VII of the 1964 Civil Rights Act (Oyez).

In a 6-3 decision, the Court ruled in favor of Kennedy and found that his actions were protected under the First Amendment's Free Speech and Free Exercise Clauses, concluding that it protects an individual's personal religious observance from government attack, and that the Establishment Clause was not applicable to his prayers. The decision overturned the longstanding Establishment Clause test created in *Lemon v. Kurtzman* (1973). The three-part test only allowed the government to assist religion if the assistance is secular, not religious, if the government is not promoting or inhibiting religion, and if the government is not excessively entangling church and state. The Court in *Kennedy* abandoned the long-established Lemon test and instead, as the majority stated, used a test based on "historical practices and understandings" (*Kennedy v. Bremerton School District*, 2022). With this decision, the Court began to transition away from the Establishment Clause into a free exercise claim when reviewing instances of religion in schools.

The Court's decision in *Kennedy* poses a few risks to the separation of church and state that have been and could be translated into Texas politics, as well as states around the nation. One risk is one of religious coercion, which was mentioned in *Santa Fe*. Students are at risk of religious coercion if districts are not able to intervene with a faculty's conduct that could be deemed coercive (Schiavone, 2023, p. 40-41). The decision in Kennedy does not prevent school districts from interfering when someone brings religion into school, but the Court's decision demands that there must be direct proof of coercion to warrant proper intervention (Schiavone, 2023, p. 41). Another risk of the *Kennedy* decision is one of an "inherent bias in favor of Christianity" that the Court has imposed by relying on the history and traditions of the Nation

(Schiavone, 2023, p. 41). The Court's test of "historical practices and understandings" to reach their decision is unclear, but the culture of the United States has been flooded with Christianity and relying on this test will naturally lean Christian (Schiavone, 2023, p. 41-42). If and when the Court's decision is applied, the result of its application will favor Christian ideals and prayers that are likely to have a coercive effect.

Kennedy obstructed what the Court had been creating for decades: a separation between church and state. Before *Kennedy*, the Court had worked to create a clear line of religion in schools. Since the 1960s, the Court "recognize[d]...that prayer exercises in public schools carry a particular risk of indirect coercion" (as cited in Driver, 2022, p. 237). However, the Court's decision in *Kennedy v. Bremerton* undercut this reasoning, "and history could soon be wielded to restore God to a central place in our common classrooms" (Driver, 2022, p. 241).

These risks reflect the Court's failure to properly distinguish public schools from private schools, where school prayer and religion in general is permitted (Driver, 2022, p. 261). In committing this error, it has led, and will continue to lead, to confusion in applying the decision to school administration and everyday activities in the classroom (Driver, 2022, p. 261). This will lead to a stronger presence of religion, specifically Christianity, in schools, which some may welcome with open arms. However, this poses a dramatic issue for religious minorities who could be subject to religious coercion and bias where their rights are not being protected after the *Kennedy* decision.

Impact of Religious Affiliation

Religious affiliation may not have such a large impact on the public for most, but it can be an especially gray area for judges at all levels. To be a judge, especially a federal judge, in the

United States, it is expected that religion should not interfere in the decision-making process, and the same can be said for Supreme Court justices. However, regarding the Establishment Clause and judgements involving it, researchers have found that religiosity tends to influence how judges vote in favor of Establishment Clause arguments. For instance, statistics by researchers Sisk and Heise show that Catholic judges decided against religion at a rate of 29.6% while non-Catholic judges decided at a rate of 41.5% (p. 710). This demonstrates that Catholic judges were much more likely to resist Establishment Clause challenges towards the government. At the same time, judges who were Jewish didn't act in any significant way in relation to the Establishment Clause. While the focus of this paper is on the United States Supreme Court, these trends illustrate the role that religious affiliation can have in the judiciary.

Thus, the religiosity of the United States Supreme Court should be discussed. Right now, the United States Supreme Court consists of nine justices who make up a mostly conservative Court. The Court consists of six Catholics: Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Sonia Sotomayor, Brett Kavanaugh, and Amy Coney Barrett. Two justices are Protestant with Neil Gorsuch identifying as Episcopalian and Ketanji Brown Jackson identifying as a nondenominational Protestant. Elena Kagan is the only Jewish justice on the Court. The six most conservative justices include Chief Justice Roberts and Justices Thomas, Alito, Kavanaugh, Barrett, and Gorsuch; five Catholics and one Protestant. Justices Sotomayor, Kagan, and Jackson are the more liberal justices; one Catholic, one Jew, and one Protestant (Newport, 2022).

