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THE LEGAL ASPECTS OF RELIGION IN THE PUBLIC SCHOOL CURRICULUM

by

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A Dissertation Submitted to
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The role of religion in the public schools is one of the most controversial issues in American education. The vast number of religious groups and their widely differing opinions contribute to the controversy. In addition, few topics stir human emotions more strongly than the mention of religious activities in the public schools. School officials face challenges in trying to follow the laws of the land, accommodate local religious customs, protect the rights of minority groups, and deal with their own religious beliefs.

The purposes of this study were (1) to review the history of religion in the public school curriculum; (2) to determine from current literature the critical legal issues involving religion in the public school curriculum; (3) to review and analyze case law related to religion in the public school curriculum; and (4) to provide guidelines for practicing school administrators who must make decisions on the legality of permitting religious activities as part of the public school curriculum. This study is developed in a factual manner based on the legal issues involved and will not attempt to address the moral values inherent in permitting religious activities in the public school curriculum.

An analysis of judicial decisions does not always reveal consistent and definitive solutions for resolving litigious issues. The time, place, and particular set of circumstances involved account for the sometimes varied rulings by the courts. However, predicated on an analysis of judicial decisions, it is concluded that the following activities are constitutional:

1. to release students to go off campus for religious instruction
2. to permit equal access for religious groups to meet on campus

3. to provide a moment of silence
4. to teach Bible study courses
5. to use religious symbols and religious holidays to teach about religious customs and cultures and
6. permit student initiated prayers.

It is further concluded that the following activities are unconstitutional:

1. to release students on campus for religious instruction, including shared time programs
2. to teach balanced treatment of creationism and evolution
3. to distribute religious materials on campus
4. to use school-sponsored prayers and Bible reading
5. to display permanent religious symbols
6. to permit prayers at graduation exercises and athletic events and
7. to require students to participate in school activities that conflict with sincerely held religious beliefs

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of The Graduate School at The University of North Carolina at Greensboro.

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November 9, 1995
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CHAPTER I

INTRODUCTION

LET US PRAY! Why does a nation that has "One Nation Under God" in its pledge of allegiance and "In God We Trust" on its currency rule prayer unconstitutional in the public schools? "What many people do not understand is that the United States is not a government of religion, but a nation of essentially religious people."[1]

"The role of religion in the public schools is one of the most controversial issues in American education."[2] This controversy is due to the vast number of religious groups and their widely differing opinions.[3] In addition to being controversial, religion in public schools is a very emotional issue.[4] School officials face challenges in trying to follow the laws of the land, accommodate local religious customs, protect the rights of minority groups, and deal with their own religious beliefs. In a country with 1200 different religious bodies,[5]

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[1]H. C. Hudgins, Jr. and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, 3d ed. (Charlottesville, Virginia: The Michie Company, 1991), 399.

[2]John David Burkholder, "Religious Rights of Teachers in Public Education," Journal of Law and Education 18, no. 3 (Summer 1989): 335.

[3]Ibid.

[4]Ibid., 336.

[5]Nancy Gibbs, "America's Holy Wars," Time 138 no. 23 (9 December 1991): 62.

school officials must be more knowledgeable about the laws governing religious issues in the public schools. School oficials must not let pressure groups for local religious customs or their own religious beliefs keep them from protecting the rights of students. Students do not leave their rights at the "schoolhouse gate."[6]

For the first one hundred fifty years of America's existence, no one seriously challenged the legality of providing religious activities, curricular or extracurricular, as part of the public school curriculum. In fact, many states, beginning with Massachusetts in 1647, required religious activities as part of the public school curriculum.[7] Since the 1940s, however, in ever increasing numbers, there have been challenges to providing religious activities as a part of the public school curriculum. Before this period school officials met little if any resistance in designing curricula that provided religious activities on a daily basis.

There are two main groups in the struggle over religious activities in the public schools. The "separationists" on one hand argue that church and state must remain apart and that government should not be in the business of endorsing one faith over another. The "accommodationists," on the other hand, believe the "wall of separation" has grown too thick and costs too much. They contend that "by isolating God from public life the courts have replaced freedom of religion with freedom *from* religion."[8]

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[6]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 St.Ct 733, 21 L.Ed.2d 731 (1969).

[7]Neil Gerard McCluskey, Public Schools and Moral Education (New York: Columbia University Press, 1959), 12.

[8]Gibbs, 62.

One duty of school officials is to protect the First Amendment religious freedoms of each child. The guarantees of religious freedom are expressed in the First Amendment to the Constitution in these words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[9] When Congress adopted the First Amendment it sought to protect citizens from an established state church, since many members of Congress and their ancestors had come to America to escape from an established state church. At the time the First Amendment was adopted there were few denominations; "today there are more than 289 denominations listed in the *Handbook of Denominations in the United States*."[10] Over the years individuals have used the courts to protect their free exercise of religion and to ensure governmental neutrality in matters of religion.[11] Some examples follow:

(1) West Virginia Board of Education v. Barnette, 1943.

(2) Engel v. Vitale, 1962

(3) Abington School District v. Schempp, 1963

(4) Yoder v. Wisconsin, 1972

(5) Lee v. Weisman, 1992

In Abington School District v. Schempp the Supreme Court ruled that the state laws requiring devotional Bible reading in schools violated the

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[9]U. S. Constitution, Amendment I.

[10]Kristen J. Amundson, Religion in the Public Schools (Arlington: Virginia: American Association of School Administrators, 1986), 3.

[11]Ibid., 4-21.

establishment clause of the First Amendment as applied to the states by the Fourteenth Amendment.[12] Even though the Supreme Court first ruled on school-sponsored prayer in 1962, the issue is still controversial. From 1962 to 1985 at least 200 proposals were introduced into the United States Congress to overturn the Supreme Court ruling on school prayer.[13] School-sponsored prayer and devotional Bible reading in public schools have created the greatest sources of litigation and public confusion concerning religious neutrality.[14] In order to protect religious freedoms guaranteed by the First Amendment school boards must be knowledgeable about curriculum activities that have been and may be challenged by students under the First Amendment. School officials must exercise caution in formulating policies that permit local religious customs as a part of the public school curriculum. America is a culturally diverse society. School districts have to be sensitive to minority rights as well as majority rights. It is the responsibility of school boards and school officials to protect the rights of all individuals within school districts.

Statement of the Problem

School officials face a dilemma today in formulating policy to accommodate local religious customs and their own religious beliefs, and at the same time comply with their legal duty to protect the religious rights of individuals as guaranteed by the First Amendment. School officials' knowledge

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[12]Ibid., 19.

[13]James E. Wood, "Church-State Issues in Education in the 1980s," Religion and Public Education 12, no. 3 (Summer 1985): 77.

[14]Amundson, 15.

or lack of knowledge of federal laws, state laws, school board policies, local religious customs, and their own religious beliefs concerning religious activities as part of the public school curriculum will influence how they deal with religious activities, curricular and extracurricular, as part of the public school curriculum. This study provides information that may help school officials in formulating policies that guarantee that no one's beliefs, religious or nonreligious, are infringed upon by the school system.

Purpose of the Study

The purposes of this study are: (1) to review the history of religion in the public school curriculum; (2) to determine from current literature the critical legal issues involving religion in the public school curriculum; (3) to review and analyze case law related to religion in the public school curriculum; and (4) to provide guidelines for practicing school administrators who must make decisions on the legality of permitting religious activities as part of the public school curriculum. This study is developed in a factual manner based on the legal issues involved and will not attempt to address the moral values inherent in permitting religious activities in the public school curriculum.

Questions to Be Answered

This study is limited to litigation regarding religious activities in the public school curriculum. A major purpose of this study is to develop practical legal guidelines for educational decision makers to have at their disposal when faced with decisions concerning permissable religious practices in the public school curriculum.

This study answers the following questions:

1. What legal guidelines can be set forth to aid school officials in policy-making and practices of religion in the public schools?
2. What are the major legal issues regarding religion in the curriculum of public schools?
3. Are there discernible patterns and trends that are identified from analysis of judicial decisions?
4. Based on established legal precedents, what are the legally acceptable criteria for permitting religious practices in the curriculum of public schools?

Methodology

Legal research as defined by Hudgins and Vacca[15] was the methodology used for this study. Legal principles were derived from an analysis of judicial decisions.

The framing of a problem as a legal issue is the beginning of legal research. In this study, the issue is the legal aspects of religion in the public school curriculum. Federal and state court decisions were investigated. A bibliography of court decisions was assembled. Each federal and state judicial decision was read and analyzed for three major reasons: the facts of the case, the decision and rationale, and implications of the decision.

Federal and state court decisions are the primary sources for this study. Legal encyclopedias, law reviews, educational articles, and books are secondary

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[15]Hudgins, 25-55.

sources used to provide supplemental information for this study. The Current Index to Journals in Education, Index to Legal Periodicals, Current Law Index, American Law Reports, and Resources in Education are included as resources.

The actual court cases are examined as reported in the National Reporter System, which includes decisions rendered by the following courts: the United States Supreme Court, the United States Court of Appeals, the United States District Courts, and state appellate courts. Decisions from lower courts are included when higher-level judicial decisions are not available for a given area of research. Cases were read and categorized according to the nature of the involvement of religion in the public school curriculum.

Shepard's Citations were used to "shepardize" legal cases. This provided a history of reported judicial decisions and a treatment of those decisions. This also allowed the researcher to depend on the applicable judicial holding.

Definition of Terms

For the purposes of this study the following definitions are used:

Balancing Test: "A constitutional doctrine in which the court weighs the right of an individual to certain rights guaranteed by the Constitution with rights of a state to protect its citizens from the invasion of their rights; used in cases involving freedom of speech and equal protection."[16]

Certiorari: "A writ from a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein."[17]

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[16]Black's Law Dictionary, 5th ed. (St. Paul, Minn.: West Publishing Company, 1979), 131.

[17]Ibid., 207.

Creationism: "The doctrine that ascribes the origin of matter, species, etc. to acts of creation by God."[18]

Curriculum: "All of the interactions among persons as well as the interactions between persons and their physical environment."[19] (This definition refers to all the interactions persons encounter in school settings.)

Equal Access Act: "Public Law 98-377 of 1984 which states that it is unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within the limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[20]

Evolution: "Biology: a.) the development of a species, organism, or organ from its original or primitive state to its present or specialized state; phylogeny or ontogeny; b.) the theory now generally accepted, that all species of plants and animals developed from earlier forms of hereditary transmission of slight variations in successive generations."[21]

Federal Laws: Laws passed by Congress or laws arising as the result of federal court decisions.

Humanism: "Any system of thought or action based on the nature,

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[18]Webster's New World Dictionary of the American Language. Second College Edition, (New York: New World Dictionaires/Simon and Schuster, 1984), 332..

[19]Dale L. Brubaker, Curriculum Planning: The Dynamics of Theory and Practice (Glenview, Illinois: Scott, Foresman and Company, 1982), 2.

[20]20 USC 4071, Section 802 (a).

[21]Webster's New World Dictionary, p.486.

dignity, interests, and ideals of man;specifically, a modern, nontheistic, rationalist movement that holds that man is capable of self-fulfillment, ethical conduct, etc. without recourse to supernationalism."[22]

Legal Duty: The legal obligation of a person to follow federal, state, and local laws.

Local Customs: Religious practices that are traditionally permitted on a local level in public schools.

Moment of Silence: "A short period of time, usually a minute in length, implemented at the beginning of the school day as a time for completely unstructured private thoughts or contemplation. In North Carolina, this statute was enacted in 1985."[23]

Public Schools: "Schools established under the laws of the state (and usually regulated in matter of detail by the local authorities) in the various districts, counties, or towns, maintained at the public expense by taxation, and open, usually without charge, to the children of the residents of the city, town, or other district. Schools belonging to the public and established and conducted under public authority."[24]

Religion: "As used in constitutional provisions of the First Amendment forbidding the 'establishment of religion,' the term means a particular system of faith and worship recognized and practiced by a particular church, sect, or denomination."[25] In public education this means a particular

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[22]Ibid., 682.

[23]North Carolina General Statute 115C-47 (29), 1985.

[24]Black, 1207.

[25]Ibid., 1161.

system of faith and worship that is practiced within the public schools and inclusive of school activities and is subject to litigation.

School board policies: Policies approved by the board of education.

Sectarian: "Denominational; devoted to, peculiar to, pertaining to, or promotive of, the interest of a sect, or sects. In a broader sense used to describe the activities of the followers of one faith as related to those of adherents of another."[26]

Secular: "Of or relating to worldy things as distinguished from things relating to church and religion; not sacred or religious; temporal; worldly [secular *music*, secular *schools*]."[27]

State Laws: Laws passed by the state or laws resulting from state courts.

Significance of the Study

Increasing numbers of individuals are seeking court redress for their grievances regarding religious activities as part of the public school curriculum. As the demands for accountability increase, school officials need to understand better the implications of recent judicial decisions regarding this issue and the factors affecting their decisions to obey or ignore the law of the land.

School officials, in order to protect religious freedoms guaranteed by the First Amendment, must be knowledgeable about federal and state laws affecting the public school curriculum. The information gained from this study

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[26]Ibid., 1214.

[27]Webster's New Word Dictionary, 1288.

will enable school officials to understand better what is allowable under the law with regard to this issue.

Limitations of the Study

This study is limited to an analysis of federal and state court cases regarding religious activities in the public schools. The Supreme Court in 1962 and 1963 held school prayers unconstitutional. The Supreme Court rulings should have but did not end controversy over whether to allow prayer in public schools. Much has changed during the intervening years in the attitudes of society and the courts.

Design of the Study

Chapter I contains an introduction, the statement of the problem, the purpose of the study, the questions to be answered, the methodology, the definition of terms, the significance of the study, the limitations of the study, and the design of the study.

Chapter II presents a review of the literature related to the legal aspects of religion in the public school curriculum, as well as a summary review of the historical development and growth of public education in United States.

Chapter III is a presentation of religious practices that have been litigated in the state and federal courts. Attention is also focused on current trends.

Chapter IV is a review and an analysis of selected judicial decisions on religious practices in the public school curriculum. The facts of the cases, decisions of the courts, and discussions are presented for each category.

Chapter V is a summary of the information obtained from a review of the literature and from the analysis of the selected court cases. The questions asked in the introductory part of the study are answered. Conclusions are drawn on the current legal status of religion in the public school curriculum. Finally, general conclusions and recommendations are presented.

CHAPTER II

REVIEW OF THE LITERATURE

Old World Influences on American Education

American civilization roots are anchored in the ancient Greek and Roman civilizations. The Greeks introduced a personal and political freedom and initiative by trusting themselves to follow truth as they saw it. Greek literature, art, and philosophy were a legacy and cultural heritage for Western ciivilization. The Romans contributed law, government, and practical arts. Christianity building on Greek philosophical ideas, especially those of Aristotle and Plato, and Roman love of law, and with its new ideas evolved from the past, form the connecting link and preserving bond between the old and new civilizations.[28]

In time the Roman Empire fell, Greek was forgotten, Latin was evolved into several European languages and knowledge of art and sciences disappeared. Moreover, schools disappeared. Though weakened, the Christian Church saved civilization. It took ten centuries to reconstruct enough of the ancient civilization so the modern world was able to survive.[29]

The Renaissance began in Italy, and other city--states and nations joined. The Renaissance, is characterized by

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[28]Ellwood P. Cubberley, Public Education in the United States (Boston: Houghton Mifflin Company, 1934), 1-2.

[29]Ibid., 3.

> (1) a wonderful revival of ancient learning; (2) a great expansion of men's thoughts; (3) a general questioning of all ancient authority; (4) a great religious awakening; (5) a wonderful period of world exploration and discovery; (6) the founding of new nations on new lands; (7) the reawakening of of the old Greek spirit of scientific inquiry; and (8) the evolution of our modern civilization.[30]

The development of manufactured paper and the invention of the printing press provided a prime opportunity to advance the new learning. Paper was in general use throughout Europe by 1450.[31] The invention of Gutenburg printing as the greatest invention to improve the flow of information since the invention of writing.[32] Johannes Gutenburg, a goldsmith from Maniz, Germany, used movable type made of a metal alloy, with which type could be cast precisely and in large quantities. By 1448, Gutenburg had established a large printing office in Mainz, Germany.[33] The earliest documents with printed dates are "letters of indulgence" issued as early as 1454 "from a press at Mainz and ascribed to Johannes Gutenburg."[34] By 1475, the printing press was established in the all European leading cities and paved the way for a rapid extension of schools and learning. In time, the

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[30]Ibid, 3.

[31]Ibid, 5.

[32]Edgar W. Knight, Twenty Centuries of Education (Boston: Ginn and Company, 1940), 214.

[33]Hugh Thomas, A History of the World (New York: Harper and Row, 1979), 199.

[34]Knight, 216.

printing press was destined "to become one of the world's greatest tools for human progress and individual liberty."[35]

The changed attitude toward the Roman church's dogmatic and repressive rule was very important in American educational history, perhaps more important than the Renaissance. Led by Martin Luther and German princes, people defied the church's authority and revolted. The revolt spread throughout all of Europe and the Roman Catholic Church and Western Europe were premanently divided[36]

Even though principles of religious toleration had been established, the Western world was not ready for such rapid change. A century and a half of religious warfare passed before the people of Western Europe were willing to stop fighting and recognize other religious ideas among other people. Even though the fighting was concluded, hostile religious ideological camps existed long into the nineteenth century. As the progress of civilization slowed, misery spread and because of suffering, people fled home to new colonies rather than conform.[37]

The main idea underlying Martin Luther's, Huldreich Zwingli's, John Calvin's, and John Knox's actions was to substitute the Bible authority for Church authority . The basis for this action came out of the revival of Greek study and recovery of Gospels' written Greek language. In theory at least, to be saved meant that one must be able to read God's word, participate in

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[35]Cubberley, 5.

[36]Cubberley, 6-7.

[37]Cubberley, 7-8.

church service intelligently and live lives predicated on spiritual mandates.[38]

Formally salvation was predicated on church authority, thus, it was not important for more than a few to be educated. The new theory emphasized individual responsibility, thus, a least for Protestants, education of all became a vital necessity. To provide public education meant the creation of a completely new type of school, the elementary school, taught in the native language of common people. Elementary schools replaced the secondary Latin schools of the Renaissance. And for church leaders cathedral and monastic Latin schools were necessary. A dual school system developed in Europe--elementary schools for the masses and secondary schools for the classes.[39]

With the Renaissance well underway and sweeping new knowledge, secondary schools emerged to provide formal reorganization for students. Moreover, the Reformation provided a new motive for education in religion not intended for either service to state or church. Of all revolting countries, only England failed to develop educational institutes for Protestants. In time, elementary education in England did develop. However, the movement occured only as the results of new political and industrial developments in the late nineteenth century.[40]

Colonial Settlement in America

"The settlement of America, it has been said, had its origins in the

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[38]Ibid, 8.

[39]Cubberley, 9.

[40]Ibid.

unsettlement of Europe."[41] European upheaval encapsulating political, economic, and social conditions, and a result of the Renaissance and the ProtestantReformation, set the stage for the American colozination.[42] In the seventeenth century Englishmen in unprecedented numbers left England seeking religious freedom and economic opportunity in the colonies.[43] The English were not alone in colonizing America. Early colonial settlers included Spanish, French, Dutch, Czechs, Swedes, Scottish Presbyterians, Portuguese Jews, and Germans. The cultural contact not only included the relationships between Europeans and Indians, but also Europeans groups. The rival colonies intensified burdens placed on education.[44]

Colonization of America lasted approximately two hundred years, from Roanoke Island in 1587 and Jamestown in 1607 to the signing of the Declaration of Independence from England in 1776. Every European group that came during the two centuries brought customs from the old country.[45]

The New England Colonies

The first permanent settlement in New England, which was the second in English America, resulted from discontent of Puritan Separatists.

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[41]Lawrence A Cremin, Traditions of American Education (New York: Basic Books, Inc., 1977), 3.

[42]Ibid.

[43]Ibid. 4.

[44]Ibid., 6.

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

Separatists, many imprisoned and some even executed for opposing government's Church of England, decided to leave England, which was illegal without the consent of the king, and head to America. In 1608 Separatists from a congregation in Scrooby, in Nottinghamshire, first emigrated to Holland and in time concerned with influence of Dutch culture made plans for the new colonies. They intended to establish a colony without interference and where they could spread "the gospel of the Kingdom of Christ to those remote parts of the world."[46]

In 1620, Separatists with permission from the Virginia Company to settle an independent community with ownership of land in Virginia made plans to sail. James I said he would "not molest them, provided they carried themselves peaceably."[47] This historic concession opened English America to settlement by dissenting Protestants.[48] Led by William Brewster, the Puritans contracted with London merchants to form a joint economic adventure in northern Virginia.[49]

In the fall of 1620, the Mayflower, with over one hundred passengers, began a difficult voyage, due to rough seas, crowded conditions, and improper

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[46]Richard N. Current, T Harry Williams, Frank Freidel, and Alan Brinkley, American History: A Survey to 1877, vol 1 (New York: Alfred A Knopf, 1987), 38.

[47]Ibid.

[48]T. Harry Williams, Richard N. Current, and Frank Freidel, A History of the United States: To 1877, 2d ed., rev. (New York: Alfred A. Knopf, 1964), 36.

[49]Norman A. Graebner, Gilbert C. Fite, and Philip W. White, A History of the United States, vol 1 (New York: McGraw-Hill, 1970). 49-50.

diet. Sighting Cape Cod, the Mayflower pilgrims realized they were out of the London Company's jurisdiction and thus had no authority for governance. It is at this time, especially when some of the non-Puritans began to discuss "their own liberty," that William Brewster, John Carver, William Bradford, and others insisted that some form of self-government compact be agreed upon. This, the Mayflower Compact, was the first self-government in America.[50] The Compact read:

> In ye name of God. We whose names are unwritten, the loyall subjects of our dread soveraigne Lord King James, by ye grace of God, of Great Britaine, Franc, & Ireland king, defender of ye faith, &c. Haveing undertaken, for ye glorie of God, and advancemente of ye Christian faith and honor of our king & countrie, a voyage to plant ye first colonie in ye Northerne parts of Virginia, doe by these presents solemnly & mutually in ye presence of God, and one of another, covenant, & combine ourselves togeather into a Civill body politick; for our better ordering, & preservation & furtherance of ye ends aforesaid; and by vertue hereof to enacte, constitute, and frame such just & equall Lawes, ordinances, Acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for ye generall good of ye colonie: unto which we promise all due submission and obedience. In witness whereof we have hereunder subscribed our names at Cap-Codd ye-11-of November, in ye raigne of our soveraigne Lord King James of England, France, & Ireland ye eighteenth, and of Scotland ye fiftie fourth. Ano. Dom. 1620.[51]

The pilgrims landed on December 21, 1620, at a site they named Plymouth. At the end of a difficult year and a plentiful harvest, the Plymouth

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[50]Ibid.

[51]The World Book Encyclopedia, (Chicago: World Book Inc., 1991), s. v. "Mayflower Compact," by Joan R Gundersen.

Colony was a celebrated success.[52]

The example set by the Plymouth Colony plus the turbulent events in England generated a strong interest in colonization among other groups of Puritans. The Massachusetts Bay Colony, which sailed for New England in 1630 with seventeen ships and one thousand people, was the largest single migration of its kind in the seventeenth century. Governor John Winthrop brought with him the charter of the Massachusetts Bay Colony, establishing colonial authority within the colony.[53]

The colonists were seen and indeed saw themselves as God's agents, not merely patriots and adventurers. A Puritan preacher, John Cotton, preached God's approval for the voyage to New England in his sermon to the Winthrop fleet at Gravesend in June, 1630:[54] "I will appoint a place for my people Israel, and will plant them, that they may dwell in a place of their own, and move no more; neither shall the children of wickedness afflict them any more, as beforetime."[55] Being a part of God's grand design brought a sense of purpose to the institutions of colonial education. Colonists were committed to creating and maintaining Zion.[56] Governor John Winthrop in his famous sermon, "A Model for Christian Charity," which he delivered on the ship Arabella shortly before it arrived in New England stated: "The eyes of all the

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[52]Graebner, Fite, and White, 51.

[53]Current, Williams, Freidel, and Brinkley, 40.

[54]Cremin, 10.

[55]II Samuel 7:10

[56]Cremin, 10.

world are upon us. The new colony would be 'a city on the hill' an example of virtue and godliness to the rest of the world."[57]

Unlike the Mayflower pilgrims, the new Massachusetts migration immediately produced several new settlements: Charlestown, Newtown, Roxbury, Dorchester, Watertown, Ipswich, Concord, with Boston as the colony's capital. The Massachusetts Bay Company soon became the Massachusetts colonial government.[58]

Plymouth colonists received a patent for the land from the Council of New England but never obtained a royal charter giving them indisputable rights of government. With over seventy years of history and as citizens of a de facto independent republic, they were annexed by the larger colony of Massachusetts Bay.[59]

Different from the original , the Puritans who founded Massachusetts had no intention of breaking away from the Church of England. They only wanted to purify the church from the evil influence of Rome. Their behavior showed little if any enthusiasm for and to the Anglician establishment. The community church had complete authority with no connection to the Anglican Church. The congregation of each church had complete authority to choose the minister and control all goverance and policy, thus a Congregational church.[60]

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[57]Current, Williams, Freidel, and Brinkley, 43.

[58]Ibid, 40-41.

[59]Williams, Current, and Freidel, 37.

[60]Ibid., 42.

