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MIZE, RICHARD LEON

THE LEGAL ASPECTS OF RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS

The University of North Carolina at Greensboro ED.D. 1980

THE LEGAL ASPECTS OF RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS

by

Richard Leon Mize

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School boards and school administrators face a continuing problem today in the making and implementing of policy dealing with religion and religious instruction in the public school setting. In the first century and a half of American educational history, religion played an integral part in the public school curriculum.

Beginning in the 1940s, many customary public education practices came under fire by various religious sects and civil liberty groups. As various constituencies challenged religious instruction practices in public schools, courts ultimately had to settle the disputes. Judicial decisions in the 1940s and 1950s established a new religious instruction philosophy in the public schools.

In the 1940s, courts rendered more conservative decisions in First Amendment religious freedom cases. Judicial decisions developed the position that religious instruction that tended to advance religion could not take place in public school settings.

West Virginia State Board of Education v. Barnette was the first decision establishing the new judicial philosophy. The court insisted that requiring students to salute the flag was unconstitutional when such action offended serious religious dogma. During the following decades, the United States Supreme Court handed down

decisions affecting religious instruction in public education: (1) allowing released time for religious instruction away from the school setting; (2) disallowing the reading of Bible verses; and (3) declaring prayer at school unconstitutional.

This study (1) reviews the cyclic history of religious versus secular instruction; (2) reviews judicial decisions based on First Amendment considerations for religious instruction; and (3) presents an in-depth analysis of landmark court cases dealing with religious instruction in public education.

Judicial reviews include the following areas:

1. Released time from public schools for religious instruction.
2. Prayer in the public schools.
3. Bible reading in school.
4. Celebration of religious holidays in the school setting.
5. Bible clubs in the school setting.
6. Teaching the theory of evolution.
7. Sex education in the public schools.
8. Patriotic exercises.
9. Display of religious symbols in public school setting.
10. Use of electronic media teaching aids.
11. Academic courses in religion.
12. Distribution of religious material in public schools.

Based on an analysis of judicial decisions, the following religious practices are allowable within the First Amendment of the Constitution: (1) released time for religious instruction away from the school setting, (2) moments of silence for private meditation, (3) secular study of the Bible as literature, (4) celebration of holidays with both secular and religious importance, (5) teaching theories of the origin of man other than the Biblical story, (6) teaching sex education as a public health course, (7) displaying religious symbols as art or culture, (8) use of electronic media aids, and (9) academic studies of religion.

This study includes a list of recommendations for school boards and administrators so that school board policy and administrative practice assure each student's religious freedom rights.

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CHAPTER I

INTRODUCTION

> 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 to peaceably assemble, and to petition the government for a redress of grievances.[1]

The First Amendment to the Constitution was added in 1791 at the insistence of Thomas Jefferson and James Madison. Madison proposed the First Amendment and the rest of the Bill of Rights when it became apparent that the Constitution would not be ratified without guaranteed protections.[2]

Jefferson insisted upon the adoption of a bill of rights as a deterrent to a strong executive. Only a decade after the adoption of the Bill of Rights, Thomas Jefferson said of the First Amendment:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between church and state.[3]

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[1]U.S. Constitution, amend. I.

[2]Leo Pfeffer, Church, State and Freedom (Boston: The Beacon Press, 1953), pp. 117-19.

[3]Saul K. Padover, The Complete Jefferson (New York: Duell & Stran & Pearce, 1943), pp. 518-19.

Maintaining this constitutional wall between church and state in the public school curriculum is an omnipresent task. School board policy and administrative practice must reflect the separation of secular curriculum and manifestations of religious instruction.

During the 1940s, the United States Supreme Court began to rule on policies that had previously been inviolate. Supreme Court decisions dealing with religious instruction in public schools developed the position that no religious instruction might be undertaken during public school time. Landmark cases were:

1940--Minersville School District v. Gobitis (Pa.).[4] The Supreme Court upheld the flag salute in public schools.

1943--West Virginia State Board of Education v. Barnette.[5] The Supreme Court struck down a school practice requiring children to salute the flag when the act ran counter to their religion.

1948--McCollum v. Board of Education (Ill.).[6] The Supreme Court declared that releasing children from regular classes to attend religious instruction in the school building violated the First Amendment establishment clause.

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[4]Minersville School District v. Gobitis (Pa.), 310 U.S. 586, 60 S. Ct. 1010 (1940).

[5]West Virginia State Board of Education v, Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943).

[6]McCollum v. Board of Education (Ill.), 333 U.S. 203, 68 S. Ct. 461 (1948).

1952--Zorach v. Clauson (N.Y.).[7] The Supreme Court insisted that releasing children from regular classes to attend religious instruction away from the school campus was constitutional.

1952--Doremus v. Board of Education (N.J.).[8] The Supreme Court dismissed an appeal of a New Jersey Supreme Court declaring Bible reading in school constitutional.

1962--Engel v. Vitale (N.Y.).[9] The Supreme Court insisted that State Board of Regents' mandated prayer in all public education classrooms was unconstitutional.

1963--Abington School District v. Schempp (Pa.),[10] and Murray v. Curlett (Md.).[11] The Supreme Court maintained that a state statute requiring Bible reading and prayer in the public schools was unconstitutional.

Since the 1940s, the United States Supreme Court, federal courts of appeal, and federal district courts have maintained the position that no religious instruction may be undertaken at school.

Often, school board policy had to be modified to comply with judicial decisions that keep inviolate the

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[7]Zorach v. Clauson (N.Y.), 343 U.S. 306, 72 S. Ct. 679 (1952).

[8]Doremus v. Board of Education, 5 N.J. 435, 75 A 2d 880 (1950), 342 U.S. 429 (1952).

[9]Engel v. Vitale (N.Y.), 370 U.S. 421, 82 S. Ct. 1261 (1962).

[10]Abington School District v. Schempp (Pa.), 374 U.S. 203, 83 S. Ct. 1560 (1963).

[11]Murray v. Curlett (Md.), 228, 239, 179 A 2d 698 (1962).

constitutional religious freedoms of public school teachers and students.

This study (1) reviewed the cyclic history of religious versus secular instruction in public schools; (2) reviewed those courses that are inherently both secular and religious, such as art, music, drama, literature, and history of religions; (3) reviewed court decisions based on First Amendment considerations for religious instruction; and (4) presented an analysis of landmark court cases dealing with religious instruction in public education.

The overall purpose of this study was to provide school boards, public school administrators, and public school teachers with appropriate information regarding the legal aspects of religious instruction in the public school setting. This information is necessary in order to carry on the vital business of education in public schools while upholding the rights of all students under the Constitution.

Since the question of what constitutes student rights under the First Amendment is not easily answered, there was a need to review court cases and related literature encapsulating religion in school instruction. It is in the area of religious instruction that school boards, administrators, and teachers often abridge the constitutional rights of students.

Statement of the Problem

School boards and school administrators face a continuing problem today in making and implementing policy dealing with religious instruction in public education. The problem is multi-faceted and volatile in nature.

School boards are the policy-making agencies for public schools. School policy must be established within the constitutional and statutory limit of each state, and more important, within the limits of the United States Constitution. Moreover, school boards must respond to public demand for quality programs and continuing cultural and social growth in public schools.

Administrators are faced with (1) the administration of school board policy, (2) implementation of state constitutional and statutory mandates, and (3) the protection of the constitutional rights of all students. Administrators must also deal with populace satisfaction in presenting a quality educational program. In the minutiae of school operations, the school administrator must ensure that each student enjoys the "constitutional guarantee that the students or teachers do not shed their constitutional rights at the schoolhouse gate."[12] This idea must be omnipresent in the school administrator's mind.

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[12]Tinker v. Des Moines Independent School District (Ia.) 393 U.S. 503, 89 S. Ct. 733 (1969).

The administrative implementation of school board policy, both state and local, and the adherence to constitutional requirements in administration of public schools are of paramount importance in the legal aspects of religious instruction in public schools. A disagreement between the student and the school administrator often occurs, resulting in court action. The judicial process must determine whether or not the student's constitutional rights were violated by the actions of the school administrator.

Thus, there is a serious need to examine the legal aspects of religious instruction in the public school setting in order that school boards and administrators can ensure First Amendment freedom of religion for all students. Specific recommendations need to be developed (from reviews of court decisions) for public school administrators to use when preparing curricula or specific programs. Teachers should be aware of the recommendations and their implementation in classroom instruction day after day, in order to ensure these rights.

Questions To Be Answered

One of the stated purposes of this study is to develop specific legal recommendations for school boards, administrators, and teachers to use when considering the legal aspects of religious instruction in public schools. Below are listed several key questions to which this study will seek answers in order to assure that public school

educators afford to each student all of the First Amendment religious freedom rights of our Constitution.

(1) Under what circumstances are the First Amendment rights of students abridged?

(2) What educational practices in public schools have abridged First Amendment religious freedom rights?

(3) What should administrators know concerning the constitutional rights of students in religious instruction?

(4) Are there any specific trends to be determined from judicial analysis?

(5) Based on review and analysis of judicial decisions, are there trends and directions that can help school boards and administrators avoid the abridgment of students' rights under the First Amendment religious freedom clause?

(6) Based on analysis of judicial decisions, can any projections be made concerning disagreements that may arise between school policy and students' rights under the First Amendment?

Scope of the Study

This was an historical study of the legal aspects of religious instruction. The research identified and delineated specific areas under which: (1) state statutes have been challenged for abridging the First Amendment rights; (2) school boards have been challenged in courts for policy

practices that are unconstitutional; (3) results of litigations were analyzed and reported; and (4) recommendations were presented for school boards and administrators to utilize in future policy considerations.

This study has utile value for school boards, administrators, and public school teachers, since all of the above are involved in formulating or implementing education policy that could be unconstitutional. This study is limited to the legal aspects of religious instruction in public schools. Only those aspects of public education that pertain to the school setting are reviewed. Major court cases covering religious aspects of public school education that pertain to school setting were reviewed. Major court cases covering religious instruction in public school were reviewed, analyzed, and reported. Recommendations were made for administrators who deal with religious instruction in public schools.

Methods, Procedures, and Sources of Information

The basic research technique of this research study was to examine and analyze the available references concerning the legal aspects of religious instruction in public schools in order to determine if a need existed for such research. A search was made of Dissertation Abstracts for related topics. Journal articles related to the topic were located through use of such sources as Reader's Guide to

Periodical Literature, Education Index, and the Index to Legal Periodicals.

General research summaries were found in the Encyclopedia of Educational Research, various books on school law, and in a review of related literature obtained through a computer search from the Educational Resources Information Center (ERIC).

Federal and state court cases related to the topic were located through the use of the Corpus Juris Secundum, American Jurisprudence, the National Reporter System, and through the help of the Institute of Government at the University of North Carolina at Chapel Hill.

Definition of Terms

Selected terms which were used in this study are defined below:

Released time: the releasing of school children from school during the school day for the purpose of religious instruction.

Religious instruction: any instruction that can be construed to have a religious tone or that tends to advance religion.

Accommodation: allowance within constitutional limits of some leeway for religious instruction for interested students.

Tripartite test: the Supreme Court test for constitutionality of school board policy dealing with

religious instruction. To pass the test, policy must (1) reflect a clearly secular legislative purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive government entanglement with religion.[13]

Significance of the Study

For a century and a half of the history of the United States, no one seriously questioned the legality of public school accommodation of religious instruction. Religion and morality are among the cornerstones of legislation establishing state school systems, starting with Massachusetts in 1647, when that state passed the pioneer general school law, the "Old Deluder Act." This act stated that each village with fifty or more householders would provide a school and appoint a teacher.[14]

> It being one chief object of that old deluder, Satan, to keep men from the knowledge of the scriptures, as in former times by keeping them in an unknown tongue, so in latter times by persuading them from the use of tongues.[15]

In 1837, Horace Mann was selected the first secretary of the newly created State Board of Education of Massachusetts. Mann's principal and immediate accomplishment as secretary

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[13]Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[14]Neil Gerard McCluskey, Public Schools and Moral Education (New York: Columbia University Press, 1958), p. 12.

[15]The Colonial Laws of Massachusetts (Boston: City Council of Boston, 1889).

was to organize and solidify the school districts of the state into one effective school system. Mann brought to the position a feeling for Calvinism acquired as a boy, when his brother and friend drowned, and their cold, Calvinistic funeral service left him with the personal dilemma of dreading Calvinism, but not being able to emancipate himself from it.[16]

> Directly and indirectly, the influences of the Board of Education have been a means of increasing, to a great extent, the amount of religious instruction given in our schools. Moral training, or the application of religious principles to the duties of life, should be its inseparable accomplishment.[17]

Horace Mann made this statement in a report in 1838, almost two hundred years after the "Old Deluder Act." The strong influence of Calvinism was always apparent in Mann's administration of the Massachusetts schools.[18]

Thoughts concerning basic moral and religious instruction were prevalent in schools throughout the early years of national growth. As state after state was admitted to statehood and developed public schools, moral and religious education was included in the curriculum.

During the decade of the 1940s and in subsequent years in ever-increasing numbers, there have been challenges

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[16]McCluskey, pp. 16-17.

[17]Mary Peabody Mann and G. C. Mann, eds., Life and Works of Horace Mann, 5 vols. (Boston: Lee & Shepard, 1891), vol. 4: Ninth to Twelfth Annual Reports and Orations, p. 103.

[18]McCluskey, p. 13.

to the status quo in religious instruction. Prior to this time, school boards and administrators had relatively little interference in designing curricula which included everyday religious instruction of children in public schools.

The underlying aim was to afford a moral, academic, and religious education for each child. Assuming this philosophy, school boards adopted policies reflecting the inclusion of religious instruction in public schools, and administrators felt free to include religious instruction in the organization of the curriculum.

As the constitutionality of this philosophy began to be challenged in the courts, policy makers had to review respective policies concerning religious instruction. As judicial decisions were handed down affecting the philosophy and practices of public schools, school boards and administrators had to reassess individual school policy and implementation of new policy that reflected changes assessed by the judiciary.

It is one of the duties of school boards and administrators to assure that each child is afforded First Amendment religious rights. Administrators, in order to ensure religious freedoms, must be knowledgeable about common educational practices that have been and may be challenged by students under the First Amendment. School boards should be aware of challenges to their policies and exercise caution in formulation of policy which could abridge First Amendment freedom of religion rights.

Design of the Study

The remainder of this study was divided into three major parts. Chapter 2 reviewed literature related to the topic of religious freedom and interrelationship of public education and religious instruction. Chapter 2 also chronicled the history of religious instruction, encapsulating the birth, development, and growth of public education in world history and in United States history. The cyclic influence of religion on public education was reviewed and reported.

Chapter 3 included a discussion of the infringements upon First Amendment religious freedoms with which public schools have been challenged, including (1) released time from public schools for religious instruction, (2) prayer in school, (3) Bible reading in school, (4) celebrating religious holidays, (5) Bible or religious clubs in school settings, (6) teaching of evolution, (7) patriotic instruction, (8) display of religious symbols in school settings, (9) use of electronic media aids, (10) courses in religion, and (11) distribution of printed religious material in school settings.

Chapter 4 was a review analysis of landmark court decisions relating to the eleven categories identified in chapter 3. The facts of the cases, decisions of the courts, and discussions were presented for each category.

Chapter 5 contained a summary and conclusion of information obtained in chapters 2, 3, and 4. In addition, the questions asked in the introduction of the study were answered. Finally, a listing of recommendations for school boards and administrators concerning the protection of individual constitutional rights was included.

CHAPTER II

REVIEW OF RELATED LITERATURE

Early History of Church-State Relationships

Since the dawn of time, man has been linked with the supernatural. Early man, upon assuming the upright stance and rudiments of thought, established himself as a religious being.[19] Primitive man saw everything as religious, and all of his waking hours were spent in a religious atmosphere.[20] From birth to death, each of early man's important events was wreathed in a religious aura. There was no differentiation between secular and religious. Secularism, or an entity beyond the pale of religion, was not in early man's thought capacity.

As man advanced to tribal living for safety and protection, tribal customs or primitive laws were established to govern everyday actions.[21] Breaking one of the customs was violating a taboo, which could bring upon one the wrath of a supernatural mysterious being or god.[22] Each head of a family was expected to protect his family from beasts,

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[19]H.G. Wells, The Outline of History (Garden City, N.Y: Garden City Books, 1920), pp. 94-95.

[20]Ibid., p. 95.

[21]Ibid., pp. 95-96.

[22]Richard E. Leakey and Roger Lewin, Origins (New York: E.P. Dutton, 1977), pp. 204-5.

provide food and shelter, and perform obeisance to his god.[23] Man was the earthly manifestation of the superhuman spirit that controlled all nature.

Among the heads of tribal families, one progressed to become the head of the clan, and assumed the role of interceding for the clan with the gods. Man subsequently became regarded as a divine being.[24] An increase in the number of clans brought about complexities in leadership that necessitated a full-time warrior for a leader. When the leader devoted his full time to protecting the clan and arranging for provisions and shelter, there arose a need for someone to intercede for the clan with the supernatural powers, and maintain the sanctity of the taboos. Thus, the offices of priesthood were formed. The state or tribal chieftain became the superior force in the tribe and the priest assumed a secondary or inferior role. "And Melchizedek king of Salem brought forth bread and wine: and he was the priest of the most high God."[25]

The king of Jerusalem thousands of years later continued the early idea of the head of state's being the embodiment of the gods. Abraham recognized the king to be god and king, and brought tithes to Melchizedek to venerate the earthly office.

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[23]Wells, pp. 96-97.

[24]Ibid.

[25]Genesis 14:18.

The superiority of the state existed in Hebrew history and was manifest in many tribes. The most marked example of the superiority of the state over religion occurred during the time of Hammurabi, sixth in the line of succession to the Amorite or West Semitic dynasty of Babylonia in the twenty-first century B.C.. In the thirtieth year of the reign, Hammurabi consolidated all of Babylon into one kingdom. Immediately he set about creating a code of laws for governing the kingdom. In the code of laws, Hammurabi set forth rules for the courts that extended equal justice throughout the kingdom. Hammurabi relegated all the gods of the kingdom to relative levels of importance.[26] Table 1 presents a time-line showing the cyclical church-state relationship through the centuries.

Inevitably, the sands of time eroded the Babylonian Empire just as the cycle of churth-state relationships was changing. The superior position of the state over religion declined with the influx of nomadic tribes into Babylon.[27]

"Theocracy" has been used to describe the Mosaic Law of the Hebrew tribes. This theocracy is a meld of church and state into one code of ten laws or commandments set forth by a god through one spokesman, Moses. Moses' theocracy

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[26]Pfeffer, p. 4.

[27]Arnold J. Toynbee, A Study of History (New York: Oxford University Press, 1947), pp. 387-89.

TABLE 1

THE HISTORIC EVOLUTION OF THE CHURCH-STATE RELATIONSHIP
LEADING TO THE FIRST AMENDMENT
SHOWING EAST-WEST MIGRATION
OF THE RELIGIOUS BACKGROUND
OF THE WRITERS OF THE
UNITED STATES
CONSTITUTION

2000 B.C.	Babylonia. Hammurabi ruled by code of laws. State administered religion.
1500 B.C.	Colonization of Greece. City-State rule. State dominated religion, but tolerant of any religion.
1300 B.C.	Moses established Hebrew Nation at Mount Sinai. Theocracy. The church was the state.
1000 B.C.	Hebrews ruled by strong kings. State was dominant and used religion to further ends of the state.
722 B.C.	Israel captured by Assyria. State dominated religion.
500 B.C.	Rome established as republic. Creation of tribunes. State dominant over church.
444 B.C.	(a) Golden Age of Pericles. State dominated religion and used polytheism to further aims of state. (b) Roman laws made public, stating power of the state.
399 B.C.	Death of Socrates, ostensibly for corrupting youth in the study of religion and man. State used religion.
200 B.C.	(a) Palestine ruled by Maccabees as Roman agents. State dominant. (b) Greece freed from Macedonia. State dominant.
60 B.C.	(a) Rise of Julius Caesar and Roman conquest of Gaul and Britain. Emperor venerated as a god. State dominant. (b) Pompey subdued Jews and made Herod King. Jews allowed to worship one god, but required to pray to Caesar. Roman state dominated.
0	(a) Birth of Christ. (b) Europe as well as the Levant ruled by Rome, "Pax Romana." Christianity introduced to Britain. State dominant.
70 A.D.	Jerusalem destroyed by Titus. Christians persecuted. State dominant.

TABLE 1--Continued

311 A.D.	Roman Empire reunited by Constantine. Christianity made legal.
313 A.D.	Edict of Milan. State dominant, but religion allowed to flourish.
476 A.D.	(a) Fall of Western Roman Empire. (b) France founded by Clovis, who became a Christian. Church and state co-dominant.
500 A.D.	Britain invaded by Angles, Saxons, and Jutes. Christianity brought back by Augustine, but tribal government dominant.
800 A.D.	(a) Charlemagne crowned head of Roman Empire by Pope Leo III. Church dominant. (b) Papal states established. Church dominant.
962 A.D.	Otto the Great crowned head of the Holy Roman Empire by Pope John XII. Church dominant.
1073 A.D.	Henry IV of France forced to pay homage to Pope Hildebrand. Church dominant.
1173 A.D.	Henry II of England forced by the church to allow separate legal system for clerics. Chastised by Pope Alexander III for Thomas a' Becket's murder.
1198 A.D.	Pope Innocent III dominated every major state in Europe. King John of England excommunicated in 1209. Church dominant.
1300 A.D.	Papacy moved to Avignon. State dominated church until 1577. Papacy moved back to Rome by Pope Gregory XI. Period of internal problems in church. State dominant.
1517 A.D.	Martin Luther posted 95 theses challenging the authority of the church. Beginning of Protestant Reformation.
1534 A.D.	Henry VIII and the Act of Supremacy excluded Pope Clement VIII from England, seized church property and gave it away. Church of England created. State dominant.
1542 A.D.	Pope Paul III established Inquisition in Rome. Cruel attempt to reestablish the power of the church.
1553 A.D.	Queen Mary restored Catholics to power in England and made state subservient to church. Pope Paul IV used English armies to fight Spain.

TABLE 1--Continued

1558 A.D.	Queen Elizabeth reestablished Church of England and excluded Pope from authority in England. Rise of Puritans. State dominant.
1607 A.D.	English colony of Jamestown settled. Anglican influence. English law. State dominant. Theocentric.
1620--1763	Colonization period. Various sects from Europe settled in communities bringing religious beliefs from the old country. Dominance varied from colony to colony.
1642	Civil War in England.
1653	Cromwell ruled Britain as Lord Protector and staunch defender of separatism. Constitution provided for tolerant Christianity. State dominant.
1690	Salem witch-hunts in Puritan colony of Massachusetts. Church dominant.
1776	Declaration of Independence.
1779	Jefferson wrote bill for establishing religious freedom in Virginia. Adopted in 1786. Full religious freedom and separation of church and state established in Virginia.
1791	Ratification of Bill of Rights. First Amendment established separation of church and state.

*Dates approximate; church-state relationships general, not absolute.

eradicated all functions of state other than that of serving the dictates of one God.[28]

This omnipotent, monotheistic code of laws held in it the seeds of future religions for future western world cultures.[29] The establishment of the Hebrew nation on Sinai and the installation of Mosaic Law set the stage for Judeo-Christian concepts with strong inherent church-state relationships. This church-state relationship, established and nourished for the next four thousand years throughout the western world, constituted a springboard for the New World's religious freedom.[30]

The monotheistic nature of the Jewish religion lasted until the tribes were beset by the Philistines.[31] The Jews felt the need for a visible king and asked the prophet Samuel to select one. Samuel selected Saul to be the king of Israel. Saul set about elevating the state to be master of religion and ended the theocratic Mosaic Code. As the kingdom passed through the powerful and autocratic David, the Jewish nation was molded into a true monarchy.[32]

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[28]Exodus 18:13-18.

[29]Norman F. Cantor, Western Civilization: Its Genesis and Destiny (Glenview: Scott, Foresman and Company, 1970), pp. 1-3.

[30]Ibid., p. 3.

[31]Pfeffer, p. 6.

[32]Ibid.

While it is true that David founded the monarchy, Solomon consolidated the power of the state into the monarchy and subjugated religion to the power of the state. The supremacy of the state established by David prevailed in varying forms and with varying degrees of effectiveness until the destruction of Jerusalem by the Romans in A.D. 70.[33]

The Mosaic Code, the religious writings, and the Torah governed the Jews in dispersion and exile. Jewish religion prevailed in business transactions and in record-keeping in the absence of any government agency. Thus, in the final analysis, the code of Moses and Jewish theocracy outlasted the strong kings of Hebrew history.

Elsewhere, in the Levant, a country of city-states was being established as a purveyor of art, culture, and learning. Greece progressed historically as a union of city-states with dominance of the state over religion. The state so dominated religion in Greece that priesthoods were sold to the highest bidder.[34]

Athens, one of the Greek city-states, was extremely education-minded, and the home of Pericles and Solon and the renowned teacher, Socrates. Socrates was put to death, ostensibly for impiety and corrupting the young.[35] Plato

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[33]Toynbee, p. 380.