While it has been argued that the Supreme Court is supposed to be unbiased and free of imposing religious beliefs, the Roberts Court has been making decisions that are arguably in favor of religion. According to research by Epstein and Posner, since the middle of 2022,

research and statistics show that 83% of religion cases that the Roberts Court decides on are pro-religion. This is an astonishing difference from previous Supreme Courts with different Chief Justices. For instance, when looking at religion cases decided in other courts, the New York Times in one article recalls that 58% of decisions of the Rehnquist Court (1986-2005) were pro-religion, 51% of decisions of the Warren Court (1969-1986) were pro-religion, and 46% of decisions of the Burger Court (1953-1969) were pro-religion (Epstein & Posner, 2022, as cited in Philbrick, 2022). Of the cases previously stated, *Kennedy* is the only one decided by the Roberts Court. *Van Orden* and *Santa Fe* were decided by the Rehnquist Court and *Santa Fe*, *Schempp*, and *Engel* were decided by the Warren Court, which was a more liberal one. The Rehnquist Court was on the more conservative side, but not as conservative as the Roberts Court. The pro-religion trend of the Roberts Court is apparent, especially in the *Kennedy* decision and how the Court did not follow precedent that it had established over the course of decades, which is a common pattern in decisions made by the Roberts Court.

Similar to how religious affiliation can affect judicial decisions, the dominance of a particular religion like Christianity in a state's population may also affect the extent to which public schools are led, specifically in Texas. There appears to be an apparent relationship between support for religion in a state's public schools and the religiosity of that state. With this in mind, the State of Texas ranks as number eleven by the Pew Research Center in 2014 in terms of most religious state overall, and 64% of Texans self-report to be "highly religious" (as cited in, Gooch & Abel, 2018, p. 482). At the time, 77% of adult Texans identified as Christian where 31% of them reported themselves as Evangelical Protestants. 18% stated that they were unaffiliated with any religion (as cited in, Gooch & Abel, 2018, p. 482). Keeping this in mind, researchers Gooch and Abel conducted a survey of multiple facets of the Texas public school

system, which included administrators, principals, teachers, and students. The survey was conducted prior to *Kennedy* during the end of 2013 and the beginning of 2014. However, the impact of religious expression is still significant especially since Court decisions were more limiting on religious expression in public schools at the time. The survey asked questions relating to religious expression in public schools and policies, legal doctrines, and standards in that environment.

Most of the respondents in Gooch and Abel's study who were administrators were white, male, over the age of 45, and all had graduate degrees. 98% of respondents answered that their schools allow student-led organizations to be faith-based, but not all had a designated space where they could meet on campus. 48% of respondents answered that there was a way for student-led organizations, including faith-based ones, to advertise principles and meetings to students. When asked if the respondents have official policies prohibiting faculty from making religious announcements, 83% answered "no". Along with other questions, the researchers deduced that the respondents were aware of prohibitions on religious expressions in the classroom but were more concerned with which expressions were allowed. Regarding prayer, 80% of respondents answered that they either didn't have any official policy on prayers led by faculty or administrators or that they thought that this prayer was somewhat permissible in their school (Gooch & Abel, 2018, p. 491-497). The previous statistics on religious expression in public schools highlight the religious attitudes of the public school system of the State of Texas.

While the research conducted on Texas schools was before *Kennedy*, it could be suggested that this sort of behavior was even more amplified after the decision. The study proves that religious affiliation does play a role in how one conducts religious expression in the public-school setting, specifically in Texas. While it may not be entirely intentional, it could also be

suggested that a person's religious affiliation creates an implicit bias on a person and their decision-making process, which could also be applied to judges at all levels. Understanding how the decisions by the Supreme Court has weakened the separation of church and state is significant in understanding the role that religion is playing at the legislative level in Texas in relation to religion in schools and on government grounds.

The Appearance of Religion in the Texas State Legislature

With Texas already being a highly religious state, the Supreme Court's current interpretation of the Establishment Clause will unarguably continue to impact the role that religion plays in legislation. For instance, Senate Bill 763 was introduced in February 2023 during the 88th Texas Legislature Regular Session and was passed in June 2023. This bill was employed as "relating to allowing public schools to employ or accept as volunteers chaplains" (S.B. 763). The bill works to "use safety funds to pay for unlicensed chaplains to work in mental health roles" as well as allow volunteer chaplains in schools (Downen, 2023). While schools have to liberty to partake in this or not, opponents of the bill fear that S.B. 763 "will be a Trojan horse for religious activists to recruit in schools" and amplify the tension in school boards (Downen, 2023). Senate Bill 763 is just one instance of religion beginning to infiltrate schools following the *Kennedy* decision, but this decision and others have begun to encourage states to propose or adapt laws, specifically in the Texas Legislature.