It did not take long for the English settlement to begin colonizing other parts of New England. Unproductiveness of the rocky soil around Boston and the oppressiveness of the Massachusetts government were reasons to push on to new colonies. Later migrations would occur because of the growing population pressures in the original settlements.[61]

Not all settlers in Massachusetts were Puritans and as the population increased, the proportion of Puritans and others favored nonPuritans.[62] Even though the leaders were Puritan, most other settlers were small merchants, farmers, and artisans who fled England because of hard economic times and persecution. Only about one-fifth of the settlers were church members.[63]

Rhode Island was settled by Roger Williams and Anne Hutchinson and both were expelled for opposition to the church in Massachusetts. Roger Williams received a charter from Parliament establishing a single government for the heterogeneous settlements around Providence. Rhode Island's government was patterned after Massachusetts, but it did not restrict vote to church members nor tax for church support. In 1663 a royal charter confirmed this arrangement and added a guarantee of "liberty in religious concernments." For a time Rhode Island was the only colony in which all faiths could worship without interference.[64]

In 1635, Thomas Hooker, a minister from Cambridge, defied the

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[61]Current, Williams, Freidel, and Brinkley, 43

[62]Ibid.

[63]Nelson Blake, ed. The United States: From Wilderness to World Power (New York: Henry Holt and Company, 1957), 19.

[64]Current, Williams, Freidel, and Brinkley, 44.

Massachusetts government and led a congregation 100 miles beyond the settled frontier to establish the town of Hartford in the Connecticut Valley. Four years later the towns of Hartford, Windsor, and Wethersfield established a government known as the Fundamental Orders of Connecticut. Even though Connecticut's government was similar to that of Massachusetts Bay, more people had the right to vote and hold office.[65]

John Davenport, a Puritan minister and wealthy merchant from England, founded New Haven on the Connecticut coast. In 1639, the colony established a Bible-based government, The Fundamental Articles of New Haven, which was more ideologically religiously based than Massachusetts Bay. In 1662, the governor of Connecticut received a royal charter extending his jurisdiction over the New Haven.[66]

In 1629, Maine and New Hampshire were established when two English proprietors, Captain John Mason and Sir Ferdinando Gorges, divided a grant obtained from the Council for New England along the Piscataqua River and created two separate settlements. Even with generous marketing efforts, especially by Gorges, few people inhibited the northern regions until volatile religious activities occurred in Massachusetts Bay. In 1639, John Wheelwright, a disciple of Anne Hutchinson, led some of his fellow dissenters to Exeter, New Hampshire. Soon other groups, both dissenters and orthodox Puritans, settled in Maine and New Hampshire. Even though Massachusetts Bay Company attempted to extend authority over the newly settled northern region, in time all was lost. After a long legal battle in England's highest court,

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[65]Ibid.,43.

[66]Ibid.

New Hampshire became a separate royal province in 1679. Finally, Massachusetts bought the claims of the Gorges heirs and gained control of Maine which remained a part of Massachusetts until 1820.[67]

Puritans continued to exercise absolute influence over all New England. Still, Quakers, Baptists, Presbyterians, and Anglicians who settled in the area ventured to challenge the permanent control of Congregationalism.[68]

The influence of the New England Puritans on American culture is pervasive.

> No other colonizing people dominated colonial culture as did the Puritans. The Catholics in Maryland, the Quakers in Pennsylvania, and the Baptists in Rhode Island, as important as those cultures were, were only marginal compared to the Puritans.[69]

The Middle Colonies

Since no dominant church group controlled the middle colonies, they were a "melting pot" of many religious sects. Prior to the Revolutionary War sixteen distinct sects were settled in the middle colonies, including Quakers, Mennonites, Lutherans and Reformed Germans, Baptists, Methodists, Presbyterians, Anglicans, Catholics, and Jews.[70]

"One thing the Protestant sects held in common was their fear and hate

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[67]Ibid.

[68]V. T. Thayer, Religion in Public Education (New York: The Viking Press, 1947), 10.

[69]Joseph E. Bryson and Samuel H. Houston, Jr., The Supreme Court and Public Funds for Religious Schools: The Burger Years, 1969-1986 (Jefferson, North Carolina:McFarland and Company. Inc., 1990), 9.

[70] Thayer, 10.

of Catholicism."[71] Catholics as a group were suspected and feared. As individuals, they lived almost entirely outside the principal cultural and political affairs. They were denied religious freedom, the right to participate in government, and to education. On the eve of the American Revolution, many of these burdensome disabilities and penalties had been removed, yet the record establishes that constitutional conventions of only four of the original thirteen states gave Catholics the unrestricted right to vote and hold office.[72]

The Southern Colonies

The Church of England was the dominant faith in Virginia and North and South Carolina yet in the western sections of North Carolina, Georgia, and Virginia, non-conformists such as Quakers, Baptists, Huguenots, and Presbyterian resisted the established church.[73] These frontier settlements of many different religious sects opposed tax support of the Church of England. As long as frontier settlers served as a buffer against the Indians, the Church ignored them and allowed congregations to build churches and worship as they pleased.[74] In time as the Indian threat passed, attempts were made to tax them for support of the Church of England and to force them to receive Anglican clergymen.[75]

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[71]Ibid., 11.

[72]Neil G. McCluskey, Catholic Education in America: A Documentary History (New York: Columbia University Press, 1964), 3.

[73]Thayer, 10.

[74]Ibid., 20.

[75]Ibid.

James Madison and Thomas Jefferson were dominant forces for a democratic frontier.[76] Virginia was the first state embracing a "declaration of rights" which addressed religious freedom and provided stimulus for subsequent drafting of religious guarantees included in the First Amendment to the United States Constitution Bill of Rights. Both Jefferson and Madison were greatly influenced by John Locke, who contended that religion is entirely a personal matter which should be beyond the reach of civil magistrates.[77] In 1776, James Madison and Thomas Jefferson secured the passage of a Virginia bill which legalized all forms of worship and exempted dissenters from parish rates.[78] In 1785, the state took the final step in passing the Religious Freedom Act, "which disestablished the Episcopal Church, abolished all parish rates, and forbade the use of religious tests for office."[79]

Following Virginis's lead between 1776 and 1783 most of the original thirteen states embraced a formal declaration of rights, and others incorporated some guarantee of individual liberties in their constitutions.[80] The North Carolina Constitution of 1776 states in part: "all men have a natural and inalienable right to worship Almighty God according to the dictates

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[76]Thayer, 20.

[77]Leo Pfeffer, "Religion, Education and the Constitution," Lawyers Guild Review 8 (1948): 387.

[78]Thayer, 20.

[79]Ibid.

[80]Martha M. McCarthy. "Religion and Public Schools: Emerging Legal Standards and Unresolved Issues," Harvard Educational Review 55, No. 3 (August 1985): 289.

of their own conscience."[81] In 1777, Vermont approved a like provision, adding, however, the importance of scriptures as a guide for conscience.[82] The Articles of Confederation of 1777 did not address personal freedoms, the assumption being that citizens' rights were a concern of the states.[83]

Colonial Attitudes

Many settlers in the American colonies had crossed the Atlantic to avoid persecution or discrimination because of religious belief, yet few of them were willing to extend freedom of conscience to others. Whether it was the Established Church of England or new and different churches, the concept of establishment remained.[84] In all colonies except Rhode Island, Pennsylvania, Delaware, and New Jersey, efforts were made early in each colony to restrict the privilege of residence to religious faithful although the nature of the true faith varied from colony to colony.[85] Many colonies were so firm in religious beliefs and practices that nonbelievers were punished or expelled.[86] Roger Williams was expelled from Massachusetts for his advocacy of religious freedom. He founded Rhode Island as a haven for everyone who wanted a choice to believe or not to believe as his conscience dictated. Williams believed

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[81]Thayer, 21.

[82]Ibid.

[83]McCarthy, 289.

[84]David W. Beggs, III and R. Bruce McQuigg, eds., America's Schools and Churches (Bloomington, Indiana: Indiana University Press, 1966), 37-38.

[85]Thayer, 10.

[86]Beggs and McQuigg, 38.

that the foundation of government should be predicated on popular sovereignty, not divine right, and that church was one of many social institutions. Roger Williams' ideology, once a minority view, prevailed later when the Bill of Rights provided for separation of church and state.[87]

Most Protestants believed that children should read the Bible as a source of truth and salvation. Colonists established public sectarian schools to ensure that children learned to read. Dissenters were not permitted to establish schools for their own children.[88]

By late eighteenth century there was a pronounced movement in favoring increased religious liberty or toleration, albeit in different degrees, in all the colonies. Even before the Revolutionary War, colonists began to realize that it was advantageous "to set aside religious differences to facilitate trade and commerce among the colonies and as a matter of enlightened, republican philosophy."[89] Improved communication lessened the isolation of provincial America. The exchange of goods and ideas benefited each other. People discovered common human interests and a human basis for mutual respect. The economic development in colonies encouraged more cosmopolitan ways of living and thinking. John Wesley once remarked, "whatever riches have increased, the essence of religion has decreased in proportion."[90] The necessity for unity increased when the divided colonies declared independence

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[87]Ibid., 38-39.

[88]Ibid., 39

[89]Rodney K. Smith, Public Prayer and the Constitution (Wilmington, Delaware: Scholarly Resources, Inc., 1987), 35.

[90]Thayer, 15.

from Great Britain, the greatest military power in the western world. The threat of war with Great Britain mandated at least a momentary setting aside of religious differences in the colonies. As experiences at Valley Forge and other military engagements illustrated, soldiers and patriots with differing religious faiths had to ignore differences and cooperate in the effort against Britain. Even though some colonials never coexisted because of religious and political thought, cooperation, toleration, and coexistence among followers of different religious beliefs came to be a practical necessity in the colonies, "and what may have begun largely as an expedient truce among religionists was soon to find articulation in principles of religious toleration and liberty."[91]

American Education in the Colonial Period

The colonists transplanted the English village community to America, in that they transplanted an educational form of household, church, and school. Education was an obligation of the family. Providing the young with their ideas about life, home, community, and the world was a family responsibility. Some families provided systematic tutoring and communal devotion.[92]

The church was less responsible for educating young people. Teaching within the church focused on symbolic and metaphoric interpretation of the meaning of life, language, and religious beliefs, preaching, catechizing, and religion in everday life.[93]

In the early seventeeth century preaching and catechizing were the

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[91]Smith, 35.

[92]Cremin, 12.

[93]Cremin, 12-13.

most practiced form education. As communities gained greater stability and growing self-confidence formal schools were established. Colonists viewed schooling after religion as the most important bulwark against the Devil.[94]

Abilities at the College of Cambridge," Jonathan Mitchell ("probably" in 1663) in "A Modell for the Maintaining of Students and Fellows of Choice" described how he felt about the need for education:

> We in this country, being far removed from the more cultivated parts of the world, had need to use utmost care and diligence to keep up learning and all helps to education among us, lest degeneracy, barbarism, ignorance and irreligion do by degrees break in upon us.[95]

The early Protestant colonial schools were largely instruments of religion. Knowledge of the gospels was seen by reformers as a means of personal salvation. This meant that children must be taught to read so they might become acquainted with the commandments of God and learn what was expected of them.[96]

In addition to theEnglish, Spanish, French, Czechs, Swedes, Scottish Presbyterians, and German sectarians were among early settlers. And even though they settled on the frontier with their European customs regarding

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[94]Lawrence Cremin, American Education: The Colonial Experience 1607-1783 (New York: Harper and Rowe Publishers, 1970), 176-177.

[95]Jonathan Mitchell, "A Modell for the Maintaining of Students and Fellows of Choice Abilities at the College in Cambridge," *Publications of the Colonial S Society of Massachusetts,* XXXI (1935), 311, quoted in Lawrence Cremin, American Education: The Colonial Experience, 1607-1783 (New York: Harper & Row Publishers, 1970), 177.

[96]Cubberley, 12.

religion and education, almost from the beginning the culture became English--"English culture triumphed, and with it English law, English language, and English custom."[97]

The Puritans had the greatest influence on the course of education. They gave direction to the future development of the American educational system.[98]

From 1634 to 1647, the General Court of Massachusetts passed four laws that were supremely important in establishing the direction of American public education. Two laws, in 1634 and 1638, established common taxation of all property for town and colony benefit, a principle that became the basis for present-day taxation to support public schools.[99]

The law of 1642 insisted that parents assume responsibility for their childrens' education, including the ability to read and understand religion and the capital laws of the country. "The law of 1642 is remarkable in that for the first time in the English speaking world, a legislative body representing the State ordered that all children should be taught to read."[100]

And the fourth enactment, the famous Law of 1647, the "Old Deluder Satan Act," required a town with a least fifty families to

> . . . appoint one within their towne to teach all such children as shall resort to him to write and read. . .wages

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[97] Cremin, Traditions of American Education, 6.

[98] Cubberley, 13.

[99] Cubberley, 14.

[100] Cubberley, 17.

> shall be paid either to parents or masters of such children, or by ye inhabitants in general . . .[101]

There were no English precedents for what Massachusetts had done. The Law of 1647 established for the first time in Anglo-Saxon history the right of the state to require communities to establish and maintain schools.[102]

Many towns obeyed the law. And some towns skillfully evaded the law. A teacher would be hired when the court was in session and dismissed when adjourned and/or some towns shuttled teachers back and forth between towns to make government officials believe that each town was maintaining a school. While larger and richer towns continuously maintained schools, the number of students enrolled were small.[103]

Regarding the four laws, George Martin, a Massachusetts historian, said:

> It is important to note here that the idea underlying all this legislation was neither paternalistic nor socialistic. The child is to be educated, not to advance his personal interests, *but because the State will suffer if he is not educated.* The State does not provide schools to relieve the parent, nor because it can educate better than the parent can, but because it can thereby better enforce the obligation which it imposes.[104]

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[101](*Records of the Governor and Company of the Massachusetts Bay in New England*, vol. II, p.203. Boston, 1853), quoted in Ellwood P. Cubberley, Readings in Public Education in the United States (New York: Houghton Mifflin Company, 1934). 18-19.

[102]Cubberley, 18.

[103]H. G. Good, A History of American Education (New York: The Macmillan Company, 1956), 41-42.

[104]Cubberley, 19.

More important these four laws established a cornerstone for the American public educational system. "Massachusetts educational history is in essence the educational history of New England."[105] In the seventeenth century, all the New England colonies except Rhode Island which had been founded on the principle of religious freedom, used these laws as a basis of legislation for established and maintained public schools.[106] Rhode Island was the exception because there was no state religious mandate forcing the issue.

New England had the only public schools before the Revolutionary War. Education in the Middle Atlantic and Southern States could best be described "as localized religious schools with little lasting significance."[107]

American Education in the Eighteenth Century

The seventeenth century witnessed the transplanting of European ideas of government, religion, and education to the new American Colonies. By the eighteenth century three types of educational practices were well-established American. The first practice was strong Calvinistic religious state, promoting a system of common schools, higher Latin schools, and a college, for both religious and civic ends--the New England System. From New England the concept spread westward and deeply influenced later educational development of all westward states settled by New Englanders. The Calvinistic influence on

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[105]Bryson and Houston, 11.

[106]Cubberley, 19-20.

[107]Bryson and Houston, 11.

education, and in time the church and state separation "evolved our modern state school systems."[108]

The second was parochial school practice, most notably in the middle colonies of the Dutch, Moravians, Mennonites, German and Swedish Lutherans, German Reformed Church, Quakers, Presbyterians, Baptists, and Catholics. Protestant Pennsylvania and Catholic Maryland best portrayed the educational practice of church control of all educational effort, resented interference from the state, and was dominated by church standards, and "in time came to be a serious obstacle in the way of state organization and control."[109]

The third type of educational practice, was public supported schools for orphans and the poor. There was often little or meager government support for these schools. Nevertheless, the Church of England often promoted the concept and government support continued to grow. Children of middle and upper classes in society attended private or church schools, or were taught by tutors in their homes. A tution fee was rendered for instructional services.[110]

The most imperative feature of early colonial schooling was influence of religious purpose in instruction. One learned to read mainly for the purpose of reading the Catechism and the Bible, and to "know the will of the Heavenly Father."[111] Even though of the religious component was more pervasive in

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[108]Cubberley, 25.

[109]Ibid.

[110]Ibid.

[111]Ibid.

Calvinistic New England than in Southern Colonies, but throughout America during the early colonial period, the religious purpose was dominant.[112]

The analysis of textbooks really indicates dominance of religious influence in schools. Textbooks books used during the colonial period were the Hornbook, the religious Primer, the Psalter, the Testament, and the Bible, supplemented during later years by newer English textbooks, the most notable of which were those written by Hodder and Dilworth.[113]

The New England Primer was first printed about 1660.[114] Religious in nature, The New England Primer was used in schools and churches and was used in all the colonies except those under control of the Church of England--"it taught millions to read and not one to sin."[115] The New England Primer was reprinted throughout the Colonies under different names, but the public preferred the name New England Primer over all the others. An estimated three million more copies were sold. As late as 1806, The New England Primer was still in use in the Boston dame schools and even later in the country districts.[116] This important little book Ford has well characterized,in the followingwords:

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[112]Cubberley, 41-42.

[113]Cubberley, 42.

[114]Paul Monroe, Founding of the American Public School System: A History of Education in the United States (New York: The Macmillan Company, 1940), 132.

[115]Cubberley, 46.

[116]Ibid.

> As one glances over what may truly be called "The Little Bible of New England," and reads its stern lesson, the Puritan mood is caught with absolute faithfulness. Here was no easy road to knowledge and salvation; but with prose as bare of beauty as the whitewash of their churches, with poetry as rough and stern as their storm-torn coast, with pictures as crude and unfinished as their own glacial-smoothed boulders, between stiff oak covers which symbolized the contents, the children were tutored, until, from being unregenerate, and as Johnathan Edwards said, "young vipers, and infinitely more hateful than vipers" to God they attained that happy state when, as expressed by Judge Sewell"s child, they were afraid that they "should goe to hell,"and were "stirred up dreadfully to seek God." God was made sterner and more cruel that any living judge, that all might be brought to realize how slight a chance even the least erring had of escaping eternal damnation.[117]

Schooling gradually became more secular during the eighteenth century, not completely secular, but more secular. Successive editions of The New England Primer, and/or textbooks by Thomas Dilworth, which became very popular after 1750 indicated a growing secular influence in textbooks. [118] "The first American secular textbook did not appear until about the time of the American Revolution."[119]

By the middle of the eighteenth century it was clear that European culture and types of schools were no longer dominant. A new spirit of individualism led Americans to adapt things to meet American needs. The growing exasperation with England for foolish colonial policy tended to accentuate a feeling for independence. General Braddock's defeat in the 1764

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[117]Cubberley. 46.

[118]Kaestle, 161.

[119]Cubberley. 42.

war, after his insulting boastfulness, had the satisfactory effect that the colonies could care for themselves.[120]

The following colonial directions indicated an approaching end to the Colonial period to English domination: (1) development of the public and state schools in New England from the original religious school; (2) development of an American Common school; (3) rise of the school district system; (4) introduction of new types of textbooks; (5) decline of the Latin Grammar Schools; (6) rise of the English Grammar School; (7) development of the American Academy; (8) establishment of two new colleges (Pennsylvania, 1749; Kings, 1754), which from the beginning placed themselves in sympathy with the more practical studies; and (9) abandonment by Yale in 1767 and Harvard in 1772 of listing students in the catalog according to rank and social standing of parents. The Revolutionary War hindered continuous progress of American education by success in the war closed the colonial period.[121]

At the end of the Revolutionary War, the federal government was heavily in debt and struggling to survive. At first, those in the states and nation responsible for the government were too preoccupied with problems of organization, finance, and order to think much of other things, but soon after a partial measure of these had been established, the leading statesmen of the time began to express the need for general education.[122]

Prior to the Revolution there had been but one real motive for

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[120]Cubberley, 75.

[121]Cubberley, 75-76.

[122]Cubberley, 88.

maintaining schools--the religious--which began to wane after 1750. The Declaration of Independence had affirmed that "all men are created equal," that "they are endowed by their Creator with certain inalienable rights," and that "to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed." These new political ideas tended to create a new political motive for education, which was destined to grow in importance and in time replace the religious motive.[123]

Educated men developed the Constitution of the United States, but the word *education* is not mentioned. Considering the historical period, it is not surprising that the founders of the American Republic did not deem the subject of public education important enough to warrant consideration in the Constitutional Convention or the document. Education was still largely a private matter and largely under the control of the Church.[124] The Constitutional mandate was "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity,"-- purposes which dealt with secular affairs, matters of this world rather than another.[125]

Even though founders of the Constitution were educated men, many of them were not interested in educating the masses. The leaders were often products of aristocratic doctrine of education--that schools were intended for

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[123]Ibid.

[124]Cubberley, 84-85.

[125]Edgar W. Knight, Education in the United States, 3rd ed., rev. (Boston: Ginn and Company, 1951), 138.

the leaders --and for those who could afford the privilege of education.[126] Fortunately, there were notable exceptions--George Clinton, Ezra Stiles, Thomas Jefferson, George Washington, Francis Marion, John Jay, John Hancock, John Adams, and James Madison, to name a few--who supported a general education and promotion of science and literature. They realized that education was crucial to the survival of the Republic.[127]

The noted education historian Paul Monroe has suggested that:

> No other single problem connected with education presented greater difficulties to our forefathers than that of its support. To begin with, most of them agreed with Jefferson that government is best which governs least. Certainly they believed that government to be best which taxes least. But they quite generally disagreed with Jefferson when he held that the support of education is one of the undoubted responsibilities of government.[128]

Publicly supported schools, as we know them today, were only dreams of the national and state leaders of the late eighteenth century. No other nation in the world has copied the American public education experience.

Ezra Stiles presented the following challenge and vision at his election as governor before the assembly of Connecticut in 1783:

> We shall have a communication with all nations in commerce, manners, and science, beyond anything heretofore known in the world. Manufacturers and artisans, and men of every description, may perhaps come and settle among us. They will be few indeed in

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[126]Cubberley, 144.

[127]Cubberley, 88-91.

[128]Monroe, 295.

> comparison with the annual thousands of our natural increase, and will be incorporated with the prevailing heredity complexion of the first settlers:--we shall not be assimilated to them, but they to us, especially in the second and third generations. This fermentation and communion of nations will doubtless produce something very new, singular, and glorious.... That prophecy of Daniel is now literally fulfilling--there shall be a universal traveling to and fro, and knowledge shall be increased. This knowledge will be brought home and treasured up in America: and being here digested and carried to the highest perfection, may reblaze back from America to Europe, Asia and Africa. and illumine the world with truth and liberty.[129]

In 1784, Governor George Clinton of New York presented the following message to the legislature:

> Neglect of the Education of Youth is among the Evils consequent on War. Perhaps there is scarce any Thing more worthy of your Attention, than the Revival and Encouragement of Seminaries of Learning; and nothing by which we can more satisfactorily express our Gratitude to the supreme Being, for his past Favours; since Piety and Virtue are generally the Offspring of an enlightened Understanding.[130]

As early as 1779 Thomas Jefferson presented a comprehensive plan to the state legislature of Virginia for education, but failed to secure approval for the bill. Writing to James Madison from Paris in 1787, Jefferson stated:

> Above all things, I hope the education of the common people will be attended to; convinced that on this good sense we may rely with the most security for the preservation of

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[129]Cremin, American Education: The Colonial Experience, 561.

[130]Cubberley, 88-89..

a due degree of liberty.[131]

After his retirement from American presidency, Thomas Jefferson wrote Colonel Yancey the following:

> If a nation expects to be ignorant and free in a state of civilization it expects what never was and never will be.... There is not safe deposit [for the functions of government], but with the people themselves; nor can they be safe with them without information.[132]

In his first address to Congress, in 1790, President George Washington stated:

> There is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is in every country the surest basis for public happiness. In one in which the measure of government receives their impressions so immediately from the sense of the community as in ours, it is proportionally essential.[133]

In his 1796 farewell address, President George Washington said:

> Promote then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion the structure of government gives force to public opinion, it is essential that public opinion should be enlightened.[134]

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[131]Cubberley, 89.

[132]Ibid.

[133]Ibid.

[134]Ibid.

In a statement on the need of popular education in South Carolina, General Francis Marion wrote:

> God preserve our legislature from penny wit and pound foolishness. What! Keep a nation in ignorance rather than vote a little of their own money for education! What signifies this government divine as it is, if it be not known and prized as it deserves? This is best done by free schools. Men will always fight for their government according to their sense of value. To value it aright they must understand it. This they cannot do without education.[135]

Chief Justice John Jay, writing to Benjamin Rush, asserted:

> I consider knowledge to be the soul of the Republic, and as the weak and wicked are generally in alliance, as much care should be taken to diminish the number of the former as of the latter. Education is the way to do this, and nothing should be left undone to afford all ranks of people the means of obtaining a proper degree of it at a cheap and easy rate.[136]

James Madison wrote:

> A satisfactory plan for primary education is certainly a vital desideratum in our republics.
> A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.[137]

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[135]Ibid, 89-90.

[136]Ibid.

[137]Ibid.

In 1793, Governor John Hancock, delivered a message to the General Assembly of Massachusetts in which he declared:

> Amongst the means by which government has been raised to its present height of prosperity, that of education has been been the most efficient; you will therefore encourage and support our Colleges and Academies; but more watchfully the Grammar and other town schools. These offer equal advantages to poor and rich; should the support of such institutions be neglected, the kind of education which a free government requires to maintain its force, would be very soon forgotten.[138]

President John Adams, with true New England thoroughness, forcibly stated the new motive for free public education:

> The instruction of the people in every kind of knowledge that can be of use to them in the practice of their moral duties as men, citizens, and Christians, and of their political and civil duties as members of society and free men, ought to be the care of the public, and of all who have any share in the conduct of its affairs, in a manner that never yet has been practiced in any age or nation The education here intended is not merely that of the children of the rich and noble, but of every rank and class of people, down to the lowest and the poorest. It is not to much to say that schools for the education of all should be placed at convenient distances and maintained at the public expense. The revenues of the State would be applied infinitely better, more charitably, wisely, usefully, and therefore politically in this way that even in maintaining the poor. This would be the best way of preventing the existence of the poor....
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> Laws for the liberal education of youth, especially of lower classes of people, are so extremely wise and useful that, to a humane and generous mind, no expense for this

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[138]Ibid.

purpose would be thought extravagant.[139]

Benjamin Rush summed up the task facing American leaders at the end of the American Revolutionary War:

> The American war is over; but this is far from being the case with the American revolution. On the contrary, nothing but the first act of the great drama is closed. It remains yet to establish and perfect our new forms of government; and to prepare the principles, morals, and manners of our citizens for these forms of government, after they are established and brought to perfection.[140]

Over two hundred years later we are still perfecting the American form of government. And even though the Constitution does not mention education, today the federal government is heavily involved in education. The final chapter of the federal government's role in education is yet to be written.