[34]Pfeffer, p. 8.

[35]Louise R. Loomis, ed., "The Apology," Five Greek Dialogues: Plato (New York: Walter J. Black, 1942), pp. 17-20.

stated that the reason for the great philosopher's death was the teaching and tutoring of young men in the incessant search for truth of heaven as of earth.[36]

Socratic teachings and influences on moral philosophy and education have lived for centuries through the teaching and writing of Plato. Athens and other city-states, while somewhat tolerant in religious matters, insisted upon each citizen's worshipping Apollo and Zeus. The governments of Greece were more tolerant than the theocracy of the Hebrews, but still did not practice true religious freedom.[37]

The next thread in the tapestry of western world church-state heritage leads to the West and the Roman Empire and its "Pax Romana." As the legions of Pompey marched into Jerusalem and dispersed the Hebrews and Titus ordered the destruction of the temple of Solomon, the political state of the Hebrews, or theocracy, gave way to the Roman government.

The religion of Rome was similar to the tolerant Greek-state religion in that citizens could worship any god as long as the emperor was worshipped as the primary god.[38] All of Rome's conquered territories enjoyed the same religious tolerance and had the same responsibility to revere the emperor above all the rest.[39] The Hebrews were the

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[36]Ibid., p. 19.

[37]Cantor, p. 1.

[38]Pfeffer, p. 10.

[39]Ibid.

notable exception to this requirement. The Hebrew theology, even under the dominion of Rome, would not allow followers of Judaism to worship the emperor. Accommodation was made by Rome for the Jews to worship the one God, yet they were required to pray for the emperor.[40]

The dogmatic refusal to worship more than one god continued with the Christians as the new sect emerged. Christians were not exempt from emperor worship as were the Jews, and when it was determined that anyone who was not a Jew refused to worship the emperor, the heretic was put to death in one of various spectacular fashions.[41]

While the Romans professed religious tolerance, the state subjugated religion and used the various sects as scapegoats for the state's own excesses and shortcomings. For three hundred years after the death of Christ, the Romans considered Christians as outlaws and rabble. The state waged war upon the Christians with varying degrees of intensity from emperor to emperor up to the time of Constantine.

> Tell us therefore, what thinkest thou? Is it lawful to give tribute unto Caesar, or not? But Jesus perceived their wickedness, and said, Why tempt ye me, ye hypocrites? Shew me the tribute money. And they brought unto him a penny. And he saith unto them, Whose is this image and superscription? They say unto him, Caesar's. Then saith he unto them, Render

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[40] Ibid.

[41] Ibid., pp. 10-11.

> therefore unto Caesar the things which are Caesar's and unto God the things that are God's.[42]

The Christian sect was a tenacious group which, during times of great duress, covertly grew and gained strength through adversity. It became apparent to Constantine in the early years of his reign that Christianity was not going away.[43] The Christians still believed in rendering unto Caesar what was Caesar's and unto God what was God's.

Constantine, meeting with Licinius in Milan, tried to resolve the problems of their co-governing of the Roman Empire. The two co-rulers of the empire formulated and issued an epochal religious freedom pact with the Christian sect at Milan in A.D. 313.[44]

The Edict of Milan was the first proclamation in history that guaranteed religious freedom. There is some question as to whether a document was drawn up or a series of proclamations made, but there is accord on the point that resolutions were drawn up and issued proclaiming religious freedom for all people.

> When Constantine and Licinius met in Milan (February 313), they resolved their political problem and agreed on certain legal provisions in favor of the Christians. While no edict was issued at Milan, the contents of these

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[42]Matthew 22:17-21.

[43]Pfeffer, p. 12.

[44]Ibid., pp. 12-13.

> resolutions are recorded in a rescript issued by Licinius for the East on June 13, 313, prescribing that everyone, including Christians, should be given freedom to follow the religion that suited him, in order that the favor of every divinity in heaven might be ensured for the emperor and his realm. Ordinances hostile to Christians were lifted; general and unrestricted freedom of religious practice was guaranteed. Confiscated Church property was to be restored gratuitously, and the Christians were once more given the right of forming a legal corporate body.[45]

While the resolutions purported to be a harbinger of religious freedom, the Edict of Milan was indeed an instrument for the subjugation of the Christian church by Constantine, who had himself become a Christian. Within a short while after the resolutions were promulgated, the state was allowing churches to be built only by state decree.[46] Private gods were forbidden, and all non-Christian temples were ordered closed. All worshippers of any god but the Christians' god were declared heretics and criminals by the state.[47]

The thread of western ancestral tapestry once again changed hue. The emperors who succeeded Constantine used the power of the church for the ends of the state.[48]

Augustine, as the Bishop of Hippo, established authority within the church to coerce citizens to follow

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[45]A.W. Ziegler, New Catholic Encyclopedia, 15 vols., (New York: McGraw-Hill Book Company, 1967), 9:838.

[46]Pfeffer, p. 13.

[47]Ibid.

[48]Will Durant, The Age of Faith (New York: Simon and Schuster, 1950), pp. 6-10.

orthodoxy or be tortured brutally or put to death. This turn of events indicated another phase in the revolving of church-state relationships. The cycle was complete once again. The Christian church of Rome waxed stronger until it was supreme and remained so until early in the sixteenth century, when Martin Luther nailed his historical protest to the door of All Saints' Church in 1517.[49]

The church so dominated the state during the thousand years preceding Luther's embryonic reformation that emperors were appointed by the head of the church, namely, the Pope. This was caused partly by the weakness of small principalities which were unifying into countries, and partly by the inexorable continuum of the church.[50]

The church so dominated states as to be responsible for the Inquisition.[51] The Inquisition, or Holy Office, was instituted to punish heretics for the church, and dissidents for the state. The church so dominated thought and so intimidated art and culture and writing in western Europe that the period of time is called the Dark Ages.[52] Men were burned at the stake for scientific investigations. Learning was obliterated by the fear of one's being termed a heretic. The church was omniscient, and any knowledge or learning

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[49]Ibid., p. 784.

[50]Toynbee, pp. 185-86.

[51]Durant, p. 388.

[52]Toynbee, pp. 185-86.

by an individual was an affront to the church, and, consequently, to the state.

> The highest aim of mankind is eternal happiness. To this chief aim of mankind all earthly aims must be subordinated. This chief aim cannot be realized through human direction alone but must obtain divine assistance which is only to be obtained through the Church. Therefore the State, through which earthly aims are obtained, must be subordinated to the Church. Church and State are as two swords which God has given to Christendom for protection; both of these, however, are given by him to the Pope and the temporal sword by him handed to the rulers of the State.[53]

Heads of state did not always acquiesce to the power of the church, and many struggles for power were carried on during this period of Dark Ages in western Europe.[54] The papacy reached the highest point of absolute control of the state under Innocent III at the beginning of the thirteenth century. This humble, pious pope came nearer to being a universal dictator than any secular potentate. For Pope Innocent III not only dominated the political sphere in a Napoleonic style, but also vindicated the claim to be the source of all spiritual authority.[55] In the twelfth century, Pope Alexander III humiliated the Emperor of the Holy Roman Empire, Frederick I, by uniting Italy against the Emperor. Pope Alexander brought the King of England, Henry II, to his

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[53]Pfeffer, p. 15

[54]E.R. Chamberlin, The Bad Popes (New York: The Dial Press, Inc., 1969), pp. 77-123.

[55]Arthur Wilford Nagler, The Church in History (New York: Abingdon Press, 1929), p. 297.

knees in the late twelfth century because of the King's complicity in the murder of Thomas à Becket, Archbishop of Canterbury. Henry II of England had appointed Thomas Archbishop of Canterbury with the idea that Thomas would bend to the King's will. Thomas refused and became a champion of church power. The Archbishop excommunicated three bishops who were sympathetic to the state. Henry II became so outraged that four of his knights were inspired to murder Archbishop Thomas à Becket.[56]

The decline of the theocratic rule began with Pope Boniface VIII's imprisonment by Philip of France in the thirteenth century.[57] Pope Boniface died in prison and the papacy never regained its dominance over the state. Thus, another cycle was completed in Europe.

However, on the Iberian peninsula the Spanish Inquisition lived on after the practice of persecution was abandoned by other western European countries. Michael Servetus, a renowned physician and teacher, was put to death for teaching about blood circulation and physiology, and was considered a heretic. Servetus was accused by John Calvin and burned at the stake in Greece.[58]

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[56]Goldwin Smith, A History of England (Chicago: Charles Scribner's Sons, 1949), pp. 50-62.

[57]Chamberlin, pp. 77-123.

[58]Nagler, Church in History, pp. 156-57.

The Protestant Reformation was heralded as a harbinger of religious freedom. Instead of religious freedom, the world was subjected to another century of dominance of church over state, and religious intolerance. Church reformers associated with the protest were bent upon reinstating the ancient theocracy of the Hebrews over Europe. Zwingli and Calvin were both strongly in favor of a theocracy.

As western Europe emerged from the Dark Ages into the Renaissance of learning, education, art, science, and all of the cultural aspects of civilization, many dissident sects were ardent advocates of true separation of church and state.

Of the three strands of church-state relationship exhibited in the tapestry--the use of religion to further state policy, the theocratic idea of church-state unity, and separatism--the latter is the thread that ultimately followed our forebears to the New World.[59]

In its inexorable march to the west, civilization brought to England relationships of church and state that were common throughout Europe. Henry VIII quarreled with Pope Julius II, but accepted and used the church to further the power of the crown. Henry VIII elevated the state above the church in 1534 by the "Act of Supremacy," which made the

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[59]Harold J. Grimm, The Reformation Era 1500-1650, 2nd ed. (New York: Macmillan Co., 1973), p 446.

King or his heirs the head of the Church of England. Thus, the church was annexed to the state, with Henry VIII head of the church and the state, thereby excluding the Catholic Church and Pope Clement VII from power in England.[60] Queen Mary acquiesced to the powers of Rome and allowed the church to dominate her reign.[61] Elizabeth I dominated the church and set about effecting a compromise of power between church and state in England.[62]

Church-State in New England

Puritanism became an issue during Elizabeth's reign. Anti-Pope feelings grew stronger and evolved into an organization that effected doctrinal changes in the Church of England. Puritanism came to signify religious and civil liberty and freedom from papal tyranny.[63] The rise of Puritanism in England had great portent for American church-state relationship. Puritanism was in full flower in England when the first settlements were made in America.

The threads of the western world's ancestral tapestry were coming together when the ships of Walter Raleigh, and later ships of the London Company placed English people on the Virginia coast in 1607.[64] The Pilgrims in 1620 landed on

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[60]Smith, pp. 220-24.
[61]Ibid., pp. 237-40.
[62]Ibid., pp. 245-51.
[63]Grimm, p. 446.
[64]Smith, pp. 272-78.

the American coast in New England. Puritans and religious separatists made up the company of Pilgrims. These separatists had been persecuted in England by the established church and imprisoned by the magistrates under the power of the church.[65]

Colonization of America lasted about two hundred years, from Roanoke Island to Philadelphia and the signing of the Declaration of Independence from England and any external force. During two centuries of colonization, every group who came to live in this country brought the religion it had practiced in the old country.[66] The Puritans were as zealous as their puritanical forebears had been in England. The Inquisition among the Spanish immigrants was just as vicious and relentless as it had been in the Old World.[67]

Oppression from taxation, economic pressure, and callous mistreatment of citizens brought about a Declaration of Independence from Great Britain.[68] In the long list of grievances drawn up by the delegates to the Second Continental Congress, nothing was said about religious oppression. All the facts presented to the world were

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[65]Ibid., pp. 301-3.

[66]Edwin Scott Gaustad, A Religious History of America (New York: Harper & Row, 1966), pp. 27-110.

[67]Ibid., pp. 8-17.

[68]Samuel Eliot Morison, The Oxford History of the American People (New York: Oxford University Press, 1965), pp. 180-212.

civil in nature. The significance of this omission is notable in that there were so many sects and so many different affiliations that a single statement of grievance would not suffice.[69]

Formation of a government was the first order of business after the Revolution. Before the end of the war, each state had formed a government. These governments all reflected fear that the state's chief executive as well as the nation's president would be too powerful, so the new constitutions gave a preponderance of power to the legislative branch. At the end of the colonial era, church and state had been united in nine of the thirteen colonies. The Revolution brought about complete separation of church and state in all of the new states. New York, Maryland, the Carolinas, and Georgia disestablished the church early in the war.[70] New England came much later after much activity within the states.[71] All ties with European mother churches were severed. There was complete church, as well as political, independence.[72]

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[69]S.E. Forman, Forman's Our Republic, rev. Frieman P. Wirth (New York: D. Appleton-Century Company, 1944), pp. 65-78.

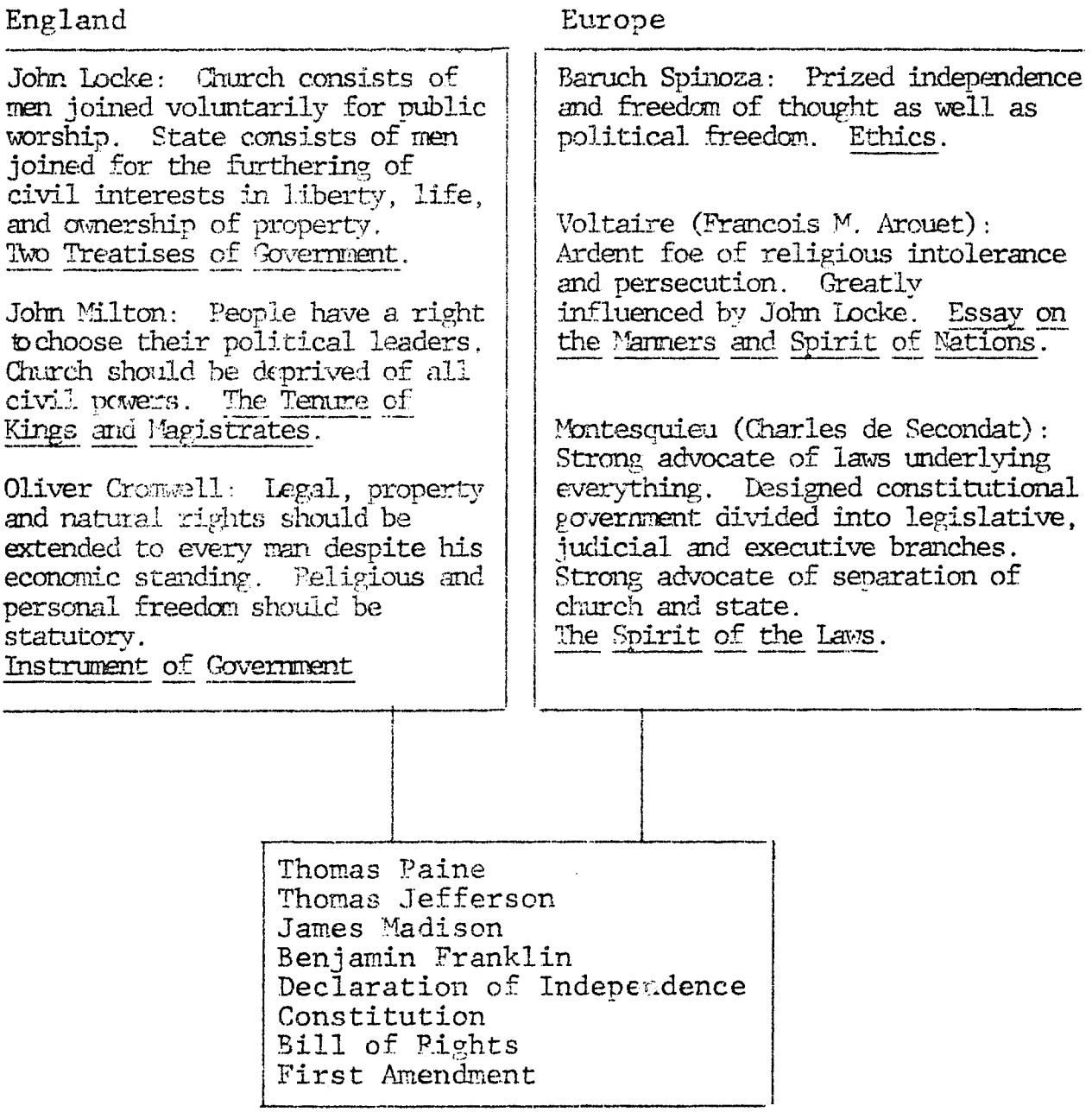
[70]William H. Marnell, The First Amendment (Garden City: Doubleday and Company, 1964), pp. 108-110.

[71]Ibid., pp. 115-34.

[72]Ibid., pp. 115-44.

TABLE 2

REPRESENTATIVE EUROPEAN CHURCH-STATE PHILOSOPHY
INFLUENCING AMERICAN COLONIAL PHILOSOPHY



The philosophy of Voltaire's crusade for tolerance and his penchant for deism had an influence on the thinking of the molders of the United States Constitution.[73] Montesquieu's writings had far-reaching influence upon the writers of our constitution and American thinkers.

John Locke's philosophy of government and men led the English philosophers in influence over American thought. However, Cromwell's lifelong distrust of clerics and strong feeling for religious liberty gave impetus to the direction of religious freedom in the United States.[74]

The United States was fully established with ratification of its Constitution in 1791.[75] The Constitution of the United States set forth all duties, powers, and responsibilities of all branches of government. It was a beautifully executed document, the product of the greatest minds that could be assembled. There was considerable difficulty getting the Constitution ratified, however, because of divergence of thought and a lack of a bill of rights. Washington, the first president, suggested in his first inaugural address that a bill of rights might be drawn up.

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[73]Crane Brinton, John B. Christopher and Robert Lee Wolff, A History of Civilization, 1300 to 1815 (Englewood Cliffs: Prentice-Hall, Inc., 1976), pp. 468-69.

[74]Ibid., pp. 470-71.

[75]Morison, pp. 312-16.

The Bill of Rights was proposed partly as an appeasement for those who wanted one, and partly as a check on the judiciary.[76] Twelve amendments were submitted to the states in 1791. Ten of the twelve were ratified and became known as the Bill of Rights, or personal guarantee of protection from encroachment by the federal government.[77]

The First Amendment represented the culmination of thousands of years of religious heritage. For the first time in the history of Judeo-Christian heritage, an established government had said the people will make no law respecting an establishment of religion, or prohibiting free exercise thereof.[78]

Man had come full cycle in church-state relationship from the beginning of his time on earth through machinations of theocracy, the tyranny of the Dark Ages, the Holy Roman Empire, the Reformation, and the established church in England.

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecution, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade

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[76]Forman, pp. 312-16.

[77]Ibid., pp. 144-45.

[78]Pfeffer, p. 115.

> of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.[79]

English heritage influenced early ideas of education as well as church-state relationship. Education was largely a responsibility of the home and the church in the new colonies.[80]

Religion and the Early Schools

The New England Primer used as a reading textbook was clearly an extension of Calvinist influence in education. The Primer was designed to teach, in a catechetical way, skills necessary to read the Bible. As soon as a boy had mastered the art of reading to the extent that he could recite the catechism of the sect, he was apprenticed to a master for vocational training.[81]

Public schools evolved from private, church-related schools over the period of a century in the United States.

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[79]Pfeffer, pp. 26-27.

[80]Lawrence A. Cremin, American Education, The Colonial Experience, 1607-1783 (New York: Harper & Row, 1970), pp. 31-57.

[81]William M. French, America's Educational Tradition (Boston: D.C. Heath & Company, 1964), pp. 1-12.

Evolution was slow and tedious. The move from sectarian, puritanical schools to free, tax-supported schools, indeed took more than a century.[82]

The southern and middle colonies generally had schools that were established by private wealth or by religious groups. The legacy of the New England Latin school and the strong influence of Puritanism and Calvinism influenced the schools along the Atlantic seaboard, even until the middle of the nineteenth century.[83]

Horace Mann, the father of the common schools in New England, and Secretary of the State Board of Education of Massachusetts in the first half of the nineteenth century, in his farewell address after twelve years in office said:

> . . . I believed then, as now, that religious instruction in our schools, to the extent which the Constitution and the laws of the State allowed and prescribed, was indispensable to their highest welfare, and essential to the vitality of moral education. Then, as now, I believed that sectarian books and sectarian instruction, if their encroachment were not resisted, would prove the overthrow of the schools . . . . And I avail myself of this, the last opportunity which I may ever have, to say in regard to all affirmations or intimations that I have ever attempted to exclude religious instruction from the schools, or to exclude the Bible from the schools, or to impair the force of that volume, that they are now, and always have been, without substance or semblance of truth.
>
> . . . That our public schools are not theological seminaries, is admitted. That they are debarred by law from inculcating the peculiar and distinctive doctrines of any one religious denomination amongst us, is claimed; that they are also prohibited from even teaching that what they do teach is the whole of religion, or all that

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[82] Ibid., pp. 67-83.

[83] E.P. Cubberly, Public Education in the United States (Boston: Houghton Mifflin Company, 1919), pp. 118-35.

> is essential to religion, is equally certain. But our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and in receiving the Bible, it allows it to do what it is allowed to do in no other system, to speak for itself.[84]

To Mann, the purpose of religious education in schools was to enable the student to judge according to dictates of reason and conscience what personal religious obligations were and whither the obligations led.

> But if a man is taxed to support a school where religious doctrines are inculcated which one believes to be false, and which one believes God condemns, then man is excluded from school by the divine law at the same time that man is compelled to support the school by the human law. This is a double wrong.[85]

This report left little doubt that Mann saw the Bible as the balance between secular education and religious education. Mann thought that as long as the Bible was used as a text or read without exposition, the Bible was permissible in public schools.

The struggle Mann had in making schools non-sectarian received a boost as more and more Catholics emigrated to America and settled on the Atlantic seaboard. The priests in Baltimore were charged by Catholic parents to see that Catholic children were not subjected to Protestant instruction in public schools.[86]

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[84] Pfeffer, pp. 284-85.

[85] Ibid.

[86] Ibid., pp. 286-88

Catholics were not as much interested in non-religious instruction as in supplanting non-sectarian Protestant religious instruction with Catholic instruction.[87] If Catholicism could not be introduced in the public schools, then public moneys must be made available for parochial schools.

Catholics in New York sought parochial aid under the guidance of Bishop John Hughes. In the 1840s as many as 20,000 Catholic children failed to attend school because of religious differences.

Governor William Seward recognized the gravity of the problem and reorganized the school system to incorporate the private Catholic schools into the New York system. Catholic schools would retain private charters and religious affiliation while receiving public funds. Religious instruction would be curtailed as long as the school was getting public funds.

Immediately, other sectarian groups requested public money for private sectarian schools.

Governor Seward appointed a committee to make recommendations to the authorities. The committee determined that a Catholic school that does not teach Catholicism is the same as a public school; therefore, there was no need for parochial schools. The committee further determined that

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[87]Ibid., pp. 286-88.

sectarian groups had no claim on public money for parochial schools.[88]

In the middle Atlantic states some early schools were tied to sectarian religion, inasmuch as schools had been founded and nourished by religious groups before support by public moneys. These religious groups started secular schools in Sunday Schools to bring together children of all classes in one school. This system seemed to imply charity to the people, and gave way to publicly financed schools.[89]

Thomas Jefferson opened the door to non-sectarian schools in the South with the "Bill for Establishing Religious Freedom," which was passed by the Virginia General Assembly at the insistence of James Madison. Essential parts of the bill are:

> (1) God made man's mind free, and deliberately chose that religion should be propagated by reason and not coercion.
>
> (2) Legislators and rulers have impiously assumed dominion over faith, and have established and maintained false religions.
>
> (3) It is sinful and tyrannical to compel a man to furnish contributions for the propagation of opinions which he disbelieves and abhors, and it is also wrong to force him to support this or that teacher of his own religious persuasion.

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[88]Joseph E. Bryson, "The Legality of Using Public Funds for Religious Schools," in Emerging Problems in School Law (Topeka, Kansas: National Organization on Legal Problems of Education, 1972), pp. 82-84.

[89]Edgar Knight, Education in the United States (Boston: Ginn & Company, 1929), pp. 168-79.

> (4) Our civil rights have no dependence on our religious opinion, and therefore imposing religious qualifications for civil office tends to corrupt religion by bribery to obtain purely external conformity.
>
> (5) The opinions of men are not the object of civil government, nor under its jurisdiction. It is a dangerous fallacy to restrain the profession of opinions because of their ill tendency; it is enough for the rightful purpose of Civil Government for its officers to interfere when principles break into overt acts against peace and good order.
>
> (6) Truth is great and will prevail if left to herself. Truth has nothing to fear from conflict with error.

The second section, which is the operative part, reads as follows:

> Be it therefore enacted by the General Assembly of Virginia that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.[90]

The bill paved the way to the realization of separation of church and state in Virginia and throughout the southeastern states. Jefferson's "wall of separation between church and state" was becoming a reality.

Jefferson, with the belief that people could govern themselves, also thought people should be educated. A "Bill for the More General Diffusion of Knowledge" was introduced in the Virginia Legislature only four years after Jefferson's writing of the Declaration of Independence.[91]

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[90]Pfeffer, pp. 101-2.