An example of this sort of religious infiltration in legislation is Senate Bill 1515, a proposed bill authored by Phil King, a Republican member of the Texas Senate. It was introduced in the 88th Texas Legislature Regular Session. With the following words alone, it is

obvious that the Supreme Court's interpretation of the Establishment Clause since *Kennedy* has affected Texas legislation. The author's Statement of Intent states:

> S.B. 1515 would require Texas public elementary and secondary schools to display the Ten Commandments in each classroom. At present, Texas public schools have no such requirement, and this legislation only became legally feasible with the United States Supreme Court's opinion last year in *Kennedy v. Bremerton*, 142 S. Ct. 2407 (2022), which overturned the Lemon test under the Establishment Clause (found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)) and instead provided a test whether a governmental display of religious content comports with America's history and tradition (S.B. 1515).

The Bill also includes subsections that public elementary and secondary schools must follow. The subsections mandate the poster or framed copy of the Ten Commandments to be "legible to a person with average vision from anywhere in the classroom" (S.B. 1515). S.B. 1515 also mandated that the poster or framed copy of the Ten Commandments "be at least 16 inches wide and 20 inches tall" (S.B. 1515). The bill also says that if a school does not have a copy in each classroom, then they must accept any private offer of poster or framed copy as long as it does not have any additional information on it. Also, if a classroom has a copy that doesn't follow the previously listed requirements, then the school may replace it using public funds or private donations. The bill was meant for the 2023-2024 academic school year.

The bill is what is known as 'dead' and is not current legislation after it failed to get a vote by the Texas House of Representatives in May 2023. Texas Democrats expressed concerns over the ramifications this legislation would have on non-Christians, and the bill was also called out for what it means for the separation of church of state. While the high religiosity of Texas,

conservative lawmakers, and Christian views are the driving forces in legislations like this, this was not possible before the *Kennedy* decision, like the author's Statement of Intent said. In this way, it is obvious how the Supreme Court's interpretation of the Establishment Clause has already begun to affect Texas politics. While the bill is 'dead', it is not impossible for the Texas Senate or House of Representatives to reintroduce the bill anew or introduce a similar version of it, which is exactly was has been done with Senate Bill 20.

Senate Bill 20 was introduced recently in early November 2023 in the 88th Legislature 4th Special Session by Phil King, who also authored S.B. 1515. This bill has only been introduced and has not passed through the required steps to become law yet. The introduction of the bill is the almost the exact same as the introduction of S.B. 1515 that did not get passed. This is a clear demonstration of Texas lawmakers continuing to advance religion into public schools after the first attempt failed with S.B. 1515. We are now in a period of waiting to see if the result of this bill will be different than S.B. 1515.

Senate Bill 797 was recently passed in the 87th Legislature Regular Session and it is "relating to the display of the national motto in public schools and institutions of higher education" (S.B. 797). With this bill, it became law that public elementary, secondary, and higher education institutions must:

> "display in a conspicuous place in each building of the school or institution a durable poster or framed copy of the United States national motto, "In God We Trust," if the poster or framed copy meets the requirements of Subsection (b)," (S.B. 797).

Some of the requirements also include its donation for display or its purchase from private donations. Also, the poster or copy needs to contain the United States flag and state flag

and cannot depict any other information other than what is listed. S.B. 797 took effect on September 1st, 2021. According to the Texas Tribune, schools have already begun displaying donated or privately purchased "In God We Trust" posters as of August 2022, and organizations like the Southlake Anti-Racism Coalition are not happy with the law. While it can be argued that these required postings aren't advancing any religion because it is the national motto, this bill marks a slow transition to do just this (Downen, 2023).

Senate Bill 32 is very similar to S.B. 797 and was introduced in the 88th Legislature 3rd Special Session. It was authored by Angela Paxton, a Republican member of the Texas Senate. Like S.B. 797, it requires the conspicuous display of the national motto, "In God We Trust". However, S.B. 32 includes the posting of "historically significant documents to the founding of the United States" with their own requirements (S.B. 32). The introduced version of the bill defines "historically significant documents to the founding of the United States" to mean the United States Declaration of Independence, the United States Constitution, and the Ten Commandments (S.B. 32). Like S.B. 1515 relating to the Ten Commandments in public classrooms, this was only made possible after the *Kennedy* decision. While S.B. 32 did not pass the introduced phase of the legislative process and is now dead, the bill illustrates one of countless attempts by Texas lawmakers to advance religion in public schools.

