

9-1-2004

EDUCATION Elementary and Secondary Education: Authorize the Reading or Posting of Certain Writings, Documents, and Records Without Content-Based Censorship Thereof; Provide for Notice to Local School Superintendents; and for Other Purposes

Joshua Brooker

Laura Verduci

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Recommended Citation

Joshua Brooker & Laura Verduci, *EDUCATION Elementary and Secondary Education: Authorize the Reading or Posting of Certain Writings, Documents, and Records Without Content-Based Censorship Thereof; Provide for Notice to Local School Superintendents; and for Other Purposes*, 21 GA. ST. U. L. REV. (2004).

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EDUCATION

Elementary and Secondary Education: Authorize the Reading or Posting of Certain Writings, Documents, and Records Without Content-Based Censorship Thereof; Provide for Notice to Local School Superintendents; and for Other Purposes

BILL NUMBER:	SB 394
SUMMARY:	The bill would have permitted state school boards to allow and encourage their teachers and administrators to read or post in their school building, classrooms, or at any event, documents or any portion of documents that relate to American heritage. The bill would have provided a list of documents, including the Constitution, the Declaration of Independence, the Mayflower Compact, and United States Supreme Court decisions. The bill would have prohibited content-based censorship of American history and heritage-based documents regarding any religious references.

History

The First Amendment's Establishment Clause provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹ The Constitution left courts with the power to interpret when a state action violates the Establishment Clause.² In *Lemon v. Kurtzman*, the Supreme Court established a three-prong analysis to determine the constitutionality of a statute under the Establishment Clause.³ A statute is

1. U.S. CONST. amend. I.

2. See Interview with Bob Overstreet, History and Advanced Placement Government teacher at Walton High School, in Cobb County, Ga. (Apr. 22, 2004) [hereinafter Overstreet Interview].

3. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

constitutional under the *Lemon* test when it satisfies the following requirements: (1) the statute has a secular, legislative purpose; (2) the statute's principal effect neither advances nor inhibits religion; and (3) the statute does not foster an excessive government entanglement with religion.⁴ American citizens have challenged the constitutionality of statutes that required prayer, a moment of silence, and the posting of the Ten Commandments in public schools.⁵ The Supreme Court found that the statutes in these cases violated the Establishment Clause.⁶ Recently, the Ninth Circuit Court of Appeals in *Newdow v. U.S. Congress* struck down a 1954 Congressional Act that added "under God" to the nation's Pledge of Allegiance because it violated the Establishment Clause.⁷

SB 394, if passed, would have allowed and encouraged teachers to read and post in public schools certain historical documents and affirmations significant to American history.⁸ The list of documents and affirmations included, among others, the United States Constitution, the Declaration of Independence, the Mayflower Compact, the Pledge of Allegiance, and the National Motto: "In God We Trust."⁹ SB 394 stated, "There shall be no content based censorship of American history or heritage in this [S]tate based on religious or other references in these writings, documents, affirmations, or records."¹⁰ Senator Eric Johnson of the 1st district, the bill's sponsor, stated that the reason for introducing the bill was that "[s]ome teachers are afraid that if they refer to our Creator or if they refer to religion or God that they might somehow get in trouble."¹¹ He wanted teachers to understand that there is no censorship as to the documents' religious references and that the law permits the references if educators want to post them.¹² Perhaps he felt that because of the Supreme Court decisions discussed above and

4. *Id.*

5. See *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985); *Stone v. Graham*, 449 U.S. 39, 43 (1980); *School Dist. v. Schempp*, 374 U.S. 203, 223 (1963); *Engel v. Vitale*, 370 U.S. 421, 430-32 (1962).

6. *Wallace*, 472 U.S. at 60; *Stone*, 449 U.S. at 43; *Schempp*, 374 U.S. at 223; *Engel*, 370 U.S. at 430-32.

7. *Newdow v. U.S. Congress*, 292 F.3d 597, 612 (9th Cir. 2002).

8. SB 394 (SCS), 2004 Ga. Gen. Assem.

9. *Id.*

10. *Id.*

11. Audio Recording of Senate Proceedings, Feb. 2, 2004 (remarks by Sen. Eric Johnson), at http://www.georgia.gov/00/channel_title/0,2094,4802_6107103,00.html [hereinafter Senate Audio].