As already indicated, America was settled by many different religious sects. However, after the American Revolution and 1787 Constitutional Convention and movement westward religious dominance in every phase of American life began to diminish. There are three major events that lead to eroding the state-religious concept: (1) European immigration, especially large numbers of Irish and German Catholics; (2) developing divisions within the established denominations; and (3) the dawning of a pragmatic political and religious philosophy best expressed in the opening words of the First Amendment to the Constitution[141]--"Congress shall make no law respecting

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[139]Ibid., 90-91.

[140]Cremin, 564.

[141]Bryson and Houston, 19.

an establishment of religion or prohibiting the free exercise thereof."[142]

In the center of fiery constitutional debates, James Madison had promised the opposition, led by Patrick Henry, that if Virginia ratified the Constitution, he would enthusiastically work for a constitutional amendment concerning individual rights. James Madison, early in life and as a student at Princeton, had rejected sectarianism with great concern for what he called the "hell-conceived principle of [religious] persecution" adopted by his Anglican colleagues.[143] William Cabell Rives, Madison's classmate, close friend, and biographer, suggested that Madison may have intentionally selected Princeton rather than the College of William and Mary for his education on religious grounds, because of the attitude of President Witherspoon, a supporter of disestablishment and broad rights of religious exercise, on the "question of an American Episcopate."[144]

James Madison opposed a Virginia tax for the support of Christian religion. In Madison's famous *Memorial and Remonstrance Against Religious Assessments,* he insisted:

> Who does not see that the same authority *which can establish Christianity, in exclusion of all 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 threepence only of his property for the support of any *one establishment, may force him to conform to any other*

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[142]U. S. Constitution, Amendment I.

[143]Graebner, Fite, and White, History of the Unites States,367.

[144]Smith, 39.

establishment in all cases whatever?[145]

In the very next section, Madison explained that such an establishment of Christian preference over non-Christian sects consisted of an improper denial of the principle of equal treatment by government of religious beliefs for all persons:

> Because the bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. Above all are men to be considered as retaining an "*equal* title to the free exercise of Religion according to the dictates of conscience." Whilst we assert for ourselves a freedom of embrace, to profess and to observe the religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us.[146]

Madison was more concerned that the bill aided Christianity to the exclusion of other religions, than he was that it aided or accommodated religion. Being a Christian, Madison felt that "to deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us" would establish a grave error because all humans should be free to choose and act, on conscience issues without unequal or preferential treatment at the hands of the government.[147]

"And no member of Congress was more influential in shaping the Bill of

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[145]James Madison, "Memorial and Remonstrance Against Religious Assessments," (1785), quoted in Rodney K. Smith, Public Prayer and the Constitution (Wilmington, Delaware: Scholarly Resources, Inc., 1987), 52.

[146]Ibid, 52-53.

[147]Ibid, 53.

Rights, the first ten amendments to the Constitution, than James Madison, the father of the Constitution."[148]

Another Virginian, Patrick Henry, strongly argued against ratifying the Constitution just because of the absence of individual rights. Early in his political career, Patrick Henry had fixed his position with respect to religious liberty. During the economic crisis of 1758, the Virginia Assembly had temporarily suspended payment for church support required by English law. Judicial relief was sought by Anglican ministers. The Virginia Assembly's legal counsel, Patrick Henry, insisted[149]

> that the Act of 1758 had every characteristic of a good law;. . . . that a King by disallowing acts of this salutary nature, from being the father of the people, degenerates into a tyrant, and forfeits all right to his subjects' obedience.
> [T]he only use of an established church and clergy in society, is to enforce obedience to civil sanctions. . . . that when a clergy ceases to answer these ends, the community have no further need of their ministry, and may justly strip them of the appointments; that the clergy of Virginia, in this particular instance of their refusing to acquiesce in the law in question, had been so far from answering, that they had most notoriously counteracted, those great ends of their institution; that . . . instead of countenance, and protection and damages, (the clergy) very justly deserved to be punished with signal severity.[150]

Even though Virginia lost the decision, Patrick Henry became famous

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[148]Bryson and Houston, 19.

[149]Ibid., 20.

[150]Moses C. Tyler, Patrick Henry, American Statesman (Boston: Houghton Mifflin, 1887), 3, 53. quoted in Joseph E. Bryson and Samuel H. Houston, Jr., The Supreme Court and Public Funds for Religious Elementary and Secondary Schools: The Burger Years, 1969-1986 (Jefferson, North Carolina: McFarland and Company, Inc., 1990), 20.

as a champion for religious liberty throughout colonial America and throughout the pages of history. He wrote the Sixteenth Article of the Virginia Bill of Rights, which states

> that religion, or the duty we owe our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force or violence; and, therefore, that all men should enjoy the fullest toleration in the exercise of religions, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under color of religion, any man disturb the peace, the happiness, or the safety of society; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[151]

Thomas Jefferson, along with political leaders James Madison, John Jay, and Alexander Hamilton, were extremely important in influencing the Constitution and the First Amendment of the Bill of Rights. Writing to the Baptist Conference in Danberry, Connecticut in 1802, Thomas Jefferson stated:

> 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 the Government reach actions only, and not opinion, 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.[152]

The solution the founding fathers worked out to handle the religious issue was both revolutionary and wholesome. The Constitutional Convention simply

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[151]Ibid., 20.

[152]Ibid.

incorporated into the Constitution provisions which guaranteed the free exercise of their religious faith to all, and forbade the establishment by Congress of any state religion, or the requirement of any religious test, or oath as a prerequisite for holding office under the control of the federal government.[153]

The period from 1776 until the Constitution was ratified in 1789 was a tedious period for the political leaders of the fragile government. Two states, North Carolina and Rhode Island, refused to approve the Constitution and take part in the new government until Congress agreed to add a bill of rights. By December 1791, enough states had approved ten of the twelve amendments to make them a permanent part of the Constitution. The first ten amendments to the Constitution are known as the Bill of Rights.[154]

The federal government's first involvement in education was in the settlement of the lands west of the Alleghenies and east of the Mississippi River. The original thirteen colonies gave up their claims to this area to the new national government. At the end of the war, soldiers and other immigrants began to move into this new territory. These new settlers demanded to purchase land, but before it could be sold it must be surveyed. In 1785, Congress adopted the "Congressional Townships" in which each township contained six square miles. Each township was again divided into sections of one square mile which were divided into quarter sections. The sixteenth township was to be used for school support. In adopting the Northwest

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[153]Cubberley, 87.

[154]The World Book Encyclopedia (Chicago: World Book, Inc., 1991), s. v. "Constitution of the United States," by J. W. Peltason.

Ordinance of 1787, Congress provided that "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of educations shall be forever encouraged"[155] in the part of the territory lying north of the Ohio River. The settlement of this area by people, mainly from New England, determined the future attitude toward public education in states to be developed from this territory.[156]

The land grant offer continued in each state, except Texas, which owned its own land when admitted, and West Virginia and Maine, which were carved from other states. Beginning with the admission of California as a state in 1850, the grant was increased to two sections, the sixteenth and the thirty-sixth in each state. Utah, Arizona, and New Mexico were each granted four sections due to the low value of much of the land.[157]

As mentioned earlier, the Constitution of the United States was silent on the subject of education. From 1776 through 1800 all the states except Rhode Island and Connecticut adopted new state constitutions. Several states amended or revised their constitutions during this period. Three new states, Kentucky, Tennessee, and Vermont were added to Union before 1800. None of the state constitutions adopted before 1800 mentioned the matter of schools and education.[158]

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[155]Cubberley, 92.

[156]Cubberley, 91-92.

[157]Ibid., 92-93.

[158]Ibid., 94.

American Education in the Nineteenth Century

Outside of New England and New York America before 1820 had not yet developed a national educational consciousness. And in spite of national grants for education to new states progress in education was limited to cities and a few states. In the South many years--mid-eighteenth century and later--would pass before a commitment to education would be made,[159] For many education for the masses was still thought to be a luxury. Ellwood Cubberley presented several reasons for the lack of interest in education among the masses of the people:

> The simple agricultural life of the time, the homogeneity of the people, the isolation and independence of the villages, the lack of full manhood suffrage in a number of States, the continuance of the old English laws, the want of any economic demand for education, and the fact that no important political question calling for settlement at the polls had as yet arisen, made the need for schools and learning seem a relatively minor one.... There was little need for book learning among the masses of the people to enable them to transact the ordinary business of life. A person who could cipher in that time was an educated man, while the absence of these arts was by no means a matter of reproach.[160]

After the War of 1812, energies were turned toward developing a democratic system of public schools. As democratic consciousness began to gain emphasis, the demand came for a more practical institution, less exclusive and less aristocratic in character and better adapted in its instruction to the needs of frontier society.[161]

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[159]Ibid., 110.

[160]Ibid., 110-111.

[161]Ibid., 111-112.

In early eighteenth century churches continued efforts to maintain church charity schools. In the meantime, the cry for education grew rather rapidly, and developing new educational opportunities became too much for religious institutions to handle. Also, religious institutions did not want to give up their influence on educating youth. And yet the churches had no interest in new curiculum ideas that reflected the needs and wants of the new democracy. With the coming of nationality and the slow but steady growth of national consciousness, national pride, national needs, and the steady development of national resources in the shape of taxable property combined to make secular instead of religious schools seem both desirable to a constantly growing number of citizens.[162] "In almost every state, citizens banded together to fight for the cause of public schools."[163] This change in attitude was aided by the work of a number of semi-private philanthropic agencies, the most important of which were "(1) the Sunday School Movement; (2) the growth of City School Societies; (3) the Lancastrian Movement; and (4) the coming of the Infant-School Societies."[164]

Finally, there emerged two new motives for schools:

> (1) to advance the idea of progress--that mankind can be better by combiningg public institutions, schools, and material wealth for human betterment; and (2) to prepare people for self government--the general concept that self-government is the only political and social organization that offers a reasonable

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[162]Ibid., 120-121.

[163]Lawrence A, Cremin, The Transformation of the School (New York: Alfred A Knopf, Inc., 1961), 12.

[164]Cubberley, 120-121..

guarantee for liberty.[165]

The noted historians Charles and Mary Beard, writing in the Rise of American Civilization in 1927, said the "idea of progress" is the

> most dynamic social theory ever shaped in the history of thought--the idea of progress on the continual improvement in the lot of mankind on the earth by the attainment of knowledge and subjugation of the material world to the requirement of human welfare.[166]

It became apparent, in time, to educational and political leaders that liberty and political equality could not be maintained without the general education for all. American thinkers such as Thomas Paine, James Madison, John Adams, Samuel Adams, Benjamin Franklin, and especially Thomas Jefferson (who eloquently wrote in the Declaration of Independence that "life, liberty and the pursuit of happiness," a revolutionary idea, that people are supposed to be happy) advanced the "progress " idea.[167]

The transforming power of the "progress" philosophy became a forceful tool of American Civilization. In addition, the idea of progress and perfectibility of humankind and democratic institutions became the central theme for American statesmen and philosophers. It was not by mere chance that "progress" democracy and universal public education for all children, regardless of socioeconomic condition, emerged hand in glove in the middle of the

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[165]Bryson and Houston, 14.

[166]Charles Beard and Mary Beard, The Rise of American Civilization (New York: Macmillan, 1927), 1, 443.

[167]Bryson and Houston, 16.

nineteenth century. The new democracy needed a forceful political-social tool that would guarantee America's greatness through continued progress. Educational leaders Horace Mann (Massachusetts), Elisha Potter (Rhode Island), Henry Barnard (Connecticut), John Pierce (Michigan), Samuel Lewis (Ohio), Calvin Wiley (North Carolina), W. T. Harris (St.Louis), John Dewey (New York) and associates forged the tool: "universal public education--America's greatest gift to Western Civilization."[168]

By 1820, state constitutional recognition of education was found in thirteen of twenty-three states. Seven states--Massachusetts, Maine, Connecticut, New Hampshire, New York, Ohio, and Vermont--had statutes establishing school systems.[169] The schools were maintained through an ingenious variety of school-finance schemes--property tax, education "fee" or tuition, fishing tax, salt-working tax, lotteries, funds from congressional and state land grants, occupational tax, insurance-premium tax, bank tax, and liquor tax. In 1836, the federal treasury surplus was distributed to the states for education purposes.[170]

Daniel Webster, in a speech delivered at Plymouth, Massachusetts, in 1822, and again in a speech delivered at Madison, Indiana, in 1837, expressed an idea of importance of education in a nation such as ours. In the Madison speech, he said:

> Education, to accomplish the ends of good government, should

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[168]Ibid.

[169]Cubberley, 97.

[170]Bryson and Houston, 14.

> be universally diffused. Open the doors of the schoolhouses to all the children in the land. Let no man have the excuse of poverty for not educating his offspring. Place the means of education within his reach, and if he remain in ignorance, be it his own reproach . . . On the diffusion of education among the people rests the prescription and perpetuation of our free institutions.[171]

The second quarter of the nineteenth century was a period in which the Union expanded dramatically--from coast to coast. Economic, social, political, and religious pressure made extreme demands on church-related education. National and state political, economic, educational, and religious leaders started clamoring for an education system--a free public-school system. Ellwood Cubberley described the second quarter of the nineteenth century in the following manner:

> The second quarter of the nineteenth century may be said to have witnessed the battle for tax-supported, publicly controlled and directed, and non sectarian common schools. In 1825 such schools were the distant hope of statesmen and reformers; in 1850 they were becoming an actuality in almost every Northern State. The twenty-five years intervening marked a period of public agitation and educational propaganda; of many hard legislative fights; of a struggle to secure desired legislation, and then to hold what had been secured; of many bitter contests which church and private-school interests, which felt that their "vested rights" were being taken from them; and an occasional referenda in which the people were asked, at the next election, to advise the legislature as to what to do. Excepting the battle for the abolition of slavery perhaps no question has ever been before the American people for settlement which caused so much feeling or aroused such bitterant agonisms. Old friends and business associates parted company over the question, lodges were forced to taboo the subject to avoid disruption, ministers and their congregations often quarrelled over the question of free schools, and politicians avoided the issue. The friends of free schools were at first commonly regarded as fanatics, dangerous to the State, and

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[171]Cubberley, 156.

> the opponents of free schools were considered by them as old-time conservatives or as selfish members of society.[172]

Horace Mann, father of American public education and secretary of the State Board of Education in Massachusetts, established the inevitable relationship between education and progress of democracy. Like Thomas Jefferson, he believed that democracy's continued existence is a direct relationship to an intelligent, educated constituency. Mann insisted that "never will wisdom preside in the hall of legislation . . . until Common Schools . . . create a more far-seeing intelligence and a purer morality than has ever existed among communities of men."[173]

For Mann, the public schools were social tools shaping an emerging society of the new democracy. Therefore, the goal of the democratic government must be "self-discipline, self government, and self-control."[174] Public education was the "great equalizer . . . balance wheel of the social machinery . . . creator of wealth undreamed of."[175]

Under Mann's aggressive offensive leadership, Massachusetts in many ways taught the nation the ideals of universal education. With a sense of devotion proper to a crusader, Mann had accepted the challenging, unpaid

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[172]Ibid., 164.

[173]Twelfth Annual Report of the Board of Education, Together with the Twelfth Annual Report of the Secretary of the Board (Boston, 1849), 84. quoted in Lawrence A. Cremin, The Transformation of the School (New York: Alfred A. Knopf, 1961), 9.

[174] Cremin, The Transformation of the School, 11.

[175]Ibid., 9.

position of secretary of the State Board of Education in Massachusetts, which at that time was the most literate and religious section of the United States. Mann expressed his feelings:

> Henceforth, so long as I hold this office, I devote myself to the supremest welfare of mankind upon earth . . . *Faith* is the only sustainer. I have faith in the improvability of the race--in their accelerating improvability . . . a spirit mildly devoting itself to a good cause, is a certain conqueror--Love is a universal solvent.[176]

In general Mann's concept was with sectarianism and not religion. Mann himself explained his position. In explaining his position Mann wrote a clergyman the following:

> Every one who has availed himself of the means of arriving at the truth on this point, knows that I am in favor of religious instruction in our schools to the extremist verge to which it can be carried without invading those rights of conscience which are established by the laws of God and guaranteed by the Constitution of the State.[177]

Mann, in his final report, 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

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[176]Neil Gerard McCluskey, S. J., Public Schools and Moral Education (New York: Columbia University Press, 1959), 22-23.

[177]Leo Pfeffer, Church State and Freedom rev. ed. (Boston: Beacon Press, 1967), 332.

> 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. . . .
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> . . . 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 religion, or all that 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.[178]

To Mann the purpose of religious education in the schools was to provide the opportunity for the child

> to judge for himself according to the dictates of his own reason and conscience, what his religious obligations are and whither they lead. But if a man is taxed to support a school where religious doctrines are inculcated which he believes to be false, and which he believes that God condemns, then he is excluded from the school by the divine law, at the same time that he is compelled to support it by the human law. This is a double wrong.[179]

Mann's final report, as well as other writings, makes it clear that he envisaged a difference between religion and sectarianism, and that the dividing line was the Bible. As long as the Bible was read without comment, it was permissible religious instruction. Once the written word was explained or

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[178]Ibid., 232-233

[179]Ibid., 333.

interpreted it was impermissible sectarian instruction.[180]

The struggle for free schools was a bitter one and for twenty-five years the outcome was in doubt. Local elections were decided on the school issue. Legislation passed in one session was sometimes repealed in the next. State laws mandating public schools were ignored by the local communities that were supposed to build them. Time after time "the partisans of popular education encountered the bitter disappointment that accompany any effort at fundamental social reform."[181]

By 1860, a majority of the states had created public school systems that bore upon them the marks of Mann's ideal. There was great variation from state to state and region to region. New England, long a leader in public education, also had a tradition of private education, and private schools continued to flourish in the region. The Midwest sent a far greater proportion of its school children to public schools. "With the exception of North Carolina, the Southern area lagged behind, and generally did not establish public schooling until after the Civil War."[182]

Many educational leaders believed that pauper schools should be abolished. The pauper school concept was English based on class and out of step in America. And the new Western democracy could not tolerate the concept--"all men are created equal, and endowed by their Creator, with certain inalienable rights."[183]

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[180]Ibid.

[181]Cremin, The Transformation of the School, 13.

[182]Ibid.

[183]Cubberley, 189-190.

Moreover, many paupers would not send their children to pauper schools and for many who did send children to pauper schools despised the system. The Philadelphia Society for the Establishment and Support of Charity Schools made this address in 1818:

> In the United States the benevolence of the inhabitants has led to the establishment of Charity Schools, which though affording individual advantages, are not likely to be followed by the political benefits kindly contemplated by their founders. In the country a parent will raise children to ignorance rather than place them in charity schools. It is only in large cities that charity schools succeed to any extent. These dispositions may be improved to the best advantage, by the Legislature, in place of Charity Schools, establishing Public Schools for the education of all children, the offspring of the rich and poor alike.[184]

Teaching religion in public schools was a common practice until well into the middle of the nineteenth century. Horace Mann, recognizing the value of a common core of religious beliefs, attempted to develop a nonsectarian school system. William T. Harris, Superintendent of the St. Louis Public Schools, joined Mann in his struggle for nonsectarian schools. They differed over the use of the Bible in public education. Mann believed the Bible could be used, if it were read without comment, explanation, or interpretation. Harris believed there was no place for using the Bible in public education. Harris contended that only the moral aspect of religion had a place in public education.

By 1840, church-state separation had occurred in every state in the nation. The differences between Protestants and Catholic over separation of

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[184]Ibid., 190.

church and state were becoming an important philosophical issue among educational leaders. The secularization of the public schools moved in two distinct fronts--(1) the curricular, and (2) school finance. According to Mann, public education religious instruction should give to all "so much religious instruction as is compatible with the rights of others and with the genius of the government."[185] He believed that there was a common core of Christian religious beliefs which could be taught in the common school without objection, and that it was up to the home and church to elaborate on these commonly held beliefs. He supported a nonsectarian doctrine which would exclude specific sectarian doctrines or man-made creeds. He retained the Protestant Bible, which "is the acknowledged expositor of Christianity" and "in strictness Christianity has no other authoritative expounder."[186]

Mann was not the only one who supported nondenominational Christianity in the common school. In 1837, Samuel Lewis, Ohio's first state superintendent of common schools, in his First Annual Report to the Legislature supported the nondenominational solution to the problem of religion in the public school. Lewis believed that schools should "inculcate sound principles of Christian morality" which did not encroach upon sectarian differences. Being there was "a strong common ground, where all Christians and lovers of virtue meet," Lewis encouraged teachers "to train up the rising generation in those elevated moral principles of the Bible" as well as "all social and relative duties with proper inducements to correct action."[187]

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[185]Neil G. McCluskey, Catholic Education in America: A Documentary History (New York: Columbia University Press, 1964), 6.

[186]Ibid.

[187]Samuel Lewis, First Annual Report of the Superintendent of

The Reverend Horace Bushnell of New York, a liberal Congregational minister, published an article in which he defended the Scriptures as an essential part of the common school curriculum while denying the legitimacy of sectarian teaching. "Nothing is more certain than that no such thing as sectarian religion is to find place for the Bible as a book of principles, as containing the true standards of character and the best motives and aids of virtue."[188] If a parent wanted more than this for his child, it was his obligation to do it himself in his own home. "To insist that the state shall teach that, . . . would be folly and wickedness together."[189]

William T. Harris, superintendent of the St. Louis Public Schools separated the church-state education issue into two intellectual spheres: "the most fitting occasion for efficient instruction in religion on the one hand, and on the other hand the question of guarding the rights of private conscience and the separation of church and state."[190] In what is surely the most significant philosophical treatise ever written by an educator on church-state separation, Dr. Harris maintained that

> the principle of religious instruction is authority; that of secular instruction is demonstration and verification. It is obvious that these two principles should not be brought into the same school, but separated as widely as possible.

Common Schools (Columbus, Ohio: S. Medary, 1838), 7, quoted in Lannie, 3.

[188]Horace Bushnell, "Christianity and Common Schools," Common School Journal of Connecticut II (January 15, 1840), 102, quoted in Vincent P. Lannie, Public Money and Parochial Education (Cleveland: The Press of Case Western Reserve University University, 1968), 3.

[189]Ibid.

[190]Editorials, Literary Digest 27, no. 9 (August 29, 1903): 261.

> Religious truth is revealed in allegoric and symbolic form, and is to be apprehended not merely by the intellect, but also by the imagination and the heart. The analytic understanding is necessarily hostile and skeptical in its attitude toward religious truth.[191]

To Harris, the only sensible and sane direction was the complete secularization of public education. He contended that Catholic parents would adopt public education if they could be protected against proselytizing of their children by Protestant influences--a secular purity "where the Catholic may feel safe to leave their children."[192] Harris insisted that the spirit of the times calls for wider and wider separation of the Church from secular institutions, but " such separation does not make them godless nor the Church less powerful, but quite the contrary."[193]

The push by Horace Mann and other educational leaders for making public schools non-sectarian received support from an unlikely source, Catholic leaders. In early colonial days Protestants banded together in opposition of the Catholics. By the time of the American Revolution many of the restrictions placed on Catholics had been removed, but numbers were not sufficientto be a serious problem. By the middle of the nineteenth century the number of Catholics living along the Atlantic coast, especially in the larger cities, had swelled to such numbers that they could no longer be ignored.

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[191]"The Separation of the Church from the Tax-Supported School," Education Review 26 (October 1903): 38.

[192]William T. Harris, Morality in the Schools, Tract 12, quoted in Neil Gerard McCluskey, Public Schools and Moral Education (New York: Columbia University Press, 1958), 169.

[193]Ibid.

On the question of nonsectarian schools, Protestants felt that it was satisfactory to use the King James Version of the Bible. The disagreement over the use of the Bible goes back to the time of the Protestant Reformation. Protestants believed that salvation came from studying the Bible; the reason for teaching children to read was so they could read the "word." Individuals could make their own decisions. They did not have to depend on the church, i. e., Catholics on the other hand, put their emphasis not on the word, but on the church. They were not dependent on reading the Bible but following what the priests imperatives.

The Irish potato famine had a tremendous influence on shaping the schools in America, private and public. The failure of the potato crops forced the farmers to emigrate from Ireland to America and in record numbers.

For a country that prided itself on being a "melting pot", Protestant Americans were not very warm to the Catholics from Ireland, Germany, and Italy. Most of the Catholics immigrants to were poor and, not having the funds to move from the cities where they landed, settled in the poor areas of Boston, New York, Philadelphia, and Baltimore. The Irish were the largest national group to settle in New York in the 1840s.[194] They were not well received. A typical advertisement of the period read: "Woman wanted.--To do general housework . . . English, Scotch, Welsh, German, or any country or color except Irish."[195]

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[194]Diane Ravitch, The Great School Wars: New York City, 1805 -1973: A History of the Public Schools as Battlefield of Social Change (New York: Basic Books, Inc., 1974), 27.

[195]Robert Ernest, Immigrant Life in New York City, 1825-1863 (New York:King's Crown Press, 1949), 67, quoted in Ravitch, 29.

Historically, since Catholic children were not made to feel welcome in the public schools, wherever possible, they went to their own schools.[196] By 1840, there were over two hundred Catholic schools in America. In some school systems, public-school adaptations were made for Catholic children. For example, in Lowell, Massachusetts, "Irish" schools were established for Catholic children only, and they were taught by Catholic teachers.[197] In other situations public schools were used at the end of the school day and week for religious purposes.