Relating to prayer in schools, Senate Bill 1396 is another bill rising from the Texas Senate, and it was authored by Mayes Middleton, a Republican member of the Texas Senate, and was introduced in the 88th Texas Legislative Regular Session. The bill would allow school district board of trustees or a charter school's governing body to vote to adopt a policy that requires every campus to provide students and employees with a chance to partake "in a period of prayer and Bible reading on each school day" with certain criteria as per the bill (S.B. 1396).

The bill mandates that students and employees were only able to participate in the prayer or reading from the Bible if they, or a parent/guardian, signed a consent form. The consent form was to include an acknowledgement of their choice in participating, a statement that they don't object to their own, or the students, participation, and a waiver of rights to sue. Subsection (b) (1) (c), is particularly interesting to the subject of this paper and states that the consent from must include:

> "(C) an express waiver of the person's rights to bring a claim under state or federal law arising out of the adoption of a policy under this section, including claims under the United States Supreme Court's interpretations of the Establishment Clause, which forever releases the school district and all school officials from any such claims that the signatory might assert in state or federal court" (S.B. 1396).

The previous excerpt of S.B. 1396 acknowledges the way that prayer in schools falls under the Establishment Clause in some way, which is why it includes the waiver to avoid a lawsuit. In some way, I find the waiver to be an acknowledgement of how church and state are being entangled, which makes this portion of the bill so interesting. The bill is now dead and was not made into a law. However, as visible with S.B. 1515 and 20, it is entirely possible for this bill to be revised or reintroduced in the Texas Legislature. If this happens, the bill may achieve a different result.

While the majority of the previous Senate Bills were after the *Kennedy* decision, it is important to note the presence that religion has had for decades in the Texas legislature, which makes the ramifications of the *Kennedy* decision even more impactful. As many chambers in state legislatures and the United States Congress, the Texas Legislature has begun their session

days with an often-Christian invocation for decades. One invocation from the 84th Legislative Session from 2015 said:

> "Today, Father, we…thank you for the gifted men and women that you have called to serve in this body…We also ask, Father, that these legislators and all who assist them would be ever mindful of the fact that they are first and foremost your servants…And finally, Father, help us all, as citizens and governors alike, to recognize the futility and the foolishness of governing without you…We ask all of these things, Father, in the name of your precious Son, Jesus Christ, Amen" (as cited in, Voeller, 2019, p. 305-306).

The purposes of the legislative prayer primarily have to do with reminding representatives of their "noble task", purpose, and to create unity (as cited in, Voeller, 2019, p. 306). However, this invocation highlights another way that religion infiltrates the state government, and as statistics for self-identified Christians drop as the years progress, the legislative prayer may become less popular with time (Voeller, 2019, p. 307).

Conclusion

The Establishment Clause is nothing new to the United States Supreme Court, and cases will most likely appear for review again in the future. Cases going back to 1947 have created a precedent for what the Establishment Clause means and how it is supposed to be interpreted in schools and on government grounds. Each of the decisions for close to 80 years have worked to establish a working separation of the church and the state. However, it is evident that this separated relationship is slowly becoming to unravel as interpretations of the Establishment Clause change. As the currently conservative Roberts Court with relatively new justices remain, we may see matters of church and state entangle even further. This is an especially important

concept to remember in places like Texas with its high religiosity in its citizens and government traditions. Religious affiliation may not be intended to have direct effects on legislative, judicial, and political processes, but it cannot be denied that it creates, to some extent, a form of implicit bias. Even still, religion has always played a role in the State of Texas as a southern and highly religious state. However, we are seeing an even further advancement of religion in the state's legislations with Senate Bills 763, 1515, 20, and 32.

With the Roberts Court and the *Kennedy* decision, the research suggests that the divide between church and state will only get smaller and smaller. This shrinking jeopardizes schoolchildren attending Texas public schools who are now at risk of religious coercion and other conduct that has violated the Establishment Clause in the past. Changes like this will also endanger religious minority groups and further an inability to separate public schools from private ones. As time progresses, we may see other unexpected decisions like *Kennedy*, and I fear that it may cause irreparable damage to the church and state construct that this country has worked towards since 1787 in search of religious liberty. As further research like this and other studies are conducted, the separation between church and state may resolve itself if officials become aware of the ramifications their actions have. For now, however, let us pray.

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