12. *Id.*

because of the most recent case dealing with the Pledge of Allegiance, teachers were wary about using these documents simply because they contained religious references. Senator Johnson mentioned that the General Assembly had considered this issue in previous sessions.¹³ Senator Perry McGuire, formerly of the 30th district, originally proposed the bill in 1995.¹⁴

Bill Tracking

Consideration by the Senate

Senators Eric Johnson, Bill Stephens, Tommie Williams, and Don Balfour of the 1st, 51st, 19th, and 9th districts, respectively, sponsored SB 394.¹⁵ The Senate first read SB 394 on January 13, 2004.¹⁶ The Lieutenant Governor assigned the bill to the Senate Education Committee.¹⁷ The Senate Education Committee favorably reported on the bill, by substitute, on January 29, 2004.¹⁸ The Senate read the bill a second time on January 30, 2004 and a third time on February 2, 2004.¹⁹ The substitute added the published texts of the United States Congressional Record and “[o]rganic documents from the precolonial, colonial, revolutionary, federalist, and postfederalist eras” to the bill’s list of documents and affirmations.²⁰ The substitute also changed the date by which the State School Superintendent would have had to distribute copies of the proposed new Article to all the school districts from January 1, 2004 to no later than August 1, 2004.²¹

13. *See id.*

14. *Id.*; SB 324, as introduced, 1995 Ga. Gen. Assem.

15. SB 394, as introduced, 2004 Ga. Gen. Assem.

16. State of Georgia Final Composite Status Sheet, SB 394, Jan. 13, 2004 (May 19, 2004).

17. *See id.*

18. State of Georgia Final Composite Status Sheet, SB 394, Jan. 29, 2004 (May 19, 2004).

19. State of Georgia Final Composite Status Sheet, SB 394, Jan. 30, 2004 (May 19, 2004); State of Georgia Final Composite Status Sheet, SB 394, Feb. 2, 2004 (May 19, 2004).

20. *Compare* SB 394, as introduced, 2004 Ga. Gen. Assem., *with* SB 394 (SCS), 2004 Ga. Gen. Assem.

21. *Compare* SB 394, as introduced, 2004 Ga. Gen. Assem., *with* SB 394 (SCS), 2004 Ga. Gen. Assem.

Passage by the Senate

The Senate adopted the Senate Committee substitute on February 2, 2004 by a vote of 47 to 5.²² On the day of the vote, Senators debated the bill for approximately 15 minutes.²³ Senator Eric Johnson initiated the debate by speaking in favor of the bill.²⁴ He indicated that he proposed the subject matter of SB 394 prior to the 2004 session.²⁵

The bill states that “[l]ocal school boards may allow and encourage any teacher or administrator . . . to read or post in a public school building . . . affirmations or documents of American heritage.”²⁶ Senator Faye Smith of the 25th district expressed her concern over the term “encourage” during one of the Senate Education Committee meetings.²⁷ She argued that if school boards could encourage teachers to post documents, then a teacher may feel pressured and thus compelled to post or read the documents or affirmations listed in the bill.²⁸

Senator Johnson, however, emphasized that SB 394 would not mandate the posting of affirmations or documents.²⁹ He indicated that the purpose of SB 394 was to quell teachers’ fears over using the documents or affirmations.³⁰ Senator Steve Thompson of the 33rd district questioned the wisdom of including former Supreme Court decisions in the list of documents that the bill allowed.³¹ He opined that the State should not enact a bill that equates Supreme Court decisions with documents related to the founding of America.³² Senator Johnson responded that, although some Supreme Court

22. Georgia Senate Voting Record, SB 394 (Feb. 2, 2004).

23. See Senate Audio, *supra* note 11.

24. *Id.* (remarks by Sen. Eric Johnson).

25. *Id.*

26. SB 394 (SCS), 2004 Ga. Gen. Assem.

27. Telephone Interview with Maggie Garrett, Staff Attorney, American Civil Liberties Union (Apr. 22, 2004) [hereinafter Garrett Interview].

28. See *id.*

29. See Senate Audio, *supra* note 11.

30. See *id.*

31. *Id.* (remarks by Sen. Steve Thompson).