The Protestant educational leaders did not fully understand why Catholics were unwilling to accept the public schools. Catholic leaders simply tried to neutralize the Protestant influence, thus making the public schools more acceptable to Catholic children. Even through the First Provincial Council in 1829 had called for the establishment of Catholic schools, the bishops meeting in Baltimore in 1840 urged a more far reaching and comprehensive "separate system of education for the children of our communion."[198] In very frank language, they stated their reasons for reaching this decision:

> . . . we have found by a painful experience, that in any common effort it was always expected that our distinctive principles of religious belief and practices should be yielded

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[196]McCluskey, America and the Catholic School, 24-25.

[197]Regional A. Neuwien, ed., Catholic Schools in Action (South Bend, Indiana: University of Notre Dame Press, 1966), 3, quoted in Joseph E. Bryson and Samuel H. Houston, Jr., The Supreme Court and Public Funds for Religious Elementary and Secondary Schools: The Burger Years, 1969-1986 (Jefferson, North Carolina: McFarland and Company, Inc., 1990), 22.

[198]Lannie, Public Money, 6.

> to the demands of those who thought proper to charge us with error.[199]

They ruled that the dogmatic principles of the Catholic Church could never be reconciled with a heterogeneous and fluid Protestant theology. They felt that Catholic Christianity was true Christianity and had to be protected against any possible taint of corruption.[200]

The Catholic Church and Catholic parents were not interested in non-sectarian instruction. Catholicism does not separate religious teaching from temporal knowledge. The Catholic Church wanted either the right to bring its own dogma into the public schools for the teaching of Catholic children or a part of the public school funds for the support of Catholic parochial schools. American Protestantism, either because of the principle of separation of church and state or because of antagonism to Catholicismm,would not yield to either demand. Protestants were willing even to remove Protestant religion from the schools which resulted in the secularization of public education in America.[201]

Governor William Seward was quite serious when he announced that his goal was to improve education in New York. In 1839, he visited New York City several times to investigate the city's school system, which was not a part of the state's district system but was administered by the Public School Society. Originally known as the Free School Society, the Public School Society was a

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[199]Ibid.

[200]Ibid.

[201]Pfeffer, 336.

private, philanthropic, Protestant-oriented organization that was the principal recipient of common school funds and thus exercised a virtual monopoly over the city's public schools.[202]

Seward was sympathetic to the Catholic cause since many of New York City's Catholic children did not attend the public schools on religious grounds. Seward fought to educate foreign children in their native tongue. He withdrew this proposal because he was not afraid of the influence and language of an enlightened people. "His message left the impression that he would support any reasonable plan to advance universal education in New York City, whether secular or sectarian."[203]

In the 1840s, the first and most important battle for religious aid occurred in New York City. Finally, the Catholic leadership, led by Bishop John Hughes, an acknowledged separatist, asked for a share of the public school fund for use in establishing religious elementary and secondary schools. In a speech in St. Patrick's Cathedral on July 20, 1840, he insisted that public schools were Protestant institutions with Protestant activities and even a Protestant Bible (the King James Version), and in general anti-Catholic[204]. He also rejected the social ideology that public schools were necessary for maintaining democracy. In August 1840, he wrote to the bishop of New Orleans that the struggle against public schools "will cause an entire separation of our children from those schools and excite greater zeal on the

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[202]Lannie, 19-21.

[203]Ravitch, 59.

[204]Ibid., 47.

part of the people for Catholic education."[205]

Bishop Hughes, encouraged by Governor Seward's sympathetic attitude toward the plight of immigrant children not attending public schools, led an attack on the Public School Society. Despite the angry statements between the two groups, the Society hoped they could work out their differences as reasonable people. Bishop Hughes had no intention of making the public schools more tolerable for Catholic children. In the first petition to the Society, he asked for funds based on need, in the second petition, taken directly to the Board of Aldermen, he made the major issue the Catholic's right of conscience. The Board of Aldermen appointed a committee to try to reconcile the differences between the Society and the Catholics.[206]

Two other religious groups, the Scottish Presbyterian Church and the Jewish community petitioned for a share of the common school fund. They did not support the Catholic petition, and both were opposed to any division of the school fund among denominational schools. However, if the Council should act in favor of the Catholic petition, they wanted to be included in the distribution of funds.[207]

The committee listened to compromise proposals from the Society and the Catholics. At the request of the Society, the committee inspected public schools and Catholic schools. There was public debate on both sides of the issue, and finally the committee rejected Catholic claims, maintaining that

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[205]Ibid.

[206]Ibid., 47-57.

[207]Lannie, 33.

> are taxed not as members of the Roman Catholic Church, but as citizens of the State of New York; and not for the purposes of religion, but for the support of civil government. . . . Admit the correctness of the {Catholic} claim, that the Common Council of the city, or the Legislature of the State, may rightfully appropriate the Public Money to the purposes of religious instruction of any kind, in any school, and the consequences will be, that the People may be taxed by law, for the support of some one or other of our numerous religious denominations. . . . By granting a portion of the School Fund to one sect, to the exclusion of others, a "preference" is at once created, a "discrimination" is made, and the object of this great Constitutional guarantee is defeated. [208]

On January 11, 1841, at the urging of the special committee, the Board of Aldermen voted fifteen to one to reject the Catholic petition.[209] In the election campaign of 1842, mobs of Catholics and anti-Catholics roamed the streets of New York City fighting each other. The mayor used the militia and the police to protect St. Patrick's Cathedral. Bishop Hughes' home was damaged, and after failing to gain public funds for Catholic schools, he turned away from the political scene, insisting that Catholics establish a separate school system. "Let parochial schools be established and maintained everywhere . . . proceed upon the principle that, in this age and country, the school is before the church."[210]

In 1876, President Ulysses S. Grant, reflecting on past conflicts and anticipating future church-state policy, was reflecting the national will when he

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[208]Lannie, 47-48.

[209]Ravitch, 57.

[210]Lannie, 256.

made his famous remarks to the Grand Army of Tennessee:

> Encourage free schools and resolve that not one dollar of the money appropriated to their support shall be appropriated to the support of any sectarian schools. Resolve that neither the state nor the nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and the state forever separated.[211]

In 1884, the Third Plenary Council of Baltimore ordered two important Catholic education objectives: (1) Catholic priests and bishops were required to establish parochial schools, and (2) Catholic parents were bound to send their children to Catholic schools, unless a bishop granted an exception for serious cause.[212] The aim of the Catholic Church was "every Catholic child in a Catholic school."[213]

In the following years, the majority of support for Catholic schools came from parish support, diocesan support, tuition, fees, fund-raising activities, contributed services of religious and lay school staff (especially relatively inexpensive salaries of teachers), and in recent years, indirect support from the federal and state governments. Catholic schools grew at a rapid rate. By 1900, five percent of American elementary and secondary school children were

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[211]McCollum v. Board of Education, 33 U. S. 203 (1948), quoted in Leo Pfeffer, Church State and Freedom rev. ed. (Boston: Beacon Press, 1976), 337.

[212]Lannie, 257.

[213]Pfeffer, 346.

attending Catholic schools. By 1940, the percentage had increased to seven percent.[214] After World War II, Catholic schools grew at three times the rate of public schools. By 1963, fourteen percent of American elementary and secondary school children were enrolled in Catholic schools[215]. Due to financial and social difficulties, Catholic schools began to decline in the mid-1960s. From 1963 to 1969 it is estimated that one thousand Catholic schools closed with a loss in enrollment of fourteen percent.[216]

As the 1970s arrived, Catholic elementary and secondary schools faced an uncertain future. Declining enrollment and increasing costs worked against them. Also, political, religious, social, and educational transitions were changing in American history. The election of President Nixon signaled the movement of America in a conservative direction. "In the 1970s there was an intensification of legislative church-state activities, thus greater judicial response."[217] In addition, "the Supreme Court handed down more church-state decisions from 1969 to 1986 than in the entire 180 years prior to 1969."[218]

In the election of 1960, religion was a major campaign issue. John Kennedy was a Catholic. Protestants, especially in the "Bible Belt," were

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[214]Andrew M. Greeley and Peter H. Rossi , The Education of Catholic Americans (Chicago: Adline Publishing Company, 1966), 2.

[215]McCluskey, America and the Catholic School, 1.

[216]Benton Patterson, "What's Behind the Shutdowns-- and What's Ahead," School Management 13 (April 1969): 49.

[217]Bryson and Houston, 25.

[218]Ibid.

afraid that if Kennedy won the election the Vatican would control the presidency. Kennedy was the first Catholic elected president and the Vatican did not control the presidency. Their fears of a Catholic takeover were unfounded.

From the Protestant Reformation of the sixteenth century to the present, Catholics and Protestants have been in conflict with each other. In Northern Ireland, both sides are still killing each other in the name of Christianity.

By 1860, public education had made tremendous strides toward being a success. The main lines for future development had been mapped out, and the chief battles had been won. At least one half of the nation's children were receiving a formal education. The will of the people was that they planned to establish and maintain a state system of free schools. When President Lincoln delivered his famous Gettysburg address, he said, "our fathers brought forth on this continent a new Nation, conceived in liberty, and dedicated to the proposition that all men are created equal."[219] Lincoln could point with pride to the free public schools which "guaranteed opportunity and liberty."[220]

With the judicial decision in Kalamazoo,[221] "that secondary schools are a legitimate function of public education and that they can be supported by public tax," the American public system was firmly established. Other nations

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[219]Joseph E. Bryson and Samuel H. Houston, Jr., The Supreme Court and the Legality of Using Public Funds for Religious and Secondary Schools: 1970-1984 (Charlottesville: The Miche Company, 1984), 21.

[220]Ibid.

[221]Stuart v. Kalamazoo, 30 Michigan 69 (Mich. 1874).

were taking notice as Americans voiced the opinion in legislative assemblies and at local levels that "education was important and part of the very thread of American national life."[222]

William T. Harris was undoubtedly the leading figure of his pedagogical era. He made significant contributions to education, first as the superintendent of the St. Louis public schools and later as the United States Commissioner of Education. He entrenched the public-school idea, echoing, following in the footsteps of Horace Mann. In 1871 he wrote,

> The spirit of American institutions is to be looked for in the public schools to a greater degree than anywhere else. If the rising generation does not grow up with democratic principles, the fault will lie in the system of popular education.[223]

A year later he cautioned: "An ignorant people can be governed, but only a wise people can govern itself."[224] He realized that more than the school was involved in educating a child. "In society, a child is molded by family, church, civil community, and state, before it enters school. All these influences continue unabated during his years as a student."[225]

Harris was firm in his convictions concerning schools.

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[222]Bryson and Houston, 22.

[223]Sixteenth Annual Report of the Board of Directors of the St. Louis Public Schools (St. Louis, 1871), 28, quoted in Lawrence A Cremin, The Transformation of The School (New York: Alfred A. Knopf, 1969), 16.

[224]Seventeenth Annual Report of the Board of Directors of the St. Louis Public Schools (St. Louis, 1872), 58, quoted in Lawrence A. Cremin, The Transformation of The School (New York: Alfred A. Knopf, 1969), 16.

[225]Cremin, The Transformation of The School, 17.

> The question of the separation of Church and State, . . . is the deepest political question in modern history. . . . Let the community see to it that our public schools are free from sectarian bias of whatever kind, and the church, by its appropriate instrumentalities, will best perform its mission.[226]

John Dewey has been called the philosopher of democratic education. His unparalleled place in history has been sufficiently described by his closest disciple, William Heard Kilpatrick:

> Pestalozzi had prepared the ground. Froebel and Herbert had helped. Horace Mann, Henry Barnard, William T. Harris, Stanley Hall, Francis W. Parker, and others had carried America further along the Pestalozzi road. But one thing was lacking. Not one of these men, nor all combined, had given an adequate theory for a thorough going democratic, science-respecting education. This Professor Dewey had done.[227]

Dewey had an intense interest in the history of philosophy and had a first-hand knowledge of the great classics. His critics claimed he was biased in his presentation of some traditional ideas. But beyond books or ideas, social forces were the fire that forged Deweyan instrumentalism. He was too much a Jeffersonian democrat not to be uneasy with the socially conservative philosophy of the American neo-Hegelians, especially that represented by William T. Harris. Dewey visualized brave new challenges in America's transformation from an agrarian democracy to an urbanized industrial society.

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[226]Fifteenth Annual Report of the Board of Directors of the St. Louis Public Schools (St. Louis, 1870), 22, quoted in Neil Gerard McCluskey, Public Schools and Moral Education (New York: Columbia University Press, 1958), 147-148.

[227]"Apprentice Citizens," Saturday Review (October 22, 1949), 12, quoted in Neil Gerard McCluskey, Public Schools and Moral Education (New York: Columbia University Press, 1958): 177.

He wanted all men to freely share in the life of democracy. He devoted his talents to promoting a political democracy based upon social, cultural, industrial, and economic principles.[228]

American Education in the Twentieth Century

Western migration in the latter part of the nineteenth century brought about social and cultural upheaval when masses of people from different backgrounds shared ideas. Sectarian religious principles were modified as civilization moved westward and developed new cultures.[229]

Twentieth-century education emerged from a period of unrest in the 1890s when there appeared to be a profound realization on the part of American leaders and the general public that a major transformation had been fashioned in American society. Urbanization, mass immigration, and enormous industrial growth were themselves highly significant, but in addition, a giant increase in railroad travel and newspaper circulation meant an awareness of change being brought home to the American population. The ordinary American citizen was beginning to worry about what kind of world the twentieth century would be.[230]

Americans looked more and more to universal public education as a catalyst for addressing social problems. The increasing number of children

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[228]McCluskey, Public Schools and Moral Education, 201.

[229]Samuel Eliot Morison, The Oxford History of the American People (New York: Oxford University Press, 1965), 744-761.

[230]Herbert M. Kliebard, "Three Currents of American Curriculum Thought." Current Thought on Curriculum: 1985 ASCD Yearbook (Alexandria, Va: Association for Supervision and Curriculum Development, 1985), 32-33.

entering school was reason for concern. In 1890, less than seven percent of adolescents from fourteen to seventeen attended school. Four decades later more than half of adolescents fourteen to seventeen were enrolled in high school.[231]

Industrial and social growth in post-war America caused ordinary people and educators to examine curriculum content. Production of automobiles and other products through assembly line procedures provided incentive for industrial growth, making available a new economy in which there was more money to spend on public education. Moreover, there was a new freer atmosdphere in America. Education became synonymous with social and economic mobility.[232]

Many of the previously accepted educational practices were now questioned and reassessed by legislative action or judicial action. "American schools mirrored the problems that were common in the larger society."[233]

Significant changes occurred in the schools in the 1960s. Americans had decided, in the late nineteenth century, that education would be the best catalyst through which to change society.[234] Financed in part by federal funds fostering change and innovation, new teaching techniques such as open classrooms, team teaching, individualized instruction, new mathematics, and

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[231]John R. Verduin, Jr., Cooperative Curriculum Improvement (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1967), 23.

[232]Ibid.

[233]Diane Ravitch, "What We've Accomplished Since WWII," Principal (January 1984): 8.

[234]Ibid., 9.

alternative curricula entered American public schools. To many parents teaching and curiculum changes brought confusion. The traditional classroom which most parents attended had almost disappeared. Educational emphasis moved from teaching facts to understanding concepts. Decision making, thinking skills, and value clarification were an integral part of the new curriculum. In too many cases, students decided what, when, and how they wanted to learn. Parents began to question if children were learning anything.[235]

"Due Process" was a concept with new meaning when applied to rights of students in dealing with student discipline. In the 1969 Tinker v. Des Moines[236] case, the Supreme Court held, that students do not leave their rights at the "schoolhouse gate."

Since the United States Constitution was silent on education, as America grew and the population increased, individual states assumed responsibility for public education based on the Tenth Amendment. The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[237] The states were restricted in action only by the provisions of the United States Constitution and by state constitutions

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[235]Joseph E. Bryson and Elizabeth W. Detty, Censorship of Public School Library and Instructional Materials (Charlottesville, Va: The Michie Company, 1982), 51.

[236]Tinker v. Des Moines Independent Community School District, U.S. 503 89, St. Ct. 733, 21 L.Ed. 2d 731 (1969).

[237]U. S. Constitution, Amendment X.

and subsequent acts of state's legislatures.[238]

In spite of the fact that legislatures generally have constitutional authority to construct a state's system of education through statutory enactment, their authority was not without legal boundaries. Historically, federal courts, using the Fourteenth Amendment guarantee and, armed with judicial mandates of the Fourteenth Amendment have placed constraints on state authority over public education.[239]

As early as 1923, in Meyer v. Nebraska the Supreme Court conditioned state authority over curriculum. The Court suggested, "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights."[240] In the 1925 Pierce v. Society of Sisters case, an Oregon case, the Supreme Court took another step further and made clear that children are not mere "creatures of the State."[241]

During intervening years federal courts have responded to a variety of constitutional issues regarding state authority and public education. State authority over public school matters such as compulsory attendance, compulsory flag salutes, prayer and Bible reading, teachers' rights, and other

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[238]H. C. Hudgins, Jr. and Richard S. Vacca, Law and Education: Contemporary Issue and Court Decisions, 3rd ed. (Charlottesville, Va: The Michie Company, 1991), 17.

[239]Ibid., 18.

[240]Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

[241]Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 510, 69 L.Ed. 1070 (1925).

issues must always pass constitutional muster.[242]

State courts have also delivered decisions limiting educational authority of legislatures. For example, as early as 1926, the State Supreme Court of Appeals for Virginia said, in Flory v. Smith, that:

> [t]he legislature . . . has the power to enact any legislation in regard to the conduct, control, and regulation of the public free schools, which does not deny to the citizen the constitutional right to enjoy life and liberty, to pursue happiness and to acquire property.[243]

Separation of Church and State

The founding fathers enacted a system of government that hereto before existed only in minds of philosophers. Yet their work grew out of more than 150 years of a pragmatic experience.in Colonial self-government. The political leaders had developed a passion for freedom and wished to extend the concept to all citizens. In both the Preamble and Bill of Rights leaders defined forever the purpose and limited power of government.[244] The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."[245] Since the adoption of the First Amendment in 1791, constitutional scholars have engaged in extensive debate over exactly what framers of the Constitution did or did not

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[242]Hudgins and Vacca, 18

[243]Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926).

[244]Religion in the Public Schools (Alexandria, Va: American Association of School Administrators, 1964), 1.

[245]U. S. Constitution, Amendment I

mean by those two clauses. No matter what ideological frame member of Congress were thinking when they wrote the First Amendment, there was probably little consideration regarding church-state relations in public schools.[246] "The simple truth," Supreme Justice Sandra O'Conner once observed,

> is that free public education was virtually non-existent in the late eighteenth century. . . . Since there then existed few government-run schools, it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools.[247]

To James Madison and Thomas Jefferson religious freedom was the essential part of the struggle for freedom.[248] It is the Supreme Court's responsibility when called on to do so to define what religious freedom means in church-state issues. "The Supreme Court has not been consistent in establishing a national standard."[249] Religion as used in constitutional provisions of the First Amendment forbidding the "establishment of religion," means "a particular system of faith and worship recognized and practiced by a particular church, sect, or denomination."[250] In public education this means

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[246]Kristen J. Amundson, Religion in the Public Schools (Arlington: Va: American Association of School Administrators, 1986), 7.

[247]Wallace v. Jaffree, 105 S.Ct. 2479 (1985).

[248]Arval A. Morris, The Constitution and American Education (St. Paul: West Publishing Company, 1977), 328.

[249]Bryson and Houston, 27.

[250]Black's Law Dictionary, 5th ed. (St. Paul: West Publishing Company, 1979), 1161.

religious activities that are practiced within the public schools and are subject to litigation. In the 1947 Everson v. Board of Education case, Justice Hugo Black, writing for the majority, gave the first substantial definition to establishment clause 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 remain away from church against his will or force him to profess a belief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance, no tax in any amount, large or small, can be levied to support any religious activities or institutions, 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." [251]

A wall of separation between church and state presented a sensible, common-sense approach to the difficult church-state question. Yet even the Everson Court was able to put a sizeable hole in Jefferson's "wall" by upholding a New Jersey statute providing transportation for children attending religious schools--hop a ride to the school of choice. The Supreme Court predicated its judicial decision on the child benefit theory.[252] The Fourteenth Amendment states:

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[251]Everson v. Board of Education, 330 U.S. 1, 15 (1947).

[252]Bryson and Houston, 27.

> Section 1. 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 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.[253]

In many challenges to church-state issues in public schools, plaintiffs predicate complaints on state constitutions and statutes. It was not until the twentieth century that the United States Constitution was used in litigation regarding church-state issues. Initially, these cases were based on the Fourteenth Amendment, for it restricted state action, unlike the Bill of Rights which was applicable to only the federal government. Over the years, and through a number of Supreme Court decisions, the Supreme Court gradually absorbed the Bill of Rights into the Fourteenth Amendment--the absorption theory or the incorporation doctrine. The free exercise clause was absorbed in 1940, Cantwell v. Conecticut, and the establishment clause absorbed in 1947, Everson v. Board of Education. [254]

The Supreme Court has a long history of involvement in church-state decisions dating back to 1908. In the 1908 Quick Bear v. Leupp[255] case, the Court's first church-state case, the issue was federal money was used in contracting with sectarian schools to provide an education for Indian children on a reservation. The practic had begun in 1894 and there was oppositin to the

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[253]United States Constitution, Amendment XIV.

[254]Hudgins and Vacca, 400.

[255]Quick Bear v. Leupp, 210 U.S. 50 (1908).

practice even then. Finally, Congress passed federal legislation disallowing the practice with the last appropriation in 1899.

Even though Commissioner of Indian Affairs, Frances E. Leupp, was prohibited from using public funds for sectarian education by law , he was petitioned by Sioux Indians, Rosebud Agency, South Dakota, to provide a pro-rata share of an Indian trust fund to contract with St. Francis Mission Roman Catholic School for their children's education. The trust fund was established in 1868 with Sioux Indians by Congress. The fund existed for the "support and maintenance of day and industrial schools, including erection and repairs of school buildings."[256] Reuben Quick Bear and Associates sought an injunction on constitutional grounds prohibiting using the funds; government "shall make no appropriation whatever for education in any sectarian schools."[257] An injunction was granted by the District of Columbia Federal Court and Commissioner Francis Leupp appealed. The District of Columbia Appeals Court reversed, and plaintiff Reuben Quick Bear and Associates appealed. The Supreme Court's ruling was was that: (1) the trust fund was private money, not public money; (2) the Sioux Indians had asked for a pro-rata share for sectarian school support; and (3) this request was in reality a free exercise of religion, constitutionally protected. Chief Justice Fuller concluded:

> It seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians, and such would be the effect of the construction for

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256Ibid.

257Ibid., 81.

which the complainants contend.[258]

In the 1923 Meyer v. Nebraska[259] case the Supreme Court addressed the issue of whether or not parents had a right to determine their child's education.[260] And in the 1923 Frothingham v. Mellon,[261] case the issue was legal standing to litigate where public monies were involved. And legal standing is critical to litigate regarding shurch-state public schools issue. Justice Sutherland maintained that

> his (the taxpayer's) interest in the moneys of the treasury--partly realized from taxation and partly from other sources-- is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation of any payment out of the funds so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.[262]

In the 1925 Pierce v. Society of Sisters[263] case and its companion case, Pierce v. Hill Military Academy the Supreme Court addressed Oregon compulsory attendance law required children ages eight to sixteen attend only public schools.[264] The Supreme Court ruled Oregon's compulsory

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[258]Ibid., 82.

[259]Meyer v. Nebraska, 262 U.S. 390 (1923).

[260]Ibid., 400.

[261]Frothingham v. Mellon, 262 U.S. 447 (1923).

[262]Ibid., 490.

[263]Pierce v. Society of Sisters, 268 U.S. 510.

[264]Ibid., 530.

attendance law unconstitutional. Based on Meyer, the Supreme Court insisted that parents have right to determine direction of education for children-- public or private.cide where their children will attend school. In affirming a lower-court decision, the Court concluded:

> Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the state; those who nuture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[265]

So parents have a constitutional guarantee to decide placement of children in either public or nonpublic elementary schools.

In the 1930 Cochran v. Louisiana State Board of Education[266] decision the Supreme Court upheld a 1928 Louisiana statute forcing the state school board to provide "school books for school children free of cost" to all children in the state, including children attending private schools.[267] The state maintained the legislation was aid to children, not to religious elementary and secondary schools. "The schools obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries."[268] Plaintiff Cochran objected on

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[265]Ibid., 534-535.

[266]Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).

[267]Ibid., 374.

[268]Ibid., 375.

Fourteenth Amendment due process consideration that his property was taxed for private education purposes which amounted to taxation without due process.[269] Chief Justice Hughes accepted the state rationale:

> Viewing the statute as having the effect thus attributed to it we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislature does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.[270]

The Court created a situation where children and not the institutions benefited. This type of expenditure at public expense became known as the "child-benefit" theory.

In the 1940 Cantwell v. Connecticut [271] case the Supreme Court decided another landmark church-state education case. It is because the Supreme Court maintained that "the fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment." In essence, the First Amendment religion clause is applicable to the states via the Fourteenth Amendment. The "absorption" theory was now complete, and the Supreme Court understood what it had been doing since the ratification of the Fourteenth Amendment in 1868.[272]

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[269]Ibid., 374.

[270]Ibid., 375.

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

[272]Ibid., 303.