[91]Ibid., p 279.

In neighboring North Carolina, the first state-supported university opened for students in 1794. The university was established as non-sectarian, but was actually a sectarian public university to serve the few classical schools in the state.[92]

Archibald Murphey was one of the prime movers in getting the university established. The University of North Carolina Board had been beseeching the legislature to establish a system of public education. Murphey recommended in 1816 that a statewide system of public schools be set up with the following course of study:

> In the primary grades should be taught reading, writing and arithmetic. A judicious selection of books should from time to time be made by the board of public education for the use of small children; books that shall excite their curiosity and improve their moral dispositions. And the board should be empowered to compile and have printed for the use of primary schools, such books they may think will best subserve the purposes of intellectual and moral instruction. In these books, he should be educated in the books of the Old Testament and the books which contain the word of truth and the doctrines of eternal life.[93]

Archibald Murphey was recognized as the father of public education in North Carolina and had a vision far beyond his time. Murphey was a follower and an admirer of

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[92] H.G. Good and J.D. Teller, A History of American Education (New York: The Macmillan Company, 1973), pp. 95-96.

[93] M.C.S. Noble, A History of the Public Schools of North Carolina (Chapel Hill: University of North Carolina Press, 1930), p. 139.

Jefferson and suffered with Jefferson the position of being ahead of the times.[94]

Evolution of Public Schools in the Nineteenth Century

Teaching religion in public schools remained sectarian until after the 1840s, when Horace Mann, recognizing the value of a common core of religious beliefs, tried to create a non-sectarian school system.[95]

In 1868, William Harris became superintendent of public schools in St. Louis and set about making the St. Louis school system the best in the country. Many authorities considered the system to be superior to any along the Eastern coast.[96]

At the outset, Harris was beset on each side by opposing sects who were convinced that every doctrine was taught in the schools except the doctrine the besieger espoused. Harris argued that only the moral aspect of religion had a place in public education.

> Whatever the Church has nurtured to such a maturity that it can live and thrive on its own inherent value, should no longer be supported and recognized fully by the State as necessary to the well-being of society. Morality will not lose, but religion will gain by letting the State have charge of moral education.[97]

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[94] Ibid., p. 174.

[95] McCluskey, p. 46.

[96] Ibid., p. 145.

[97] Ibid., p. 148.

Religion would be the gainer, Harris thought, if churches would teach those sectarian moral ideas inherent in church doctrines and use schools to inculcate morality, thus strengthening the wall of separation between church and state.

In an article written for a social service journal in 1884, Harris wrote:

> Frequently it has been admitted by its friends that education--at least, without reading of the Bible--is pernicious and immoral. I think it is sufficiently evident that such is not the case, but rather the opposite. But in this exposition I wish to be explicitly understood as claiming only that Public School education is moral and completely so, on its own basis; that it lays the basis for religion, but is not a substitute for religion. It is not a substitute for the State because it teaches justice--it only prepares an indispensable culture for the citizen of the State. The State must exist; Religion must exist and complement the structure of human culture begun in moral education.[98]

This article further delineated schools and religion as separate in the mind of Harris. Harris' entire tenure as superintendent of St. Louis schools was spent in the struggle to make public schools free from sectarianism and acceptable to Catholic, Jew and Protestant alike. Harris was adamant in the desire to keep the Bible out of public schools. The Bible was considered a divine book, and there was no way to read it without perceiving religious sectarian views.

Harris concluded that religious instruction should take place away from the school setting. Harris conceived a plan of permitting children to be excused from school for two

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[98]Ibid., p. 160.

hours a week to go to a place away from school for sectarian religious training. In his zeal to protect the wall of separation between church and state, Harris described this condition as an accommodation for schools to allow for religious training. A century later this issue was manifested in Zorach v. Clauson.[99]

Elisha Potter in 1850 was elected Rhode Island Commissioner of Public Schools.[100] Potter was ahead of the times in his views on religious instruction in public schools, as were Mann and Harris. Potter thought that schools had an obligation to teach moral values and a moral education, but not sectarian religious instruction. Potter noted, "Prayer can be made to express the sectarian peculiarities of the person who makes the prayer." In one statement of belief, Potter in 1853 said:

> No book shall be introduced into any public school by the committee, containing any passage of matter reflecting in the least degree upon any religious sect, or which any religious sect would be likely to consider offensive.[101]

Potter agreed with the idea that the right to regulate school books and exercises rests in the hands of the school committee; however, Potter warned that "this power is to be construed subject to the great constitutional provision

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[99]Zorach v. Clauson, (N.Y.), 343 U.S. 306, 725 S. Ct. 679 (1956).

[100]Thomas F. Flaherty, "A Precedent for Court Decision on Religion in Public Schools," Education 92 (November/December 1971) 75-77.

[101]Ibid., p. 77.

for freedom of conscience.[102] Since the school system was partially supported by state funds, Potter thought that no one should use the schools as a means to enforce upon others different religious views.

Certainly no objections would be raised to reading the Bible or studying religion in an objective manner as part of a secular program of education. In fact, "It might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization."[103] However, reading the Bible as a religious exercise would be unconstitutional, since this would interfere with the neutrality of the state.

Potter sounded a cautionary note on using the Bible as a text. Potter was concerned lest the use of the Bible as a text would cause the student to develop an irreverent attitude toward the Bible. Potter knew that parents who respected the Bible would not be pleased if children were adversely affected by such use.

These harbingers of things to come could not convince a burgeoning country that a wall of separation between church and state meant exactly that. There were scattered attempts to rectify situations of unbearable interference with a sect's

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[102] Ibid.

[103] Ibid.

freedom to exercise its rights from time to time, but the inclusion of religious instruction in curricula was common in the nineteenth century and into the twentieth.

Church-State in Public Schools, 1900--1960

The migration westward in the latter part of the nineteenth century brought about social and cultural changes when masses of people from different backgrounds interchanged ideas. Sectarian religious tenets were modified as civilization moved westward and established new cultures.[104] Movement of large numbers of people for military training or warfare in the Spanish-American War at the turn of the century and in World War I in 1917 allowed the populace insight into different segments and seams of society.

Easterners moving westward for work in the aviation industry, in preparation for World War II, southerners moving north for work in defense factories in the industrial region, and northerners moving south for military training learned different ways of life.

The global thrust of World War II was to establish personal liberties and to restore man's dignity. This feeling was domestic as well as foreign and was manifested by citizens, with insights gained from moving from section to section in the country, challenging government agencies and established practices of society.

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[104]Morison, pp, 744-61.

Many of the formerly accepted practices were questioned and reassessed by legislative action or by court action. The Jim Crow custom and "separate but equal" facilities were questioned by ethnic groups and subsequently eradicated. "Due process" was a new concept in student discipline brought about by challenging common practice. Teacher rights and responsibilities were modified due to litigious challenges of policies of boards of education.

The challenge this study reviewed is the challenge to religious education in public schools. This study has traced man's relationship with religion, and religion's with state from the beginning of time to the establishment of American public education, and has found public education to be a function of the state. It has shown that, from the very beginning of the American public school system, religious instruction was included in the curriculum and accepted by the state.

The United States Supreme Court and Religion in the Public Schools

Since public schools are a creation of the state, financed and administered by the state, changes in educational practices are likely to represent political majority thinking. Challenges to educational practices resulting in change, therefore, have brought about judicial decisions, based on the constitutionality of each practice.

As early as 1925 in Pierce v. Society of Sisters,[105] the United States Supreme Court became a force in shaping public school policy. The Supreme Court declared unconstitutional an Oregon state law requiring attendance at public schools only. The ruling allowed students to satisfy the compulsory attendance law by attending either private or public school.

In 1930 in Cochran v. Louisiana State Board of Education,[106] the Supreme Court furthered the "child benefit theory" in the use of public money for private sectarian schools. The Supreme Court upheld a Louisiana law which provided free textbooks to each child in the state regardless of whether he was a public or private school student.

Another of the religious instruction practices challenged was the reading of the Bible in public schools. In 1931, the United States Supreme Court refused to hear an appeal from the Washington Supreme Court ruling which sustained the exclusion of the Bible from the public schools, stating that no substantial federal question was raised.[107]

In 1948, the United States Supreme Court struck down a program of released time for religious education in

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[105]Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S. Ct. 571 (1925).

[106]Cochran v. Louisiana State Board of Education, 281 U.S. 370, 74 LEd 913, 50 S. Ct. 335 (1930).

[107]Clithero v. Showalter, 284 U.S. 573 (1931).

Illinois as an unconstitutional use of school premises, and school sanction for religious education.[108]

In 1952, the United States Supreme Court refused, for procedural reasons, to take jurisdiction of an appeal from a New Jersey decision sustaining as constitutional a statute requiring Bible reading, without comment, in public schools.[109]

In 1952, the United States Supreme Court once again dealt with released time, this time sustaining a New York program conducted off school premises and alleged to be without school pressure for pupil participation.[110]

In 1954, the United States Supreme Court refused review of a New Jersey decision holding that distribution of Gideon Bibles in school was unconstitutional.[111]

In 1960, the United States Supreme Court remanded the first decision of a federal court on Bible reading in public schools. A United States District Court declared unconstitutional a Pennsylvania statute requiring Bible reading with unison recitation of the Lord's Prayer.[112]

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[108] McCollum v. Board of Education, 11 333 U.S. 203, 68 S. Ct. 461 (1948).

[109] Doremus v. Board of Education, 342 U.S. 429 (1952).

[110] Zorach v. Clauson, 343 U.S. 306 (1952).

[111] Tudor v. Board of Education, 14 N.J. 31, 100 A.Bd. 857 (1953).

[112] Schempp v. School District of Abington Tp., 177 F. Supp., 398 (E.D. Pa. 1959).

Review of the literature in this study culminates with the majority decision in Everson, written by Justice Hugo Black. Justice Black gave the first substantial definition to the scope of the First Amendment,

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'[113]

The subsequent challenges to educational practice were considered with the establishment of religion or the freedom of religion clauses of the First Amendment as a yardstick. To promote justice, it behooves public school administrators and teachers to be aware of, and ensure that their policies and practices reflect the intent and purpose of the First Amendment of the Constitution of the United States of America.

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[113]Everson v. Board of Education of Ewing Township (N.J.) 330 U.S. 1, 9 LED 711, 67 C. Ct. 504 (1947).

CHAPTER III

THE LEGAL ASPECTS OF RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS

> 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.[114]
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[115]

With the advent of extensive litigation concerning religion and public schools, it becomes necessary to delineate specific areas of concern. There have been a number of court cases dealing with religion in public education since the mid 1940s. There were earlier church-state cases, but the floodtide began with decisions concerning the constitutionality of released time for religious instruction.

In the long history of church-state relationships, there have been many cycles of first church, then state exercising dominance over the other, and many instances of

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[114] U.S. Constitution, amend. I.

[115] U.S. Constitution, amend XIV, sec. 1.

the two being completely separated, or one and the same. In the same way, external pressures and moods of citizens have created cyclic changes in judicial philosophy in deciding church-state cases.

In Gobitis,[116] the Third Circuit Court of Appeals and the United States Supreme Court ruled against the plaintiff in a case concerning the religious scruples of a sect regarding the flag salute. The time was 1940, and stormclouds of war filled the horizon. There was a patriotic upsurge among citizens, and it was unthinkable that anyone would refuse to pledge allegiance to the flag.

By 1943, the United States, though in the midst of war, sensed ultimate victory. This feeling was manifest in the Barnette[117] decision, wherein religious scruples of the family forbade the Barnettes to acknowledge allegiance to anyone or anything other than God. Although the case was similar to Gobitis, the Supreme Court ruled in this instance that to compel a person to salute the flag in defiance of religious scruples violated First Amendment rights.

The Constitution had remained the same, and the First Amendment had not changed, but external pressures of impending war and the patriotic mood of the people affected a decision that was later reversed.

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[116]Minersville School District v. Gobitis (Pa.), 310 U.S. 586, 60 S. Ct. 1010 (1940).

[117]West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943).

Chapter 3 includes reviews of judicial decisions on challenges to educational practices since the 1940s. The categories of practices reviewed are (1) released time, (2) Bible reading, (3) school prayer, (4) Gideon Bibles, (5) sex education, (6) religious courses, (7) teaching of evolution, (8) celebration of religious holidays, (9) Bible clubs, (10) use of electronic media aids, (11) religious symbols, and (12) patriotic programs. All of these practices have been challenged in court, and precedents have been established.

Released Time

Various released-time programs that have been used by schools to afford some religious instruction to students were all struck down by McCollum;[118] that is, those which allowed volunteers to come to school and use school facilities to teach religion. All litigation concerning released time for religious instruction prior to McCollum was in state courts. All state court decisions were contrary to the United States Supreme Court decision in McCollum.

As stated above, earlier state court decisions, all of which involved plans in which religious instruction was given outside the school facilities or property, reached the conclusion that release of pupils during school hours for the

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[118] McCollum v. Board of Education (Ill.), 333 U.S.203, 68 S. Ct. 461 (1948).

purpose of attending religious education classes did not violate specific constitutional guarantees relating to religion contained in the various state constitutions. Neither did such release violate other specific provisions of such state constitutions with reference to the use of public funds in aid of any sectarian purpose, or due process or equal protection clauses of the Fourteenth Amendment to the United States Constitution.

In Gordon v. Board of Education,[119] a California State Court of Appeals denied mandamus against school board members to compel the board to discontinue a released-time plan. The state court insisted that a statute providing that students with written permission from parents might be excused from schools for religious instruction was legal.

The California court further stated that apparently state money was not being used for religious education, and absences from school for attendance at religious instruction classes were being accurately reported. School funds were allotted on average daily attendance. The California court ruled that no violation of the First or Fourteenth Amendment had occurred.

The California court approved the time-release plan and expressed the thought that releasing the student for an hour a week to attend religious instruction away from school would further the study of sociology.

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[119]Gordon v. Board of Education, 78 Cal. App. 2d 464 178 P 2d 488 (1947).

In an earlier Illinois case of People ex rel. Latimer v. Board of Education,[120] the Illinois court dismissed a petition to compel a school board to revoke action authorizing a school superintendent to excuse public school pupils at parents' request for an hour each week to attend religious education classes at places outside the school setting. The Illinois court held that the released-time plan in question did not violate constitutional prohibitions relating to the establishment or free exercise of religion. The Illinois court noted the practice did not allow for use of public funds in aid of any church or sectarian purpose. In so concluding, the state court stressed that there was no charge that the action of the school board was discriminatory, that any particular denominations or religious faiths were favored. The Illinois court further noted that no part of the religious instruction was held in the schoolroom on school property, and that there was no clear statement of any time spent by principals or teachers, and/or even how much money, if any, was used out of the public school fund in connection with the release of pupils from the public school for the religious instruction.

In People ex rel. Lewis v. Graves,[121] a New York Court of Appeals held valid and constitutional a plan for

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[120]People ex rel. Latimer v. Board of Education, 394 Ill. 228, 68 NE 2d, 305, 167 ALR 1469 (1946).

[121]People ex rel. Lewis v. Graves, 245 N.Y. 195 NE, 663 rehearing denied in (1927), 245 N.Y. 620, 157 NE 882.

release of school pupils for thirty minutes of the school day once a week to enable the students to receive religious instruction at places designated by parents. The New York court further compared released time for religious education to released time for music lessons or dancing lessons.

Litigation up to 1948 tended to uphold the release of children from school as being constitutional if the religious education took place away from school premises.

On-Campus Released Time

In McCollum v. Board of Education,[122] the issue was, basically, whether or not school children could be legally released from regularly scheduled classes to attend sectarian religious classes in the school building. Classes were offered during the regular school day and were taught by teachers other than public school teachers. The United States Supreme Court insisted the practice in the Champaign public schools was unconstitutional under the First Amendment, as establishment of religion.

In Martinsville, Virginia, the school system offered a religious education program in which weekly classes were conducted. Outside teachers were sent in by private organizations. Students chose either to attend study period or, if parents had signed cards giving permission, religious

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[122] McCollum v. Board of Education, Ill. 333, U.S. 203, 68 S. Ct. 461 (1948).

classes at school. The ruling of the United States District Court, Western District of Virginia, based on McCollum, forbade the Martinsville system to allow religious instruction at school.[123]

Off-Campus Released Time

The United States Supreme Court, in Zorach v. Clauson,[124] considered the time and place of religious education, unlike McCollum, in which religious instruction took place in the children's school. In Zorach, religious training was done by teachers hired by religious organizations of the area. Children signed up for a choice of religious training and attended the scheduled class at the appointed time away from school.

In McCollum, the Supreme Court insisted that the Champaign school system was promoting the establishment of a religion, while in Zorach the New York system was accommodating school children by allowing religious training away from school.

In 1975, in Smith v. Smith,[125] the United States District Court, Western District of Virginia, ruled that released time in which religious instruction was offered away from school was illegal and enjoined the system from

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[123]Vaughn v. Reed, 313 F. Supp. 431 (MD Va. 1970).

[124]Zorach v. Clauson, N.Y., 343 U.S. 306, 72 S. Ct. 679 (1952).

[125]Smith v. Smith, 523 F 2d 121 (Fourth cir. 1975).

such practices. On appeal to the Fourth Circuit Court of Appeals, the ruling was reversed and the teaching of religious subjects away from school upheld.

In Logan, Utah, junior and senior high schools had a released-time program for students to attend seminars for credit during school hours. Students attended Mormon seminaries adjacent to school for one hour each day. Courses were elective and the students were granted credit for Old and New Testament courses taken at Mormon seminaries.[126]

The United States District Court, District of Utah, found Logan's attendance participation in the time-release program constitutional; however, parts of the Utah plan exceeded perimeters of the First Amendment. Granting credit for courses violated the establishment clause by advancing religion.

The wall between church and state does offer accommodation in released-time programs. Religious instruction must be conducted in such a way that such instruction does not interfere with normal school setting nor exceed constitutional limits on establishment of religion.

Bible Reading

Throughout the history of public education, Bible reading by school personnel or by students at school during

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[126]Lanner v. Wimmer, 463, F. Supp. 867 (1978).

school hours has been an established practice. The practice has been litigated many times.

Many state school officers issued decrees against Bible reading in public schools prior to 1900. Moreover, school boards curtailed religious exercises in schools. These official actions occurred even though the majority of state courts sustained devotional exercises in their public schools.

In Doremus,[127] the New Jersey Supreme Court considered the constitutionality of a statute requiring the reading of five verses of the Old Testament at school each morning. By the time the case reached the courts, it was moot on grounds that the plaintiff had graduated from high school at that time. An appeal to the United States Supreme Court, in 1952, dismissed Doremus for lack of standing because of the plaintiff's failure to show a direct and particular financial interest, so as to establish standing to litigate.

In 1963, the United States Supreme Court, in Schempp,[128] handed down the basic decision that a Pennsylvania law requiring the reading of ten verses from the Bible in school each day was unconstitutional. The Court established a test for determining the constitutionality of

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[127]Doremus v. Board of Education, 5 N.J. 435, 75A 2d 880, 1950: 342 U.S. 429 (1952).

[128]Abington School District v. Schempp, 374 U.S. 203 (1963).

religious instruction in public schools. The First Amendment is breached if either the purpose or primary effect of instruction advances or inhibits religion.

Since Schempp, the federal courts have decided many cases concerning Bible reading in school during the school day. Moreover, school boards and school administrators seemed reluctant to tailor their policies and practices to the decision in Schempp and continued either to condone or require Bible reading in school.

Along with Schempp, the United States Supreme Court decided Murray, which concerned a Baltimore School Commission ruling requiring Bible reading and/or recitation of the Lord's Prayer to open the school day.

The Maryland Court of Appeals had upheld the school's required Bible reading as constitutional. The case was heard by the United States Supreme Court on a writ of certiorari. The Maryland Court of Appeals decision was reversed.[129]

In 1969, the American Civil Liberties Union, in conjunction with other separatist organizations, brought legal actions against the Albert Gallatin Area School District in Pennsylvania for conducting religious programs in the school district. Upon motion of a school board member that Bible reading be part of school curriculum, the practice

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[129]Murray v. Curlett, 228 Md., 239, 179 A(2d) 698 (1962).

began. A passage from the Bible was read each day over the school loudspeaker. If the school was not equipped with loudspeakers, the Bible was read in the classrooms.

Students were not required to remain within hearing of Bible reading. The fact that Bible reading was done in a public building, a subdivision of the state, and upon the motion of a government body established Bible reading as an action of the state. For the state to teach and further religious exercises is not within the United States Constitution.

The First Amendment says nothing of free actions of children meeting on students' free time and initiative to practice religious exercises. The First Amendment does make it unlawful for the state to make any law establishing a religion or prohibiting the free exercise of a religion.

In Mangold v. Albert Gallatin Area School District, Fayette County, Pennsylvania,[130] the Third Circuit Court of Appeals upheld the findings of the United States District Court, Western District, Pennsylvania, and the practice of Bible reading at school was once again declared unconstitutional.

In 1964, a Federal District Court in Adams v. Engelking,[131] declared part of Idaho school code

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[130]Mangold v. Albert Gallatin Area School District, Fayette Co., Pa., 438, F2d 1194, 3d Cir. (1971).

[131]Adams v. Engelking, 231, F. Supp. 666 (D. Idaho) (1964).

(section 33-1604) requiring compulsory daily Bible reading unconstitutional as advancement of religion.

In another district court case, Goodwin v. Cross County School District No. 7,[132] the plaintiff charged that school board members illegally allowed religious practices to be conducted in the district schools. Members of the student council were allowed to read Bible verses and recite the Lord's Prayer as part of school opening exercises. Bibles were being presented to fifth grade children at school. Baccalaureate services also came under fire as a violation of First Amendment rights. Community churches were invited to send ministers to schools periodically to speak to classes. In the classroom while speaking, some ministers would ask if children were "saved." Each child was then asked to indicate whether he attended church.

In some instances, teachers had requested students to memorize a prayer which was recited in unison each day before lunch. Certain teachers required students to read from the Bible as part of daily routine.

The distribution of Gideon Bibles to fifth-grade students, ministers questioning children, prayer recitation, and Bible reading at school were declared unconstitutional by the United States District Court, Eastern District, Arkansas, as violating children's rights under the First Amendment.

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[132]Goodwin v. Cross County School District No. 7, 394 F. Supp. 417 (ED Ark. 1973).

Baccalaureate services were conducted annually in the high school auditorium, usually by a local minister nominated and elected by the senior class. Baccalaureate services were held on a day when school was not in session and, since attendance at the services was not required, the plaintiff did not bear out the burden of proof in showing that the baccalaureate service was of such religious nature as to violate First Amendment Rights.

In Meltzer v. Board of Public Instruction of Orange County, Florida,[133] parents of children attending public school brought action for injunctive and declaratory relief from Bible readings, distribution of Bibles, and requiring teachers to inculcate the practice of every Christian virtue.

The board of education had allowed Orange County, Florida, public schools to begin the day with Bible readings and devotional exercises. Gideon Bibles had been given out at school for years until the practice met with opposition. These Bibles were stored in a room awaiting court ruling before further distribution.

2. Chapter 231.09(2) of the Florida Statutes provides:
231.09 Duties of instructional personnel. Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the school board, shall perform the following functions:
(2) Example for pupils. Labor faithfully and earnestly for the advancement of the pupils in their

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[133]Meltzer v. Board of Public Instruction of Orange County, Florida, 548 F. 2d 559 (5th Cir. 1977).

> studies, deportment and morals, and embrace every opportunity to inculcate, by precept and example, the principles of truth, honesty and patriotism and the practice of every Christian virtue. [Emphasis added].[134]

The United States District Court, Middle District, Florida, denied relief to parents, who subsequently appealed to the United States Court of Appeals for the Fifth Circuit. That decision of the lower court was reversed by Judge Gee, who wrote within the ruling that the statute would probably be legal if the word "Christian" were deleted.

The statute had been implemented by the Superintendent of Orange County Schools with instructions for principals of the ninety-seven schools in the system:

> 4. TO: ALL ORANGE COUNTY PUBLIC SCHOOL PRINCIPALS
> FROM: JAMES M. HIGGINBOTHAM District Superintendent
> SUBJECT: RELIGIOUS BOOKS AND LITERATURE
>
> . . . . . .
>
> GUIDELINES
>
> The following are guidelines for the principals of the Orange County District School Board schools for handling of religious books or doctrine offered to the schools for free distribution. We emphasize that we are directing these guidelines only toward religious books and doctrine not intending to modify general present policies or guidelines with regard to other literature.
>
> 1. A place be designated within the school facility for all religious books and literature which may be supplied by outside groups or organizations.
> 2. Books and literature be available to the students only at the designated location.
> 3. All faiths be allowed to provide books and literature under the terms of these guidelines.
> 4. No distribution nor allowing of distribution of books and literature be undertaken through the classroom, homerooms, in assembly or on any portion

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134Ibid.