32. *Id.* Senator Thompson stated that “there are Supreme Court decisions with which we have all been appalled through the years . . . I just wonder if that is as relevant as other documents of our Founding Fathers.” *Id.*

decisions have been overturned or deemed misguided, they are a part of American history and important to education.³³

Senator Michael Meyer von Bremen of the 12th district discussed the contradiction created by encouraging teachers to post and teach pre-1850 documents in high schools, while at the same time, the State eliminates the pre-1850 history curriculum.³⁴ Senator Johnson, however, disagreed.³⁵ He stated, “I believe certainly in post-1850 history there are aspects of the Constitution that can be and should be studied.”³⁶ Senator Johnson made reference to the Freedom Shrines—a mounted collection of 30 documents significant to American history—that individuals have posted on school walls.³⁷ The Exchange Clubs of Georgia post Freedom Shrines as “windows to the world of America’s proud past,” allowing the nation’s youth access to historical American documents.³⁸ Senator Johnson again stressed the permissive nature of the bill.³⁹ Schools would be free to use the documents “at the appropriate age group and in the appropriate educational manner.”⁴⁰

Senator Nadine Thomas of the 10th district expressed some concern over the bill’s inclusion of the published text of the Congressional Record.⁴¹ She indicated that some of the topics discussed during congressional hearings would not be appropriate for school children to hear, particularly debates over sex education.⁴²

Senator Vincent Fort of the 39th district was the last Senator to ask questions.⁴³ He expressed concern regarding the definitions of “organic” and “precolonial.”⁴⁴ Senator Johnson defined “organic” as “real and official documents.”⁴⁵ He stated that “precolonial” documents are those documents that have had an influence on

33. *Id.* (remarks by Sen. Eric Johnson).

34. *Id.* (remarks by Sen. Michael Meyer von Bremen).

35. See Senate Audio, *supra* note 11 (remarks by Sen. Eric Johnson).

36. *Id.*

37. *Id.*; see *Exchange Americanism Program*, The National Exchange Club, at <http://www.nationalexchangeclub.com/programsservice/a.htm> (last visited Mar. 3, 2004) [hereinafter *Americanism Program*].

38. *Americanism Program*, *supra* note 37.

39. See Senate Audio, *supra* note 11.

40. *Id.*

41. *Id.* (remarks by Sen. Nadine Thomas).

42. See *id.*

43. See *id.* (remarks by Sen. Vincent Fort).

44. See *id.*

45. Senate Audio, *supra* note 11.

American history, although the document need not originate in the United States to qualify.⁴⁶ For example, Senator Johnson indicated that the Mayflower Compact's authors wrote the document in Europe.⁴⁷ He noted that Native American documents and the Magna Carta are examples of "precolonial" or "organic" documents.⁴⁸ When Senator Fort asked if the Bible would qualify, Senator Johnson stated that "organic document[s] would not [include] the Bible [under his] interpretation."⁴⁹

Consideration by the House

The House read SB 394 for the first time on February 3, 2004 and for a second time on February 5, 2004.⁵⁰ The Speaker assigned SB 394 to the House Education Committee.⁵¹ The bill never made it out of the Committee.⁵²

The Bill

SB 394, had it passed, would have amended Title 20, Chapter 2 of the Official Code of Georgia Annotated by adding Article 32 to the end of the Chapter.⁵³ The bill would have added Code sections 20-2-2080 to -2082.⁵⁴

Article 32—the American Heritage in Education Act—would have permitted school boards to allow and encourage teachers to use, read, or post excerpts, portions, or replicas of certain documents and affirmations that are significant to American history on school walls.⁵⁵ The documents included in SB 344 were as follows: the United States Constitution; the Constitution of Georgia; the Declaration of Independence; the Mayflower Compact; the National

46. *See id.*

47. *Id.*

48. *Id.* (remarks by Sens. Eric Johnson and Vincent Fort).

49. *Id.* (remarks by Sen. Eric Johnson).

50. State of Georgia Final Composite Status Sheet, SB 394, Feb. 3, 2004 (May 19, 2004); State of Georgia Final Composite Status Sheet, SB 394, Feb. 5, 2004 (May 19, 2004).