> The First Amendment declares that Congress shall make no respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.[273]

In 1947, the Everson v. Board of Education[274] decision addressed the issue of the New Jersey legislature to provide transportation for children attending religious elementary and secondary schools--to the religious school of choice. Plaintiff Everson objected on bases that: (1) taxation for private use without due process is a violation of the Fourteenth Amendment; and (2) the First Amendment forbids using tax money for religious schools. State courts differed on the decision. Everson won in the lower court and lost in the New Jersey Court of Appeals. On appeal, the Supreme Court ruled that legislation was aid to children (the child benefit theory of Cochran) and satisfied a public need. In response to Everson's second charge, the Supreme Court delivered perhaps its most memorable description of what First Amendment means (the full statement was quoted earlier in this chapter), including Jefferson's words: "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.' "[275] The Court's majority (the decision was five to four) maintained the New Jersey legislation had never made the slightest breach in the wall of separation. In addition, the Court maintained, the First Amendment "requires the state to be

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[273]Ibid.

[274]Everson v. Board of Education, 330 U. S. 1 (1947).

[275]Ibid., 15.

neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary."[276]

In dissenting, Justice Jackson contended the majority's judicial logic contradicted its decision. He likened the Court's logic to Julia, who according to Byron, "While whispering, 'I will never consent,'--consented."[277] Justice Jackson also acknowledged the shallow logic upon which the child- benefit theory was based:

> Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.[278]

Justice Rutledge also chastened the majority insisting the Court "sustained public payment for small concessions to religious schools, while it made wholly private in character the larger things without which small could have no meaning or use."[279] In conclusion, Justice Rutledge maintained the Cochran decision paved way for this decision, and the two decisions would create a rationale for a third. "Thus with time the most solid freedom steadily gives way before continuing corrosive decision."[280] Justice Rutledge was correct in his prophecy.

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[276]Ibid., 18.

[277]Ibid., 24.

[278]Ibid.

[279]Ibid., 51.

[280]Ibid., 29.

Two landmark cases involving release time for students to attend religious activities during regular school hours were decided in 1948 and 1952. public school students during regular school hours for the purpose of religious instruction helped in establishing standards for ruling on the constitutionality of separation of church and state issues. In the 1948 McCollum v Board of Education,[281] case, students were released from secular instruction to attend religious instruction in t public school buildings. Students who did not have permission to participate in the religious instruction were assigned to another section of the building to continue secular instruction. McCollum asked for a court order requiring the school board to

> adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools . . . and in all public houses and buildings in said district when occupied by public schools.[282]

She contended that public schools were promoting religion in violation of the First Amendment. The Illinois State court denied her claim and McCollum appealed to the Supreme Court. Justice Hugo Black writing the majority opinion for the Supreme Court stated: "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[283] This decision prohibits use of public school facilities for released time for religious instruction during the school day.

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

[282]Ibid., 205.

[283]Ibid., 210.

In the 1952 Zorach v Clauson.[284] case the Supreme Court addressed the issue of released time for off-campus instruction. A New York education law allowed students, with permission from their parents, to leave the school buildings and grounds to attend religious centers for religious or devotional exercises. Plaintiff Zorach and friend maintained the public schools manipulated schedules to accommodate religious activities in violation of the First Amendment. By a six to three vote the Supreme Court rejected the claims of the plaintiff's and sustained New York City's released time program for off-campus religious instruction. The three dissenting judges maintained the program used "a secular institution to force religion" on school children. Justice Jackson insisted that school "serves a temporary jail for a pupil who will not go to church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. "[285]

Prayer and Bible reading have contributed greatly to developing judicial standards for ruling on separation of church and state issues. Over half of the states have permitted or required prayer at some point in the history of their public schools. Prior to 1962, at least twelve states and the District of Columbia required Bible reading.[286]

In the 1962 Engel v. Vitale[287] case the Supreme Court addressed the issue of required prayer. The New York State Board of Regents mandated a

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

[285]Ibid., 324.

[286]Kern Alexander, School Law. (St. Paul, Minn.: West Publishing Company, 1980), 238.

[287]Engel v. Vitale, 370 U.S. 421 (1962).

prayer-- all twenty-two words--"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[288] Plaintiffs claimed the mandated prayer violated the establishment clause of the First Amendment. After failing in New York courts, they were successful in the United States Supreme Court with an eight to one vote. The Court maintained the mandated prayer as First Amendment establishment-- religious minorities must surrender to the beliefs of this prayer. Therefore, it is unconstitutional to mandate one group's beliefs on another group. The significance of Engel is that dictated prayer in public school classrooms, led by teachers and recited by students, is unconstitutional.

One year later, another case addressed the constitutionality of Bible reading and prayer recitation in the public schools. In Abington School District v. Schempp, and a companion case, Murray v. Curlett,[289] at issue was the Pennsylvania statute mandating Bible reading and recitation of the Lord's Prayer at the beginning of the school day. The statute was declared unconstitutional by the federal district court. On appeal to the Supreme Court, the decision of the district court was upheld. In a concurring opinion Justice Douglas stated that "though the mechanism of the State , all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others."[290]

Continuing the Court said::

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[288]Ibid, 422.

[289]Abington School District v. Schempp, 374 U.S. 203, 83 S. Ct. 1650 (1963).

[290]Ibid., 228.

> The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect neither advances nor inhibits religion.[291]

This the beginning of the tripartite test which was completed in Lemon I.[292] The first two parts are: (1) "Does the statute have a secular legislative purpose?" (2) "Does the principle of the statute either advance or inhibit religion?" These two questions, along with the third question developed later, still remain the Supreme Court's standard for ruling on violations of the establishment clause of the First Amendment.

In 1968, a case addressed the issue introduced in the Cochran decision. In Board of Education v. Allen,[293] the plaintiff contended that the loaning of textbooks to parochial students failed constitutional muster by advancing religion at the expense of the taxpayers. The New York trial court ruled in favor of the plaintiff, but the Court of Appeals overturned the decision of the trial court. On appeal, the Supreme Court concurred with the Court of Appeals. Again, the child benefit theory surfaced when the Supreme Court said the Board of Education had not established that the "process of secular and religious training in religious schools are so intertwined that secular

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[291]Ibid., 222.

[292]Lemon v. Kurtzman, 91 S. Ct. 2111 (1971).

[293]Board of Education v. Allen, 392 U.S. 236 (1968).

textbooks furnished to students by the public are in fact instrumental in the teaching of religion."[294]

The language used by Justice White in speaking for the majority left some indecision on the part of both public and parochial school leaders. He failed to identify the limitations required by the First Amendment when he applied the public purpose theory. He evidently reasoned that the state could provide funds to parochial schools as long as the money was used to pay for secular services.

In 1971, the Supreme Court encountered the indecision left by Justice Whites remarks when asked to rule on two state statutes which aided parochial schools. The two states, Pennsylvania and Rhode Island, were using the vagueness issue created by Justice White to apply the secular purpose standard in using public funds to pay for such items as textbook, teachers' salaries, supplements, and instructional materials in certain secular subjects. In Lemon v. Kurtzman (Lemon I),[295] the Court declared both states' statutes unconstitutional. After applying the Schempp test, the Court then added a third test: Does the statute require or foster excessive entanglement between church and state? With the addition of this question, the "tripartite test" was now complete. In this case, the Supreme Court decided there was excessive entanglement between the state and religion. A later challenge of this ruling in 1973, Sloan v. Lemon[296] the Supreme Court again denied the practice, this

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[294]Ibid, 248.

[295]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105.

[296]Sloan v. Lemon, 413 U.S. 472 (1973).

time citing that reimbursing parents of nonpublic school students for a portion of tuition expenses had the principal effect of advancing religion.

The tripartite test provided the Supreme Court a standard to use in ruling on decisions involving religious issues. It is still applied in many cases throughout the nation, and it serves as a guideline for school districts to use in planning activities of a religious nature.

These cases from Quick Bear to Lemon I have provided a foundation for litigation in the area of religion and the public schools. The principles established in these proceedings have guided courts to the standards that currently exists. It is a far cry from local sectarian schools created for salvation to the public schools in colonial days to those of today in which any reference to religion is often opposed.

Summary

Beginning with the early schools in the United States, the American public school has been a rallying place for the community. Citizens feel deeply committed to their schools. Because citizens claim ownership in schools, they see rationale for schools as an appropriate place; therefore, they strongly defend schools purposes, often to great length, regardless of the outcomes.

The idea of ownership, "I can dictate to and control what I own," has led to increased conflict within the public schools. However, this perception is the opposite of the legal interpretation of what school should represent. Justice Frankfurter, writing in the McCollum decision, stated the school's role very clearly:

> Designed to serve as perhaps the most powerful agency for promoting the cohesion among a heterogeneous

> democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from diverse conflicts, of Government from irreconcilable pressures by religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home indoctrination in the faith of choice. This development of the public school as a symbol of our secular society was not a sudden achievement not attained without conflict. While in the small communities of comparatively homogeneous religious beliefs, the need for absolute separation presented no urgencies, elsewhere the growth of the secular school encountered the resistance of feeling strongly against it. But the inevitability of such attempts is the very reason for Constitutional provisions primarily concerned with the protection of minority groups. And such sects are shifting groups, varying from time to time, and place to place, thus representing in their totality the common interest of the nation.[297]

Since 1980, there has been an alarming increase in the number of attacks on the public schools. Targets have included specific courses, library books, textbooks, audio-visual materials, and teaching methodologies. Critics have charged the schools with promulgating religion as well as inhibiting the free exercise of religion.

Students are the very reason public schools exist. They are trapped in the middle of the religious conflict. Are students who are taught one thing at home and in the church, exposed to other ideas in schools? Are students "victims" because they are denied the right of access to divergent thinking? Or are they "victims" because someone charges the schools are infringing on their religious freedoms?

Public schools are a mirror image of society. They reflect the pendulum of history, including judicial decisions. As long as schools are an extension of

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[297]McCollum v. Board of Education, 333 U.S. 216-217.

the populace which support them, school leaders must remember that schools represent all the people.

The election of President Reagan in 1980 lent support to the conservative philosophy which supports calling for prayer in the schools, a return to the basics, balanced treatment in biological sciences, emphasis on the importance of the traditional family, and tuition credit and vouchers which aid private schools. By 1988, President Reagan had nominated approximately one-fourth of the federal judges sitting on the bench, and the mood of the courts was beginning to change. Some courts appear to be adopting a much more lenient attitude with regard to religion in the schools.[298]

Today, members of the Supreme Court are not in total agreement on religious issues in the public schools. The tripartite test is still used as a measurement for ruling on cases involving religion in the schools. Another chapter may yet be written on how the Court will swing in the future.

Attention will now shift in this study from a review of the literature to a judicial review of the litigation and court proceedings that have helped define "what is" and "what is not" legal regarding religion in the curriculum of public schools. By careful scrutiny of the legal ramifications of the conflict, recommendations can be made to avoid future conflicts.

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[298]R. Freeman Butts, "A History and Civics Lesson for All of Us," Educational Leadership (May 1987): 21-25.

CHAPTER III

THE LEGAL ASPECTS OF RELIGION IN THE PUBLIC SCHOOL CURRICULUM

Introduction

The Constitution of the United States does not mention education. Individual states through the interpretation of the Tenth Amendment --"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[299]-- established a system of state supported public schools.

It was not until the twentieth century that citizens were able to address their grievances on religious issues in the federal courts. Federal courts have intervened in litigation involving the following two principal issues: "(1) alleged violation of constitutionally protected right, privilege, or immunity of an individual: and (2) validity questions of state or federal statutes under the United States Constitution."[300]

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[301] These sixteen words have induced

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[299]U. S. Constitution, Amendment X.

[300]Joseph E. Bryson and Elizabeth Detty, Censorship of Public School Library and Instructional Material (Charlottesville: The Miche Company, 1982), 72.

[301]U. S. Constitution, Amendment I.

substantial research and many court cases in attempts to define the First Amendment's religious protection.[302] There has been and continues to be debate as to what the framers of the First Amendment intended.

When the founding fathers of the United States met in Philadelphia in the summer of 1787 to write the Constitution, they felt they had a knowledge of humankind. This knowledge helped them draft a Constitution suitable to a fledgling government. "To them a human being was an atom of self-interest. They did not believe in man, but they did believe in the power of a good political constitution to control them."[303] Consequently, the Constitution was not written for the personification of liberty. According toHofstadter, the authors' concern was property, not liberty.

> In fact, it was the opponents of the Constitution who were more active in demanding such vital liberties as freedom of religion, freedom of speech and press, jury trial, due process, and protection from unreasonable searches and seizures."[304]

"The establishment clause means that government is neutral in matters of religion. It does not promote one religious activity over another nor

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[302]Martha M. McCarthy, "Religion and Public School: Emerging Legal Standards and Unresolved Issues," Harvard Educational Review 55, No. 3 (August 1985): 276.

[303]Richard Hofstadter, The American Political Tradition and the Men Who Made It (New York: Vintage Books, 1955), 3.

[304]Ibid., 11.

does it compel participation in a religious activity."[305] Everson [306] established the principles for interpreting the establishment clause. Justice Hugo Black, writing for the majority, stated:

> 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 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 nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions whatever 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 laws was intended to erect a "wall of separation between church and state."[307]

"The free exercise clause means that a person may believe what he wishes. He may believe in his God or no God, and government will not interfere with that belief."[308] The Abington School District v Schempp and Murray v. Curlett [309] cases helped define the free exercise clause.

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[305]H. C Hudgins, Jr. and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, 3rd ed (Charlottesville, Va: The Michie Company, 1991), 399.

[306]Everson v. Board of Education, 330 U.S. 1, 15 (1947).

[307]Ibid., 15

[308]Hudgins and Vacca, 399.

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

> [The free exercise clause] 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 thereof, free of any compulsion from the state. . . . The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of religion.[310]

Yet, the balancing test for the free exercise clause outlined in Wisconsin v. Yoder[311] differs from the tripartite test used in establishment clause cases. The initial question in determining violation of free exercise is whether the activity is violating a sincerely held belief of the plaintiff. Next, if it is a sincere belief, is it being violated by government action and to what extent? The last question is whether the action "serves a compelling interest that justifies the burden imposed on the free exercise of religious beliefs."[312]

The distinction between the two clauses appears to be that "a violation of the free exercise clause is predicated on coercion, while the establishment clause violation need not be so attended."[313]

The interpretation of the First Amendment has an important bearing on the course of the decision. The establishment clause "protects a person from

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[310]Ibid.

[311]Wisconsin v. Yoder, 406 U.S. 205 (1972).

[312]Martha M. McCarthy, A Delicate Balance: Church, State, and the Schools (Bloomington: Phi Delta Kappa Educational Foundation, 1983), 13.

[313]Abington School District v. Schempp, 374 U.S. 203, 223 (1963).

having his religious identity controlled, changed, or influenced by government and that means protecting those persons who currently have a religious identity and those other persons who do not."[314]

A broad interpretation of the First Amendment denies a strict prohibition of any aid to parochial groups regardless of the impartiality or equity of such aid. To put it another way, it urges absolute neutrality toward all things religious. Historically, this interpretation has been the position of the United States Supreme Court.[315]

A narrow interpretation of the First Amendment presumes the addition of the letter "a" before the word "religion."

> Under this interpretation government may not recognize a single religion of America, and also government would equally be prohibited from preferring one or more religions or churches over others. But, the point is that government would be permitted under this interpretation, to have a specific purpose and primary effect of equally aiding all religions or all churches or religious groups.[316]

It is the responsibility of the Supreme Court when called on to do so to define what religious freedom means in church-state issues. The Supreme Court has not been consistent in establishing a national standard.[317] As the members of the Supreme Court change, their rulings change accordingly. Also,

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[314]Arval A. Morris, "Fundamentalism, Creationism, and the First Amendment," West's Education Law Reporter, Vol. 41 (St. Paul: West Publishing Company, 1987), 14.

[315]Ibid.

[316]Ibid., 15.

[317]Bryson and Houston, 27.

the mood of the nation has a great bearing on their decisions. As of 1992, the majority of the Court continued to interpret the First Amendment in the broad sense.

The Fourteenth Amendment states:

> Section 1. 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 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.[318]

In many challenges to church-state issues in public schools, plaintiffs predicate complaints on state constitutions and statutes. It was not until the twentieth century that the United States Constitution was used in litigation regarding church-state issues. Initially, these cases were based on the Fourteenth Amendment, for it restricted state action, unlike the Bill of Rights which was applicable to only the federal government. Over the years, and through a number of Supreme Court decisions, the Supreme Court gradually absorbed the Bill of Rights into the Fourteenth Amendment--the absorption theory or the incorporation doctrine. The free exercise clause was absorbed in 1940, Cantwell v. Conecticut, and the establishment clause absorbed in 1947, Everson v. Board of Education. [319]

In the early 1960s the Supreme Court in ruling on Bible reading[320] and

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[318]United States Constitution, Amendment XIV.

[319]Hudgins and Vacca, 400.

[320]Engel v. Vitale, 370 U.S. 421 (1962).

state-sanctioned prayer[321] reiterated that the establishment clause intended to erect "a wall of separation between Church and State."[322] The Court applied two criteria in testing the constitutionality of the challenged state action: (1) "Does the statute reflect a secular purpose?" and (2) "Does the principle of the statute either advance or prohibit religion?" The Court rejected the argument that such religious accommodations in public schools are necessary to protect free exercise rights, concluding that state-sponsored devotional activities--even though nondenominational with voluntary participation--have a sectarian purpose and the primary effect of advancing religion.

In 1971, the Supreme Court added a third criterion in establishment clause analysis: (3) "Does the legislative action require or foster excessive government entanglement with religion?"[323] The three criteria for analyzing establishment clause violations formed the tripartite test. The tripartite test, commonly known as the Lemon[324] test, was first used in an education case, Lemon v. Kurtzman,[325] in 1971. Being unable to meet the requirements of even one prong of the test prescribes that a policy or activity be ruled unconstitutional. The Supreme Court routinely uses this test in ruling on

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

[322]Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

[323]Walz. v. Tax Commission of City of New York, 397 U S. 664, 674 (1970).

[324]Lemon v. Kurtzman, 403 U.S. 602 (1971).

[325]Ibid.

religious matters in the public schools.

Establishment clause cases center on the legality of the governmental action itself, whereas in free exercise claims individuals commonly accept the legitimacy of the governmental regulation but claim an entitlement to special treatment because the regulation has an adverse effect on the practice of their faith. To judge free exercise claims, the judiciary applies a balancing test that includes an evaluation of whether practices dictated by a sincere and legitimate religious belief hamper the governmental action and, if so, to what degree. If such an impairment is confirmed, the court then evaluates whether the state action serves a compelling interest that justifies the burden imposed on the free exercise of religious beliefs.[326] Even if a compelling interest is shown, the judiciary will require the government to follow available means to accomplish its objective that are less burdensome on free exercise rights. Applying this balancing test, the judiciary must make sensitive judgments as to what makes up a sincere belief and a burden on its practice and what types of governmental interests are required to override free exercise rights.[327]

The most difficult church and state controversies involve conflicting claims between free exercise and establishment clauses. Both claims are cast as absolute terms, and either if expanded to a logical extreme would tend to clash with the other. The principle of governmental neutrality toward religion, expressed in the First Amendment, has been easier to state than to apply. Accommodations made to protect free exercise rights can be viewed as advancement of religion in violation of the establishment clause, but

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[326]*See* Wisconsin v. Yoder, 406 U.S. 205, 214-215 (1972).

[327]McCarthy, 289.

overzealous efforts to protect against state sponsorship of religion can encroach upon free exercise rights. The boundary is sometimes hazy between accommodation and advancement and between separation and hostility. In the public school setting, difficult legal questions arise when students' rights to attend public school in a climate free from state-imposed religious doctrine are pitted against claims that religious accommodations are required to enable students to practice their faith.[328]

Which should prevail--the government's responsibility to adhere to establishment clause prohibitions or one's right to exercise religious beliefs? There is some sentiment that the establishment clause is intended mainly to implement the free exercise clause, so if they should clash the free exercise clause should take precedence. There is also a competing theory that nonestablishment is the overriding concern which under some circumstances may justify a minimal burden on free exercise rights. The tension between the two clauses has complicated the judiciary's task in church and state cases, and ultimately the Supreme Court may have to make a decision regarding the hierarchy of the First Amendment religious freedoms.[329]

Quick Bear v. Leupp paved the way for the Supreme Court to rule on religious activities occurring in the public school curriculum that violated the First Amendment as applied to states through the Fourteenth Amendment.

Dealing with religious activities in the public school curriculum is a very sensitive issue. School officials face challenges in trying to abide by the laws of the land, accommodate local religious customs, protect the rights of minority

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[328]Ibid., 290-291.

[329]Ibid., 291.

groups, and deal with their own religious beliefs. The task is no easier for the state and federal courts. The ultimate authority, the Supreme Court, is often divided in rendering its decisions. Divided or not, the decisions of the Supreme Court sets the standard for protecting the First Amendment rights of individuals.

History of Church-State Litigation

For the first one hundred fifty years of America's existence no one seriously challenged the legality of providing religious activities, curricular and extra-curricular, as part of the public school curriculum. In fact, many states beginning with Massachusetts in 1647, required religious activities as part of the public school curriculum.[330] Since the 1940s, however, in ever increasing number, there have been challenges to providing religious activities as a part of the public school curriculum. Before this period, school officials met little if any resistance in designing curricula that provided religious activities on a daily basis.

Over the years, even Presidents have expressed different views concerning separation of church and state. In 1876, President Ulysses S. Grant made a speech in which he stated that not one dollar in public funds was to be given to benefit sectarian schools. In 1986, President Ronald Reagan asked Congress to provide public funds to parents who enrolled their children in religious sectarian schools. President George Bush also supported tax credits for parents whose children enrolled in private schools. President Bill Clinton does not favor providing tax credits to parents whose children attend private

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[330]Neil Gerard McCluskey, Public Schools and Moral Education (New York: Columbia University Press, 1959), 12.

schools. His only child attends a private school in the Washington, D.C. area.

From 1948 until 1992 the Supreme Court ruled on more church-state cases than in any comparable time segment in the history of the United States. As a matter of fact, from 1969, when Chief Justice Warren Burger was appointed to the Court until his retirement in 1986, there were more church-states cases handed down than in the entire Supreme Court history. Since 1970, each term of the Supreme Court has had at least one church and state case on the docket.

Curriculum Decisions

A state has the right to require a specified curriculum to be taken by all students. This authority is inherent in the state's responsibility to prepare all students for good citizenship. A local school board has a more limited authority bound by parental rights. The selection of curriculum offerings is a joint effort between school and parents. Parental objections to specific courses generally stem from what parents perceive as ideas which are in conflict with their religious beliefs. "It is their contention that the school is sponsoring religion in offering the courses and experiences."[331]

Several writers have defined curriculum, with the result that some definitions are much broader than others. Dale Brubaker defines the curriculum as "what persons experience in a setting."[332] Edmund Reutter defines the curriculum as "encompass[ing] all experiences provided for public

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[331]Hudgins and Vacca, 426.

[332]Dale L. Brubaker, Curriculum Planning: The Dynamic of Theory and Practice (Glenview, Ill.: Scott, Foresman and Company, 1982), 2.

school students under the aegis of public school authorities."[333] Both definitions would include the curricular and extracurricular activities within the school environment.

Black's Law Dictionary defines curriculum as "The set of studies or courses for a particular period, designated by a school or branch of a school."[334] Black's definition provides a very narrow interpretation of curriculum, which restricts curriculum to the formal set of studies or courses in the classrooms.

Arval Morris uses yet another definition, a two-fold definition, one encompassing all of the preceding definitions of curriculum.

> The term "curriculum" can be used in at least two senses. One sense refers to the studies prescribed for a given grade, the successful completion of which leads ultimately to a high school diploma. A second sense of the term refers to the whole life-experience program of the school.[335]

Morris also points out that in addition to the formally stated curriculum, there is a hidden curriculum. The first one is spelled out and is easy to recognize by reviewing the specified courses, course content with its articulated goals, objectives, outcomes, and the prescribed textbooks that are used in order to achieve this purpose. The second is the hidden curriculum. For

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[333]E. Edmund Reutter, Jr., "Censorship in Public Schools: Some Recent Developments,"Current Legal Issues in Education, ed. M. A. McGhehey (Topeka: National Organization on Legal Problems of Education, 1977), 1.

[334] Black's Law Dictionary, 5th Ed., (St. Paul: West Publishing Company, 1979), 345.

[335]Arval Morris, The Constitution and American Education (St. Paul: West Publishing Company, 1980), 188.

example, the school teaches values by examplesand the communicated word through procedures to administer the school discipline policy. The school may or may not recognize the hidden curriculum that is portrayed by its image.

If one accepts each of these definitions, one can accept Boles' assertion "that almost every conceivable area of the public school curriculum has been challenged at one time or another someplace in the United States."[336]

As stated at the beginning of this section, a state has the authority to establish curriculum, while local school boards frequently have power granted by the state to prescribe curriculum, as long as it does not conflict with state mandates. The federal government has no direct control over curriculum, but it can exert tremendous pressure on school systems by funding or not funding programs. In order to be eligible for the federal grants, school systems must agree to abide by certain regulations and conditions.[337]

The authority to establish curriculum is not absolute. Courts may intervene when a question of constitutional rights arises.[338]

> In deciding on the constitutionally of a statute or rule, the courts will balance the interests of the parties involved. With regard to the school curriculum, students, parents, teachers, and the state will have interests which must be taken into consideration.[339]

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[336]Donald E. Boles, The Two Swords, Commentaries and Cases in Religion and Education (Ames: The Iowa State University Press, 1967), 301.

[337]Morris, Constitution, 189.

[338]Kern Alexander and M. David Alexander, The Law of Schools, Students and Teachers in a Nutshell (St. Paul: West Publishing Company, 1984), 29.

[339]Ibid., 30.