> of school property by the staff, students or outsiders.
> 5. Periodic announcements may be made that literature is available at the designated place.
> 6. No school employee may comment upon the decision by any group to make available or not make available literature, the content of such literature, or in any way influence others concerning the literaure or concerning the taking or reading of the literature.[135]

The district court judge denied the plaintiffs' relief and allowed the school board to continue the Bible readings if they were inspirational instead of devotional. The plaintiffs turned to the United States Court of Appeals of the Fifth Circuit. The appeals court discerned from the district court that the statute was not likely to be enforced; thus, there was no need for an injunction. Upon remanding the case to the district court, the appeals court questioned the likelihood of enforcing the statute requiring teachers to inculcate every "Christian" virtue.

It became apparent during the trial in district court that the board of education had made no changes in its policy concerning Bible reading, devotions, and the distribution of Bibles. After fourteen months, the district court still found no reason for issuing an injunction.

During the second round of appeal, the United States Circuit Court of Appeals found the ever-present threat of enforcing the statute to be a continuous and brooding presence and issued a declarative judgment against the defendant.

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[135] Ibid.

Bible reading and devotional exercises were declared unconstitutional under the First Amendment, notwithstanding the students' right to absent themselves from participation. The practice of passing out Gideon Bibles in the classroom or at a central place on campus was said by the court to be of sufficient harm to warrant an injunction.

The "Christian virtue" clause of the Florida statute 231-09(2) was declared unconstitutional as worded.

This decision of the United States Fifth Circuit Court of Appeals was handed down in March, 1977, and a rehearing en banc was granted in May, 1977. Now the appeals court in effect declared Bible reading and prayer in the Orange County schools illegal, but pronounced the "Christian virtue" statute and the distribution system for Gideon Bibles legal.

The entire course of this case ran in the district court and the court of appeals for eight years. In 1980 the United States Supreme Court decided to let stand the ruling of the appeals court reaffirming the unconstitutionality of religious exercises in public school.

In Johns v. Allen,[136] a 1964 case, the issue was easier to determine, rulings were more concise, and the spirit was similar to Schempp. The United States District Court in Dover, Delaware, enjoined the Dover Special School District

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[136]Johns v. Allen, 321 F. Supp. 852 (D. Del. 1964).

from Bible reading and prayers in the classroom. The Delaware legislature had excused the Lord's Prayer and Bible reading from prohibition against religious services at Dover public schools.

A second factor in the case was much more damning. The Delaware schools were operating with a statute requiring daily Bible reading and a penalty system for teachers who failed to comply. The penalty was a twenty-five-dollar fine for the first offense and immediate withdrawal of teaching certification for a second offense.

The United States District Court issued a permanent injunction to stop these practices. The statute was declared unconstitutional, as the law tended to further a sectarian religious exercise.

This study has reported a clear-cut clinical decision from the United States Supreme Court that Bible reading at school on school time is illegal. The study has also reported that school boards have tried to contravene this decision. Moreover, state legislatures have often infringed upon the Fourteenth Amendment by passing statutes that allow violation of the First Amendment.

In Reed v. Van Hoven,[137] a United States district court judge arranged accommodation for students who desired

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[137]Reed v. Van Hoven, 237 F. Supp. 48 (WD Mich. 1965).

religious exercises at school. In 1965, shortly after Schempp, parents of elementary school children in Michigan sued the Jenison School Board to stop the practice of Bible-reading exercises at school. Such religious practices were common in opening the day's work in the classroom.

While the case was being prepared, the Jenison School Board modified the daily program. The new program was to be held before the start of the school day or after the dismissal bell in the afternoon. Schools were to ring a bell at 8:40 A.M.. Another bell at 8:45 indicated the opening of designated places for those students wishing to participate in Bible reading and meditation. At 8:50, a third bell ended devotional time and signified the actual beginning of school. The devotional sessions were devoid of any supervision by either teacher or other adult. Plaintiffs objected to the modified plan as well, and sought an injunction to stop this new practice. The contention was that such practice tended to segregate children and cause excusal problems.

The United States District Court, Western District, Michigan, did not enjoin the practice, but did modify the practice to accommodate students wishing to participate without violating the rights of other children. The district court proposed that Bible reading be done before or after the regular school day, with no bells ringing for attendance, nor any instructions as to where and when the activity would take place. Those children desiring to attend the devotional

activities were to find out the time and place and attend in a decorous way. The exercise itself must be separate and apart from the regular school day. Moreover, a time gap was required between the end of the religious exercise and the beginning of the school day. Time for students' mingling was important. Thus, when the bell rang for class, students were mingling on the way to empty classrooms.

The Michigan district court realized that this approach was by no means a final judgment; the ruling was designed as an accommodation. Provisions were made by the court for a record to be kept of the events during the instruction period to aid in judgment of merits of the case. If the policy was unworkable or if it were challenged, an injunction would be considered. This policy of accommodation apparently worked to the satisfaction of everyone, because there was no further litigation in the case.

While the above decision maintains as essential an inviolate Constitution with guarantee of freedom, the decision does offer accommodation for religious activities. In leaving the door open for an injunction, perhaps the Michigan district court served both masters, church and state.

Bible reading at school on school time violates the First Amendment establishment of religion clause. Such has been the mandate of the federal court system since 1963. Moreover, the courts involved have elucidated this picture by rendering clearly cut decisions since that time.

The Fourteenth Amendment precludes any state statute's allowing the violation of that freedom.

School Prayer

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country.[138]

The regents' prayer above was composed as the official prayer of the New York State School System, and was instituted by the New Hyde Park School System. A group of parents challenged the constitutionality of the practice and sued to have prayer discontinued, based upon the establishment clause of the First Amendment.

A New York State court had found that prayer in public schools was permissible at the time of adoption of the Fourteenth Amendment, and from this reasoned that prohibition had not been intended. Furthermore, the New York State Board of Regents was thought to be free to compose a non-denominational prayer in order to avoid the sectarian influences that might result if teachers and pupils were free to choose any prayer. The decision was affirmed in the appellate division and the court of appeals. Although the prayer was non-denominational and participation of children in the prayer was optional and voluntary, the United States Supreme Court held, by a six-to-one majority, that use of the regents'

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[138]Engel v. Vitale, (N.Y.) 370 U.S. 421, 82 S. Ct. 1261 (1962), p. 422.

prayer violated the "no establishment" clause, and so reversed the lower court decisions.

The United States Supreme Court held that the action of the state in composing prayer for recital in the schools as a part of a program to further religion constituted a violation of the establishment clause. The majority opinion, written by Justice Hugo Black, explained that one of the reasons for the colonization of America was to escape from governmentally composed prayers in England and Europe. Once settled in the colonies, those religious groups with sufficient control began to make their own prayers the standard. The Court noted that the colonists later recognized that government approval of any one particular form of worship caused strife among various religions groups, and concluded that framers of the Constitution intended the First Amendment to stand as a guarantee that neither the power nor the prestige of the federal government would be used to control, support, or influence the kinds of prayer the American people might pray.

In DeSpain v. DeKalb Community School District,[139] the force of Engel influenced a decision that insisted a kindergarten class prayer, recited before snack time, was unconstitutional. The children had been reciting the verse:

> We thank you for the flowers so sweet;
> We thank you for the food we eat;
> We thank you for the birds that sing;
> We thank you for everything.

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[139]DeSpain v. DeKalb Community School District, (Ill.) 384 F. 2d 836, (USCA 7th Cir. 1968).

The prayer, which was recited in school on school time, and which the children were compelled to recite, was in violation of the First Amendment and thus declared illegal. The verse appeared innocent but was considered by the plaintiffs and then by the court to be a prayer, and as such unconstitutional.

Many ensuing suits combined Bible reading and prayer or meditation or devotional exercises for adjudication. Bible reading and praying were again declared unconstitutional under the First Amendment establishment of religion clause.

In Mangold v. Albert Gallatin Area School District,[140] parents challenged the practice of daily Bible reading and non-denominational mass prayers in public schools. Religious exercises were voluntary and optional for students. The school board adopted and implemented a motion to install Bible reading and prayer as an exercise in the schools during the school day. The federal district court insisted that such exercise violated First Amendment rights of students in the public schools, and the Third Circuit Court of Appeals sustained the district court decision.

In Arkansas, the Cross County School District[141] was enjoined from having a student council member recite the

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[140] Mangold v. Albert Gallatin Area School District, Fayette Co., Pa., 438 F. 2d 1194, 3d Cir. (1971).

[141] Goodwin v. Cross County School District, No. 7, 394 F. Supp. 417 (ED Ark, 1973).

Lord's Prayer over the intercom. The Arkansas District Court, Eastern District, declared this daily practice, as well as accompanying Bible reading, illegal under the First Amendment establishment clause.

As reported before in Johns v. Allen,[142] the Delaware Board of Education directed that at least five verses from the Bible be read daily in each classroom in the state. The statute further stated: "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools." The United States District Court, District of Delaware, permanently enjoined Delaware schools from practicing religious exercises at school.

Unconstitutionality of school prayer was affirmed in Meltzer v. Board of Public Instruction of Orange County, Florida,[143] by the Fifth Circuit Court of Appeals. Prayer in Orange County schools had been included in daily religious exercise, and was condoned by a Florida statute that required teachers to "inculcate every Christian virtue." Reciting prayers in Florida schools had been under question for seven years before the decision of the court of appeals curtailed the practice.

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[142]Johns v. Allen, 231 F. Supp. 852 (D Del. 1964).

[143]Meltzer, (5th Cir. 1978).

An uneasy accommodation was made in Reed v. Van Hoven[144] concerning prayer at school. The district court allowed school children, without help or interference from school officials, to meet at school for short prayer in a room and at the time of students' choice, so long as the session was over and the children had at least five minutes to mingle with the other children before the bell rang for school to start. Records of any complaints or problems were to be kept and brought back to the district court for final judgment. If the accommodations had not peacefully settled the issue, an injunction would be considered.

Prayer at school violates the First Amendment of the United States Constitution. In every instance it has been challenged, school prayer has been ruled illegal. School boards, administrators, and teachers should be aware that, if encouraged or even allowed, class prayer at school is in violation of the Constitution.

In Stein v. Oshinsky,[145] parents sued to enjoin the school board and board of regents to allow school children to pray at school. Parents wanted the school board to afford children a time to express love and affection to Almighty God in the classroom each day. Parents, who represented

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[144]Reed v. Van Hoven, 237 F. Supp. 48 (WD Mich. 1965).

[145]Stein v. Oshinsky, 224 F. Supp. 666 (ED N.Y. 1963), rev'd. 348 F 2d 999 (2d civ. 1965), cert. denied 382 U.S. 957 (1965).

Protestant, Catholic, Jewish, American Apostolic, and Episcopalian faiths, charged that denying children opportunity to pray was in violation of the First Amendment.

The district court agreed with the parents, because children would not be compelled to pray. Those parents were granted an injunction to allow voluntary prayer at school. The defendants appealed to the United States Second Circuit Court of Appeals. The court of appeals, in reversing the district court's decision, said:

> Determination of what is to go on in public schools is primarily for the school authorities. Against the desire of these parents that their children 'be given an opportunity to acknowledge their dependence and love to Almighty God through a prayer each day in their respective classrooms,' the authorities were entitled to weigh the likely desire of other parents not to have their children present at such prayers, either because the prayers were too religious or not religious enough; and the wisdom of having public educational institutions stick to education and keep out of religion, with all the bickering that intrusion into the latter is likely to produce. The authorities acted well within their powers in concluding that plaintiffs must content themselves with having their children say these prayers before nine or after three.[146]

Ultimate accommodation for students to have a period of meditation may have been the target for attack in Gaines v. Anderson.[147] Framingham, Massachusetts, schools resolved in 1976 to comply with a state statute requiring teachers to hold a one-minute period of silence each day for individual meditation. Teachers were to insist on absolute silence

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[146] Ibid.

[147] Gaines v. Anderson, 421 F. Supp. 337 (1976).

during the one-minute period, then end the silence with "thank you." The meditation period was supervised closely by teachers. There was a method of reporting interruptions built into the system.

The charge was brought by parents of twelve students claiming the period of meditation violated the students' First Amendment religious rights. It was the opinion of the United States District Court that the statute did not violate First Amendment religious rights. The purpose of the statute was secular in philosophy and nature. A period of silence did not enhance or aid any religion; there was no involvement of the state in religion, so entanglement was nil. This court found the program to be within bounds of constitutionality, and so dismissed the charge.

Gideon Bibles

The distribution of portions of the Bible in elementary schools has been a Gideon Society project since 1908. Books distributed contained the New Testament, Psalms, and Book of Proverbs from the King James Version. The custom of the Gideon Society was to write the school superintendent requesting permission to go into schools and hand one of the books to each fifth-grade through high-school student.[148]

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[148]Tudor v. Board of Education, (N.J.) 348 U.S. 857, 75 S. Ct. 25 (1954).

In Tudor v. Board of Education,[149] such a letter was received by the Rutherford Board of Education and read at next session. The school board proposed to allow Gideons to give a Bible to each child who requested one. However, there was opposition at the meeting from a Catholic priest and a Jewish rabbi. The clergymen maintained the Gideon Bible was sectarian under the laws of their respective religions.

The school board devised a distribution system on the advice of legal counsel. Before the books were distributed, litigation was brought against the board seeking an injunction against distribution. A temporary injunction halted distribution. After a hearing, the New Jersey Superior Court, Law Division, decided in favor of the school board and lifted the injunction. Upon appeal, the court reinstated the injunction as requested, and the case was thus heard by the New Jersey Supreme Court.

The New Jersey Supreme Court saw the practice as sectarianism. The school board was accused of showing a religious preference by permitting the King James Version to be distributed despite objections of Jews and Catholics. The question was whether or not Bible distribution constituted an establishment of religion on behalf of the school board. The court insisted that activities which separated and

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[149] Ibid., p. 858.

excluded some children from the mainstream were constitutionally questionable.

> When . . . a small minority of the pupils in the public school is excluded for any cause from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the Constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others. (At 44 N.W. 975.)[150]

Distribution of sectarian material was judged to be more than accommodation. The New Jersey Supreme Court decided that distribution of the Gideon Bibles violated both the New Jersey and the Federal Constitutions.

In a 1978 Florida case, the United States District Court and Fifth Court of Appeals had considerable difficulty sorting out the complaints. Gideon Bibles were distributed by the Orange County School Board. This practice was challenged by parents of a school child who sought an injunction preventing the Gideon Society from distributing the sectarian book at school.

In Meltzer,[151] the Gideons went into the classrooms and halls and buttonholed children to hand them the Bibles.

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[150] State ex rel. Weiss v. District Board 76, Wis., 177 44 N.W. 967, 7 LRA, 330 (S. Ct. 1890).

[151] Meltzer v. Board of Instruction of Orange County, Florida, 577 F. 2d 311 (5th Cir. 1978).

Such practice was challenged, along with the practice of reading Bible verses and of adhering to a Florida statute that teachers "inculcate every Christian virtue."[152]

The case had a first hearing in 1970, but final decision from the Fifth Circuit Court of Appeals was not rendered until July, 1978. Parents complained about Gideon distribution of Bibles in classrooms, halls, and lunchrooms. The school board then revised the guidelines for distributing Bibles.[153] See chapter 3, page 66, for Guidelines.

The Fifth Circuit Court of Appeals insisted that distributing sectarian literature to children at school under the new guidelines was not a violation of the establishment clause; however, those who were in opposition to the majority opinion were eloquent in dissent.

> . . . In the face of rulings by both the Florida state court and the federal District Court which indicated the likely constitutional infirmity of a Bible distribution scheme, the Board's conduct exhibits a sectarian commitment to Bible distribution, sectarian in the sense that the Board thought availability of Bibles was for religious values, not, say, as instruments of good literature. Such conduct also exposes the Board's promulgation of the guidelines and, correspondingly, that a primarily sectarian purpose underlay those guidelines.[154]

Due to the lack of clarity in this decision, it would be prudent to follow a course of neutrality in religious literature distribution until future decisions provide more direct guidelines.

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[152]Ibid., p. 313.

[153]Ibid., p. 314.

[154]Ibid., p. 317.

Sex Education

Parental objection to sex education on religious grounds has been consistently rejected where attendance is not compulsory. A violation of the free exercise clause of the First Amendment is predicated on coercion. The courts have consistently allowed human sexuality courses to be included in the curriculum as long as students have the option of excusal from classes.

Courts have maintained violation of the First Amendment establishment clause will not occur if sex education is taught as a public health course and not as a religious course.

Compulsory sex-education classes in Maryland were established by State Board of Education policy. Classes were part of a sequential program in the curriculum dealing with family living. The program was challenged in Cornwell v. State Board of Education.[155] A civil suit was brought against the school board seeking to enjoin implementation of the policy. Legal action sought to have the policy declared unconstitutional as First Amendment establishment of religion. Parents asserted that sex education was a private matter to be presented at home. Sex education, parents insisted, is a manifestation of free exercise of religion, and the board's policy infringed upon religious freedom.

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[155]Cornwell v. State Board of Education, 314 F. Supp. 340 (Md. 1969).

The United States District Court decided that the State Board's policy was a public health measure and the state's interest in public health outweighed the religious impact on children. In dismissing the case, the United States District Court, District of Maryland, maintained:

> . . . it is quite clear to this Court that the purpose and primary effect of the bylaw here is not to establish any particular religious dogma or precept, and that the bylaw does not directly or substantially involve the state in religious exercises or in the favoring of religion or any particular religion. The bylaw may be considered quite simply as a public health measure.[156]

In Hopkins v. Hamden Board of Education,[157] the question of interference with free exercise of religion surfaced again. Hamden schools had a sequential health education course for the entire school career of the children. Among the nine main concepts of public and personal health presented was "Family Living and Sex Education." Parents insisted that including sex education in public schools as a mandatory course was in violation of the free exercise clause in the First Amendment. Parents maintained that teaching sex in the schools amounted to establishing a religious philosophy, and requiring attendance at the classes infringed upon the right to free exercise of religion.

The Connecticut Court of Common Pleas considered the sex-education courses to be secular in nature and in the realm

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[156]Ibid., p. 344.

[157]Hopkins v. Hamden Board of Education, 289 A 2d 914 (1971).

of public health. Sex-education courses, when taught as health science, did not compose a religion or an establishment of religion. As a secular course, sex education could not be construed by parents as an infringement upon free exercise of religion. The injunction was denied and sex education was upheld as a public health matter.

Sexual intercourse, masturbation, and contraception were included in the teaching of a sex-education course that came under fire in Valent v. New Jersey State Board of Education.[158] The court noted that to teach dogma opposed to one's religion, thereby perhaps requiring that a child attend or be educated at a private sectarian school, stretched the reasonableness of the free exercise of religion clause of the First Amendment. The case was dismissed without a motion for summary judgment.

The New Jersey court concluded that in a "free exercise" case requiring a balancing approach, judicial determinations are not solely answers to questions of law, but require that facts either be proven or stipulated and balanced before a legal standard can be applied and judgment rendered.

The foregoing cases dealt with sex-education classes requiring attendance of each child. Courts upheld all sex-education courses when presented as public health issues. The following cases dealt with sex education allowing children to be excused by parental note.

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[158]Valent v. New Jersey State Board of Education, 114, N.J. (1971).

In Medeiros v. Kiyosaki,[159] parents of fifth- and sixth-grade children objected to the showing of a film series dealing with family life and sex education. Films were shown in classrooms to children whose parents wanted them to see the series. Parents had the option of withdrawing children from the film viewing. The film series was shown on television to parents on Monday night before being shown to children the following week. This afforded objecting parents ample time to excuse children.

Plaintiffs sought to enjoin the school board from infringing upon religious freedom by establishing a religion in the classroom. The Hawaii Circuit Court could find no reason to enjoin schools from showing the film because of the excusal system. There existed no coercion for children to attend.

In San Mateo, California, parents complained to the courts that sex education interfered with parents' and students' free exercise of religious rights. In Citizens for Parental Rights v. San Mateo Board of Education,[160] the parents maintained that to teach children things inherent in sex-education classes interfered with parental religious rights to teach these things to children at home. The California Superior Court disagreed and insisted:

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[159]Medeiros v. Kiyosaki, 478, p. 2d 314 (1970).

[160]Citizens for Parental Rights v. San Mateo Board of Education, 51 Cal. App. 3d 1 (1975).

> A violation of the Free Exercise Clause of the First Amendment is predicated on coercion. Here a state statute provided that no governing board of a public elementary or secondary school might require pupils to attend any class involving family life or sex education. The statute further provided that, when any such course was offered, the parent or guardian of each pupil had to be notified that his child not attend the class. The statute prohibited the attendance of any child as to whom such request had been received. And it further provided that any written or audio-visual material to be used in the class had to be made available first for parental inspection. Moreover, another statute provided in substance that when any part of the instruction in health, family life, or sex education conflicted with the religious beliefs of the parent or guardian, the student should be excused from that part.[161]

The superior court refused the injunction, and the plaintiffs appealed to the California Court of Appeals, where the decision was upheld.

Consistency of courts in sex-education cases would lead one to believe that such courses do not amount to an established religion, nor do they interfere with one's rights to free exercise of religion under the First Amendment. Compulsory courses and optional courses have all been upheld as health-education courses, and not as a religion.

Religion Courses

In Wiley v. Franklin,[162] a Bible-study course in the public schools of Chattanooga was challenged by a fifth-grade student. The Bible course was challenged under both the

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[161] Ibid.

[162] Wiley v. Franklin, 468, F. Supp. 133 (1979).

establishment clause and free exercise clause of the First Amendment. This course was designed to teach Bible as literature, history, and cultural background for the district's system of values. The course was designed to run from kindergarten to sixth grade. The sequence of progression of the course led students through:

> KINDERGARTEN: Animals and Man; Bible--God's Book; Cain and Abel; Noah; Obadiah; Picnic with Jesus; Queen Esther and King Xerxes; Young Helpers; and Zacchaeus.
> FIRST GRADE: Bible; Creation of World; Creation of Animals and Man; Jesus--Age 12 in Temple; Four Fishermen; Deaf Man Healed; Joseph; Joseph; Joseph.
> SECOND GRADE: Bible; Creation; Creation; Christmas; Review; Death of Moses; Call of Joshua; David Anointed; David and the Giant; and Jonathan and David.
> THIRD GRADE: Bible; Creation; Review; David; Jesus at Twelve; Call of the Disciples; Feeding 5000; Esther; Esther; and Return from Captivity (Portions of Ezra and Nehemiah).
> FOURTH GRADE: Introduction; The Bible God's Holy Word; Creation of the World; Jacob at Haran; Jacob Returns Home; Joseph the Slave; God's Power Through Moses; God's Deliverance Through Moses; and God's Path Through the Red Sea.
> FIFTH GRADE: Introduction--Bible; Review of the Fourth Grade from Creation to Joseph; Review of the Birth of Moses to the Red Sea; Crossing the Jordan; Jericho; Ai--Joshua; Saul Found Dead--David is Made the New King; David Disobeys God's Laws: Absalom Betrays His Father.
> SIXTH GRADE: Introduction--The Bible; Review--Ten Commandments to King Saul; Review--Saul--David; Esther--The Beauty Queen; Esther Saves Her People; God's People Return to Their Land (Portions of Ezra and Nehemiah); Peter's Denial and Judas' Sad End; Trial and Crucifixion; Resurrection and Appearances.[163]

Students elected to attend the classes by written request from parents. Each child attending Bible classes brought from home a request for the student to participate.

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[163]Ibid., p. 139.

Those students who did not wish to participate stayed in the classroom with the regular teacher and continued with the day's work.

A tremendous amount of peer pressure was felt by children who chose not to participate in the Bible course. There were complaints that nonparticipating students suffered academically from "make-work" assignments given the students during the time the course was offered.

Teachers for the Bible courses were hired and paid by a citizens' group organized in 1922 called the "Public School Bible Study Committee." The committee was composed entirely of members of the Christian faith.[164] The Chattanooga school administrators had authority to remove the teachers from school.

The committee financed Bible courses with donations from churches and love offerings from parents of students attending the courses. In 1977, the committee raised and spent $230,000[165] to finance the public school Bible course. There was no public money spent other than housekeeping money for the rooms used by the Bible teachers.

The intent of the Chattanooga School Board regarding the Bible course was set forth in a policy statement as follows:

> In the study of the heritage of America, which is a significant facet of the instructional program for Chattanooga Public Schools, the Bible is considered in

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[164]Ibid., p. 136.

[165]Ibid., p. 137.

> its relations to history, literature, and social thought. The teaching of Bible as religious doctrine, however, is not viewed as the prerogative of schools, since the public schools serve students of many religious backgrounds. Therefore, in consideration for the total school program, the laws governing religious freedom, and the right of every individual to exercise free choice in such matters without personal embarrassment to himself or his family, Bible may be offered as an elective subject but not as a requirement.[166]

County board policy of the Hamilton County School Board regarding Bible courses was as follows:

> The Rules, Regulations and Minimum Standards of the Tennessee State Board of Education sets forth as two of the goals for education in this state that the students gain 'knowledge and appreciation of the history of the community, state, nation, and world,' and 'knowledge of a variety of moral and ethical values and use of this knowledge for establishing a personal value system free from bias and prejudice.' In studying American heritage in Hamilton County Schools, the Bible is presented in relation to its place in the origin of the republic, the establishment and development of the public education, the emphasis on individual worth, and its pervading influences in the country's government, history, and the very fabric of American society.[167]

The philosophy of the school boards as stated was to teach those things that prevailed in society and kept it viable. A total of ninety-three percent of the 21,356 elementary children in the Hamilton County and Chattanooga City Schools in 1977-1978 participated in the Bible-study courses.[168]

There were no fixed standards for certification of teachers hired by the committee. There were no sectarian

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[166] Ibid.