51. State of Georgia Final Composite Status Sheet, SB 394, Feb. 5, 2004 (May 19, 2004).

52. *Id.*

53. SB 394 (SCS), 2004 Ga. Gen. Assem.

54. *Id.*

55. *Id.*

Motto: “In God We Trust”; the Pledge of Allegiance; the National Anthem; any writings, proclamations, or speeches of United States presidents or of the signers of the Declaration of Independence or the United States Constitution; “[o]rganic documents from the precolonial, colonial, revolutionary, federalist, and postfederalist eras,” Supreme Court decisions; and the acts of the United States Congress, including the published text of the Congressional Record.⁵⁶ The section also provided that there “shall be no content based censorship of American history or heritage . . . based on religious or other references” in the listed documents and affirmations.⁵⁷ The section further provided that the State School Superintendent had to distribute a copy of the proposed Article no later than August 1, 2004 to all school districts in the state.⁵⁸ The bill would have required local superintendents to distribute a copy of the bill to all the schools after they received it from the State Superintendent.⁵⁹

Section 2 of the bill would have repealed “[a]ll laws and parts of laws in conflict with this Act.”⁶⁰

Analysis

SB 394, had it passed, most likely would have been the subject of a significant constitutional challenge under the Establishment Clause.⁶¹ Although the bill appears secular on its face, opponents of SB 394 argued that the bill’s primary purpose and effect would have been to promote religion within Georgia’s public schools.⁶² American Civil Liberties Union attorney Maggie Garrett commented that “[i]f [the] real concern was that teachers are afraid to post documents because of religious references [in the documents], then it makes more sense to [educate] teachers about the Establishment Clause” rather than to propose a statute that would invite teachers to violate the Clause.⁶³ “The effect of the bill would be to allow and encourage teachers to

56. *Id.*

57. *Id.*

58. *Id.*

59. SB 394 (SCS), 2004 Ga. Gen. Assem.

60. *Id.*

61. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

62. See Garrett Interview, *supra* note 27; SB 394 (SCS), 2004 Ga. Gen. Assem.

63. Garrett Interview, *supra* note 27.

post documents wherever in school no matter how it ties into the course This bill creates more confusion than clarity in the matter for teachers.”⁶⁴ She further characterized the bill as “misleading.”⁶⁵ “[I]t tells teachers they can put up anything they want regardless of religious content or religious purpose.”⁶⁶ Garrett explained that the bill would have allowed “[t]eachers [to] take parts of these documents . . . and just post [religious] parts without the rest of [the] text,” which might not be constitutional.⁶⁷

In addition to the Establishment Clause argument, SB 394 may have been subject to attacks on other grounds. The bill’s ambiguity in defining the types of documents that it covers could have led to excessive litigation as educators attempted to protect or remove individual documents not specifically delineated under the bill.⁶⁸ While the bill contains a list of specific documents, it also includes an ambiguous catch-all provision.⁶⁹

Additionally, the bill’s language does not discriminate among the types of censorship that teachers could have forgone when teaching public documents.⁷⁰ Under the bill’s broad language, teachers could have presented documents containing lewd material in public school classrooms without censorship.⁷¹ Thus, this could have also been a point of attack by opponents of the bill.

Constitutional Challenge Under the Establishment Clause

The Establishment Clause provides, “Congress shall make no laws respecting an establishment of religion”⁷² The Supreme Court has held that a state’s pursuit of its public duties will at times affect certain aspects of religion.⁷³ The Establishment Clause does not

64. *Id.*

65. *Id.*

66. *Id.*

67. Garrett Interview, *supra* note 27. The bill provides that teachers can post or read “excerpts” or “portions” of the document. SB 394 (SCS), 2004 Ga. Gen. Assem.

68. *See* SB 394 (SCS), 2004 Ga. Gen. Assem.

69. *Id.* (“There shall be no content based censorship of American history or heritage in this [S]tate based on religious or other references in these writings, documents, affirmations, or records.”).

70. *Id.*

71. *See* Senate Audio, *supra* note 11 (remarks by Sen. Nadine Thomas).