The founding fathers had no way of knowing what schools would be like or how many religious groups there would be, or how the courts would interpret the "free exercise clause" and the "establishment clause" of the First Amendment, two hundred years later. Religion as a part of the school curriculum has generated a great deal of controversy in the public schools. "Religion can be a strong force, and it can serve either to unify or to divide people."[340]

As with curriculum, in order to discuss religion in the schools, it is necessary to define it. One definition of religion follows:

> Any individual or group belief is religious if it occupies the same place in the lives of its adherents that orthodox beliefs occupy in the lives of their adherents. Four characteristics should be present: (1) a belief regarding the meaning of life. (2) a psychological commitment by the individual adherent (or if a group, by members generally) to this belief; (3) a system of moral practice resulting from adherence to this belief; and (4) an acknowledgment by its adherents that the belief (or belief system) is their exclusive or supreme system of ultimate beliefs.[341]

The Random House College Dictionary defines religion thus:

> a set of beliefs concerning the case, nature, and purpose of the universe; a specific and institutional set of beliefs and practices generally agreed upon by a number of persons or sects; a deep conviction of the validity of religious beliefs and practices.[342]

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[340]Morris, Constitution, 325.

[341]"Defining Religion," University of Chicago Law Review 32 (1965): 550-51.

[342]The Random House College Dictionary, rev. ed. (New York: Random House, 1975), 1114-1115..

Webster's Ninth New Collegiate Dictionary defines religion as

> the service and worship of God or the supernatural; commitment or devotion to religious faith or observance; a system of beliefs held to with an order and faith.[343]

Black's Law Dictionary defines religion as

> Man's relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings. In its broadest sense includes all forms of belief in the existence of superior beings exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments. Bond uniting man to God, and a virtue whose purpose is to render God worship due him as source of all being and principle of all government of things.[344]

> As used in constitutional provisions of First Amendment forbidding the "establishment of religion," the term means a particular system of faith and worship recognized and practiced by a particular church, sect, or denomination.[345]

There has been and continues to be debate over what the framers of the First Amendment meant by the "free exercise clause" and the "establishment clause." "As late as the time of the Revolutionary War, at least eight of the thirteen former colonies had established churches, four of the other five had

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[343]Webster's Ninth New Collegiate Dictionary (Springfield, Mass: G. and C. Merriam, 1967), 724.

[344]Black's Law Dictionary, 5th ed., (St. Paul: West Publishing Company, 1979), 1161.

[345]Ibid.

established religions."[346]

According to one historian, the "wall of separation" metaphor used by Thomas Jefferson did not mean complete and absolute separation of church and state so that no religion or religious influence was to be permitted in state-sponsored activities and laws. His chief aim was the protection of one's religious beliefs and opinions.[347] This is a far cry from the interpretation given Jefferson's "wall of separation" metaphor in Everson v. Board of Education, which stated that the First Amendment means " 'at least' that, among other things, neither a state nor the federal government can pass laws that aid all religions."[348]

This chapter will examine the legal aspects of religion in the public school curriculum in the following areas: Released Time For Religious Instruction: On campus, Off Campus, and Shared Time; School-Sponsored Prayer and Bible Reading; Patriotic Exercises; Creationism and Evolution: Balanced Treatment; Equal Access and Religious Groups on Campus; Prayer at Athletic Events; Religious Symbols and Holidays; Moment of Silence; Secular Humanism; Graduation Exercises; Distribution of Religious Literature; Bible Study Courses; Compulsory Attendance; and Immunizations. All of the above practices have been litigated in court on religious grounds, and precedents have been established.

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[346]Engel v. Vitale, 370 U.S. 421,427-428.

[347]Daniel L. Dreisback, Real Threat and Mere Shadow: Religious Liberty and the First Amendment (Westchester, Ill.: Crossway Books, 1987) 120.

[348]Everson v. Board of Education, 330 U.S. 15-16.

Released Time for Religious Instruction

The practice of releasing students for religious instruction in the United States can be traced to Gary, Indiana, in 1914.[349] Challenges to providing released time for religious instruction in public schools had been litigated in state courts, which did not find any violation of the First and Fourteenth Amendments. The Supreme Court has ruled on two landmark cases involving released time. The first case was McCollum v. Board of Education[350] in 1948. The second case was Zorach v. Clauson[351] in 1952. In 1985 the Supreme Court ruled on a shared time program, School District of the City of Grand Rapids v. Phyllis Ball.[352]

On Campus

In McCollum v. Board of Education[353] the local board of education in Champaign, Illinois had agreed to provide released time for religious instruction in the schools during regular school hours for students whose parents had signed a request card. Students not receiving religious instruction were assigned to another part of the building to continue their secular studies. McCollum, a parent, requested a court order forcing the school board to

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[349]Kern Alexander, Ray Corns, and Walter McCann, Public School Law: Cases and Materials (St. Paul: West Publishing Company, 1969) 107.

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

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

[352]School District of the City of Grand Rapids v. Phyllis Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed. 267 (1985).

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

> adopt and enforce rules and regulation prohibiting all instruction in and teaching of religious education in all public schools . . . and in all public school houses and building in said district when occupied by public schools.[354]

Her argument was that tax-supported schools were promoting religion in violation of the First and Fourteenth Amendments. The Illinois state courts ruled against McCollum, and she appealed to the Supreme Court. In writing the Court's majority opinion, Justice Black stated, " This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[355] Justice Black once again expressed views announced by the majority and minority in Everson--even repeating Everson's articulate First Amendment definition. Justice Black then acknowledged that

> the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.[356]

The McCollum decision forbids the use of released time for religious instruction on campus during the school day. This landmark case is one of the most often quoted cases concerning religious instruction in the public schools.

In Vaughn v. Reed[357] in 1970, plaintiffs, fathers of children who

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[354]Ibid., 205.

[355]Ibid., 210.

[356]Ibid., 212.

[357]Vaughn v. Reed, 313 F.Supp. 431 (W.D.Va. 1970). See also People

attended the Martinsville School System, sought an injunction against the religious education program being held in the Martinsville elementary schools. The defendants contended that the program did not violate the First Amendment.

Weekly classes were held by teachers sent in by a private organization for students whose parents had given written permission for their children to attend the classes. They were purported to teach the students about religion rather than to indoctrinate them therein. Students whose parents did not sign excusal cards were assigned to a study period. Using McCollum v. Board of Education as the controlling authority, the Chief Judge of the United States District Court of the Western District of Virginia ruled that when those students whose parents had not signed cards were excused for study period, the First Amendment was violated.

Off Campus

The second landmark case dealing with released time was Zorach v. Clauson.[358] This 1952 case differed from McCollum in that it permitted released time for off-campus instruction. A New York education law allowed

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ex rel. Lewis v. Graves, 245 N.Y. 195 156 N.E. 663 (1927); People ex rel. Latimer v. Board of Education of City of Chicago, 394 Ill. 228, 68 N.E.2d 305 (1946); Dilger v. School District 24 CJ, 222 Or. 108, 352 P.2d 564 (1960) for courts upholding discretionary power of board of education to provide released time programs. Some court decisions indicated parents had the right to have children excused or released from school for religious purposes: Lewis v. Spaulding, 193 Misc. 66, 85 N.Y.S.2d 682 (1948), appeal dismissed 299 N.Y. 564, 85 N.E.2d 791 (1949); Gordon v. Board of Education of City of Los Angles, 78 Cal.App.2d 464, 178 P.2d 488 (1947); Perry v. School District No. 81, Spokane, 54 Wn.2d 886, 344 P.2d 1036 (1959); Fisher v. Clackamas County School District 12, Or.App., 507 P.2d 839 (1973).

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

students, with permission from their parents, to leave the school buildings and grounds to attend religious centers for religious instruction or devotional exercises. Plaintiff Zorach and friends maintained that public schools manipulated schedules to accommodate religious activities in violation of the First Amendment. The same law made school attendance compulsory and students not released stayed in the classrooms. Churches reported attendance of students released from public schools who failed to report for religious instruction. By a vote of six to three, the Supreme Court rejected the claims of the plaintiff's and sustained New York City's released time for an off-campus religious instruction program. The three dissenting judges maintained the program used "a secular institution to force religion" on school children. Justice Jackson insisted that school "serves as a temporary jail for a pupil who will not go to church. It takes more subtlety of mind than I possess to deny that this is government constraint in support of religion."[359]

In 1975, in Smith v. Smith[360] public school students challenged a release-time program whereby public school students were released during school hours for religious instruction off school campuses by a nonprofit organization supported by the council of churches. The Chief Judge for the United States District Court for the Western District of Virginia granted injunctive relief and the defendants appealed. On appeal, the United States Court of Appeals, Fourth Circuit, ruled that the release-time program had a

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[359]Ibid., 324.

[360]Smith v. Smith, 391 F.Supp. 443 (1975), 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). See also State and Holt v. Thompson, 66 Wis.2d 659, 225 N.W.2d 678 (1975).

secular purpose in accommodating the 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. The Court of Appeals reversed the decision of the District Court.

In a 1981 case, Lanner v. Wimmer,[361] the United States Court of Appeals, Tenth Circuit, held that provisions in a released time program, in which students attended church-related seminaries and received public school credit for classes that were "mainly denominational" in subject matter, was unconstitutional. Also unconstitutional was a procedure that required the public schools to collect the seminary's attendance slips.

Shared Time

Shared time or dual enrollment is a cooperative agreement between public school officials and parochial school officials to share students, teachers, and facilities. The intent of such agreements is to better serve the citizens of the community.

In Fisher v. Clackamas County School District 12,[362] a suit in equity was bought by plaintiff taxpayers to prohibit the defendants, school district, its board clerk, and superintendent from using classrooms in St. John the Baptist school to conduct classes for students of the parochial school. St. John's

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[361]Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981).

[362]Fisher v. Clackamas County School District 12, 507 P.2d 839 (Ore. App. 1973).

school was a parochial school under the control of the Catholic church. The plaintiffs contended that the furnishing of teachers, textbooks and instructional materials to the students of St. John's constituted a benefit to religion institutions in violation of the Oregon Constitution, Article 1, section 5 which stated:

> No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly.[363]

The defendants and intervenors claimed that the teachers and textbooks were not being furnished to St. John's school, but to two bona fide public schools using classroom space in St. John's school; namely, Rowe Junior High Annex and Milwaukie Elementary Annex.

The circuit court ruled that the "shared time" program was unconstitutional, but approved the "released time" program. On appeal, the court of appeals, affirmed that both the "shared time" and "released time" programs violated prohibition on benefit to religious instruction, but reversed that the public school annexes in parochial school building were "public schools" since only parochial school students were enrolled.

The "shared time" program started in 1968. Seventh and eighth grade students attended the program for seven periods. Four periods they had public school teachers who taught language arts, social studies, math, and science. Four classroom were set aside for the teachers and all religious symbols were

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[363]Ibid., 841.

removed. The three remaining subjects, art, music, and religion, were taught by St. John teachers in other classrooms in the same building, where there were some religious symbols. The parochial school was responsible for physical education, study halls, cafeteria, and auditorium used by all students enrolled at St.John's school.

Students in this program were registered by St. John's school, which in turn, provided a registration list to Rowe Junior High School Annex. From this list students were enrolled in the Annex; thus each student had dual enrollment.

The St. John's school had requested the "shared time" program because of financial difficulties. The defendant school board agreed to the program because it was less expensive than assuming all the responsibility for the parochial students' education. All the students attending Rowe Junior High Annex consisted entirely of St. John's students.

The "released time" program started in 1969. Fifth and sixth grade students enrolled in the program were full-time students at Milwaukie Elementary Annex. They received instruction in a self-contained classroom. Religious symbols were removed from the two classrooms used by the program. The students were released for 120 minutes each week for religious instruction in accordance with the provisions of ORS 339.420, which provided: "Upon application of his parent or guardian, a child attending the public school may be excused from school for periods not exceeding 120 minutes in any week to attend weekday schools giving instruction in religion."[364] There were four thirty-minute sessions for religious instruction provided by Catholic Sisters

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[364]Ibid., 842.

teaching at St. John's school. The religious instruction was provided in classrooms other than those used by Milwaukie Elementary Annex program.

There were other fifth and sixth grade students being taught in the physical facilities of St. John's school. The administration of St. John's school made the decision as to which students attended Milwaukie Elementary School and which students attend St. John's school.

The St. John's school had requested the "released time" program. The defendant school district agreed, because it was financially to their benefit. Like Rowe Junior High Annex, all the students attending Milwaukie Elementary School consisted entirely of students of St. John's school.

In Grand Rapids School District of the City of Grand Rapids v. Phyllis Ball,[365] taxpayers filed a suit against the school district, and a number of state officials, challenging that the school district's shared time and community education programs violated the establishment clause of the First Amendment. The programs provided at public expense, offered classes to nonpublic school students in classrooms leased from nonpublic schools. The Shared Time program made available classes during the regular school day that were intended to supplement the "core curriculum" courses required by the State. The shared time teachers were full-time employees of the public schools, and many of them had previously taught in nonpublic schools. The Community Education Program offered voluntary classes at the conclusion of the regular school day, some of which were not offered in the public schools.

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[365]Grand Rapids School District of the City of Grand Rapids v. Phyllis Ball, 105 S.Ct. 3216 (1985). See also Special District for the Education and Training of Handicapped Children of St. Louis County v. Wheeler, 408 S.W.2d 60 (Mo. 1966); Morton v. Board of Education of City of Chicago, 69 Ill.App.2d 38, 216 N.E.2d 305 (1966).

Community Education teachers were part-time public school employees, most of whom were employed full-time in the nonpublic school where the Community Education classes were held. The students enrolled in both programs are the same students who otherwise would attend the particular school in which the classes were held. Of the forty-one private schools that participated in these programs, forty were identifiable religious schools.

The United States District for the Western District of Michigan, ruled in favor of the taxpayers and enjoined further operation of the programs. The United States Court of Appeals for the Sixth District affirmed the decision of the lower court and the defendants petitioned for certiorari. The Supreme Court, Justice Brennan delivering the majority opinion, ruled that the shared time and community education programs, which offered classes to nonpublic students at public expense in classrooms leased from nonpublic schools had the "primary or principal" effect of advancing religion and therefore violated the dictates of the establishment clause of the First Amendment, thus affirming the decision of the United States Court of Appeals for the Sixth District.

Released-time programs for religious instruction must be handled in a way that such instruction does not interfere with the normal instruction within a school nor conflict with the establishment clause of the First Amendment. Generally, on-campus released-time and shared time programs will be found to be unconstitutional, whereas off-campus released-time programs may be found to be constitutional.

School-Sponsored Prayer and Bible Reading

Prayer and Bible reading in the public schools are as old as the public

schools. As the population of the United States grew, so did the diversity among religious and nonreligious groups. Initially, the population was basically Protestants, Catholics, and non-believers, who came from Europe. Later, large numbers of immigrants came from eastern Europe and southeastern Asia, bringing with them religious traditions that were foreign to the original settlers. An increase in population, coupled with the diversity of religious groups caused frequent controversy in the public schools involving religious issues. Ultimately, the differences over religious issues in the public schools led to the courts for resolution.

At some point in their history, over half the states permitted or required prayer and Bible reading in the public schools. "Prior to 1962, at least twelve states and the District of Columbia required Bible reading."[366] The normal attitude of the courts was that the Bible and general prayer were not sectarian in nature, and their use did not violate constitutional religious guarantees[367] as evident in a North Dakota statute:

> [the] Bible shall not be deemed a sectarian book. It shall not be excluded from any public school. It may be the option of the teacher to read in school without sectarian comment, not to exceed ten minutes daily. No pupil shall be required to read it nor be present in the schoolroom during the reading thereof contrary to the wishes of his parents or guardian or other person having him in charge.[368]

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[366]Kern Alexander and M. David Alexander, American Public School Law, 3d ed., (St. Paul: West Publishing Company, 1992).

[367]Hackett v. Brooksville Graded School District, 120 Ky. 608, 87 S.W. 792 (1905).

[368]North Dakota Complied Laws, Sec, 1388 (1913).

Prayers and Bible reading continues to be a controversial issue in public schools. Too long, school systems have disregarded decisions of the Supreme Court related to religious issues and continued unconstitutional practices. As school officials realize the importance of protecting the religious freedoms of all clients, they have begun to develop policies within the framework of the law (see Appendix A).

In Dormeus v. Board of Education of the Borough of Hawthorne,[369] the New Jersey Supreme Court held that a tate statute which required the reading, without comment, of five verses from the Old Testament at the opening of each public school day did not violate the Federal Constitution. The plaintiffs, one as a parent and both as taxpayers, appealed to the United States Supreme Court. The United States Supreme Court dismissed the appeal for two reasons: (1) By the time the case reached the United States Supreme Court it was moot as it related to the rights of the child, since she had graduated from the public schools. (2) The plaintiffs failed to show such a direct and particular financial interest as is necessary to maintain a taxpayer's case within the jurisdiction of the United States Supreme Court.

In a 1962 case, Chamberlin v. Dade County Board of Public Instruction,[370] parents challenged certain religious practices in the county public schools. They brought suit to prohibit religious practices in the county public schools that they believed violated the establishment clause of the First

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

[370]Chamberlin v. Dade County Board of Public Instruction, 171 So.2d 535 (Fla. 1965).

Amendment of the United States Constitution. The practices in question were as follows:

> (1) the regular reading of verses from the Bible in assemblies and in classrooms; (2) the regular recitation of the Lord's Prayer and other religious sectarian prayers; (3) the conducting of religious and sectarian baccalaureate programs; (4) the conducting of religious census among the children to ascertain their own religious affiliation and the religious affiliation of their parents; (5) the conducting of religious test as a qualification for the employment of teachers.[371]

The Circuit Court ruled in favor of the school board and the plaintiffs appealed to the Supreme Court of Florida. The Florida Supreme Court affirmed the decision of the lower court and the plaintiffs appealed to the United States Supreme Court. The United States Supreme Court vacated the opinion and remanded the case to the Florida Supreme Court. The Florida Supreme Court affirmed their original decision and plaintiffs again appealed to the United States Supreme Court. This time the United States Supreme Court reversed and remanded the case. The Florida Supreme Court, on second remand, ruled that in light of the recent ruling by the United States Supreme Court relating to prayer issues, that numbers three, four, and five were not involved in the Schempp[372] and Murray[373] cases and nothing therein changes our views as expressed in our opinion rendered in June, 1963.

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[371]Ibid., 537.

[372]Abington School District v. Shempp, 374 U.S. 203, 83 S.Ct. 1560 (1963).

[373]Abington School District v. Shempp, (Murray v. Curlett), 374 U.S. 203, 83 S.Ct. 1560 (1963).

However, the Florida Supreme Court ruled that numbers one and two, Bible reading and prayers, in state public schools pursuant to statutes or as sponsored by school authorities did violate the establishment of religion clause of the First Amendment of the United States Constitution.

In the 1962 case of Engel v. Vitale,[374] the Supreme Court addressed the constitutionality of the New York State Board of Regents' mandated prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country."[375] Plaintiffs maintained the prayer violated the First Amendment religious establishment clause. They were unsuccessful in the trial court and in the New York Court of Appeals, but on certiorari the Supreme Court ruled the Regent's prayer unconstitutional:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.[376]

Justice Douglas, in a concurring opinion, stated: The point for decision is whether the Government can constitutionally finance a religious exercise.... I think it an unconstitutional undertaking whatever form it takes.[377]

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[374]Engel v. Vitale, 370 U.S. 421 (1962).

[375]Ibid., 422.

[376]Ibid., 431.

[377]Ibid., 437.

The "finance" issue Justice Douglas refers to is the amount of time needed to recite the prayer; there are no other "finance" issues in the case. In addition, Justice Douglas apparently realized the judicial dichotomy in Everson and recanted his support of Everson:

> The Everson case seems in retrospect to be out of line with the First Amendment. Its result is appealing as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children of parochial schools--lunches, books, and tuition being obvious examples.[378]

The conspicuous point of Engel is that prescribed prayer in public school classrooms, with teachers leading the recitation and with children reciting, will be ruled unconstitutional. This case is important in school prayer cases, since it is used as a measuring instrument for similar cases.

One year later in Abington School District v. Schempp,[379] the Court extended the Engel rule. At stake was a Pennsylvania statute requiring Bible reading without comment and the Lord's Prayer recited at the beginning of each school day. The plaintiff had the statute declared unconstitutional in the federal district court, and on appeal by the Abington Township School Board, the Supreme Court sustained.

Analyzing the past two decades of church-state history in public education, the Court stated:

> The test may be stated as follows: What are the purposes and the primary effect of the enactment? If either is the advancement

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[378]Ibid., 443.

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

> or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor prohibits religion.[380]

Continuing, the Court maintained that to allow encroachments even though minor would allow that "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent, and in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' "[381]

Justice Douglas, in a separate concurring opinion, insisted that "through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others."[382]

The Schempp ruling reinforces Engel concerning prescribed Bible reading and the Lord's Prayer. Another important aspect of Schempp is the beginning of the tripartite test that will become completely developed in Lemon I.[383] Also, the neutral accommodationist theory is obviously silent in curriculum cases dealing with religion. In curriculum cases involving religion, where public funds are being used to advance religion, the practice is a violation of the First Amendment.

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[380]Ibid., 222.

[381]Ibid., 225.

[382]Ibid., 228.

[383]Lemon v Kurtzman, 91 S.Ct. 2111 (1971).

Stein v. Oshinsky[384] did not involve a State statute requiring the children or school personnel to participate in or refrain from acknowledging their complete dependence upon God. It was simply a voluntary desire of the children without any coercion or pressure to offer a prayer to the Almighty.

The students were precluded from reciting a prayer by an order of the principal. The New York City Board of Education and the Board of Regents of The University of the State of New York upheld the principal's ruling. The parents of the infant plaintiffs sought a mandatory injunction, requiring the defendants to allow the plaintiffs an opportunity to express their love and affection for the Almighty God each day through a prayer voluntarily offered in the individual classrooms; an injunction prohibiting the defendants from interfering with the recitation of this prayer, and to declare such prayers constitutional.

The District Court ruled in favor of the parents and granted an injunction to require school officials to permit school children the opportunity to pray. The defendants appealed the decision to the United States Court of Appeals, Second Circuit. The Court of Appeals, in reversing the District Court's decision, stated:

> 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

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[384]Stein v. Oshinsky, 224 F.Supp. 757 (E.D.N.Y. 1963) *rev'd.* 348 F.2d 999 (2d Cir. 1965), *cert. denied*, 382 U.S. 957 (1965).

> educational institutions stick to education and keep out of religion, with all the bickering that intrusion into the latter is likely to produce.[385]

In Johns v. Allen[386] the plaintiffs, who were Protestants, sought to prohibit the daily reading of five verses of the Holy Bible and recital of Lord's Prayer in unison by pupils in the public schools of Delaware. One statute 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."[387] The practice of reciting the Lord's Prayer in the public school classrooms was ruled unconstitutional because it favored the Christian religion over all others. The United States District Court, District of Delaware held that even though no Delaware statute required the reciting of the Lord's Prayer, a statute gave authority to the State Board of Education to enact its directive. The District Court issued a permanent injunction against the practice of religious exercises in the public schools of Delaware.

In Adams v. Engelking,[388] parents of public school children brought a class action suit against the Superintendent of Idaho Public Schools, the members of the Idaho State Board of Education and the elected and appointed officials of Moscow School District No. 281. The defendants were made

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

[386]Johns v Allen, 231 F.Supp. 852 (1964).

[387]Ibid., 854.

[388]Adams v. Engelking, 232 F.Supp. 666 (1964).

individual defendants and also defendants as representatives of all public school districts in the State of Idaho.

Plaintiffs sought to have Section 33-1604, of the Idaho Code that provided for compulsory daily reading of passages from the Bible in all public schools of the State of Idaho, declared unconstitutional. Parents also asked for injunctive relief to prohibit the enforcement of the statute. Section 33-1604 stated:

> *Bible reading in public schools.*--Selections from the Bible, to be chosen from a list prepared from time to time by the state board of education, shall be read daily to each occupied classroom in each school district. Such reading shall be without comment or interpretation. Any question by any pupil shall be referred for answer to the pupil's parent or guardian.[389]

Separately, the plaintiffs and the defendants moved the court for summary judgment. The court concluded that plaintiffs' motion must be granted and defendants' motion denied.

The members of the court unanimously agreed that the issue was settled by Shempp.[390] Accordingly, Section 33-1604, Idaho Code, was held to be in conflict with the First and Fourteenth Amendments of the United States Constitution and hence invalid and unenforceable.

In a 1965 case, Reed v. Van Hoven,[391] parents of public school children filed a lawsuit against the superintendent and the school board members to

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[389]Ibid.

[390]Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

[391]Reed v. Van Hoven, 237 F.Supp. 48 (W.D.Mich. 1965).

prohibit religious exercises in the public schools. The suit was instituted under the First and Fourteenth Amendments to the Constitution of the United States, claiming that certain religious practices in the Jension Public Schools violated both the free exercise and establishment clauses of the First Amendment.

After the filing of this suit, a new policy with respect to religious practices was adopted and put into effect in the Jension Public Schools. Defendants claimed the new policy ended the controversy and sought a summary judgment. Plaintiffs asked for an injunction to prevent any exercise of a religious nature from being conducted.

At a hearing, the District Court denied both the summary judgment for the defendants and the injunction for the plaintiffs. A suggestion was made by the district court to the parties for a substitute policy which laid out the broad outlines for a program to allow an accommodation to those children who wished to pray, provided such religious exercises were conducted and completed beyond the hours of the regular school day. The court directed that a record of happenings be kept in order for the court to reach a final judgment on the merits of the case.

The court's proposal provided that the students who wished to pray or read scriptures be allowed to do so as long as they met before or after school in a room, other than homeroom, and completed their exercise at least five minutes before the beginning of the school day or five minutes after the ending of the school day. The exercise itself was voluntary and separate from the regular school day; therefore, it was the responsibility of the students to find the location and attend with no ringing of the bells. When the first bell rang , all

students were to be mingling on their way to classrooms to begin the school day.