[167] Ibid.

[168] Ibid.

religious tests given teachers before hiring, but at least one was asked if the applicant "had a love of God."[169] Some of the eighteen teachers had college training, and a few were college graduates. All were members of Protestant Christian churches. All the Bible teachers had attended at least one workshop conducted by the Bible Study Committee that had as a basic theme:

> We are to let the Bible speak for itself. Under no circumstances are we to try to give a slant toward any denomination. No sectarian doctrines or church rituals or creeds are to be taught. Criticism is not to be made of anyone's faith or religion. The Bible alone is to be taught without interpretation.[170]

The Bible used in most instances was the King James Version, although there was no requirement that a particular version be used. The methods of teaching were story-telling, discussing Bible lessons from verses read at the time of class, and memorizing verses by upper elementary grades. Any Biblical interpretation or criticism was specifically avoided.

Under the free exercise clause, the courses would have to be religious in nature and not secular academic courses in order to violate the First Amendment. If the courses were found to be secular instead of religious, there would be no interference with the First Amendment religious rights of the students.

The United States District Court, Eastern District of Tennessee, found that the course was not as originally

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[169]Ibid., p. 138.

[170]Ibid.

presented--history, literature, or otherwise secular--but was, in fact, of a religious nature. The course failed the second test in that it did tend to advance the Christian faith, and tended to inhibit other faiths. It also failed the third test, that of excessive entanglement between government and religion.

In order to accommodate people who wanted the Bible courses, as well as to satisfy the Supreme Court's tripartite test, the district court gave the board of education forty-five days to adopt changes in the curriculum that would:

> (1) Establish uniform minimum standards for the selection and employment of persons teaching Bible study courses in the elementary grades, which standards shall specifically exclude as a condition of selection for employment any religious test, any profession of faith or any prior or present religious affiliation.
>
> (2) Establish a procedure for the release and replacement of all teachers currently teaching Bible study courses in the elementary grades who do not meet the minimum standards adopted pursuant to paragraph (1) above, such release and replacement to be accomplished within a period of 30 days after the Court shall have approved the uniform minimum teacher standards.
>
> (3) Establish a plan whereby the school board or some duly designated school staff member or other school personnel shall without participation by any nonschool person or organization, select and employ all Bible study course teachers and effect the placement, training and supervision of all such teachers.
>
> (4) Revise the Bible study course curriculum currently used in elementary school grades so as to eliminate all lesson titles whose only reasonable interpretation and message is a religious message and which lessons are not reasonably capable of being taught within the confines of a secular course in history, literature or other secular subject matter normally included within or recognized as suitable for an elementary school curriculum.[171]

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[171] Ibid., p. 152.

Stating that the conditions given to the school boards to bring the system into compliance with the First Amendment did not preclude the funding of the program by any organization, including the "Public School Bible Study Committee," the district court rendered its decision.

The school boards revised the curriculum according to the instructions of the district court. In the second phase of the suit, Wiley v. Franklin,[172] the curriculum resulting from new guidelines was reviewed.

This district court approved the new curriculum and teacher-selection guidelines and, in keeping jurisdiction over the program for one year, admonished the school boards with the following:

> The ultimate test of the constitutionality of any course of instruction founded upon the Bible must depend upon classroom performance. It is that which is taught in the classroom that renders a course so founded constitutionally permissible or constitutionally impermissible. If that which is taught seeks either to disparage or to encourage a commitment to a set of religious beliefs, it is constitutionally impermissible in a public school setting. If that which is taught avoids such religious instruction and is confined to objective and non-devotional instruction in biblical literature, biblical history and biblical social customs, all with the purpose of helping students gain 'a greater appreciation of the Bible as a great work of literature' and source of 'countless works of literature, art and music' or of assisting students to acquire 'greater insight into the many historical events recorded in the Bible' or of affording students greater insight into the 'many social customs upon which the Bible has had a significant influence,' all as proposed in the Curriculum Guide, no constitutional barrier would arise to such classroom instruction.[173]

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[172]Wiley v. Franklin, 474 . Supp. 525 (1979).

[173]Ibid., p. 531.

Teaching of Evolution

Constitutionality of teaching evolution was decided in Epperson v. Arkansas,[174] when a young teacher sought to have a state statute prohibiting teaching of evolution voided.

The Arkansas Supreme Court had reversed the chancery court decision that the statute was in violation of the First Amendment. This court, with two sentences written in the margin of the appeal instrument, reversed the chancery court and declared the statute to be legal.

Arkansas law insisted that for a teacher in any state-supported school to teach the theory or doctrine that mankind evolved from a lower type of animal was illegal. The law further decreed that the adoption of any textbook which explained the origin of man in Darwinian style was illegal. Anyone who violated the textbook rule was subject to dismissal.

The plaintiff, Miss Epperson, was faced with the dilemma of using a new textbook which contained a chapter on evolution that was supposed to be taught. If Miss Epperson taught the chapter, dismissal would be the result. The plaintiff chose instead to challenge the statute in court.

Although the statute was never enforced, counsel for the State of Arkansas said in court that merely to teach the existence of the theory of evolution was tantamount to

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[174]Epperson v. Arkansas, 393, U.S. 97, 39 S. Ct. 266 (1968).

disobeying the statute.[175] Justice Abe Fortas, in writing the opinion of the Supreme Court, said:

> Arkansas law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth Amendment to the Constitution.[176]

The Houston School District was the subject of action to enjoin schools from teaching the theory of evolution. No statute existed ordering the teaching of evolution; the curriculum of Houston district schools included the theory of evolution, which teachers were free to teach without interference, or they might explore any other theory.

In Wright v. Houston,[177] parents of students in Houston schools attempted to cause schools to cease teaching any theory of origin except the Biblical explanation. The United States District Court, Southern District of Texas, ruled that to teach only the theory of evolution as an explanation of the origin of man did not constitute an establishment of religion. In addition, the court stated that "teachers of science in the public schools should not be expected to avoid the discussion of every scientific issue on which some religion claims expertise."

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[175]Ibid., pp. 102-3.

[176]Ibid., p. 109.

[177]Wright v. Houston Independent School District, 486 F. 2d 137 (U.S.C.A. 5th Cir. 1973).

[178]Ibid., p. 1211.

The Supreme Court of Tennessee was called upon in 1975 in Steele v. Waters[179] to decide on teaching the theory of evolution in public schools, and this body struck down as unconstitutional a state statute which required textbooks to state the theory as non-factual.

The Tennessee Supreme Court in stating that textbooks should also give equal emphasis to other theories, including, but not limited to, the account in the Bible, also stated that any requirement that religious concepts of creation held by the citizens of Tennessee be taught to the exclusion of others was unconstitutional.

Courts have consistently held that teaching the theory of evolution is scientific inquiry, and prohibition by law or policy is unconstitutional under the establishment clause of the First Amendment.

The most famous case dealing with teaching evolution is Scopes v. State.[180] John T. Scopes was convicted for teaching in the public schools the theory of evolution as set forth by Darwin, which is counter to the Biblical version of divine creation.

Scopes was charged with violation of Tennessee Statute C 27 of The Acts of 1928, or the Tennessee Anti-Evolution Act, in that Scopes did teach a theory of the origin of man that

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[179]Steele v. Waters, 527, S.W. 2d 72 (Tenn. 1975).

[180]Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

denied the religious version. Scopes was found guilty and fined one hundred dollars.[181]

Scopes and a battery of legal giants appealed to the Tennessee Supreme Court. The Supreme Court reversed the fine and found that a nolle prosequi should be entered. The Tennessee court found that the act was legal in that the law was limited only to the prohibition of teaching any theory of evolution which denied the divine creation of man. Scopes was not charged under the First Amendment, but for breaking a state statute.

Celebration of Religious Holidays

Action against the Sioux Falls School District in South Dakota alleged that the board's policy concerning religious holidays was in violation of the First Amendment's establishment of religion clause.

In Florey v. Sioux Falls,[182] parents of a kindergarten child sought to enjoin the Sioux Falls School Board from implementing a policy allowing the schools to celebrate religious holidays. The board had just one year previously reassessed policy and developed new rules to govern church-state relations.

Kindergarten classes had memorized a religious program which included a quiz about the baby Jesus and his

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[181] Ibid.

[182] Florey v. Sioux Falls School District, 464 F. Supp. 911 (1979).

rude beginnings in a stall in Bethlehem. A complaint was made, as others had been made in the past, about Christmas programs being more religious than secular.

Upon receiving the complaint, the superintendent of schools set up a committee to develop a policy statement concerning the board's church-state relationship. The new policy was adopted early in December of 1978. The complaint was filed late in November, 1978, asking for an injunction to stop the practice of patently religious programs in public schools.

That injunction was denied and the case was tried on its merits. The United States District Court, District of South Dakota, found that the kindergarten program was in violation of the establishment clause of the First Amendment. The court further ruled that the new policy forbade celebration of holidays that were only religious, but allowed the celebration of holidays that were secular as well as religious. Proper administration of the new policy was to be the key to the constitutionality of holiday celebrations.

The district court noted that an enormous amount of animated and forceful public response had been expressed against the plaintiff, apparently due to public feeling that schools should be allowed to promote the Christian religion. The district court noted that the First Amendment had been written to withstand just such an attack as public sentiment had mounted.[183]

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[183]Ibid., p. 914.

Bible Clubs

Permitting voluntary student Bible-study clubs to meet and conduct activities on public high school campuses during the school day would have the "primary effect" of advancing religion in violation of the First Amendment establishment clause, in light of the fact that under school district rules and regulations governing student clubs, the club would become an entity "sponsored by the school," entitled to use the school name in connection with its activities, and would implicitly become an integral part of the school's extracurricular program conducted during the school day when students were compelled by law to attend school.[184]

The school district of Huntington Beach had a regulation that enabled clubs to use school facilities only after the club had been recognized by school officials. The district did not recognize any religious clubs; therefore, no Bible club could meet on the school campus during the school day.

The school district, upon request, passed an interim policy resolution permitting Bible clubs to be recognized by school officials. Just as soon as legal counsel could be obtained, it was determined that the district could not constitutionally allow Bible clubs to meet at school. The district immediately rescinded its resolution.

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[184]Johnson v. Huntington Beach U. High School District, 68 Ca. App. 3dl, App. 137 Cal. Rptr. 43 (1977)

When one hundred students petitioned for recognition of a Bible club and were refused, the petitioners sued the board for injunctive and declaratory relief to establish a Bible club. Students charged that there was no federal or state constitutional proscription against school authorities' permitting the plaintiffs' Bible club to meet and conduct activities on campus during the school day. Students charged that other clubs met at school on school time and claimed that to disallow the club violated First Amendment religious freedom rights.

In applying the tripartite test to the charge by the students, the California Fourth District Court of Appeals determined that the primary purpose of their club was religious in nature. (1) The activity must have a secular legislative purpose; (2) the primary effect must neither advance nor inhibit religion; and (3) the activity must not foster excessive entanglement with religion. The mission of the club was "to enable those participating to know God better so that they will be better persons."[185] The mission of the club certainly did not pass muster on the first prong of the test.

Permitting the Bible club to meet and operate at school during the school day violated the establishment clause of the First Amendment. If the school sanctioned the club

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[185]Ibid., p. 49.

and furnished it a place to meet while children legally compelled to attend school were present, the power of the school and state was placed behind the Bible club. Consequently, the state would be compelling children to attend a school that offered religious instruction as part of its integral curriculum. Thus, the club does not pass the second part of the test.[186]

The fact that a faculty sponsor is a requirement for any club recognized by the school caused the challenge to fail the third condition of the test. The work of the sponsor and the work of the school treasurer auditing club accounts would constitute excessive entanglement of the state with religion.[187]

In summing up the case, the court of appeals stated:

> 13 This is not a case where plaintiffs are denied access to all public forum for religious expression; they are merely being denied use of school property during the school day for religious purposes. This deprivation in no way infringes upon their religious rights when practiced outside the confines of the school. Plaintiffs are only being denied religious expression in a manner involving state participation. Each club member remains free to believe and express his religious beliefs on an individual basis and the students' Bible study club is free to meet as such off campus outside of school hours. There is no infringement of plaintiffs' free exercise rights except to the limited extent made necessary by the Establishment Clause of the state and federal Constitutions.[18]

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[18]For cases in other jurisdictions holding that the Free Exercise Clause is not violated by denying religious

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[186]Ibid., p. 50.

[187]Ibid., pp. 52-53.

> adherents use of school property, see: Stein v. Oshinsky (2d Cir. 1965) 348 F.2d 999, 1001-1002, cert. den. 382 U.S. 957, 86 S.Ct. 435, 15 L.Ed.2d 361; Hunt v. Board of Education of County of Kanawha (S.D.W.Va. 1971) supra, 321 F.Supp. 1263, 1265-1266.[188]

On the other side of the continent, in Buffalo, in 1978, a group of high school students petitioned the city board of education for permission to form Bible clubs in public high schools. In Trietly v. Board of Education of City of Buffalo,[189] a pastor from a youth center, along with others, petitioned in a letter to the superintendent of Buffalo schools that the petitioners be allowed to institute Bible clubs in public schools. Clubs were to have guidelines that provided that:

> . . . each club must choose as officers, a Bible reading chairman, a recording secretary and a memory verse chairman; that club membership must be voluntary and each club and meeting must be led by students, with no meeting dominated by any one person; that the clubs must have at least one teacher volunteer as an advisor who would attend and supervise meetings; that each club must be interdenominational; that meetings must be conducted before or after the official school class day for no longer than 15 minutes, in a place which would not interfere with the conduct of normal school activities; that the meetings would not be for socializing or the discussion of churches or church doctrines; and that each club 'must be an asset to the school, providing moral and spiritual assistance to the students.'[190]

The superintendent, after consulting the school board attorney, denied permission for the clubs to organize.

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[188]Ibid., p. 52-53.

[189]Trietly v. Board of Education of City of Buffalo, 409 N.Y.S. 2d 912 (1978).

[190]Ibid., p. 914.

The school board approved the action of the superintendent and also denied the group permission to organize Bible clubs in district schools.

Petitioners brought suit to force school officials to give permission. The New York Special Term Court denied the petition, and the group appealed the decision to the court of appeals.

The New York Supreme Court, Appellate Division, applying the tripartite test, found the proposed Bible clubs had a stated purpose of being religious in nature. While there might be some secular benefits, the primary thrust of the clubs was advancement of religious philosophy contained in the Bible. The fact that the club was to meet at school and have a teacher for a sponsor caused excessive state entanglement with religion.[191] The proposed Bible clubs failed on all three parts of the test, and the petitition was rejected as judgment of the special term court was upheld.

Bible clubs that espouse advancement of religion fall into the same category as religious instruction. These clubs can be legal if the student is released from school to go to a place away from school for instruction or for meetings.

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[191]Ibid., p. 916.

Use of Electronic Media Aids

Harold and Judy Davis were parents of two elementary school children in New Hampshire, and members of the Apostolic Lutheran Church. The Davis family challenged the Jaffrey-Rindge School Board on several religious freedom counts.[192]

The Davises' religious dogma declared it sinful to watch movies, watch television, view audio-visual projections, listen to the radio, engage in play acting, sing or dance to worldly music, study evolution, study humanist philosophy, participate in sexually oriented teaching programs, openly discuss personal and family matters, and receive advice from secular guidance counselors.

Complaint arose when a Davis child left school without permission because of being required to remain in the classroom while a movie was being shown. Mr. Davis removed his children from school. Under New Hampshire school attendance law, children and parents were vulnerable to prosecution for not enrolling the children in school.

The issue at hand emphasized that interests of the children were not co-terminous with those of parents. Children have conflicting interests, and, as children, they have constitutionally protected rights.[193] As Justice William O. Douglas said in Wisconsin v. Yoder:

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[192]Davis v. Page, 385, F. Supp. 395 (1974).

[193]Ibid., p. 398.

> If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. . . .[194]

The state's compelling interest in providing all children an education was in conflict with parents' rights to rear children in the family's image. Such a balance is precarious, but children's rights must be preserved. In the complaint about audio-visual and other electronic aids, the court found in favor of the state.

The Davis children were required to attend classes using audio-visual and other electronic media aids in an academic setting, but the children were allowed to be excused from classes using the electronic media aids for entertainment. This limited exception of allowing the children to be excused from non-education activities using electronic aids does not constitute excessive entanglement of government in religion, nor does it compromise the establishment clause of the First Amendment.[195]

The health course in question was a new course that had not yet been included in the curriculum; the course was in response to a state statute providing that each school

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[194]Wisconsin v. Yoder, 406 U.S. 245, 246, 92 S. Ct. 1526 L.Ed. 2d 15 (1972).

[195]Davis v. Page, p. 402.

board had the duty to teach about the effect of drugs, alcohol, and venereal disease.

An outline of the course covered the following areas: family relationships; mental and physical health; personal hygiene; nutrition, hazards of smoking; dangers and benefits of drugs; and environmental concern.[196] In a letter to the Jaffrey-Rindge Board of Education, Mr. Davis stated these concerns:

> (1) The schools were contributing to the Women's Liberation Movement by requiring boys to take home economics and girls to take shop, thereby fostering homosexuality.
>
> (2) The schools were employing guidance counselors who were acting as psychiatrists for the children.
>
> (3) The schools were using social studies books that were not American type books. They did not depict those events that made America great.
>
> (4) The importance of the Declaration of Independence had dwindled to a paper signed for the benefit of early Americans.
>
> (5) Socialist-minded educators had obliterated the constitutional rights of free people to govern themselves.
>
> (6) The texts placed greater emphasis on the communist-dominated, godless organizations, the United Nations.
>
> (7) The schools were letting the children make up their own minds rather than be taught the American point of view.
>
> (8) The N.E.A. had stated in a recent issue of their teachers' magazine that their purpose was to create a new social work order.
>
> (9) The schools were showing pornographic films and showing obscene paintings in contradiction to state pornographic laws.
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> (10) The superintendent had upheld the art of teaching of a teacher who was teaching obscene painting.

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[196] Ibid.

(11) The school board showed no inclination that it was willing to change its policy.

Because of item 11 in the letter, Mr. Davis had removed his children from the school system.[197] The United States District Court, District of New Hampshire, determined that the state's compelling interest in teaching the health course outweighed parental concern, and found parental concern to be more a philosophical problem than a problem of religious freedom.

A significant part of the complaint was the teaching or playing of worldly music; however, the district court could not elicit a precise definition of "worldly" from the Davises. It was determined by the court that the music classes and the music played at school did not burden the constitutional freedoms of the students. The district court found that the differences between what the parents desired for music and what the school offered did not constitute an acute conflict of religious freedom.

In summing up the interest of the state in public schools, the district court quoted:

> 'The power of each parent to decide the question what studies the scholars should pursue, or what exercises they should perform, would be a power of disorganizing the school, and practically rendering it substantially useless. However judicious it may be to consult the wishes of parents, the disintegrating principle of parental authority to prevent all

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[197] Ibid., pp. 403-4.

> classification and destroy all system in any school, public or private, is unknown to the law.'[198]

Mr, Davis in his complaint covered many of the things that go on in most schools today. His extreme action in removing his children from school, and the emotion he expressed in his letter left little room for accommodation. Audiovisual aids, health classes, and music seem innocuous until one feels the First Amendment freedom of religion right has been abridged.

Religious Symbols

In Lawrence v. Buchmueller[199] a group of parents brought action against the school board for allowing a crèche to be built on school property during a portion of school Christmas holidays. Parents insisted the board of education had no authority to allow a symbol of deity or semi-deity to be built on school property.

A group of parents in Hartsdale, New York, had obtained permission from the school board to erect the crèche on school grounds at no expense to the school district. The crèche was erected during the holidays when no school was in session.

The Supreme Court of New York, Westchester County, in summation insisted that:

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[198]Kidder v. Chellis, 59 N.H, 473, 476 (1879).

[199]Lawrence v. Buchmueller, 243 N.Y.S. 2d 87 (1963).

> While the plaintiffs' ultimate objective may be to remove from the public schools anything symbolic of God and religion, the Court must confine its decision to the matter at issue, namely, whether the Hartsdale School Board's resolution permitting a group of citizens to erect upon a small portion of spacious school grounds a crèche or Nativity scene during a period of the Christmas Holidays, when school was not in session and without any involvement of the school personnel or school district's expense, constitutes a violation of the First Amendment. The First Amendment provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. Although the plaintiffs' complaint alleges that the action of the School Board interferes with the free enjoyment of their religious beliefs and constitutes an establishment of religion, for the purposes of this motion seeking summary judgment, they have abandoned all claim that the free exercise of their religious beliefs has been interfered with. And indeed, they must take such position for the papers in support of their motion fail to disclose any such interference. Since school was in recess the compulsory attendance provisions of the Education Law pleaded in the complaint become irrelevant. There is no proof that plaintiffs or their children were compelled to look upon the crèche and there is no statement or averment that any of the plaintiffs or any of their children, even voluntarily, viewed the same. There is absolutely no indication in the moving papers as to what are the religious or nonreligious beliefs of the plaintiffs and their children. The only issue of law or fact then is whether the establishment clause of the First Amendment has been violated.[200]

The complaint was filed by members of the same faith as the group had which erected the crèche. The plaintiffs had no animosity toward the religion depicted by the symbol; they only objected to the fact that the crèche was erected on public land. In the complaint the plaintiffs stated their position.

> 'Let there be no mistake, either, about the position of those plaintiffs who follow the Christian theology;

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[200] Ibid., p. 89.

> objection is made therein, not on the basis of any religious antagonism with the crèche as a symbol--but, rather precisely because it is symbolic of a basic tenet of the Church and, as such, has no place in a secular atmosphere . . . . We contend most vigorously that one may follow the Christian religion and object most emphatically that his own constitutional rights and liberties are infringed by the display of a religious symbol upon public property.'[201]

In the judgment of the New York court, erection of the crèche did not actively involve any government agency in a religious exercise. The positioning of the crèche on school property was merely a passive accommodation of religion by the schools. The crèche was allowed to stand and was declared to be within the First Amendment's establishment of religion clause.[202]

In Florey v. Sioux Falls[203] the United States District Court, in a complaint concerning holiday assemblies which contained religious art and other objects of a religious nature, allowed the schools to display the religious symbols in a way that was acceptable. Symbols were to be displayed temporarily and in an effort to show examples of religious and cultural heritage of the holiday. The purpose of the display must be entirely educational and not have the effect of promoting religion.

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[201] Ibid., p. 90.

[202] Ibid.

[203] Florey v. Sioux Falls School District, 464 F. Supp. 911 (1979).

The Sioux Falls School Board included within its board rules and regulations a certain rule concerning the display of such symbols:

> 4. The use of religious symbols such as a cross, menorah, crescent, Star of David, crèche, symbols of Native American religions or other symbols that are a part of a religious holiday is permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature. Among these holidays are included Christmas, Easter, Passover, Hanukkah, St. Valentine's Day, St. Patrick's Day, Thanksgiving and Halloween.[204]

Accommodation of religious symbols on display is related to proper administration and adherence to the policy that the display must be educational in nature.

Patriotic Programs

The pledge of allegiance to the flag has been challenged many times in state courts, federal courts, and the United States Supreme Court. The act of requiring a child to pledge allegiance to the flag has been declared unconstitutional under the freedom of religion guarantee of the First Amendment.[205]

In 1943 the United States Supreme Court upheld the District Court of the Southern District of West Virginia

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[204] Ibid., p. 918.

[205] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943).

in its injunction against the enforcement of a school regulation requiring students to salute the American flag.[206]

Challengers in this instance were members of Jehovah's Witnesses. The religious code of Jehovah's Witnesses is that the law of God is superior to laws enacted by temporal government. Failure to conform to flag salutation was punishable by expulsion with no readmission until compliance with the rule. Parents of the children were subject to a fine and incarceration.

A Georgia state court held in Leoles v. Landers[207] that it was lawful and reasonable to require children to participate in patriotic exercises. The state court further stated that the requirement did not violate the right secured by the Constitution and that the salute to the flag is by no stretch of the imagination a religious rite.[208]

In a New Jersey state court decision, Hering v. State Board of Education,[209] the state court defined the expression required of children as a pledge rather than an oath.

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[206]Ibid.

[207]Leoles v. Landers, 302, U.S. 656, 82 L.Ed. 507, 58 S. Ct. 364 (1938).

[208]Ibid., p. 655.

[209]Hering v. State Board of Education, 117 N.J.L.A. 55 189, A 629 (1937).