72. U.S. CONST. amend. I.

73. *See, e.g.,* Anderson v. Salt Lake City Corp., 475 F.2d 29, 32 (1973) (noting that some interaction between government and religion is inevitable).

prohibit this type of ancillary effect.⁷⁴ In fact, sometimes the secondary effect is unavoidable.⁷⁵ However, a state violates the Establish Clause when it uses its power for the purpose of directly affecting religion.⁷⁶

The Supreme Court in *Lemon v. Kurtzman* established the framework necessary to delineate between an ancillary and principle religious affect.⁷⁷ The *Lemon* test applies a three-prong analysis to determine whether a state's statute violates the Establishment Clause.⁷⁸ "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁷⁹

Defining Secular Purpose Under the Lemon Test

SB 394's stated purpose was to protect certain historical documents from censorship.⁸⁰ Particularly, legislators designed the bill to allow teachers to use documents related to American history in their entirety.⁸¹ Senator Johnson, the bill's primary sponsor, stated in floor debates that the bill would comfort teachers who are afraid to mention aspects of religion contained in American history.⁸² For instance, a teacher lecturing on United States currency may skip over the motto "In God We Trust."⁸³ Likewise, teachers lecturing on the Declaration of Independence may feel compelled to gloss over any mention of God.⁸⁴

The recent Supreme Court case *Elk Grove v. Newdow* proved that Senator Johnson's fears are not unfounded.⁸⁵ In *Newdow*, the

74. *Id.*

75. *Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."). Justice Brennan has stated that "not every involvement of religion in public life is unconstitutional." *School Dist. v. Schempp*, 374 U.S. 203, 232 (1963) (Brennan, J., concurring).

76. *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987) (holding that the Court is deferential to a claim of secular purpose as long as it does not amount to a sham).

77. *Lemon*, 403 U.S. at 612-13.

78. *Id.*

79. *Id.* (citation omitted) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

80. SB 394 (SCS), 2004 Ga. Gen. Assem.

81. See Senate Audio, *supra* note 11.

82. *Id.*

83. See *id.*

84. See *id.*

85. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

petitioner claimed that requiring his child to recite the Pledge of Allegiance at school violated the Establishment Clause.⁸⁶ Similar cases have reached the Supreme Court; however, those cases involved acts that the Court could easily separate as religious.⁸⁷ *Newdow* marked the Supreme Court's first inquiry into an act that was arguably more patriotic than religious.⁸⁸ While the Court dismissed the case due to the petitioner's lack of standing, the opinion appeared to support the recitation of the Pledge of Allegiance as "a patriotic exercise designed to foster national unity and pride in [the] principles [that our flag symbolizes]."⁸⁹ Thus, *Newdow* may give credence to the purposes behind SB 394.⁹⁰

However, even if the Georgia Legislature was concerned with reassuring teachers, SB 394's opponents would still contend that the principle purpose of the bill was religious.⁹¹ The question of whether the bill is legitimate hinges on whether the legislature crafted the bill to protect America's history or to advance the religious elements found within that history.⁹² The Supreme Court has stated that history and religion are inseparable in some situations.⁹³ Therefore, removing elements of religion from public schools would detract from teachers' ability to teach history.⁹⁴

Given the types of documents the bill sought to protect, legislators may have designed SB 394 to protect American history by allowing teachers to mention certain inherent religious aspects. Unlike the State's actions in school prayer cases, where teachers used the school system to reinforce religious values, SB 394 sought to use aspects of religion to further the public school's secular purposes.⁹⁵ The fact that public documents use religious figures and mottos is ancillary to the secular purpose of promoting American history.⁹⁶

86. *Id.* at 2301.

87. *Edwards v. Aguillard*, 482 U.S. 578, 581-82 (1987) (examining a state law that prohibited the teaching of the theory of evolution); *Elkhart v. Books*, 532 U.S. 1058 (2001) (ruling on the Ten Commandments displayed on a city monument); *Engel*, 370 U.S. at 424-25.

88. *See Newdow*, 124 S. Ct. at 2303.

89. *Id.* at 2305, 2327.

90. *See id.*; *see also* SB 394 (SCS), 2004 Ga. Gen. Assem.

91. *See* Garrett Interview, *supra* note 27; *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

92. *See Lemon*, 403 U.S. at 612-13.