The Michigan District Court was aware that this approach was by no means a final judgment of the court. In suggesting the interim accommodation the court attempted to avoid the connection between official authority and religion which constitutes a violation of the establishment clause. By keeping a record of the happenings during the interim period, the court would have something on which to judge the final merits in this case. Apparently the accommodation policy worked to the satisfaction of all parties, since there was no further litigation.

In 1967, the Supreme Court of New Hampshire was asked to rule on pending bills before the Senate: (1) House Bill No. 6 in its original form would require a period of silence meditation at the beginning of the first class each day in all public schools, (2) House Bill No. 6 as amended would require all public schools to hold some form of morning exercise at the beginning of each day in the first class, and (3) House Concurrent Resolution No. 9 would require a plaque with the letters "In God We Trust" at least three inches high be placed in each classroom in all public educational institutions.[392]

The Supreme Court of New Hampshire using Schempp[393] and Engel [394] responded to the Senate that: (1) House Bill No 6 would be constitutional, (2) House Bill No. 6 as amended would be unconstitutional, and

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[392]Opinion of the Justices, 228 A.2d 161 (1967).

[393]School District of Abington v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)..

[394]Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

(3) House Concurrent Resolution No 9 would be constitutional.[395]

In a 1968 case, DeSpain v. DeKalb County Community School District,[396] action was brought against the school district and others to stop the recital of a verse in kindergarten on the contention that the verse was a prayer. The verse that the kindergarten teacher required all students to recite before morning snack read: "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."[397] Judge Edwin A. Robson of the United States District Court for the Northern District of Illinois, Eastern District, entered a judgment dismissing the complaint for failure to state a cause of action. The plaintiffs appealed the decision. The Court of Appeals, influenced by the prayer decisions of Schempp and Engel, held that the verse constituted a prayer, and its compulsory recitation came within proscription of the First Amendment, thus the Court of Appeals reversed the decision of United States District Court.

In Mangold v. Albert Gallatin Area School District, Fayette County, Pennsylvania,[398] a parent challenged the constitutionality of Bible reading and nondenominational mass prayer in the public school that was adopted by the board of education on March 17, 1969. The board of education argued that

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[395]Opinion of Justices, 228 A.2d 161, 164-165 (1967).

[396]DeSpain v. Dekalb County Community School District, 384 F.2d 836 (7th Cir. 1967).

[397]Ibid., 837.

[398]Mangold v. Albert Gallatin Area School District, Fayette County, Pennsylvania, 438 F.2d 1194 (1971).

the program was voluntary. The federal district ruled that the exercises were unconstitutional and prohibited their continuance. On appeal, the United States Court of Appeals for the Third District held that the exercises of Bible reading and nondenominational mass prayers violated the establishment clause of the First Amendment, even though participation by students was allegedly voluntary.

In Goodwin v. Cross County School District No. 7,[399] public school students and their mother filed a suit against the school district, school board members, and superintendent of schools for declaratory judgment alleging that the permitting of sectarian religious activities in the schools under their control was in violation of the Constitution.

The District Court was given the task of determining four basic issues, which are:

> (1) The validity of Bible Reading and reciting of the Lord's Prayer at 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 the Cherry Valley Elementary School, and
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> (4) School Board Policies on religious practices.[400]

The District Court concluded that the Bible reading and the reciting of the Lord's Prayer and the distribution of Gideon Bibles in the school district

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

[400]Ibid. 420.

violated the establishment clause. However, the students did not support their claim that the baccalaureate services were of a religious nature.

In 1973, the Supreme Court of New Hampshire was asked to answer questions on the constitutionality of bills pending before the Senate: (1) Senate House Bill 639 as amended by the House of Representatives would permit the voluntary recitation of the Lord's Prayer and the pledge of allegiance in public schools at local option. (2) The proposed Senate amendment to the already amended House Bill 639 would permit a voluntary period of silent meditation and the voluntary pledge of allegiance in the public schools.[401]

In reaching an opinion, the justices of the supreme court were bound with the interpretation of the guaranty of religious liberty found in the First Amendment of the United States Constitution by decisions reached in the Supreme Court of the United States. The Fourteenth Amendment makes the decisions applicable to the states. In a test to determine whether or not a law offends the First Amendment prohibition on enactments "respecting the establishment of religion," the Supreme Court of the United States speaking through Chief Justice Burger stated:

> In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[402]

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[401]Opinion of the Justices, 307 A.2d 558 (1973).

[402]Walz v. Tax Commission, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

Every case must be analyzed in this area to determine the cumulative criteria developed by the Court over the years. Three such tests may be gathered from our cases:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;[403] finally, the statute must not foster "an excessive governmental entanglement with religion."[404]

Tested by these standards, amended House Bill 639 by encouraging and authorizing the daily recital of the Lord's Prayer to be conducted by teachers in the public schools would violate the First Amendment to the Constitution of the United States. The amendment proposed by the Senate to House Bill 639 to provide for "voluntary silent meditation" instead of the Lord's Prayer would not violate the First Amendment to the Constitution of the United States.

In Meltzer v. Board of Public Instruction of Orange County, Florida,[405] parents of children attending public schools brought suit for injunctive and declaratory relief from morning Bible readings, distribution of Bibles, and requiring teachers to inculcate the practice of every Christian virtue. The District Court denied relief and the parents appealed.

The Orange County Board of Education had allowed the public schools to

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[403]Board of Education v. Allen, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968).

[404]Walz v. Tax Commission, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414 (1970). Lemon Kurtzman, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, 755 (1971).

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

begin the day with Bible readings and devotional exercises. For many years, Gideon Bibles have been given to students in Orange County Public Schools.

At the August 24, 1970, board meeting the Orange County Board of Education adopted a resolution calling for a five- to seven-minute morning exercise in every school for "a period of meditation which shall include the opportunity for individual prayer and Bible reading or devotional or meditation presented by groups or organizations or an individual,"[406] followed by a patriotic exercise. At the same meeting a member of the Gideon group asked for and received approval to distribute Gideon Bibles in the public schools.

At the next meeting of the Orange County Board of Education on September 15, 1970, the eventual plaintiffs in this case complained that the resolution adopted at the August 24, 1970, board meeting violated their religious rights. The board deferred action on the complaints until it could survey the Orange County Public Schools to see how the August 24, 1970, resolution was being implemented and to obtain time to confer with their counsel regarding the legality of those policies and their implementation.

At the third board meeting, the results of the survey ordered in the September 15, 1970, meeting were released. This survey revealed that seventy of the ninety-seven schools in Orange County were practicing daily Bible reading, generally read aloud by students or the classroom teacher. In some public schools, the Bible reading was given over the school public address system. Only four of the ninety-seven schools had neither prayer nor Bible reading. At this meeting the eventual plaintiffs renewed their complaints against the devotional and the distribution of Gideon Bibles. However, counsel

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[406]Ibid., 561.

for the Orange County Board of Education gave his opinion that the morning exercises were not illegal, citing in part Chapter 231.09(2) of the Florida Statutes:

> The policy aids school officials to carry out their specific duties set forth in 231.09 among which are to "inculcate, by precept and example . . . the practice of every Christian virtue . . . ." Those who feel that the policy is unconstitutional should bring their case to Court.[407]

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 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.[408]

Taking advice from its counsel, the Orange County Board of Education refused to modify its policy regarding opening day exercises or to direct any change in its implementation.

On October 7, 1970, the Orange County Board of Education issued guidelines concerning the distribution of Bibles or other religious literature.

> TO: ALL ORANGE COUNTY PUBLIC SCHOOL PRINCIPALS
> FROM: JAMES M HIGGENBOTHAM, DISTRICT SUPERINTENDENT

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[407]Ibid., 562.

[408]Ibid.

SUBJECT: RELIGIOUS BOOKS AND LITERATURE

The following guidelines have been developed by the School Board Attorneys and apply to the handling of religious books, doctrine, or literature which may be offered to the schools for distribution. These guidelines are to be reviewed by you in detail and are to receive *immediate implementation.*

The procedures as contained in the attached guidelines are the only procedures authorized by this office and shall be the sole method of handling material of this nature.

GUIDELINES

The following guidelines for the principals of 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 classrooms, homerooms, in assembly or on any portion 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 taking or reading of the literature.[409]

On October 16, 1970, the plaintiffs filed their suit in District Court as a class action against the Orange County Board of Education claming that (1) Florida statute section 231.09(2) is unconstitutional on its face because it

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[409]Ibid., 562-563.

requires the inculcation of Christian virtue; (2) that the August 24, 1970, resolutions requiring morning devotional exercises are unconstitutional; (3) that the distribution of Gideon Bible is unconstitutional; (4) that a Southern Baptist program planned for October 19 and 20 is unconstitutional, all being in violation of the First Amendment as made applicable to the states through the Fourteenth Amendment. The plaintiff sought both injunctive and declaratory relief.

The District Court denied relief to the plaintiffs. The plaintiff had failed to show the possibility of irreparable injury or to show findings of fact as to morning exercises and the Bible distribution. The District Court went on to conclude that reference to the Bible is permitted under the First Amendment, if it is inspirational rather than devotional and it is voluntary by an individual student instead of school or teacher sponsored.

The plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit. The appeals court held that there was no evidence that the statute had been or would be applied; thus, there was no reason for an injunction. The appeals court in remanding the case to the District Court questioned whether the likelihood that the statute would be enforced was so minuscule as to present no case or controversy, thus denying the District Court of jurisdiction to grant even a declaratory judgment, or whether there was still a case or controversy present enough even though the danger of harm was not great and imminent enough to warrant an injunction.

It became apparent during the trial in District Court that the Orange County Board of Education had made no changes in its policy, except changing devotional to inspirational, concerning Bible reading, devotions, and the

distribution of Bibles.

During the second round of appeal, the United States Circuit Court of Appeals agreed with the District Court that the imminency of harm from the recurrence of the practices complained of was not sufficient to warrant the issuance of injunctive relief. The Court of Appeals disagreed with the District Court that there was no case; thus, no reason for declaratory relief. The appeals court found the ever-present threat of enforcing the statute to be a continuous and brooding presence and issued a declarative judgment against the defendant.

Bible reading and devotional exercises were declared unconstitutional under the First and Fourteenth Amendments, even though individual students were allowed to absent themselves from the exercises upon parental request.

The practice of handing out Gideons Bibles in the classroom or at a central place on campus in this case was more an encroachment of First Amendment freedoms than Tudor.[410] In Tudor parents were asked to sign for their child to receive the Gideon Bible. In Meltzer Gideon Bibles were to be distributed without parental permission. In short, the school board's decision to use the school system to distribute the Gideon Bible, at least in the eyes of the students and perhaps their parents, places its stamp of approval on the Gideon version of the Bible, thus favoring one religion over another which is unconstitutional.

The "Christian virtue" clause of the Florida statute 231-09(2) was declared unconstitutional as worded. As written it favors the Christian religion; the appeals court agreed that if the word "Christian" were deleted, the statute

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[410]Tudor v. Board of Education, 100 A.2d 857 (1953).

would probably be constitutional.

This decision was handed down by the United States Fifth Circuit of Appeals on March 11, 1977, and a rehearing en banc was granted on May 25, 1977. On July 31, 1978, the Court of Appeals, en banc, held that the resolution requiring Bible reading and prayer in the public schools was unconstitutional. In addition, the appeals court, by a equally divided vote, affirmed that District Court's rulings that there was no case or controversy or threat of imminent harm requiring either injunctive relief or declaratory judgment as to the guidelines for distribution of Gideon Bibles and the Christian virtue statute.

The entire course of this case was in the District Court and the Court of Appeals for eight years. In 1980, the United States Supreme Court agreed to uphold the ruling of the Court of Appeals reaffirming the unconstitutionality of religious exercises in public school.

In an Arizona case, Collins v. Chandler Unified School District[411] a mother of a high school student brought suit against school officials seeking to restrain them from permitting, authorizing, or condoning prayers at assemblies held on public school property because such conduct allegedly violated prohibition against governmental establishment of religion. The District Court held that: (1) the conduct in question did violate the prohibition against governmental establishment of religion, because the saying of prayers in public, whether directly or indirectly, approved by school officials, violated the establishment clause in light of Engel[412] and other related cases, and the

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[411]Collins v. Chandler Unified School District, 470 F.Supp. 959 (1979).

[412]Engel v. Vitale 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

claim by school officials that such prayers were a First Amendment free speech protected right was not valid; and (2) where the mother of a high school student had not had her civil rights violated within the meaning of federal statute governing civil action for loss of rights, she was not entitled to attorney fees pursuant to another statute.

In Kent v. Commissioner of Education,[413] the plaintiffs objected to the new so-called "school prayer law." They sought action to declare the "school prayer law" unconstitutional and they sought injunctions forbidding enforcement or implementation of the law. The law stated:

> At commencement of the first class of each day in all grades in all public schools the teacher in charge of the classroom in which each such class is held shall announce that a period of prayer may be offered by a student volunteer, and during any such period an excusal provision will be allowed for those students who do not wish to participate.[414]

Judge Kaplan of the Supreme Judicial Court of Massachusetts ruled that this "school prayer law" violated the establishment clause of the First Amendment.

In Karen B. v. Treen[415] parents of public school students sought declaratory and injunctive relief concerning the Louisiana statute and derivative Jefferson Parish School Board regulations which established guidelines for student participation in prayers in public schools. Louisiana

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[413]Kent v. Commissioner of Education, 402 N.E.2d 1340 (Mass.App. 1980).

[414]Ibid., 1341.

[415]Karen B. v. Treen, 653 F.2d 897 (1981).

Revised Statute section 17:2115 (1981) had two parts. Subsection A provided for each parish and city school board to permit a brief period of silence at the beginning of each day with no reference to a religious exercise. Parents had no quarrel with the meditation provision, and it is not part of the litigation.

The challenged provision, subsection B, was basically enabling legislation. It provided that a school board may authorize appropriate school officials to allow students and teachers to pray. Prayers were limited to five minutes. No student or teacher was compelled to pray. With written permission, students who objected to prayers, were not required to participate or be present during the time the prayer was being offered.

The Jefferson Parish School Board adopted a resolution establishing guidelines to implement section 17:2115(B) in parish schools. Its guidelines permitted a minute of prayer followed by a minute of silent meditation. Under the school board guidelines each teacher was to ask if any student wished to offer a prayer, if no student volunteered a prayer, then the teacher was allowed to offer a prayer on his own. Students had to have written permission from their parents and make a verbal request to participate in the exercise. Students without permission could either report to class, where they would remain seated and quiet throughout the morning exercises, or remain outside the classroom under other supervision.

The United States District Court for the Eastern District of Louisiana denied relief and the parents appealed. The United States Court of Appeals for the Fifth Circuit ruled that Louisiana statute section 17:2115 (1981), subsection B, and Jefferson Parish guideline permitting student and teacher prayers in the public schools violated the establishment clause of the First

Amendment. The appeals court reversed and remanded the case to the District Court.

In Jafree v. James,[416] plaintiffs brought suit challenging the constitutionality of Alabama statutes seeking to return voluntary prayer to the public schools. They asked for a preliminary injunction to prohibit enforcement of the statutes.

It was contended by the plaintiffs that Alabama Code Section 16-1-20.1 and Senate Bill 8, Alabama Act 82-735, popularly known[] as the "James Prayer Law," if carried out would be violative of their constitutional rights as proscribed by the Constitution. Senator Holmes testified that his purpose in sponsoring Alabama Code section 16-1-20.1 (1981) was to return voluntary prayer to the public schools. Section 16-1-20.1 provides in pertinent part:

> 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 may announce that a period of silence not to exceed one minute in duration shall be observed for mediation or voluntary prayer, and during any such period no other activities shall be engaged in.[417]

Senate Bill 8, provides in pertinent part:

> To provide for a prayer that may be given in the public schools and educational institutions of this state.
> BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:
> Section 1. From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, *may lead willing students*

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[416]Jaffree v. James, 544 F.Supp 727 (1982).

[417]Ibid., 731.

in prayer, or may lead the willing students in the following prayer to God:

> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, *in the sanctity of our homes* and in the classrooms of our schools *in the name of our Lord.* Amen.[418]

There was no testimony presented to the District Court as to whether or not the statutes under scrutiny had or had not been enforced. The District Court made the following discoveries of fact:

> 1. Both statutes were properly enacted and are on the books of the State of Alabama.
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> 2. The plaintiff's children are students of the public schools of the State of Alabama.
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> 3. The statute is drawn in the permissive and would authorize students and teachers to pray in the schools if they so desired.
>
> 4. The plaintiff is an agnostic and finds prayer offensive.
>
> 5. The plaintiff contends that he does not desire that his children be indoctrinated along religious lines so they can, at some future date, open-mindedly consider whether or not religion is for them and if anything of a religious nature is given to them now it will serve to poison their minds against the open-mindness.
>
> 6. Religion is more than just the Christian faith. Religion can be Christianity, Judaism, Mohammedanism, Buddhism, Atheism, Communism, Socialism, and a whole host of other concepts.
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> 7. Students feel deprived if they are not permitted a free expression of their religion at any place or time they might elect or choose.
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> 8. Religious freedoms are denied when the school authorities prohibit expression of religious conviction by denying the right to

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[418]Ibid.

pray or otherwise express themselves.

9. Parental authority is abused and parents feel their rights are trespassed when their teachings to their children are contradicted by the schools or the state when it refuses to allow free expression of religious belief on the campuses of the schools or when their children are required to hear prayers that they do not wish them to hear.

10. Any governmental activity, be that by the federal government through its legislative, judicial or executive branches or any state or county legislative or authority, through its board, bureaus, legislatures, courts or executives, that prescribes or proscribes the conduct of religion is offensive to all citizens and the Constitution.[419]

The enactment of the Alabama statutes was an attempt by the State of Alabama to encourage religious activity and return voluntary prayer to the public schools. The District Court, Chief Judge Hand, ruled that even though the statutes were permissive in form, they indicated state involvement respecting the establishment of religion and; therefore, since the plaintiffs had shown a substantial likelihood of success on the merits, the enforcement of the statutes would be forbidden. The preliminary injunction requested by the plaintiffs was granted.

Smith v. Board of Commissioners of Mobile County[420] was a continuation of the Alabama school prayer cases, beginning with Jaffree v. James[421] in 1982. In May 1982, Ishmael Jaffree filed a complaint on behalf

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[419]Ibid., 729-730.

[420]Smith v. Board of School Commissioners of Mobile County, 827 F.2d 684 (11th Cir. 1987).

[421]Jaffree v. James, 544 F.Supp. 727 (1982). Also see Jaffree v. Board of School Commissioners, 554 F.Supp. 1104 (S.D. Ala. 1983), *aff'd in part, rev'd in part sub nom*; Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *cert. denied sub nom*; Board of School Commissioners v. Jaffree, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984); Jaffree v. James, 554 F.Supp. 1130 (S.D.

of his three minor children against the Mobile County School Board, various school officials, and three teachers seeking, among other things, a declaratory judgment that certain classroom prayer activities conducted in the Mobile public school system violated the establishment clause of the First Amendment and an injunction against classroom prayer. By his second complaint, Jaffree added as defendants the Governor of Alabama and other state officials, including Appellant Board, and challenged three Alabama statutes relevant to the school prayer issue as violative of the establishment clause. Douglas T. Smith and others ("Appellees") filed a motion to intervene in the Jaffree action claiming that an injunction against religious activity in the public schools would violate their right to free exercise of religion. The district court allowed Douglas T. Smith and others ("Appellees") to intervene as plaintiffs. Later, Appellees filed a motion entitled "Request for Alternate Relief" in which the Appellees asked that, if an injunction were granted in favor of Jaffree, that injunction be enforced "against the religious secularism, humanism, evolution, materialism, agnosticism, atheism, and others" or, alternatively that Appellees be allowed to produce additional evidence showing that these religions had been established in the Alabama public schools.

The District Court divided the claims against Mobile County and local defendants and the claims against state officials into two branches. The District Court granted Jaffree's motion for a preliminary injunction against the enforcement of two of the challenged statutes, Ala. Code Ann., Sections 16-1-

20.1 and 16-1-20.2,[422] but determined after trial on the merits that Jaffree was not entitled to relief in either action because the Supreme Court of the United States was in error in holding that the establishment clause of the First Amendment prohibits the states from establishing a religion.[423] Therefore, the District Court dismissed Jaffree's compliant for failure to state a claim upon which relief could be granted.[424]

The appeals court reversed the decision of the District Court, finding that both the school room prayer activities and sections 16-1-120.1 and 16-1-20.2 violated the establishment clause, and remanded the action to the District Court with directions that the District Court "award costs to appellant and forthwith issue and enforce an order enjoining the statutes and activities held in this opinion to be unconstitutional."[425] The United States Supreme Court

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Ala. 1983), *aff'd in part, rev'd in part sub nom*; Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 178 (1984.).

[422]Ibid.

[423]Jaffree v. Board of School Commissioners, 554 F.Supp. 1104, 1128 (S.D.Ala. 1983), *aff'd in part, rev'd in part sub nom*; Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *cert denied sub nom*; Board of School Commissioners v. Jaffree, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984); Jaffree v. James, 554 F.Supp. 1130, 1132 (S.D. ALA 1983). *Aff'd in part, rev'd in part sub nom*; Jaffree v. Wallace, 705 F.2d 1526 (11th Cir 1983), *aff'd* 472 U.S. 38, 1095 S.Ct. 2479, 86 L.Ed.2d 29 (1985), 466 U.S. 924, 104 S.Ct. 1704, 80 L.Ed.2d 178 (1984).

[424]Jaffree v. Board of County Commissioners, 554 F.Supp. 1104, 1132 (S.D.Ala. 1983). at 1132.

[425]Jaffree v. Wallace, 705 F.2d 1526, 1536-37 (11th Cir. 1983), *cert. denied in part sub nom*; Board of School Commissioners v. Jaffree, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984), *aff'd in part*, 472 U.S. 38, 105 S. Ct. 2479, 86 L.Ed2d 29 (1985); 466 U.S. 924, 104 S.Ct. 1704, 80 L.Ed.2d 178 (1984).

denied certiorari with regard to the nonstatutory school prayer practices[426] and affirmed the Court's decision with regard to the statutory provisions.[427]

In its opinion denying relief in Jaffree, the District Court had stated that

> [i]f the appellate courts disagree with this Court in its examination of history and conclusion of constitutional interpretation thereof, then this Court will look again at the record in this case and reach conclusions which it is not now forced to reach.[428]

The Appellees claimed that the exclusion from the curriculum of "the existence, history, contributions, and role of Christianity in the United States and the world"[429] violated their constitutional rights of equal protection, free speech of teacher and student, the student's right to receive information, and teacher and student free exercise of religion. The District Court interpreted the position of the Appellees as that

> if Christianity is not a permissible subject of the curriculum of the public schools, then neither is any other religion, and under the evidence introduced it is incumbent upon this Court to strike down those portions of the curriculum demonstrated to contain other religious teachings.[430]

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[426]Board of School Commissioners v. Jaffree, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984).

[427]Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985); Wallace v. Jaffree 466 U.S. 924, 104 S.Ct. 1704, 80 L.Ed.2d 178 (1984).

[428]Jaffree v. Board of School Commissioners, 554 F.Supp at 1104, 1129 (S.D.Ala. 1983).

[429]Ibid.

[430]Smith v. Board of School Commissioners of Mobile County 827 F.2d

The District Court voluntarily realigned the parties and ruled that the use of home economics, history, and social studies textbooks in the Mobile County School System violated the establishment clause of the First Amendment in that the textbooks had the primary effect of advancing the religion of secular humanism.

On appeal, the appeals court held that the use of textbooks did not advance secular humanism or inhibit theistic religion in violation of the establishment clause, even assuming secular humanism was religion.

Patriotic Exercises

Over the years there have been situations in public school systems involving students who refuse to participate in a salute to the American flag and in the recitation of the Pledge of Allegiance. In these incidents students have often based their defiance of such exercises, most of which were required either by state law or school board policy, on religious freedom. The Jehovah's Witnesses organization was one religious group that objected to the flag salute exercises in public schools.

The first flag salute case decided by the United States Supreme Court was Minersville v. Gobitis.[431] This case involved two children, Lillian Gobitis, age twelve, and her brother William, age ten, Jehovah's witnesses who were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise.

684, 688 (11th Cir. 1987).

[431]Minersville v Gobitis, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940).

On May 3, 1937, counsel for Walter Gobitis filed a bill of complaint in the United States District Court, denouncing the Minersville regulation and the expulsion thereunder as violative of the Eighth and Fourteenth Amendments and requested an injunction against their continued enforcement against the Gobitis children.

From 1937 until 1940, first in the District Court and later in the Circuit Court of Appeals, the case was marked with much bickering, confusion, conflicting testimony, and presentation of lengthy briefs. Finally, on March 4, 1940, the United States Supreme Court gave the matter full consideration and granted a writ of certiorari. The United States Supreme Court reversed the decision of the Third Circuit Court of Appeals and upheld the District Court's decision supporting the Minersville School District's requirement that students must salute the American flag as a condition for school attendance.

Justice Felix Frankfurter, who expressed trepidation in tackling the case delivered the majority opinion of the Court in these words:

> 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.[432]
>
> We must decide whether the requirement of participation in 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.[433]

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[432]Ibid., 591

[433]592-593

> Our present task then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other. But, because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith.[434]

> The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the the citizen from the discharge of political responsibilities.[435]

In the lone dissent, Justice Harlan F Stone, strongly emphasized that even though the state may exercise considerable control over pupils, that control is limited where it interferes with civil liberties guaranteed by the Constitution. He stated in part:

> 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.
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> 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

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[434]594

[435]Ibid 594-595

> of religious faith which has been thought worthy of constitutional protection.[436]

The tone of the dissent by Justice Stone suggested an accommodation between church and state.