Appeal of both of these cases was denied by the United States Supreme Court. This may have set the stage for the ruling of a California state court in Gabrielli v. Knickerbocker.[210] The state court in this case upheld a school board's rule requiring pupils to salute the flag and pledge allegiance thereto. A portion of the decision read that the training of school children in good citizenship, patriotism, and loyalty to the state and nation is regarded by the law of the state as a means of protecting public welfare and is in keeping with the state school code.[211]

In Florida in 1939, a state court noted that:

> . . . . Saluting the flag connotes a love and patriotic devotion to country while religious practice connotes a way of life, the brand of one's theology or his relation to God . . . .[212]

The Florida court upheld the school board's rule suspending from school anyone refusing to comply and further stated:

> . . . . To symbolize the flag as a graven image and ascribe to the act of saluting it a species of idolatry is too vague and far-fetched to be even tinctured with the flavor of reason.[213]

In Minersville v. Gobitis[214] plaintiffs were granted an injunction to keep the school board from

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[210] Gabrielli v. Knickerbocker, Cal, 2d 82 391 (1938).

[211] Ibid.

[212] Bleich v. Board of Public Instruction, Fla., 190 So. 815 (1939).

[213] Ibid.

[214] Minersville v. Gobitis, 108F 2d 683 (1940).

enforcing a compulsory flag salute. The United States District Court ruling was upheld by the Circuit Court of Appeals and brought before the Supreme Court on a writ of certiorari. The United States Supreme Court spoke of a lack of wisdom in attempting to create patriots by fiat, declaring that patriotism is an imponderable that cannot be molded by legislative decree. The Supreme Court was eloquent in observing the lack of thought in expelling children from school for refusing to salute the flag.

The United States Supreme Court heard the Gobitis case with great trepidation. Justice Felix Frankfurter, expressing the gravity of the decision, said:

> We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment.[215]

> The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.[216]

Justice Frankfurter quoted Lincoln in his memorable dilemma, "Must a government of necessity be too strong for the liberties of the people, or too weak to maintain its existence?"[217] The decision of the Third Circuit Court

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[215]Ibid., pp. 592-93.

[216]Ibid., pp. 594-95.

[217]Ibid., p. 596.

of Appeals upholding the injunction against the Minersville School District was reversed.

Justice Harlan F. Stone, in the lone dissenting role, was eloquent in dissent:

> The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.
>
> With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection.[218]

Justice Stone in dissent suggested accommodation between church and state; however, courts continued to rule in favor of compelling students to salute the flag.

In State v. Davis parents were charged with contributing to the delinquency of minor children by directing them to refuse to salute the flag. Citing Gobitis, an Arizona state court stated that any attempt to direct or compel a child to refuse to follow a national custom in this respect in the court's opinion does contribute to the

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[218]Ibid., p. 606.

delinquency of the child, and may properly be made a crime by the state without violating the First Amendment.[219]

In State v. Smith[220] a Kansas state court ruled as valid a statute authorizing the state superintendent of public instruction to expel any child who refused to salute the flag.

In 1939-40 several cases that dealt with students being expelled from school for not saluting the flag made the children vulnerable to statutes that allowed children who had been expelled from school to be sent to training schools. It was decided in each case that a student could not be convicted of delinquency because of refusal to pledge allegiance to and salute the flag where the refusal was attributed to sincere religious beliefs.

The decisions of the courts with their explanatory notes had paved the way with each succeeding challenge for a flag-salute regulation. In West Virginia State Board of Education v. Barnette,[221] the United States Supreme Court reversed the Gobitis decision and in so doing declared that requiring children to salute the flag and pledge allegiance to the flag as a prerequisite to attending school was in violation of the students' First Amendment rights.

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[219]State v. Davis, Arizona 110 P. 2d 808 (1942).

[220]State v. Smith, Kansas 141, ALR 1030 (1942).

[221]West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943).

Justice Jackson, in writing the opinion of the court, said:

> . . . . It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.[222]
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[223]

Justice Frankfurter was as eloquent in dissent in Barnette as in the majority in Gobitis. Using the same arguments used before in Gobitis, Mr. Frankfurter was alone in dissent.

Twenty years after Barnette, in Sheldon v. Fannin,[224] the United States District Court in Prescott, Arizona, granted an injunction barring a suspension for refusing to stand for the singing of "The Star Spangled Banner." The plaintiffs in Sheldon v. Fannin were children who were members of Jehovah's Witnesses. One of the tenets of the Jehovah's Witnesses religion stems from refusal of three

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[222] Ibid., pp. 633-34.

[223] Ibid., p. 642.

[224] Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963).

Hebrew children--Shadrach, Meshach, and Abednego, to bow down to the sound of musical instruments playing patriotic and religious music throughout the land, on the order of King Nebuchadnezzar of Babylon.[225] While on suspension, the children were answerable to Arizona laws dealing with truancy and delinquency. Parents were in jeopardy of prosecution for violation of Arizona school laws.

Conduct of the students was not unruly or disruptive, nor was there any indication that the actions would disrupt school discipline. Jehovah's Witnesses were willing to stand for, but not to participate in, saluting the flag. Standing was considered sincere as an expression of appreciation for a flag representing religious freedom.

The district court saw no paradox in standing for one expression of patriotism but refusing to stand for the national anthem. The suspension for insubordination for not standing for the national anthem was declared a violation of First Amendment rights respecting free exercise.

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[225]Daniel 3:19-28.

CHAPTER IV

AN ANALYSIS OF SIGNIFICANT DECISIONS

Introduction

This chapter contains an in-depth analysis of significant court decisions in ten of the twelve categories set forth in chapter 1. An overview is presented in each category. The facts, salient discussions, and decisions are given for each case. The categories and cases are listed below:

1. Bible Reading in School

   Abington School District v. Schempp (Pa.), 374 U.S. 203, 83 S. Ct. 1560 (1963).

   Johns v. Allen, 231 F. Supp. 852 (D. Del. 1964).

   Goodwin v. Cross County School District No. 7, 394 F. Supp. 417 (Ed. Ark. 1973).

2. Prayer in School

   Engel v. Vitale (N.Y.), 370 U.S. 421, 82 S. Ct. 1261 (1962)

   Stein v. Oshinsky, 224 F. Supp. 757 (1963).

   Stein v. Oshinsky, 348 F. 2d 999 (1965).

   DeSpain v. DeKalb Community School Dist. (Ill.), 384 F 2d 836 (U.S.C.A. Seventh Cir. 1968).

   Gaines v. Anderson, 421 F. Supp. 337 (1976).

3. Released Time from Public Schools for Religious Instruction

   McCollum v. Board of Education (Ill.), 333 U.S. 203, 68 S. Ct. 461 (1948).

   Zorach v. Clauson (N.Y.), 343 U.S. 306, 72 S. Ct. 679 (1952).

Vaughn v. Reed, 313 F. Supp. 421 (1970).

Smith v. Smith, 523 F. 2d 121 (1975).

4. Patriotic Instruction

Minersville School District v. Gobitis (Pa.), 310 U.S. 586, 60 S. Ct. 1010 (1940).

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943).

Sheldon v. Fannin, 221 F. Supp. 766 (1963).

5. Sex Education in Public Schools

Cornwell v. State Board of Education, 314 F. Supp. 340 (1969).

Medeiros v. Kiyosaki, 478 P. 2d 314 (1970).

Hopkins v. Hamden Board of Education 289 A. 2d 914 (1971).

6. Distribution of Religious Literature

Tudor v. Board of Education, 14 N.J. 31, 100 A. 2d 857 (1954).

7. Teaching of Evolution

Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266 (1968).

Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

8. Celebration of Religious Holidays

Florey v. Sioux Falls Sch. Dist. 49-5, 464 F. Supp. 911 (1979).

9. Bible Clubs

Johnson v. Huntington Beach U. High Sch. Dist., 68 Cal. App. 3d 1, App., 137 Cal. Rptr. 43 (1977).

Trietley v. Board of Ed. of City of Buffalo, 65 A.D. 2d 1, 409 N.Y.S. 2d 912 (1978).

10. Religious Courses in the School Setting

Wiley v. Franklin, 474 F. Supp. 525 (1979).

Bible Reading in Public Schools

Reading Bible verses and reciting some sort of prayer are the most prevalently challenged religious exercises in public education. Overt reading of Bible verses and prayer sessions at the beginning of the school day are more visible than the subliminal aspect of religion in music, drama, clubs, chapel programs, or the celebration of religious holidays.

The Schempp case is the precedent upon which subsequent court rulings concerning the reading of Bible verses in school are based.

Abington School District v. Schempp (Pa.) 374 U.S. 203, 83 S. Ct. 1560 (1963).

Facts

Roger and Donna Schempp were students of public schools in the Abington, Pa., school district. Ellory Schempp, an older brother, had graduated from the high school in the township. The Schempp family--father Edward, mother Sidney, and the three children--were members of the Unitarian Church and attended regularly.

On each school day at Abington High School between 8:15 and 8:30, students were in homeroom for roll call and announcements. At this time each day, students from the radio and television workshop class at school conducted opening exercises over the public communication system. Exercises consisted of a student's reading ten verses

from the Bible. Following the Bible reading, all the children stood to recite the Lord's Prayer in unison with the voice over the public communication system.

These exercises were followed by a flag salute and any pertinent announcement from the administration. All teachers in those schools without public address systems conducted the opening exercise personally. Leaders of the exercises were free to choose from which Bible the selection would come, as well as the selection from that Bible.

There were no explanatory comments, no questions asked, none solicited, no interpretations made, nor any editorializing done during the exercise. Parents and students were advised that any student could absent himself from class. Students were advised that if they wanted to remain in the class they would not be compelled to participate in the exercise. Participation in the opening exercise was voluntary.

> These opening exercises were in accord with Pennsylvania Statute Number 15-1516 that required: 'At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of the student's parent or guardian.'[226]

Schempp, his wife, and three children brought suit to enjoin the enforcement of the statute. The Schempps claimed that the Fourteenth Amendment right had been

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[226]Abington School District v. Schempp (Pa.), 374 U.S. 203, 83 S. Ct. 1560 (1963).

violated and would continue to be unless the statute was declared unconstitutional as violating First Amendment rights of citizens.

The three-judge District Court for the Eastern District of Pennsylvania agreed with the contention of Schempp that the practice violated the First Amendment, and enjoined the Abington School District from enforcing the state statute in the public schools.

The district court determined that:

(1) the practice did possess a devotional and religious character and constituted a religious observance;

(2) the religious nature of the exercise was made more apparent by following the Bible reading immediately with a prayer;

(3) the fact that any of the pupils could be excused did not mitigate the obligatory nature of the exercise;

(4) each child was compelled by law to attend school; and,

(5) the state required by law that a religious exercise be conducted each day in the public schools.[227]

The school district appealed the decision to the United States Supreme Court, which, by an eight-to-one decision, upheld the district court.

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[227]Ibid., pp. 210-11.

Discussion

Justice Tom Clark delivered the opinion of the court. Justice Clark drew heavily upon Engel[228] and upon Everson[229] and Zorach[230] for writing the opinion of the court. Justice Clark pointed out that the court had decided in Cantwell v. Connecticut[231] that the Fourteenth Amendment embraced the freedoms guaranteed in the First Amendment.

Justice Clark also pointed out that First Amendment separation of state from any form of religious entanglement was specifically first because it was foremost on the minds of our forefathers.

> The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been

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[228]Engel v. Vitale (N.Y.), 370 U.S. 421, 82 S. Ct. 1261 (1962).

[229]Everson v. Board of Education of Ewing Twp. (N.J.), 330 U.S. 1, 91 LEd. 67 S. Ct. 504 (1947).

[230]Zorach v. Clauson (N.Y.), 343 U.S. 306, 725 S.Ct. 679 (1952).

[231]Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

> directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof.[232]

To withstand the stricture of the establishment clause, there must be a secular purpose to legislation and a primary effect that neither advances nor inhibits religion. The free exercise clause withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion.

In Schempp the state had required the reading of the Bible and recitation of the Lord's Prayer each day. The United States Supreme Court found that requiring the religious exercise was in violation of the establishment clause of the First Amendment.

In concurring with the court's opinion, Justice William Brennan, quoting John Locke, said:

> When John Locke ventured in 1689, 'I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other,' he anticipated the necessity which would be thought by the Framers to require adoption of a First Amendment, but not the difficulty that would be experienced in defining those 'just bounds.' The fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular

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[232]Abington v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963).

> sect or religion. Equally the Constitution enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice. The constitutional mandate expresses a deliberate and considered judgment that such matters are to be left to the conscience of the citizen, and declares as a basic postulate of the relation between the citizen and his government that 'the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . . '[233]

Justice Brennan went on to say that framers of the Constitution had foremost in mind the prevention of establishing a national church. The framers' concern did not stop with the prevention of a national church, however; they wanted to be sure the power of the federal government would not be exerted in serving any purely religious end.

> The First Amendment declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .' It is, I think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of 'separation of church and state,' which can be mechanically applied in every case to delineate the required boundaries between government and religion. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways. Secondly, the fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.
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> A single obvious example should suffice to make the point. Spending federal funds to employ chaplains for the armed forces might be said to violate the

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[233] Ibid., p. 231.

> Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion. And such examples could readily be multiplied. The short of the matter is simply that the two relevant clauses of the First Amendment cannot accurately be reflected in a sterile metaphor which by its very nature may distort rather than illumine the problems involved in a particular case.[234]

Justice Potter Stewart, dissenting, felt that the Constitution protects the freedom of each to believe or disbelieve, to worship or not worship, to pray or keep silent according to individual conscience, without restraint or coercion by government. Justice Stewart insisted that school boards could adequately administer a free program of religious exercises without infringing upon anyone's freedom.

Johns v. Allen, 231 F. Supp. 852 (D. Del. 1964).

Facts

The plaintiffs were parents of children who attended the public schools in Delaware, whose compulsory attendance law required children to be in attendance during regular school hours.

Delaware Statutes Numbers 4101 and 4102 were challenged as violating the First Amendment religious freedom rights of Geoffrey, Valerie, and Erica Johns. Mr. and Mrs. Johns asked that the Board of Education be enjoined

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[234]Ibid., pp. 308-9.

from compliance with Statutes 4101 and 4102. The statutes are as follows:

> 4101. Religious services or exercises.
> No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the monies appropriated for the support of public schools.
>
> 4102. Reading of the Bible.
> In each public school classroom in the State, and in the presence of the scholars therein assembled, at least five verses from the Holy Bible shall be read at the opening of such school, upon each school day, by the teacher in charge thereof. Whenever there is a general assemblage of school classes at the opening of such school day, then instead of such classroom reading, the principal or teacher in charge of such assemblage shall read at least five verses from the Holy Bible in the presence of the assembled scholars as directed in this section.
>
> 4103. Penalties for violation of 4101 and 4102.
> Any teacher or principal who fails to comply with the provisions of sections 4101 and 4102 of this title shall be subject to a penalty of $25 for the first violation, and, for a second violation, his or her certificate shall be revoked by the proper authorities.[235]

The plaintiffs were Protestant but objected to the reading of the King James Version of the Bible and reading of the Lord's Prayer in unison by the pupils. The practice had been in existence for many years in public schools of Delaware and apparently would continue unless enjoined. Testimony established the exercises to be of devotional or religious nature and not secular educational experience.

> The teachers who testified in this court made it clear that both teachers and pupils assumed a reverential attitude when the reading of the Bible took place

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[235]Johns v. Allen, 231 F. Supp. 852 (D. Del, 1964), p. 854.

> and that they continued the same reverential attitude when the Lord's Prayer was recited in unison. We cannot and do not entertain the slightest doubt, in view of the manner in which the Bible was read and the Lord's Prayer was recited in the public schools of Delaware, including that attended by the infant plaintiffs, that these daily proceedings were devotional and religious in nature. The demeanor of certain teachers on the witness stand in this court made it obvious that they regarded the reading of the Bible and the reciting of the Lord's Prayer as a religious exercise or service carried on by them and their pupils in a devout and reverent manner.[236]

Decision

The United States District Court issued the injunction stopping the daily religious exercises and declaring the practice unconstitutional. The court succinctly stated the finding of fact as follows:

> 4. At the school attended by the minor plaintiffs there is read to the children at the opening of each school day at least five verses of the Bible selected by the teacher in charge of the class from a King James Version of the Bible. . . .
>
> 5. The teacher selects the verses to be read from the New Testament and the Old Testament. . . .
>
> 6. The reading of the Bible each day is followed by a recitation in unison by the children of the Lord's Prayer which the teacher leads. . . .
>
> 7. The attendance of each student at the ceremony of the Bible reading is compulsory. . . .
>
> 8. The students in each class assume a reverential attitude when the reading of the Bible takes place; they continue the same reverential attitude when the Lord's Prayer is recited in unison. . . .
>
> 9. The practice of the daily reading of at least five verses of the Bible in the East Dover Elementary School constitutes religious instruction and the promotion of religiousness. . . .

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[236]Ibid., p. 856.

> 10. The practice of the daily reading of at least five verses of the Bible in the East Dover Elementary School is a religious ceremony. . . .
>
> 11. The practice of the daily recitation of the Lord's Prayer in the East Dover Elementary School is a religious ceremony. . . .[237]

Goodwin v. Cross County School District No. 7, 394 F. Supp. 417 (E.D. Ark. 1973)

Facts

Plaintiffs are Dorothy Goodwin, mother of plaintiffs Bryan, Kimberly, and Lena Goodwin, who were all students in the Cross County School District. The plaintiffs claimed that the First Amendment religious freedom liberties had been abridged by action of the school board. The Goodwins claimed that:

> (1) Ministers of religion from the community churches are periodically invited to the District schools to address various classes within the schoolroom and, on occasions, the minister requests the children to indicate, as a part of the presentation, if they attend church and, also, to indicate if they were 'saved,'
>
> (2) In some instances the teacher requires the children to commit to memory a prayer that they recite each day before lunch, and in some cases the children read from the Bible each day as part of the opening routine, and
>
> (3) The Gideon Society, a sectarian organization, is regularly invited into the schools for the purpose of distributing a sectarian religious book, generally referred to as the Gideon Bible and representatives of the organization are permitted to give illustrated talks to the children on their Bible and its world-wide distribution.
>
> As a part of the defendant School District's program, each school day is commenced by a member of the Student

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[237] Ibid., pp. 859-60.

> Council reading the Lord's Prayer and a selected Bible verse over the school's intercom system. In some instances, the teacher leads the class in prayer.
>
> The plaintiffs further contend that the School Board, through its agents and employees, authorize and condone sectarian religious baccalaureate programs on the school premises in conjunction with commencement exercises.[238]

The four basic issues for the United States District Court's determination were:

> (1) The validity of Bible reading and reciting of the Lord's Prayer at the Cross County High School,
>
> (2) The baccalaureate services in connection with the graduation exercises at the Cross County High School,
>
> (3) The distribution of Gideon Bibles at Cherry Valley Elementary School, and
>
> (4) School Board Policies on religious practices.[239]

Discussion

The school board acceded to the charges that the Bible reading was done each day by a member of the student council. For about two minutes each morning after the day's announcements, Bible verses were read and the Lord's Prayer repeated over the communication system.

The school board responded that the baccalaureate service was held in the school auditorium with a local minister in charge. Attendance was voluntary and students who did not attend were not penalized. The baccalaureate service was never held on a school day or any time when classes were in session. Selection of the baccalaureate

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[238]Goodwin v. Cross County School District No. 7, 394 F. Supp. 417 (E.D. Ark. 1973).

[239]Ibid, p. 420.

speaker and date of the service were left up to the senior class.

Regarding the distribution of Bibles, the school board responded that members of the Gideon Society visited each fifth-grade class and distributed a small, pocket-sized, partial Bible and a picture of the American flag to each fifth-grade child. At the same time, a King James Version of the New Testament was given to each teacher who would accept it.

The Cross County School District No. 7 board policy was stated as follows:

> 1. Teachers should avoid religious and political indoctrination of pupils.
>
> 2. The Cross County School District #7 School Board should not take any action which would either require or prohibit religious activities on the part of the pupils in Cross County School District #7.[240]

Decision

The Court's response to the four basic issues was:

1. The exercise of Bible reading and prayer each day at school as permitted by Cross County School District No. 7 contravened the First Amendment and was unconstitutional.

2. The baccalaureate service as constituted by the senior class did not require that it be a religious service with a minister, nor was there a format requiring prayer or any vestige of religion. Evidence did not establish that the baccalaureate service was in violation of the First Amendment.

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[240]Ibid., p. 421.

3. The distribution of Gideon Bibles, whether the children accepted them or not, was considered to be a religious exercise and prohibited by the First Amendment.

4. The findings in the first three basic issues dictated a change in school district policy, so no ruling was made on the constitutionality of the policy.[241]

Prayer in Public Schools

Courts have held since 1902 that prayer in the public schools is unconstitutional. From time to time, accommodation has been allowed in the public school setting for groups of students meeting after school or before school for group meditation. This group meditation must be without any entanglement by the school.

Engel v. Vitale (N.Y.), 370 U.S. 421, 82 S. Ct. 1261 (1962).

Facts

In November, 1951, the New York State Board of Regents, the agency charged by law with the supervision of the state's school system, adopted a seemingly innocent statement of moral and spiritual training in the schools. The statement recommended the pledge of allegiance to the flag at the beginning of each school day. The Board of Regents recommended that the pledge be accompanied by a small act of reverence to God: "Almighty God, we

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[241] Ibid., pp. 426-28.

acknowledge our dependence upon Thee, and we beg Thy Blessings upon us, our parents, our teachers and our Country."[242]

The Board of Education of Union Free District Number Nine, Hyde Park, New York, adopted the so-called "Regents' Prayer." The school board instructed district principals to institute the prayer as a daily exercise to follow the salute to the flag.

In 1959, a group of five parents representing ten children in the Hyde Park School System brought suit in Special Term Court for relief. The parents represented Jews, Ethical Culturalists, Unitarians, and one non-believer. They asked the Special Term Court to direct the Board of Education to stop the daily exercise of prayer which was offensive to some children and abridged the First Amendment right to freedom of religion.

Relief was denied by Special Term Court, so the parents appealed to the Appellate Division. The Supreme Court of Nassau County, New York, affirmed the lower court's decision in denying relief to the parents from the religious exercise. The United States Supreme Court granted certiorari.

Discussion

Justice Hugo Black delivered the opinion of the United States Supreme Court, in which he said:

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[242]Engel v. Vitale, (N.Y.) 370 U.S. 421, 82 S. Ct. 1261 (1962).

> By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and the privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say--that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.[243]

Justice Black commented on the struggle of James Madison and Thomas Jefferson in establishing religious freedom in the New World with the passage of the Virginia Bill for Religious Freedom. Justice Black commented on the

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[243]Ibid., pp. 429-30.

brevity of the Regents' Prayer, but cautioned in the words of James Madison:

> '[I]t 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?"[22]

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[22]Memorial and Remonstrance against Religious Assessments, II, Writings of Madison 183, at 185-186.[244]

Decision

The United States Supreme Court reversed the decision of the New York Supreme Court and declared the Regents' Prayer unconstitutional under the First Amendment establishment of religion clause.

Justice Potter Stewart, the lone dissenter, had this to say:

> I do not believe that this Court, or the Congress, or the President has by the actions and practices I have mentioned established an 'official religion' in violation of the Constitution. And I do not believe the State of New York has done so in this case. What each has done has been to recognize and to follow the deeply entrenched and highly cherished spiritual traditions of our Nation--traditions which come down to us from those who almost two hundred years ago avowed their 'firm Reliance on the Protection of divine Providence' when they proclaimed the freedom and independence of this brave new world.[10]

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[10]The Declaration of Independence ends with this sentence: 'And for the support of this Declaration,

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[244]Ibid., p. 436.

> with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.'[245]

Stein v. Oshinsky, 224 F. Supp. 757 (1963).

Facts

Audrey Stein, the mother of Kimberly Stein, brought suit against the principal of Public School No. 184, Whitestone, New York, to enjoin the principal from prohibiting prayer at school. Plaintiffs, along with the Steins, were members of Protestant, Roman Catholic, Jewish, American Apostolic, and Episcopalian faiths.

The school principal had denied children opportunity to recite a small prayer before morning break:

> God is great, God is Good
> And we thank Him for our Food,
> Amen.[246]

Afternoon classes recited a small prayer before refreshments:

> Thank You for the World so Sweet
> Thank You for the food we eat
> Thank You for the birds that sing
> Thank You God for everything.[247]

Discussion

The issue is whether the state can deny children attending public schools the opportunity to recite a daily

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[245] Ibid., p. 450.

[246] Stein v. Oshinsky, 224 F. Supp. 757 (1963), p. 757.

[247] Ibid.

prayer in the classroom. If so, does the denial constitute a prohibition against free exercise of religion?

Decision

The decision of the United States District Court for the Eastern District of New York was that voluntary prayer offered by school children without compulsion and not prescribed by law, would not tend to establish religion, and school children were entitled to opportunity for prayer.[248]

The principal was enjoined from prohibiting prayer at Whitestone, New York. The school officials appealed the finding of the District Court to the United States Second Court of Appeals.

Stein v. Oshinsky, 348 F. 2d 999 (1965).

Facts

The preceding case was appealed. The facts remain the same. Judge Friendly of the Second Circuit Court of Appeals said:

> Determination of what is to go on in public schools is primarily for the school authorities. Against the desire of these parents that their children 'be given an opportunity to acknowledge their dependence and love to Almighty God through a prayer each day in their respective classrooms,' the authorities were entitled to weigh the likely desire of other parents not to have their children present at such prayers, either because the prayers were too religious or not religious enough.[249]

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[248]Ibid., p. 757.