93. *Engel*, 370 U.S. at 434.

94. *See id.*

95. *See id.*

96. *See id.*

The fact that SB 394 lists specific documents is critical.⁹⁷ Absent the secular purpose of teaching history, teaching religious aspects of America's heritage would be inappropriate.⁹⁸ In *Engel v. Vitale*, the Supreme Court drew an explicit distinction between patriotic and prohibited invocations of God and prayer.⁹⁹ In his concurring opinion, Justice Douglas wrote that the narrow question presented was "whether the Government can constitutionally finance a religious exercise."¹⁰⁰

SB 394, as drafted, would not have given teachers the right to force their religious agenda upon students.¹⁰¹ The bill would have only protected religious portions of documents that directly relate to American heritage.¹⁰² The bill would have required teachers to stay within the scope of a document's particular historical relevance to qualify for the bill's protections.¹⁰³ Therefore, it is likely that there is a link between the stated purpose of the bill and any religious material that a teacher may have presented under the bill that is sufficient to satisfy first prong of the *Lemon* test.

Primary Effect Must Not Advance or Inhibit Religion

The *Lemon* test also requires that a statute's "principal or primary effect must be one that neither advances nor inhibits religion."¹⁰⁴ SB 394 is neutral on its face because it makes no distinction among religious elements so long as they appear in historical documents.¹⁰⁵ While some religions would not fall under this bill's protection because they are not relevant to America's history, the bill would have neither precluded nor encouraged any religion.¹⁰⁶

97. *See id.* (listing specific documents).

98. *See Lemon*, 403 U.S. at 612-13.

99. *See Engel*, 370 U.S. at 435 n.21.

100. *Id.* at 437.

101. *See* SB 394 (SCS), 2004 Ga. Gen. Assem.

102. *See id.*

103. *See* SB 394 (SCS), 2004 Ga. Gen. Assem. (stating that "[t]here shall be no content based censorship of *American history or heritage*") (emphasis added).

104. *Lemon*, 403 U.S. at 612.

105. *See* Senate Audio, *supra* note 11; SB 394 (SCS), 2004 Ga. Gen. Assem.

106. *See* SB 394 (SCS), 2004 Ga. Gen. Assem.; *see also* *School Dist. v. Schempp*, 374 U.S. 203, 218 (1963) (stating that a neutral statute neither advances nor inhibits religion).

Excessive Entanglement

Under the third prong of the *Lemon* test, a statute violates the Establishment Clause if it excessively entangles religion and government functions.¹⁰⁷ The potential for entanglement is substantial when a state entity teaches aspects of religion in public schools.¹⁰⁸ Here, however, the religious aspects of the documents listed in the bill are part of historical accounts, and the State has an interest in teaching history to its students.¹⁰⁹ Therefore, the entanglement, in this particular circumstance, may be necessary for the State to carry out its educational agenda.

Additionally, an entanglement argument is only necessary when the statute is purely religious.¹¹⁰ If the statute is not religious, then a state has no reason to separate itself from the statute.¹¹¹ Therefore, the question of whether SB 394 would fail the third prong of the *Lemon* test largely depends on the answers to the questions posed under the first prong.¹¹²

Based on the above analysis, a constitutional challenge to SB 394 under the Establishment Clause would have likely failed. The overriding purpose of SB 394 was sufficiently secular to avoid an Establishment Clause claim; additionally, any relationship to religion would be ancillary to the bill's purpose.¹¹³ Many of the documents and affirmations important to American history, including those listed in SB 394, contain religious references.¹¹⁴ Thomas Jefferson proclaimed in the Declaration of Independence that the people are "endowed by their Creator with certain unalienable Rights."¹¹⁵ He spoke of rights to which "the Laws of Nature and of Nature's God

107. *Lemon*, 403 U.S. at 612.

108. *See, e.g., Schempp*, 374 U.S. at 225 (holding that mandatory Bible reading in school constituted a violation of the Establishment Clause).

109. *See* Senate Audio, *supra* note 11.

110. *See Schempp*, 374 U.S. at 234 ("The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end . . .").

111. *See id.*

112. *See id.*

113. *See* SB 394 (SCS), 2004 Ga. Gen. Assem. (listing documents important to American history that also contain religious references).