[249]Stein v. Oshinsky, 348 F 2d 999 (1965), p. 1002.

Decision

The United States Second Court of Appeals held that the constitutional rights to free exercise of religion and to freedom of speech do not require a state to permit student-initiated prayer in public schools. The decision of the district court was reversed, and the school's refusal to allow prayer was determined constitutional under the First Amendment.

DeSpain v. DeKalb County Community School Dist. (Ill.) 384 F. 2d 836 (U.S.C.A. Seventh Cir. 1968).

Facts

Lyle and Mary DeSpain were residents of DeKalb, Illinois, and parents of Laura DeSpain. Laura attended kindergarten at Ellwood School located in DeKalb County Community School District. Mr. and Mrs. DeSpain brought charges to enjoin the school officials from requiring children to recite a prayer during the regular school day.

Discussion

The suit was brought against the school board, superintendent, principal, and kindergarten teacher. The kindergarten teacher had required children to recite before their morning snack:

> We thank you for the flowers so sweet;
> We thank you for the food we eat;
> We thank you for the birds that sing;
> We thank you for everything.[250]

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[250]DeSpain v. DeKalb County Community School District (Ill.), 384 F 2d 836 (U.S.C.A. Seventh Cir. 1968), p. 836.

The Federal District Court (Eastern Division, Northern District) dismissed the suit. The District Court insisted the verse was not a prayer or religious activity. The plaintiffs appealed.

Decision

The United States Seventh Circuit Court of Appeals considered the verse a prayer and declared its recitation in class unconstitutional. Quoting from Schempp, the Appeals Court commented on the gravity of even small infringements upon religious freedom.

> It is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent.[251]

The decision of the United States District Court was reversed.

Gaines v. Anderson, 421 F. Supp. 337 (1976).

Facts

In 1966, Massachusetts adopted a statute requiring one minute of complete silence for private meditation at the beginning of each day in public schools. In 1976, the Framingham School Committee resolved to develop guidelines to implement the Massachusetts statute. Pertinent parts of the guidelines are as follows:

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[251]Abington v. Schempp, 374 U.S. at 225, 83 S. Ct. (1963), p. 1573.

> 1) The following announcement shall be made each school day morning in each school at the commencement of the first class (it being understood that in the high schools the home room period would be considered the first regular period of the day) by the teacher in charge of the room. The announcement shall be made during the period of time when school attendance is taken.
>
> 'A one minute period of silence for the purpose of meditation or prayer shall now be observed. During this period silence shall be maintained and no activities engaged in.'
>
> At the end of the one minute period, the following shall be announced by the teacher.
>
> 'Thank you.'
>
> 2) If teachers are asked questions concerning this period for meditation or prayer the following should be the response.
>
> 'We are doing this in compliance with State Law. Any other questions you have should be discussed with your parents or with someone in your home.'[252]

Twelve students of Framingham schools, with their parents, brought suit claiming the statute stated above violated religious rights under the First Amendment as amended in 1973. The statute reads as follows:

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period silence shall be maintained and no activities engaged in.[253]

Discussion

The claim of the plaintiffs that the period of silence constituted a religious exercise was refuted. Plaintiffs claimed the timing of the enactment was

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[252]Gaines v. Anderson, 421 F. Supp. 337 (1976), p. 340. [253]Ibid., p. 339.

immediately after court cases invalidating school prayer. The United States District Court noted that the statute did not compel students to adopt any religious belief. In fact, students were not even compelled to contemplate religion during the minute of silence. Students were free to think any thought or no thought during this period of silence. All the students were required to do was remain silent.

Decision

The United States District Court determined that the statute did not have a primary religious purpose, nor did it tend to advance any religion. There was no excessive government entanglement, so the statute and its implementation were considered constitutional, and the complaint was dismissed.[254]

Released Time

The releasing of children from school to receive religious instruction has been challenged in several states. The precedent for virtually all the cases is the decision in Zorach[255] for off-campus and in McCollum for on-campus instruction.

McCollum v. Board of Education (Ill.), 333 U.S. 203, 68 S. Ct. 461 (1948).

Facts

Vashti McCollum lived in Champaign, Illinois, and

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[254]Ibid., p. 346.

[255]Zorach v. Clauson (N.Y.), 343 U.S. 306, 72 S. Ct. 679 (1952).

had a child enrolled in public school there. Illinois had a compulsory attendance law that applied to each child aged six to sixteen. The law required each child to be in attendance during the hours when school was in session. Failure of the parents to keep children either in public or private school was a misdemeanor.

Religious instruction was offered in Champaign public schools by a group of religious teachers who were employed by the Champaign Council on Religious Education, a private religious group including Catholic, Protestant, and Jewish members. Religion teachers went one period each week to public schools to give religious instruction to children who wanted to enroll.[256]

There was nothing compulsory about the classes, which could be attended only with written request from home. Children not excused from regular class for religious instruction stayed in the regular classroom while those excused were sent to another classroom to receive religious instruction. Absences and attendance at religious classes were kept by regular classroom teachers. Religious instruction was offered to grades four through nine. Classes were offered in three faiths by Protestant teachers, Catholic priests, or Jewish rabbis.

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[256]McCollum v. Board of Education (Ill.), 333 U.S. 203, 68 S. Ct. 461 (1948).

Discussion

Justice Hugo Black, writing majority opinion, said:

> The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-supported public school system to aid religious groups to spread their faith. . . . it falls squarely under the ban of the First Amendment . . . .[257]

Justice Black, continuing the discussion of facts, drew heavily on Everson v. Board of Education of Ewing Township[258] in saying, "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[259] Justice Black further insisted:

> Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.[260]

Justice Felix Frankfurter, in concurring with the majority opinion, said,

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[257]Ibid., p. 209-10.

[258]Everson v. Board of Education of Ewing Township (N.J.), 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (1947).

[259]Ibid., pp. 59-60.

[260]McCollum, p. 212.

> Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. 'The great American principle of eternal separation'--Elihu Root's phrase bears repitition--is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.[261]

Decision

The Illinois State District Court had denied Mrs. McCollum's petition, and on appeal the Illinois Supreme Court affirmed. The case was appealed to the United States Supreme Court where the decision of the state supreme court was reversed, and the practice of releasing students for religious instruction on campus and in public school classrooms was declared unconstitutional under the First Amendment establishment of religion clause.[262]

Zorach v. Clauson (N.Y.), 343 U.S. 306, 72 S. Ct. 679 (1952).

Facts

Facts in Zorach are almost identical to those presented in McCollum, with the exception of the location of the classes. The New York City school system had a statute

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[261] Ibid., p. 231.

[262] Ibid., p. 212.

that permitted schools to release students during school hours to attend classes in religious instruction at religious centers off school grounds.[263] The religious classes were held for one hour per week, and were conducted simultaneously in all city schools. There was no expenditure of public funds for the instruction.

School attendance in New York was compulsory for the duration of the school day. Pupil accounting was done by the religious institution during the period of religious instruction, and names were turned in to school administrators each week. Students not attending religious instruction remained in classrooms and continued work. Students attending religious studies did so upon written request from home.[264]

Charges were brought by tax-paying residents of New York City who had children in the school system. The charge was the same as McCollum: the program violated First Amendment religious freedom rights.

Discussion

Justice William O. Douglas, delivering the majority opinion of the Supreme Court, maintained,

> It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the

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[263] Zorach, p. 308.

[264] Ibid.

classrooms of the public schools. A student need not take religious instruction, He is left to his own desires as to the manner or time of his religious devotions, if any.

There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion.[6] The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.[7] Hence, we put aside that claim of coercion, both as respects the 'free exercise' of religion and 'an establishment of religion' within the meaning of the First Amendment.

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[6]Nor is there any indication that the public schools enforce attendance at religious schools by punishing absentees from the released time programs for truancy.

[7]Appellants contend that they should have been allowed to prove that the system is in fact administered in a coercive manner. The New York Court of Appeals declined to grant a trial on this issue, noting, inter alia, that appellants had not properly raised their claim in the manner required by state practice. 303 N.Y. 161, 174, 100 N.E. 2d 463, 469. This independent state ground for decision precludes appellants from raising the issue of maladministration in this proceeding. . . .

The only allegation in the complaint that bears on the issue is that the operation of the program 'has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction.' But this charge does not even implicate the school authorities. The New York Court of Appeals was therefore generous in labeling it a 'conclusory' allegation. 303 N.Y., at 174, 100 N.E. 2d, at 469. Since the allegation did not implicate the school authorities in the use of coercion, there is no basis for holding that the New York Court of Appeals under the guise of local practice defeated a federal right in the manner condemned by Brown v. Western R. of Alabama, 338 U.S. 294, and related cases.[265]

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[265]Ibid., pp. 311-12.

Continuing, Justice Douglas insisted that it would be pressing the concept of separation of church and state to ridiculous extremes to condemn the accommodation of the schedule to include religious instruction and explained further:

> In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction.[266]

Decision

The case was appealed to the United States Supreme Court from the New York Court of Appeals, which had sustained the decision of the lower court that the program was not unconstitutional and did not violate religious freedoms guaranteed by the First Amendment. The United States Supreme Court affirmed the decision of the New York Court of Appeals.

Vaughn v. Reed, 313 F. Supp. 431 (M.D. Va., 1970).

Facts

Beginning in 1942, a private religious organization, the Week-Day Religious Education Council, sent teachers into Martinsville schools to hold classes in religion. These classes were held in the regular classrooms during school hours. The religion teacher replaced the regular teacher

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[266]Ibid., p. 315.

in the classroom for one hour per week in the third, fourth, and fifth grades. Students who wanted religious instruction brought cards from home early in the year requesting assignment to the classes. Those students not taking religion classes left the regular classrooms and were sent to a study hall for the duration of the religious instruction period.[267]

Discussion

Both school board members and school administrators of the Martinsville School District contended that the classes were about religion rather than religious in nature. The defendants claimed that there was no religious indoctrination, even though they admitted that the textbook, My Adventure in Christian Living, amounted to the practice of religion.

Decision

The United States District Court questioned the practice of excusing students who did not choose to attend, if the classes were about religion. The court stated that state schools were being used to further religion in violation of the establishment clause of the First Amendment.[268]

Moreover, the court suggested that the Martinsville School District teach the course following guidelines set

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[267]Vaughn v. Reed, 313 F. Supp. 431 (M.D. Va, 1970), p. 432.

[268]Ibid., p. 433.

forth in Zorach[269] for religious instruction in the public school setting. In issuing the injunction against the program, the United States District Court invited the school district to request that the case be reopened upon compliance with the guidelines.

Smith v. Smith, 523 F. 2d 121 (4th Cir. 1975), cert. denied, 423 U.S. 1073 (1976).

Facts

The Harrisonburg school system had for forty years allowed a religious organization to present religious instruction in the classrooms. In 1963, the program moved out of the classrooms into trailers parked on streets adjacent to schools, or into nearby churches.[270] The trailers were not allowed to park on school property, nor were Week-Day Religious Education members permitted to enter the school to solicit students.

The Week-Day Religious Education Groups offered classes in three elementary schools. Obtaining a list of students from the school administrator at the beginning of the year, they mailed cards to the parents of the target-age children, who returned the cards to the classroom for retrieval by Week-Day Religious Education Group members.[271]

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[269]Zorach, p. 306.

[270]Smith v. Smith, 523 F. 2d 121 (4th Cir. 1975), cert. denied, 423 U.S. 1073 (1976), p. 445.

[271]Ibid.

Public school personnel did not distribute or collect the cards or assume responsibility for their return. Teachers were not permitted to encourage student participation in the program.

The excused students attended one hour per week of religious instruction away from the school setting. Children remaining in the classroom attended study hall, or at least received no formal training.[272]

Discussion

The Harrisonburg School Board approved the Week-Day Religious Education Group program in that the school board allowed the schools to accommodate the scheduling of religious instruction groups during the school day. No public school money was spent directly on the program, nor were any school personnel made available to do programs.

Plaintiffs challenged the program on the establishment clause, as well as the free exercise clause, of the First Amendment.

The United States District Court acknowledged that the case at hand almost exactly paralleled Zorach v. Clauson.[273] Applying the tripartite test to this case, the district court showed: (1) the program was secular in nature and merely an accommodation for the parents and students who

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[272]Ibid.

[273]Zorach, p. 306.

wanted religious instruction; (2) the school endorsement of the program and the association between school and the program through provision of captive participants had the primary effect of furthering a religion, thereby conflicting with the establishment clause of the First Amendment; and (3) the question of entanglement was potential and political through public school involvement in the program.

Decision

The United States District Court found the program as administered to be in violation of the establishment clause and issued an injunction prohibiting the release-time program in Harrisonburg, Virginia. The findings on appeal to the Fourth Circuit Court of Appeals were reversed with the following statement:

> Action was brought to challenge a release-time program whereby public school students were released during school hours for religious instruction off school premises by nonprofit organization supported by council of churches. The United States District Court for the Western District of Virginia, at Harrisonburg, James C. Turk, Chief Judge, 391 F. Supp. 443, granted injunctive relief and defendants appealed. The Court of Appeals, Winter, Circuit Judge, held that the release-time program had a secular purpose in accommodating wishes of students' parents, did not excessively entangle state with religion in that public school classrooms were not turned over to religious instruction, and, as the primary effect of the program did not necessarily advance or inhibit religion, the program did not violate the establishment clause.[274]

The preceding four cases have established that religious instruction offered at school violates the First

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[274]Smith v. Smith, p. 121.

Amendment, while religious instruction offered away from the school setting is constitutional. By applying the tripartite test and avoiding excessive entanglement, school systems can accommodate students wishing to participate in religious instruction during the school day.

Patriotic Exercises

The public school practice of patriotic exercises at school, namely the saluting of the flag and the singing of the national anthem and/or other patriotic songs was challenged as early as 1937, in Nicholls v. Lynn.[275] It was the decision of the state courts in virtually every case to uphold the legality of the practice. The United States Supreme Court in 1940 continued the trend of upholding the practice in public schools until 1943, in Barnette.

Minersville School District v. Gobitis (Pa.), 310 U.S. 586, 60 S. Ct. 1010 (1940).

Facts

Lillian and William Gobitis were expelled from public schools of Minersville, Pennsylvania, for refusing to salute the flag during a daily classroom exercise. The school board required both teachers and students to participate in the ceremony. The Gobitis children were members of Jehovah's Witnesses, a group which considered the Bible to be the

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[275]Nicholls v. Lynn (Mass.), 7 N.E. 2d 577, 110 ALR 377 (1937).

supreme authority. These children were taught to believe that people owed allegiance to none but God, and to pledge otherwise would compromise their belief.

The children were expelled from public school for not participating in the forbidden exercise. Pennsylvania's compulsory attendance law required children to be present during the school day and while school was in session. The expulsion put the children in jeopardy of being prosecuted for non-attendance. Thus, their parents had to enroll the children in a private school at their expense.

Discussion

The United States District Court granted an injunction to stop the school board's expulsion of the Gobitis children. The school board appealed and the Third Circuit Court of Appeals upheld the ruling of the district court in favor of the Gobitis family. The case was granted certiorari, and Justice Felix Frankfurter delivered the majority opinion in the United States Supreme Court. Justice Frankfurter's concern in the resolution of the case is shown in the opening paragraph.

> A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test. Of such a nature is the present controversy.[276]

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[276]Minersville School District v. Gobitis (Pa.), 310 U.S. 586, 60 S. Ct. 1010 (1940).

The opening statement conveys the feeling of national patriotism extant on the eve of World War II. Justice Frankfurter stated further that:

> The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, pre-suppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties. That is to say, the process may be utilized so long as men's right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are all fully respected.[277]

Decision

The majority opinion of the United States Supreme Court reversed the opinion of the Third Circuit Court of Appeals and declared the practice constitutional.

Justice Harlan Stone, dissenting forcefully from the dictate of the past, expressed the thought that the majority opinion was a surrender of constitutional rights of a small minority to the popular will. It was his opinion that compulsion of students to comply with regulations contrary to genuine religious beliefs was not within the scope of the First Amendment. The strength of his dissent is expressed in his closing paragraphs:

> The Constitution expresses more than the conviction of the people that democratic processes must be

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[277] Ibid., p. 600.

> preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.
>
> With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection.[278]

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943).

Facts

The United States District Court for the Southern District of West Virginia had enjoined the West Virginia Board of Education from enforcing a regulation requiring public school students to salute the flag.

Appellees were members of Jehovah's Witnesses, as were the Gobitis children. Students following the tenets of this religion refused to salute the flag; the children were termed insubordinate and expelled from school. Although readmission could be obtained by compliance with the regulation, the children were vulnerable to prosecution as

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[278]Ibid., pp. 606-7.

delinquents, and their parents liable to prosecution for non-compliance with compulsory attendance law.[279]

Jehovah's Witnesses considered the flag a graven image, and followers of Jehovah's Witnesses' sect would not acknowledge the flag with a pledge of allegiance. The sect had many times offered to acknowledge the flag with a pledge acceptable to their religion:

> I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.
> I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.
> I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible.[280]

Discussion

Justice Robert Jackson, in presenting the majority opinion, demonstrated thinking similar to that of Justice Stone in Gobitis. Justice Jackson said that, on one hand, we offer the freedom to a student to say whatever he wants under the Bill of Rights; then, on the other hand, we leave it open for public authority to compel him to say something contrary to his wishes.

Justice Jackson continued by questioning the authority of anyone to coerce citizens to utter things in which they do not believe.

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[279]West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943).

[280]Ibid., p. 628.

> Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations.[14] If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.
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> [14]For example: Use of 'Republic,' if rendered to distinguish our government from a 'democracy,' or the words 'one Nation,' if intended to distinguish it from a 'federation,' open up old and bitter controversies in our political history; 'liberty and justice for all,' if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement.[281]

Justice Jackson insisted that attempts to coerce people into uniformity and compliance have been the basis of all closed societies. Open societies allow for individual thought. The question of who designed the unity model and how its ends were met was discussed using totalitarianism and the Inquisition, as well as the Roman attempt to squelch Christianity, as examples of forcing people to accede to things in which they did not believe. These human conflicts are part of the American heritage that brought about the Bill of Rights.

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[281]Ibid., p. 634.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[282]

Decision

The majority opinion of the United States Supreme Court affirmed the decision of the United States District Court in enjoining the State Board of Education of West Virginia from enforcing the compulsory flag-salute regulation.

Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963).

Facts

Daniel Sheldon, Merle and Bruce Wingo were students of Pine Top Elementary School in Arizona and were the plaintiffs in a suit to halt the Arizona State Board of Education practice of requiring school children to stand for the singing of the national anthem.

Plaintiffs in this case were members of Jehovah's Witnesses religious sect. Jehovah's Witnesses considered the refusal to sing the national anthem to be as the refusal of the Hebrew children to bow down to the sound of patriotic and religious music played at the order of Nebuchadnezzar in Babylon.[283]

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[282]Ibid., p. 638.

[283]Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963), p. 768.

The plaintiffs were expelled from school for refusing to stand for the national anthem, and they were in jeopardy of prosecution under the compulsory attendance law.[284]

Discussion

The United States District Court leaned heavily upon Barnette in discussing the infringement of the school board's regulations upon the religious freedom of the Jehovah's Witnesses.

Decision

This Court granted the sought-for injunction to prevent the board of education from requiring the students to stand for and participate in the exercise. The consequence of expulsion was declared in violation of the plaintiffs' First Amendment rights to freedom of religious exercise.

Courts since 1940 have been consistent in ruling compulsory patriotic exercises unconstitutional if the exercises are patently contrary to serious religious beliefs.

Sex Education

Teaching sex-education courses in public school has been consistently upheld by the courts. Courts have recommended that such instruction be placed under the health education department and be taught as health education,

[284]Ibid.

Sex education as a separate topic of study and discussion may conflict with religious beliefs of some students. An excusal system to relieve the coercion of compulsory attendance has satisfied courts in cases that have been tried.

Cornwell v. State Board of Education, 314 F. Supp. 340 (Md. 1969).

Facts

The plaintiffs were students of the Baltimore County Schools. The Maryland State Board of Education had adopted a bylaw giving to each local school system the responsibility for implementing a comprehensive course on family life and sex education. Such programs were to be integrated into the sequential health education program in existence and were to be given to all elementary and secondary students.[285]

Plaintiffs brought civil action to enjoin the Baltimore County Schools from implementing the program; they claimed the bylaw violated the First Amendment freedom of religion clause.

Discussion

In this case, the plaintiffs claimed the bylaw was a result of a study based on identifying pregnant students in

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[285]Cornwell v. State Board of Education, 314 F. Supp. 340 (Md. 1969), p. 341.

the Maryland schools. It was to be the right of the home and not the Maryland schools to instruct children concerning sexual matters.

The United States District Court advanced the idea that a study of pregnancies at school would be evidence of the need for a sex-education program and questioned the validity of the plaintiffs' statement about the exclusive right of parents to impart sex education. The district court could not find a violation of the First Amendment in sex education and decided the juciciary had no legitimate interest in protecting all religions from views distasteful to the religions.

Decision

It was determined by the court that the bylaw did not establish any religion, nor did it involve the state in any religious exercises. The bylaw was considered simply a public health measure, and request for an injunction to stop the program was dismissed.

Medeiros v. Kiyosaki, 478 P. 2d 314 (Hawaii 1970).

Facts

Margaret Medeiros lived in Honolulu and was the parent of fifth and sixth grade children in the public school system there. The Medeiroses brought action in the Honolulu First Circuit Court, charging that a newly instituted film series in the local schools violated their children's

constitutional rights under the First Amendment. The state anticipated some parental objection to the series and established an excusal system allowing parents to withhold children from the program by written request. As a further safeguard, the state system arranged for the films to be shown on educational television prior to the presentation in class, so that parents might evaluate the films and have time to excuse children from attendance.[286]

Discussion

The Hawaii Supreme Court could not view the program as being in any way compulsory and as such, could not rule that the program contravened the plaintiffs' right to privacy.

The charge that the program violated the freedom of religion clause of the First Amendment was not supported. Separating sex education from religious instruction, the court held that the program did not violate the freedom of religion clause. The excusal system adopted by the school system circumvented the issue of coercion.

Decision

The Supreme Court of Hawaii could find no abridgement of religious freedom rights of citizens caused by this adoption of a film series on sex education and family life by the Honolulu schools. The ruling of the lower court denying the injunction was upheld.[287]

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[286]Medeiros v. Kiyosaki, 478 P. 2d 314 (Hawaii 1970), pp. 316-17.

[287]Ibid., p. 314.

Hopkins v. Hamden Board of Education, 289 A. 2d 914 (Conn. 1971).

Facts

Plaintiffs attended Hamden Public Schools in Connecticut, a system governed by a compulsory attendance law. The Hamden school curriculum included a course entitled "Health Education," which partly comprised a planned sequential study of family life and sex education.[288]

The plaintiffs claimed that sex education and family life instruction in the schools as a mandatory course was in violation of the United States Constitution, which prohibits the establishment of a religion and the interference with the right to free exercise of religion.

Discussion

This claim of religious interference in sex education was based on papal encyclicals that instruct parents to impart sex education at home.[289]

The Connecticut Court of Common Pleas could see no establishment of religion or philosophy in the program offered by the schools. Public interests of the state in the educational system, said the court, are of sufficient weight to relieve the state from claims of violation of the First Amendment solely on the grounds that the secular

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[288]Hopkins v. Hamden Board of Education, 289 A, 2d 914 (Conn, 1971), p. 916.

[289]Ibid., p. 920,

purposes could possibly clash with a religious belief in one or more areas of instruction.

Decision

Court findings were such that this body did not grant an injunction to stop the teaching of the mandatory health classes. The common pleas court did not find that the Hamden Schools acted in an arbitrary manner, nor that the health education class abridged the religious freedom rights of any citizen.

Distribution of Religious Literature

Distribution of Gideon Bibles or other religious literature in public schools has been the subject of state court cases since 1953. Distribution of the King James Version of the Bible or portions thereof has been considered a violation of the First Amendment in that it tends to enhance or advance the Protestant segment of the Christian religion. It is a breach of the school's neutrality to allow such distribution in the school setting; however, the Bible and other religious books are appropriately placed on the library shelves where one religion is not preferred over another.

Tudor v. Board of Education, 14 N.J. 31, 100 A. 2d 857 (1953).

Facts

Bernard Tudor was a Jewish citizen of Rutherford, New Jersey, and had a child who attended school in a Rutherford public school The Gideon Society had offered

to give each fifth through eighth grade child in Rutherford a book composed of the New Testament, Psalms and Proverbs.[290]

The Rutherford Board of Education accepted the offer and set up the mechanics of distribution. Parents were to sign a request in order for the child to receive a Gideon Bible.[291]

Mr. Tudor challenged the plan and asked the courts to enjoin the schools from distributing a clearly sectarian book at school. The charge was that the distribution of the book violated the First Amendment religious establishment clause.

Discussion

The Jewish faith does not accept the King James Version of the Bible and considers that version peculiar to the Protestant denominations. Distribution of the Bible at school violated the teachings, tenets, and principles of the Jewish faith. Distribution of the King James Version also violated the teachings, tenets, and principles of Catholicism. The charge brought before the court was that the sectarian book amounted to establishment of religion.

Decision

Upon first hearing, the superior court ordered a temporary injunction until the case could be heard. After

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[290]Tudor v. Board of Education, 14 N.J. 31 100 A. 2d 857 (1953), cert. den. 348 U.S. 816 (1954), p. 858.

[291]Ibid., p. 859.

hearing the evidence, the New Jersey Superior Court set aside the restraint. The plaintiff appealed to the appellate division, but the state supreme court ordered certification on its own motion. Finally, the New Jersey Supreme Court ruled that the distribution of Gideon Bibles violated the religious establishment clause of the First Amendment and reversed the decision of the New Jersey Superior Court.[292]

Teaching of Evolution

Courts have held that states cannot proscribe the teaching of the theory that man evolved from a lower animal form, deeming that to forbid the teaching of one theory of the genesis of man in favor of another would be to advance one religious view over another, or a non-religious view over a religious one.

Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266 (1968).

Facts

Susan Epperson, an Arkansas native, obtained her master's degree in biology from the University of Illinois and was employed as a biology teacher in Little Rock. Susan received a new textbook at the beginning of the academic year 1965, and this text contained a chapter on the theory of evolution. Susan's dilemma was: (1) if she taught the chapter she would break a state law; (2) if she did not teach the chapter, presumably she would be derelict in her duty.

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[292]Ibid., p. 857.

Susan sought the help of the Arkansas Chancery Court in having the statute voided.

> 80-1627.--Doctrine of ascent or descent of man from lower order of animals prohibited.--It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.
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> 80-1628.--Teaching doctrine or adopting textbook mentioning doctrine--Penalties--Positions to be vacated. --Any teacher or other instructor or textbook commissioner who is found guilty of violation of this act by teaching the theory or doctrine mentioned in section 1 hereof, or by using, or adopting any such textbooks in any such educational institution shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding five hundred dollars; and upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned or any commission of which he may be a member.[293]

Susan Epperson also sought to enjoin the school system from dismissing her for violating the law.

Discussion

The chancery court decided in favor of Susan and declared the Arkansas law violated the First Amendment freedom of speech clause. The school system appealed the case to the Arkansas Supreme Court and, in a two-sentence opinion written in the margin of the instrument, the Arkansas Supreme Court reversed the chancery court, dismissing the case with

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[293]Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266 (1968), p. 99.

the reminder that the state had the power to set the curriculum of the schools.

This case was appealed to the United States Supreme Court. The Supreme Court recognized that the Arkansas statute had been extant for forty years, although the state had never attempted to enforce it. The Supreme Court made note of the apologetic defense of the law put forth by the state.[294]

Justice Fortas delivered the majority opinion, in which he said:

> In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens.[15] It is clear that fundamentalist sectarian conviction was and is the law's reason for existence.[16] Its antecedent, Tennessee's 'monkey law,' candidly stated its purpose: to make it unlawful 'to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.'[17] Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language.[18] It eliminated Tennessee's reference to 'the story of the Divine Creation of man' as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man.
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> Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account,

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[294]Ibid., p. 109.

literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.

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[15]Former Dean Leflar of the University of Arkansas School of Law has stated that 'the same ideological considerations underlie the anti-evolution enactment' as underlie the typical blasphemy statute. He says that the purpose of these statutes is an 'ideological' one which 'involves an effort to prevent (by censorship) or punish the presentation of intellectually significant matter which contradicts accepted social, moral or religious ideas.' Leflar, Legal Liability for the Exercise of Free Speech, 10 Ark, L. Rev. 155, 158 (1956). See also R. Hofstadter & W. Metzger, The Development of Academic Freedom in the United States 320-366 (1955) (passim); H. Beale, A History of Freedom of Teaching in American Schools 202-207 (1941); Emerson & Haber, the Scopes Case in Modern Dress, 27 U. Chi. L. Rev. 522 (1960); Waller, The Constitutionality of the Tennessee Anti-Evolution Act, 35 Yale L. J. 191 (1925) (passim); ACLU, The Gag on Teaching 7 (2d ed., 1937); J. Scopes & J. Presley, Center of the Storm 45-53 (1967).

[16]The following advertisement is typical of the public appeal which was used in the campaign to secure adoption of the statute:

'THE BIBLE OR ATHEISM, WHICH?

'All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1. . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of their children? The Gazette said Russian Bolshevists laughed at Tennessee. True, and that sort will laugh at Arkansas. Who cares? Vote FOR ACT NO. 1.' The Arkansas Gazette, Little Rock, Nov. 4, 1928, p. 12, cols. 4-5.

Letters from the public expressed the fear that teaching of evolution would be 'subversive of Christianity,' id. Oct. 24, 1928, p. 7, col. 2; see also id., Nov. 4, 1928, p. 19, col 4; and that it would cause school children 'to disrespect the Bible,' id., Oct. 27, 1928, p. 15, col. 5. One letter read: 'The cosmogony taught by [evolution] runs contrary to that of Moses and Jesus, and as such is nothing, if anything at all, but atheism. . . . Now let the mothers and fathers of our state that are trying to raise their children in the Christian faith arise in their might and vote for this anti-evolution bill that will

take it out of our tax supported schools. When they have saved the children, they have saved the state.' Id., at cols. 4-5.

[17]Arkansas' law was adopted by popular initiative in 1928, three years after Tennessee's law was enacted and one year after the Tennessee Supreme Court's decision in the Scopes case, supra.

[18]In its brief, the State says that the Arkansas statute was passed with the holding of the Scopes case in mind. Brief for Appellee 1.[295]

Decision

The United States Supreme Court reversed the decision of the Arkansas Supreme Court and declared the statute unconstitutional under the First Amendment establishment clause.

Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

Facts

C. J. Scopes was convicted in a Tennessee state circuit court for teaching a theory of the origin of man contrary to the divine creation as taught in the Bible. His conviction cited failure to obey the following state statute:

'An act prohibiting the teaching of the evolution theory in all the Universities, normals and all other public schools in Tennessee, which are supported in whole or in part by the public school funds of the state, and to provide penalties for the violations thereof.'[296]

The conviction was appealed to the Tennessee Supreme Court.

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[295]Ibid., pp. 107-9.

[296]Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

Discussion

This most celebrated case brought together the foremost lawyer of his time, Clarence Darrow, for the defense, and a former presidential nominee, William Jennings Bryan, for the prosecution. The defense tried to prove that the statute was in violation of the establishment clause of the First Amendment.

Decision

After much furor, the decision of the Tennessee Supreme Court was nolle prosequi, with the comment that the business of the state would be better served if the court moved on to more productive things. Mr. Scopes had since moved from Tennessee and was no longer employed by the school system.[297]

Celebration of Religious Holidays

The latest challenge to the equilibrium of the church-state relationship is that concerning religious holiday celebration in the public school setting.

A number of holidays having religious significance for some sects are considered in the school calendar. Christmas, Easter, Passover, Hanukkah, St. Valentine's Day, St. Patrick's Day, Thanksgiving, and Halloween are a few of the days that have such meaning for some segment of the student population.

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[297]Ibid., p. 367.

School calendars are usually composed to avoid conflicts with different holidays. Secular celebration of holidays has been acceptable to the courts. Stressing the story of Santa Claus rather than the story of Christ, or offering a spring break rather than an Easter celebration are accommodations that are acceptable to the courts.

Florey v. Sioux Falls School District 49-5, 464 F. Supp. 911 (1979).

Facts

Justin Florey, the minor son of Roger Florey, was a student in the Sioux Falls, South Dakota, Elementary School kindergarten. Mr. Florey complained about a Christmas quiz which was part of a program for Christmas of 1977.

"The Beginner's Christmas Quiz" consisted of the following:

> Teacher: Of whom did heav'nly angels sing,
> And news about His birthday bring?
>
> Class: Jesus.
>
> Teacher: Now, can you name the little town
> Where they the baby Jesus found?
>
> Class: Bethlehem.
>
> Teacher: Where had they made a little bed
> For Christ, the blessed Savior's head?
>
> Class: In a manger in a cattle stall.
>
> Teacher: What is the day we celebrate
> As birthday of this One so great?
>
> Class: Christmas.[298]

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[298]Florey v. Sioux Falls School District 49-5, 404 F. Supp. 911 (1979).

Upon receiving the complaint, the school officials set up a committee to study the church-state relationship in the school system. The committee published its rules in 1978. Almost immediately, Mr. Florey sued for declaratory and injunctive relief. Mr. Florey claimed the rules violated the First Amendment establishment clause.

Discussion

The plaintiffs claimed that the singing of a Christmas carol like "Silent Night" even one time was a compromise of the First Amendment, even though the song did have some secular content.

The defendants focused on the secular side of the songs. They contended that a knowledge of religious songs and drama was necessary for a complete education.

Decision

The United States District Court found at the outset that the kindergarten program in 1977 violated the establishment clause of the First Amendment. The new rules adopted by the committee stated clearly that the Sioux Falls schools might observe those holidays having both secular and religious connotation. Blatantly sectarian holidays such as Pentecost, Ash Wednesday, and Good Friday could not be celebrated.[299] These rules controlling the celebration of

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[299]Ibid., p. 915.

religious holidays within the Sioux Falls School District are as follows:

1. The several holidays throughout the year which have a religious and a secular basis may be observed in the public schools.
2. The historical and contemporary values and the origin of religious holidays may be explained in an unbiased and objective manner without sectarian indoctrination.
3. Music, art, literature and drama having religious themes or basis are permitted as part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday.
4. The use of religious symbols such as a cross, menorah, crescent, Star of David, crèche, symbols of native American religions or other symbols that are a part of a religious holiday is permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature. Among these holidays are included Christmas, Easter, Passover, Hanukkah, St. Valentine's Day, St. Patrick's Day, Thanksgiving and Halloween.
5. The school district's calendar should be prepared so as to minimize conflicts with religious holidays of all faiths.[300]

The United States District Court found that the rules and their implementation constituted no particular relationship between the school and any religious holiday.

Noting the philosophy of the application of religion in the curriculum, the court determined that the policy and rules gave no aid to religion or to any religious institution. This philosophical statement reads:

Religion in the Curriculum

Religious institutions and orientations are central to human experience, past and present. An education

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[300] Ibid., p. 918.

excluding such a significant aspect would be incomplete. It is essential that the teaching about--and not of--religion be conducted in a factual, objective, and respectful manner.

Therefore, the practice of the Sioux Falls School District shall be as follows:

1. The District supports the inclusion of religious literature, music, drama and the arts in the curriculum and in school activities provided it is intrinsic to the learning experience in the various fields of study and is presented objectively.
2. The emphasis on religious themes in the arts, literature and history should be only as extensive as necessary for a balanced and comprehensive study of these areas. Such studies should never foster any particular religious tenets or demean any religious beliefs.
3. Student-initiated expressions to questions or assignments which reflect their beliefs or non-beliefs about a religious theme shall be accommodated. For example, students are free to express religious belief or non-belief in compositions, art forms, music, speech and debate.[301]

In conclusion, the court denied the injunction and ruled that the Sioux Falls School System was not in violation of the First Amendment.

Religious Clubs

Religious club meetings at school, as activities sponsored by the school, have been consistently held to be in violation of the First Amendment establishment clause. The latest cases, (1977, 1978), both concerning the establishment of Bible clubs in high schools, were decided consistently with the trend of complete separation of church and state within the public schools.

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[301]Ibid., pp. 918-19.

Johnson v. Huntington Beach U. High Sch. Dist., 68 Cal. App, 3d 1, App., 137 Cal. Rptr. 43 (1977).

Facts

Plaintiffs were students at Edison High School in the Huntington Beach District. Edison High School had prescribed rules for clubs operating on the campus, and required that clubs be recognized with official approval before meeting at school. The district did not allow religious clubs to meet at school during the day.

The district changed its policy on an interim basis to allow religious clubs to meet on campus during the school day. Upon legal advice that the proposal was unconstitutional, the district rescinded its change. Over one hundred students at Edison High responded by petitioning the school for official recognition of a club "to enable those participating to know God better."[302]

Plaintiffs upon the rejection of the petition filed suit for injunctive and declaratory relief for recognition by school officials.

Discussion

The suit was brought citing First Amendment rights to free exercise of religion.

The tripartite test was applied to the case at hand. Regarding the first facet of the test, the group had stated

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[302]Johnson v. Huntington Beach U. High Sch. Dist., 68 Cal. App. 3d 1, App., 137 Cal. Rptr. 43 (1977).

the prime reason for wanting the club was to allow the students to get to know God better. The second phase of the test deals with advancing religion, which would result if the club acquired the school's recognition and sponsorship. The third part of the test would be measured by the club's use of classrooms and meeting on the campus during the school day.

Decision

The California Fourth District Court of Appeals, having applied the tripartite test, adjudged the claim to fall short on all three parts, and so affirmed the decision of the California Superior Court, denying the injunction.

Trietly v. Board of Education of City of Buffalo, 65 A.D. 2d 1, 409 N.Y.S. 2d 912 (1978).

Facts

Reverend Bryon Lutz of the Sycamore Tree Youth Center petitioned two high schools in Buffalo for permission to start Bible clubs in these schools. The Buffalo Board of Education, upon obtaining legal counsel, denied the petition.

Parents of the petitioners brought suit against the school board to force the board to allow the religion clubs to operate.

Discussion

The expressed purpose of the clubs was to accommodate the members and provide spiritual assistance to them.

The petitioner lined up a faculty sponsor and claimed that the denial was arbitrary and that it abridged the First Amendment right to religious freedom.

The religious nature of the clubs precipitated the Erie Supreme Court's applying the tripartite test. The first part of the test showed that the purpose of the clubs was to be religious in nature. Advancement of religion and the sectarian study of the Bible answered the second part of the test. The third part of the test was failed also, since the club needed a faculty adviser and rent-free facilities on campus.

Decision

The New York Fourth Department Appellate Court, upon the application of the tripartite test and the subsequent failure of the club to pass, affirmed the decision of the Erie court. In the opinion of the appellate court, the Bible clubs would represent more than accommodation of religion by the public schools.[303]

Bible Courses

In growing numbers, high school English departments across the country are adding courses concerning the Bible. The study of the Bible can be approached in several ways and

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[303]Trietly v. Board of Ed. of City of Buffalo, 65 A.D. 2d 1, 409 N.Y.S. 2d 912 (1978), p. 912.

and with various objectives.[304] The Bible can be taught as secular literature so long as the instruction stands up to the tripartite test.

The courts have conceded or encouraged the teaching of religions of the world and a study of the Bible as literature. Studies of religion in the public schools should concentrate on studying about religions rather than advancing any one religion.

Wiley v. Franklin, 474 F. Supp. 525 (1979).

Facts

A Bible study course was taught in elementary schools in Chattanooga, Tennessee. Teachers were hired by the "Bible Study Committee," an organization of Christian laymen and ministers but, as employees of the school system, were subject to supervision and removal by school administrators.

Plaintiffs favored a course of study in Bible in the schools, but thought the existing program was unconstitutional.

Discussion

The United States District Court reiterated that courses in Bible, with proper selectivity, interpretation, objectivity, and emphasis relevant to Western culture, history, literature, and values could be taught without encountering any First Amendment religious freedom infringement.[305]

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[304]Peter Bracher, "The Bible and Literature," English Journal (November 1972): 1170.

[305]Wiley v. Franklin, 474 F. Supp. 525 (1979), p. 525.

Decision

The United States District Court ordered the school board to submit plans for a new curriculum within the district court's guidelines. [See pages 86 and 87 for salient details.] In the second phase of the suit, the court found the modified plan met the three main stipulations set forth to assure the program's constitutionality:

> (1) proposed teacher assignment standards would be approved, with elimination of permission for employment of Bible teachers whose only qualifications were a teacher permit and 12 quarter hours in Bible literature; (2) court would retain jurisdiction of lawsuit during initial year of operation of court-approved plan for Bible studies; and (3) proposed curriculum guide would be approved with elimination of lesson proposing teaching of resurrection of Jesus as recounted in the New Testament.
> Plan approved as modified.[306]

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[306] Ibid.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

The home and the church bore primary responsibility for educating the populace in Colonial America. Church and home responsibility is of ancient vintage in educational functions. The church assumed responsibility for sacred education, while leaving secular education to the home.

Colonial American homes assumed the primary responsibility for educating youth. Colonial education consisted mainly of teaching children to read the Bible. The earliest colonial governments were theocentric, and full participation necessitated a knowledge of reading and writing. Government and church functions were sometimes hard to separate.

Children of families with substantial means attended Latin Grammar schools adapted from the age-old English schools established to teach classics and prepare students for the university.

After the American Revolution, schools progressed slowly through phases of (1) private schools held for several weeks a year, (2) moving schools, (3) private boarding academies, and (4) the district school or the "little red schoolhouse" in every district.

The American common school systems began in the early 1800s and have been evolving since. Religious instruction comprised a lion's share of time and effort in American education in the 1800s. Educational leaders, such as Horace Mann, W. T. Harris, and Elisha Potter, insisted on teaching moral values instead of sectarian religion. While the teaching of moral values remained in twentieth-century school curricula, judicial processes changed the thrust of religious education in public schools.

The great social trend and experiential teaching at the turn of the century had some effect upon public school curricula; however, population movements and shifts from rural to urban living brought more lasting changes faster.

From rudimentary systems with a curriculum of reading, writing, and moral and religious instruction, schools by 1900 had begun to flex, experiment, and center on teaching children instead of subject matter.

Tremendous population growth and expanded international knowledge necessitated more comprehensive schools in the twentieth century. Population movements during World War I, the great depression, and continuing through World War II gave the American people lessened provinciality and a broader outlook.

This more universal outlook gave insight into the needs of children for a comprehensive academic education.

The present-day systems, with comprehensive high schools offering hundreds of academic courses along with hundreds of vocational training programs, are far removed from the child studying the catechism by firelight in colonial New England.

School boards and school administrators today are charged with providing a comprehensive education for each child. Problems arise in the process of deciding which curriculum offerings will achieve the quality of education needed. One of the problems deals with the mainstay of early American education--namely, religious instruction. This problem is multi-faceted and often volatile in nature.

Beginning in the 1940s, school board practices were challenged by various civil liberty groups and sectarian religious organizations. The challenges often ended in court decisions which established precedents for further school board policy considerations. Almost invariably, the courts' decisions have established and maintained a wall of separation between church and state.

Judicial decisions consistently insisted that sectarian religious instruction is unconstitutional in the school setting. Judicial decisions have urged school boards to include studies about religion in the curriculum. Secular studies about religion have been ruled constitutional when presented in such a way as not to tend to further any religion.

This study has: (1) reviewed the history of church-state relationships, (2) reviewed court decisions affecting the status of religious instruction in public schools, and (3) reviewed and analyzed significant court cases setting precedents in religious instruction cases.

Conclusions

Based on review and analysis of major judicial decisions, the following conclusions are drawn in each specific area of review:

1. Released time for religious instruction.

Conclusion: Released time for religious instruction off campus is legal. Released time for religious instruction on campus is not constitutional.

2. Prayer in public schools.

Conclusion: Prayer in public schools is unconstitutional unless the prayer is silent and private.

3. Bible reading in school.

Conclusion: Bible reading in schools for devotional purposes or to further a religion is unconstitutional. Secular study of the Bible as literature is encouraged.

4. Celebration of religious holidays in schools.

Conclusion: Celebration of those holidays with both religious and secular importance is legal. Celebration of strictly sectarian holidays is unconstitutional.

5. School Bible or religion clubs.

Conclusion: Bible clubs or religious clubs in the school setting are unconstitutional.

6. Teaching the theory of evolution.

Conclusion: Teaching any theory of the origin of man is constitutional.

7. Sex education in school.

Conclusion: Sex education in the public school is constitutional and is encouraged as a public health measure.

8. Patriotic exercises.

Conclusion: Requiring one to participate in patriotic exercises contrary to the tenets of one's religion is unconstitutional.

9. Display of religious symbols in school setting.

Conclusion: Display of religious symbols in public school is constitutional if the symbols depict art, culture, and literary works. Blatant religious symbols tending to further the establishment of religion are unconstitutional.

10. Use of electronic media aids.

Conclusion: The use of electronic aids is legal if used in instruction. If electronic aids are used as entertainment, students may excuse themselves.

11. Academic courses in religion.

Conclusion: Academic courses in religion are constitutional and encouraged. Study of the Bible as a literary work is

encouraged and constitutional if the study does not further the establishment of a religion.

12. Distribution of religious materials in public schools.

Conclusion: Distribution of religious materials at school is unconstitutional.

Questions and Answers

1. Question: Under what circumstances are First Amendment rights of students abridged?

Answer: Any condition affording less than First Amendment religious freedoms is an abridgment of students' rights. Any policy that (a) reflects a clearly religious purpose, or (b) has a primary effect of advancing or prohibiting a religion, or (c) causes excessive entanglement of government with religion is unconstitutional and is an abridgment of religious freedom rights.

2. Question: What education practices in public schools have abridged students' religious freedom rights?

Answer: (a) Released time for religious instruction on campus, (b) prayer in the school setting unless silent and private, (c) devotional Bible reading in the school setting, (d) celebration of religious holidays having no secular importance, (e) Bible or religious clubs at school, (f) teaching the Biblical explanation of the origin of man exclusive of other secular scientific explanations,

(g) teaching sex education as a course other than health or science with an excusal system, (h) requiring children to salute the flag or sing the national anthem or take part in patriotic exercises if contrary to the tenets of their religion, (i) displaying sectarian religious symbols at school unless considered works of art, culture, or literature, (j) requiring children's attendance if electronic aids are used in entertainment, (k) courses in religion unless taught as academic studies about religion, and (l) distributing religious literature at school.

3. Question: What should administrators know about the constitutional rights of students in religious instruction?

Answer: The Supreme Court's tripartite test applied to any questionable materials or practices points quickly to dubious endeavors. Administrators should know the meaning of and have a respect for the First Amendment religious rights.

4. Question: Are there specific trends to be determined from judicial analysis?

Answer: Based on judicial decisions, the trend of the courts is toward approving secular study about and concerning religion and its aspects while ruling against sectarian religious instruction of any sort within the school setting.

5. Question: Based on review and analysis of judicial decisions, are there trends and directions that can help school boards avoid abridging First Amendment religious rights?

Answer: School board policy made with the spirit and letter of the constitution in mind will reflect programs and activities within the limits of the First Amendment. Sectarian religion is not within bounds at school, and any policy allowing the practice of religion at school will not pass the tripartite test.

6. Question: Based on analysis of judicial decisions, can any projections be made concerning disagreement that may arise between school policy and students' religious rights?

Answer: As long as religion is perceived differently by students, religious freedom rights will be perceived differently, and conflict will arise. The courts have been consistent in maintaining a "wall of separation between church and state" in religious instruction cases, and it appears that this will continue.

Recommendations

Based on an analysis of judicial decisions, the following recommendations are made:

(1) School boards and administrators should be aware of all the different religious sects in the school district and organize instruction accordingly.

(2) School boards and administrators should guarantee that policy dealing with religious instruction is within established First Amendment limits as interpreted by the courts.

(3) Administrators must be vigilant in school to curtail unobtrusive religious practices which may tend to abridge student rights.

(4) Administrators must curtail overt religious sectarian programs in the school setting that would tend to abridge student rights.

(5) Administrators must ensure that inherently religious programs such as baccalaureate services are held in such place and manner that they do not create a sectarian practice in the school setting.

(6) Administrators providing religious studies in the curriculum must ensure that the program is a secular study about religion rather than a religious experience.

(7) Administrators should not allow the distribution of printed religious material at school.

(8) Administrators should exclude Bible or religious clubs from school activities within the school setting.

(9) Administrators should be aware that celebration of holidays having secular as well as religious connotation is legal, while the celebration of holidays of purely religious nature is not constitutional.

(10) Administrators should be aware that the First Amendment is beyond the reach of public sentiment and cannot be compromised by popular opinion.

EPILOGUE

In their continuing efforts to maintain the wall of separation between church and state, federal courts have recently (between January and July, 1980) decided:

1. In an Arizona case, school prayer at student assemblies is unconstitutional.[a]

2. Graduation ceremonies for an Idaho high school cannot be held in a Mormon church building.[b]

3. A Chicago teacher cannot properly refuse to teach the flag salute to school children.[c]

4. A reverse shared-time program wherein tax-paid teachers are furnished for parochial schools is unconstitutional.[d]

5. Posting the Ten Commandments in public school classrooms of North Dakota is unconstitutional.[e]

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[a]Collins v. Chandler Unified School District, 470 F. Supp. (1979).

[b]Reiman v. Fremont County Joint School District, Boise District Court (1980).

[c]Palmer v. Board of Education in Chicago, 603 F 3d (1979).

[d]American United v. Porter, civil number g-287-72, Traverse District Court (1980).

[e]Ring v. Grand Forks Public School District #1, 483 F. Supp. 272 (1980).

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