114. *See* NATIONAL MOTTO: In God We Trust (U.S. 1956); THE PLEDGE OF ALLEGIANCE (U.S. 1892); FRANCIS SCOTT KEY, THE STAR SPANGLED BANNER para. 4 (U.S. 1814); THE DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776); MAYFLOWER COMPACT para.1 (1620).

115. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

entitle them”¹¹⁶ Similarly, the Mayflower Compact, written by devoutly religious people, opened with, “In the name of God, Amen.”¹¹⁷ The Mayflower Compact also stated that the Plymouth habitants undertook their voyage “for the Glory of God, and [the] Advancement of the Christian Faith.”¹¹⁸

Problems that May Arise from Ambiguity Within SB 394

SB 394 stated that it applies to any “organic documents from the precolonial, colonial, revolutionary, federalist, and postfederalist eras.”¹¹⁹ Therefore, Georgia teachers could have taught from or displayed any document falling within one of these categories.¹²⁰

The problem with this catch-all provision is that, while it defines history by specific eras, it does not require that these documents pertain to specific events in America’s history.¹²¹ Therefore, under the bill’s original construction, a teacher could have taught out of any document so long as it originated from America’s earlier history.¹²² Journals, books, and speeches written about any subject could have qualified under this exception.¹²³ For instance, a Christian speech or a Buddhist journal that is old enough would have fallen under the exception even if they lacked historical significance.¹²⁴

This catch-all provision might have created problems for the bill as it relates to the Establishment Clause because the provision causes the bill to lose its vital connection with American history. A key factor in the earlier analysis was that each mention of religion had a connection with American history.¹²⁵ However, the catch-all provision could have allowed teachers to teach purely religious history. The best way to avoid any challenges from this ambiguity would be to limit the documents covered in the bill to those documents specifically related to a historical event. For instance, the

116. *Id.* para. 1.

117. MAYFLOWER COMPACT para.1 (1620).

118. *Id.*

119. SB 394 (SCS), 2004 Ga. Gen. Assem.

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. *See supra* pp. 85-86.

legislature could have changed the bill to read as follows: “any organic document pertaining to significant United States historical events.”

Problems Arising from Removing Content-Based Censorship

SB 394 states that teachers do not have to censor the content of historical documents.¹²⁶ However, some documents pertaining to American history contain material not suited for a younger audience.¹²⁷ According to the bill’s language, teachers could have read from congressional hearings or other documents published on the Congressional Record, regardless of whether the documents contained lewd or inappropriate material.¹²⁸

The General Assembly should decide whether or not to give teachers the discretion in this area. Legislators should be careful when creating a bill that removes content-based discrimination in schools because of the danger of exposing children to inappropriate material.

Conclusion

SB 394 would have likely been subject to Establishment Clause challenges. The bill probably would have withstood constitutional scrutiny because the religious content that the bill would have allowed was ancillary to the State’s interest in education.¹²⁹

If the General Assembly considers the bill again, legislators should reconsider the catch-all provision and possibly exclude documents that are irrelevant to American history. Although documents written in the United States during its formative period are more likely to have significant relevance to American history than general documents, a court could find that the requirement is not strict enough to ensure an adequate connection between any religious references and American history.

126. SB 394 (SCS), 2004 Ga. Gen. Assem.

127. See Senate Audio, *supra* note 11 (remarks by Sen. Nadine Thomas).

128. *Id.*; SB 394 (SCS), 2004 Ga. Gen. Assem.

129. See *supra* pp. 85-86.

Finally, the legislature should address whether allowing teachers to use personal discretion when exposing students to certain types of information is appropriate. Legislators should consider an additional amendment excluding lewd or disturbing material in any future bill similar to SB 394.

Although the General Assembly did not pass SB 394, the documents listed in the bill will continue to pervade Georgia schools.¹³⁰ Bob Overstreet, an Advanced Placement Government teacher at Walton High School in Cobb County, Georgia, commented, “[T]eachers are not afraid. They use the documents when relevant without any fear It is important to talk about the documents in the time they were written. You cannot teach history without religion”¹³¹

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130. *See* Overstreet Interview, *supra* note 2.

131. *Id.*