In 1943, the United States Supreme Court in West Virginia State Board of Education v. Barnette[437] had another opportunity to rule on the constitutionalityy of a flag salute case involving Jehovah's Witnesses. This case was the result of a requirement of the West Virginia State Board of Education that required the salute to the flag to become a regular part of the day's activities in every public school in the state. Students who refused to participate in the flag salute were expelled from school. Expelled students were denied readmission to the school until they complied with the flag salute requirement.

In Barnette the United States Supreme Court reversed their Gobitis decision and by so doing ruled that requiring students to salute the flag of the United States while reciting a pledge of allegiance as a requirement to attend school was an unconstitutional exercise of governmental authority. To force students to participate in flag salute activities in violation of their religious beliefs was a violation of students' First Amendment rights.

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

> It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only

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[436]Ibid., 606-607.

[437]West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

> when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. 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 the Bill of Rights which guards the individual's right to his own mind, left it open to public authorities to compel him to utter what is not in his mind.[438]

> 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.[439]

Justice Frankfurter used the same arguments in dissenting in Barnette as he used in expressing the majority opinion in Gobitis. In his lone dissent he stated:

> I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely the promotion of good citizenship, by employment of the means here chosen.[440]

He was of the opinion that: "The Court has no reason for existence

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[438]Ibid., 633-634.

[439]Ibid., 642.

[440]Ibid., 647.

if it merely reflects the pressures of the day."[441]

In 1963, in Sheldon v. Fannin,[442] children of the Jehovah's Witnesses faith had been suspended from school for insubordination because they refused to stand for the singing of the National Anthem. The United States District Court in Prescott, Arizona held that children of the Jehovah's Witnesses faith could not be required to stand and participate in the singing of the National Anthem. Even though the court saw the anthem as being patriotic rather than a religious exercise, it held that students could be excused from singing it because of their religious beliefs.

In a 1970 case, Frain v. Baron,[443] the court issued a temporary injunction enjoining the defendant administrators of the New York school system from excluding the plaintiffs from their classrooms for refusing to stand and participate in the Pledge of Allegiance. The refusal of the students was based on a mixture of religious and political beliefs. The court relied heavily upon Barnette and Tinker in supporting its position.

In a 1979 case, Palmer v. Board of Education of City of Chicago,[444] a probationary kindergarten teacher, who was a member of the Jehovah's Witnesses religion, filed civil rights practices challenging her proposed discharge for failure to follow the prescribed curriculum as violative of her First Amendment right of religious freedom. She had notified her principal that

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[441]Ibid., 665.

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

[443]Frain v. Baron, 307 F.Supp. 27 (E.D.N.Y. 1970).

[444]Palmer v. Board of Education of City of Chicago, 603 F.2d 1271 (1979).

because of religious reasons she could not teach any subject dealing with patriotism, the American flag, or other such matters. For a teacher to pick and choose what she was willing to teach would provide students with a distorted and unbalanced view of the history of the United States. She had a right to her own religious views and practices, but she had no constitutional right to force her views on others and to cause them to forego a portion of their education they would otherwise be entitled to enjoy. The court stated:

> Parents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please.[445]

The United States District Court for the Northern District of Illinois entered summary judgment for defendants, and the plaintiff appealed. The United States Court of Appeals, Seventh Circuit, in affirming the decision of the lower court held that:

> (1) a public school teacher is not free to disregard the prescribed curriculum concerning patriotic matters notwithstanding claim that adherence thereto would conflict with his or her religious principles, and (2) plaintiff had no due process right to an adversary hearing prior to dismissal since her religious freedom was not being extinguished, no state statute or other rule or policy created a protected interest for an untenured teacher in similar circumstances and there was no claim that plaintiff had suffered stigma by reason of discharge.[446]

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[445]Ibid., 1274.

[446]Ibid., 1271.

In a 1989 Illinois case , Sherman v. Community Consolidated School District of Wheeling Township,[447] the parents of a first grade student sued the school district over an Illinois statute that provides the pledge "shall be recited each day" by pupils in public elementary schools. The suit alleged the salute and recitation of the pledge of allegience to the flag violated the Constitution's establishment clause, by requiring this ritual with a religious element, and the free exercise clause, by, in effect, forcing their first grade son to perform a religious act that he otherwise would not have performed. The school system asked the court to dismiss the suit.

The court denied the request of the school system, on the basis that even though the school system contends that the first grade student in question is not required to recite the pledge, he is too susceptible to suggestion and pressure to have a meaningful choice. In other words, the daily recitation may, in effect, force the first grade student to join in, and that would violate his right to free exercise of religion, which includes the right freely to choose not to engage in any religious practice.

Generally, recent courts have ruled that school boards cannot require students to participate in flag salute exercises. In addition, school boards cannot force students who refuse to participate in the flag salute to stand quietly or leave the place where the exercise is held. As long as the student who refuses to participate is quiet and is not disruptive of the exercise itself or of the rights of those participating in the exercise, he or she cannot be chastised or in some other way punished.[448]

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[447]Sherman v. Community Consolidated School District 21 of Wheeling Township, 714 F.Supp. 932 (N.D.Ill. 1989).

[448]Hudgins and Vacca, 380-381.

Creationism and Evolution: Balanced Treatment

The most controversial issue of the theory of evolution is that humans descended from a lower order of animals. This is in conflict with the Old Testament's account of creation. Neither state statutes nor courts have been able to settle this issue, applicable to conflicting religious ideologies.

In the 1927 famous Scopes v. State[449] case, came the first judicial test of a state-mandated anti-evolution statute. In 1925, the General Assembly of Tennessee enacted the Tennessee Anti-Evolution Act which states in part:

> That it shall be unlawful for any teacher in any of the Universities, normals and all other public schools of the state which are supported in whole or in part by the public school funds of the state, 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.[450]

John Scopes, a biology teacher, was not prosecuted under the First Amendment but for breaking a state statute. He was convicted of teaching a theory that humanity descended from a lower form of animals, thus denying the divine creation of man, as taught in the Bible. This was a violation of the Tennessee anti-evolution statute. After a guilty verdict by the jury, the trial judge fined Scopes one hundred dollars. Scopes filed an appeal in the nature of writ of error to the Tennessee Supreme Court which reversed the decision of the trial court on a technicality; it found that a nolle prosequi should be entered

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[449]Scopes v. State, 289 S. W. 363 (Tenn. 1927).

[450]Ibid., 363-364.

but it upheld the constitutionality of the statute. The anti-evolution statute remained a law in Tennessee for almost forty more years.

In the 1968 Epperson v. Arkansas[451] case the United States Supreme Court ruled on the constitutionality of an Arkansas statute. The statute, passed in 1928, one year after the famous "monkey trial" in Tennessee, reflected a time and region when fundamental thinking was prevalent and many people believed in a literal interpretation of the Bible, including the creation of man as reported in the book of Genesis.

Susan Epperson, a public school biology teacher in the state of Arkansas, was faced with the dilemma that if she used a new biology textbook she would presumably teach a chapter on Darwinian evolution and thus be subject to dismissal or criminal prosecution. She brought action in the state Chancery Court requesting that the statute be voided. A parent of children enrolled in the public schools intervened in support of the action. The Chancery Court ruled that the statute violated the Fourteenth Amendment of the United States Constitution, but on appeal the Supreme Court of Arkansas reversed the decision and confirmed the authority of the state to specify curriculum in the public schools. However, the Supreme Court of the United States reversed that decision and stated that the statute was contrary to the intent of the First Amendment because it had as its purpose the advancement of religion. Justice Abe Fortas, in expressing the majority opinion of the Supreme Court, said:

> Arkansas' law cannot be defended as an act of religious

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[451]Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed. 2d 228 (1968).

> 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 of the Constitution.[452]

In 1970, the Mississippi anti-evolution statute was overturned in Smith v. State.[453] The Supreme Court of Mississippi ruled that the statute violated the free exercise clause of the First Amendment of the Constitution of the United States.

In the 1972 Wright v. Houston Independent School District[454] case students brought action to prohibit the school district and the State Board of Education from teaching the theory of evolution as part of the district's academic curriculum and from adopting textbooks presenting such theory. Plaintiffs claimed that the teaching of evolution in the school district inhibited the plaintiffs in the free exercise of their religion and constituted an establishment of religion. They supported the Biblical account of creation which states that man was created by God. Unlike Arkansas, which had a statute against teaching the theory of evolution, neither Texas nor the Houston Independent School District had expressed any position on the subject of evolution. However, the State had a general policy of approving textbooks

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[452]Ibid., 109.

[453]Smith v. State, 242 S.2d 692 (Miss. 1970).

[454]Wright v. Houston Independent School District, 366 F.Supp. 1208 (1972).

which presented the theory of evolution in a favorable manner. The court ruled that the plaintiffs failed to show that the teaching of evolution had inhibited the free exercise of their religion and that it constituted an establishment of religion. Therefore, defendants' request to dismiss for failure to establish a claim was granted.

Another feature in Religious Fundamentalists legal arsenal is either by judicial decree or state statute is to require teachers (and textbooks) to present evolution by "natural selection" as theory instead of scientific fact. In Daniel v. Waters[455] case, the Sixth Circuit Court of Appeals addressed the constitutionality of a Tennessee statute requiring balanced treatment of Darwinian evolution and Old Testament account of creation. The state specifically insisted that if evolution was taught then creationism must be given equal treatment. In effect the practice of teaching Darwinian evolution along with scientific creationism was to negate Darwinian evolution. Even though, Judge Edwards, writing for the Sixth Circuit Court of Appeals expressed hesitancy about intervening in fundamental operation of schools but the court must address the constitutional issues presented. After lengthly judical debate Justice Edwards concluded the Tennessee statute violated the First Amendment establishment clause.

In 1975, action was brought in Steele v. Waters[456] challenging the constitutionality of a Tennessee statute that outlined certain criteria for biology textbooks which expressed opinions of or related to theories about the origin or creation of man and his world. The part of the Tennessee statute in

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[455]Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975).

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

question was the second and third paragraphs of Chapter 377 of the Public Acts of 1973, codified as an amendment to T.C.A. section 49-2008, which read as follows:

> Any biology textbook used for teaching in the public schools, which expresses an opinion of, or relates to a theory about origins of creation of man and his world shall be prohibited from being used as a textbook in such system unless it specifically states that it is a theory as to the origin and creation of man and his world and is not represented to be scientific fact. Any textbook so used in the public education system to which expresses an opinion or relates to a theory or theories shall give in the same textbook and under the same subject commensurate attention to, and an equal amount of emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account in the Bible. The provisions of this section shall not apply to use of any textbook now legally in use, until the beginning of the school year of 1975-1976; provided, however, that the textbook requirements stated above shall in no way diminish the duty of the state textbook commission to prepare a list of approved standard editions of textbooks for use in the public schools of the state as provided in this section. Each local school board may use textbooks or supplementary material as approved by the state board of education to carry out the provisions of this section. The teaching of all occult or satanical beliefs of human origin is expressly excluded from this section.
>
> Provided however that the Holy Bible shall not be defined as a textbook, but is hereby declared to be a reference work, and shall not be required to carry the disclaimer above provided for textbooks.[457]

The Chancery Court ruled the statute unconstitutional and the defendants appealed. On appeal the Supreme Court of Tennessee affirmed that the statute, which requires textbooks to state that such theory is not represented as scientific fact and that such books are to provide equal

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[457]Ibid., 73.

treatment to the origin and creation as the same is recorded in other theories, including, but not limited to the Genesis account of the Bible and that teaching of all occult or satanical beliefs of human origin is excluded, violates both the Federal and State Constitutions.

In the 1981, Segraves v. State of California[458] case, Kelly Segraves initiated action in Superior Court, Sacramento, California, insisting that teaching Darwinian evolution established a religion and thus unconstitutional as religious advancement. Moreover, maintained Seagraves, Christian public school teachers were forced to teach an idea contrary to their Christian beliefs. Kelly Seagreaves, who co-authored The Creation Explanation: A Scientific Alternative to Evolution, positioned his argument in the following manner:

> Neither evolution nor creationism is purely scientific. They are both philosophically founded, and both are part science and part religion. Once you start getting into origins, you are out of the realm of science. At that point, it becomes philosophical, interpretational, a belief system. We are saying the state board cannot set policy that mandates a belief system.[459]

As trial began in early March 1981, plaintiff Seagraves requested that Judge Perluss please narrow his complaint and focus language in State Science Curriculum Guideline, i. e., believe or not. Judge Perluss acknowledged that "what I visualized as a great constitutional case had evolved itself--excuse me, come down to--a question of semantics."[460] Continuing Judge Perluss

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[458]Segraves v. State of California, No. 278978 (Cal.Super.Ct. 1981).

[459]Arnstine, Donald, "The Acadamy in the Courtroom: The Sacramento Monkey Trail," Journal of Thought 18, no. 1 (Spring 1983): 17.

[460]Ibid.

described the case as "a long road to a little house,"[461] Finally, Judge Perluss maintained that the State Science Curriculum did not violate plaintiff's freedom of religion. However, Judge Perluss ordered the California State School Board to distribute copies of a 1973 policy inisisting that evolution be taught as theory not fact.

In a 1982 McLean v Arkansas Board of Education [462] case the question at bar was whether or not a state statute requiring "balanced treatment" between scientific creationism and Darwinian evolution was First Amendment violation as establishment of religion if enforced in public schools. The court using the tripartite test maintained that state statute failed the first part of endorsing and advancing religion. Judicial logic suggested that Old Testament account of creation was a religious ideology and not scientific theory. Thus scientific creationism fails the secular values test because it is not grounded in scientific theory. Finally, the court maintained that the statute failed the third part of the tripartite by excessively entangling government in this case (school officials) with religion.

In the 1987 Edwards v. Aguillard[463] case the United States Supreme Court addressed the "balanced treatment" issue. The case at bar arose when the Louisiana General Assembly enacted into law a statute called "Balanced Treatment for Creation-Science and Evolution-Science in Public School

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[461]Ibid., 18.

[462]McLean v. Arkansas Board of Education, 529 F.Supp. 1255 (E.D. Ark. 1982)

[463]Edwards v. Aguillard, 765 F.2d 1251 (5th Cir. 1985), *reh. denied* 779 F.2d (5th Cir. 1985), 482 U.S. 578 (1987).

Instruction." The statute two parts were: (1) that instruction in human origin was not required; and (2) if human origin was taught then instruction must include both Darwinian evolution and creation science. Plaintiffs--parents, teachers, and religious leaders filed suit insisting the statute violated the First Amendment religious advancement. Both District and Circuit Court of Appeals (5th Circuit) insisted that religious intent permeated the statute. Moreover, the statute discredited "evolution by counterbalancing its teachings at every turn with the teaching of creationism."[464]

The United States Supreme Court in a seven to two vote with Justice William Brennan writing for the majority insisted the statute "advanced the religious viewpoint that a supernatural being created mankind."[465] Moreover, the statute conflicted with "the one scientific theory that historically has been opposed by certain religious sects."[466] Finally, Justice Brennan maintained that statute failed all three prongs of the tripartite test and thus was unconstitutional.

Equal Access and Religious Groups on Campus

In Mergens v. Board of Education of the Westside Community Schools,[467] Justice Sandra Day O'Conner stated: "[I]f a State refused to let

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[464]Edwards v. Aguillard, 765 F.2d 1251, 1257. (5th Cir. 1985).

[465]Tom Mirga, "Creationism Law in Louisiana is Rejected by Supreme Court," Education Week 6, No 39 (June 24, 1987) :1

[466]Ibid., 6.

[467]Mergens v. Board of Education of the Westside Community Schools, 110 S.Ct. 2356.2371 (1990).

religious groups use school facilities open to others, then it would demonstrate not neutrality but hostility toward religion."

An outcry of public school students who were denied their right to free speech on a religious basis resulted in the passage of the Equal Access Act.[468] The signing of the Equal Access Act[469] by President Ronald Reagan in 1984 made legal practices several courts had held to be in violation of the establishment clause.[470] This act stipulates that:

> it shall be unlawful for a public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[471]

This act, as the name implies, allows equal access, or a fair opportunity, to use school facilities for group meetings. Since the school prayer decisions of the 1960s, school administrators have been overly cautious in their decisions about permitting religious groups to use school facilities. They

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[468]John W. Whitehead, The Rights of Religious Person in Public Educaton (Wheaton, Ill.: Crossway Books, 1991), 115.

[469]Pub. Law No. 98-377, 802-805, 98 Stat. 1302 (1984) [codified at 20 U.S.C. 4071-4074 (1988)].

[470]*See, e.g.*, Brandon v. Board of Education of the Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), *cert denied*, 454 U.S. 1123 (1981); Johnson v. Huntington Beach Union High School Dist., 68 Cal.App.3d 1, 137 Cal.Rptr. 43 (Cal.Ct.App.), *cert.denied*, 434 U.S. 877 (1977): Trietley v. Board of Education, 65 A.D.2d l, 409 N.Y.S.2d 912 (N.Y.App.Div. 1978).

[471]Whitehead, 118.

have many times denied their use, citing the fact that they cannot allow religious groups to meet on school grounds, due to their belief that it would constitute a violation of the First Amendment. It may also be said that the use of school facilities by religious groups may cause unnecessary "entanglement" of a governmental agency (the school) with religion.[472] This section will examine the circumstances that led to the passage of the legislation, the statute's substantive provisions, and the recent Supreme Court decisions upholding the act's constitutionality.[473]

In Lemon v. Kurtzman[474] the Supreme Court devised a series of requirements (known as the *Lemon* test) by which it measures whether a given practice or policy sufficiently maintains the separation between church and state to use in ruling on the two constitutional provisions that frequently arise in the public schools, "the establishment clause" and "the free exercise clause". In many situations the two clauses may be in conflict with each other. According to the Lemon test, the governmental act is constitutional only if "(1) it has a secular legislative purpose, (2) its primary effect does not promote or inhibit religion, and (3) the policy does not result in excessive government entanglement of religion."[475]

Prior to the 1980's many devotional groups were denied permission to hold Bible club meetings on school campuses for fear of conflict between

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[472]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2111 (1971).

[473]Board of Education v. Mergens, 110 S.Ct. 2356 (1990).

[474]*See* School District of Abington Township v. Schempp 374 U.S. 203, 220-223 (1963); Engel v. Vitale, 370 U.S. 421, 429-30 (1962).

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

church and state. Permitting voluntary clubs to meet on school campuses during the school day would have the "primary effect" of advancing religion in violation of the establishment clause of the First Amendment.

Throughout the 1980s, many devotional groups were interested in having devotional meetings in public schools during noninstructional time. This created a nightmare for school administrators who were not sure of what was legal and what was illegal based on the First Amendment to the Constitution. This period of not knowing what to do created many legal controversies. The Supreme Court ruled in 1981 that students attending state-supported institutions of higher education could not be denied access unless there was a "compelling governmental interest."[476] In Widmar, a distinction was made between college students and secondary school students.
College students were regarded as "young adults" while high school students were still regarded as "impressionable." From this interpretation there seems to be a double standard permitted by the Court.

Between 1980 and 1985, student-initiated devotional groups were not allowed to have meetings during non-nstructional time on public school campuses.[477] Five federal appellate courts endorsed this double standard, saying, in effect that a minimal amount of restriction on the rights of high school students to assemble and express religious views is necessary in regard

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[476]Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed. 2d 440 (1981).

[477]Martha M. McCarthy, "Student Religious Expression: Mixed Messages from the Supreme Court," In West Education Law Reporter, 64 (1991): 2.

to the establishment clause of the Constitution.[478] The Supreme Court declined to review all but one of the cases.

Bender v. Williamsport Area School District,[479] the case the Supreme Court reviewed, reversed the decision of the lower court which had disallowed a devotional group meeting in the public high school. However, the Court did not render any opinions on the merits of the case.

Prior to the passage of the Equal Access Act students were confronted with three important hurdles in their attempt to enjoy the full protection of their First Amendment rights under the Constitution. First, there was the discretion exercised by school administrators who were often overly conservative in their interpretation of the law. Second, students and their parents, inexperienced in matters of civil rights, often had difficulty finding attorneys to defend religious student rights. Third, even when students could find competent attorneys, there are conflicting federal circuit decisions on different aspects of equal access question, some of which take a narrow view of the First Amendment rights of students.[480]

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[478]Bender v. Williamport Area School District, 741 F.2d 538 (3d Cir. 1984), *vacated,* 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed. 2d 501 [30 Ed. Law Rep. 1024] (1986); Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391 [26 Ed Law Rep 152] (10th Cir. 1985); Nartowicz v. Clayton County School District, 736 F.2d 643 [18 Ed. Law Rep. 273] (11th Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 [2 Ed. Law Rep. 961] (5th Cir. 1982, *cert. denied,* 459 U.S.1155, 103 S.Ct. 800, 74 L. Ed. 2d 1003 (1983); Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123. 102 S.Ct. 970, 71 L.Ed.2d 109 (1981).

[479]Bender v. Williamport Area School District, 741 F.2d 538 (3d Cir. 1984), *vacated,* 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed. 2d 501 [30 Ed. Law Rep. 1024] (1986).

[480]Whitehead, 117-118.

In a 1980 case, Brandon v. Board of Education of the Guilderland Central School District,[481] six students, who were members of a group called "Students for Voluntary Prayer," filed suit for declaratory, injunctive, and monetary relief against the principal, the superintendent, the board of education, and its individual members for denying their group communal prayer meetings in the public school immediately before the beginning of the school day. The United States District Court for the Northern District of New York granted the defendants judgment and dismissed the compliant. The students appealed to the United States Court of Appeals, Second Circuit. The Court of Appeals, Irving R. Kaufman, Circuit Judge, affirmed the decision of the District Court by ruling that:

> (1) plaintiffs' free exercise rights were not limited by school board's refusal to permit communal prayer meetings to occur on school premises, and authorization of student-initiated voluntary prayer would have violated the establishment clause by creating an unconstitutional link between church and state, and (2) school board's refusal did not violate plaintiff's right to free speech, freedom of association, or equal protection.[482]

In Widmar v. Vincent,[483] a student religious group, Cornerstone, at the

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[481]Brandon v. Board of Education of the Guilderland Central School District, 635 F.2d 971 (1980). See also Hunt v. Board of Education of the County of Kanawha, 321 F.Supp. 1267 (1970); Johnson v. Huntington Beach Union High School District, 68 Cal.App.3d 1, 137 Cal.Rptr. 43 (1977); Trietley v. Board of Education of the City of Buffalo, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

[482]Ibid., 972.

[483]Widmar v. Vincent, 635 F.2d 1310 (8th Cir. 1980), aff'd, 454 U.S. 263 (1981).

University of Missouri at Kansas City, challenged a regulation that prohibited the use of campus facilities for religious work or teaching. The United States Supreme Court determined that the university's neutral, open-door policy for extracurricular activities in essence established an open forum for student groups. The free speech clause of the First Amendment kept the university from excluding any group on the basis of their views unless the exclusion was necessary to protect a compelling state interest. The Supreme Court held that permitting Cornerstone to meet only incidentally promoted religion. Applying the tripartite test, Justice Powell, writing for the majority, maintained that a policy permitting Cornerstone and all other groups to meet:

> [W]ould have the secular purpose of making campus facilities available to all student organizations; it would not advance religion because the institution's endorsement of religious groups would not be implied any more than its endorsement of student political groups; and an "equal access" policy would avoid excessive governmental entanglement with religion because minimal supervision of student organizations is required on college campuses.[484]

Correct knowledge of the concept of public forum is critical to an understanding of permissible activities. The Supreme Court has grouped government property into the following three types of forums: (1) traditional public forum; (2) public forum by designation; and (3) traditionally nonpublic forum.[485] Public parks, streets, and sidewalks are examples of a traditional

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[484]Martha M. McCarthy, "Religion and Public Schools: Emerging Legal Standards and Unresolved Issues," Harvard Educational Review 55, No. 3 (August 1985), 297.

[485]Janine M. Murphy, "Access to Public School Facilities and Student by Outsiders," School Law Bulletin XVI, No. 1 (Winter 1985), 10-11.

public forum. In this realm individuals enjoy the greatest degree of freedom of speech with regard to time, place, manner of expression, and content. Reasonable government regulations are permitted "as long as the regulations are neutral in regard to the content of expression, are narrowly tailored to serve a significant government interest, and leave alternative channels of communication open."[486]

Forum by designation include public colleges and universities as well as auditoriums in government buildings. In this realm, the governing body of the institution uses its own discretion to decide if an open forum will exist. The ruling body is not required to provide an open forum, however, once it has done so, it is governed by the same standards that apply to a traditional public forum. For this reason, Cornerstone was granted permission by the Supreme Court to meet at the University of Missouri at Kansas City.

Historically, nonpublic forums have included places such as public schools, government office buildings, and military bases. In this realm, government officials may control free speech activity by either retaining authority to control the content of all expressive activities or they may create a limited public forum within the nonpublic forum.[487] This happens when access is open to specific types of groups but closed to others. If, for example, a school permits Cub Scouts and the Y.M.C.A to use the school's mailing system, a limited public forum is open for groups that provide activities for students.[488]

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[486]Ibid., 10.

[487]Ibid., 12.

[488]Ibid.

A school board has three options available in granting nonschool groups to use school facilities. First, it may prohibit the use of all facilities by nonschool groups. This, however, conflicts with the goal of many school districts that encourage increased use of school facilities. A second option is to permit all outside groups to use school facilities. The third option is to create a limited public forum.[489]

In Lubbock Civil Liberties Union v. Lubbock Independent School District,[490] the Civil Liberties Union filed a suit in 1979 claiming that the school district had continued unconstitutional religious practices including morning Bible reading over the public address systems, classroom prayers led by teachers, a period of silent prayer ended by "Amen" over school public address systems, and distribution of Gideon Bibles to fifth and sixth grade students. The Civil Liberties Union stated that the above practices continued even after the school district had in 1971 reflected in a policy letter stating neutrality of all personnel regarding religious activities, a discontinuance of prayers over the school public address system, a prohibition against the encouragement of any particular religious activity, the prohibition of any speakers on religion in any assembly, and the discontinuance of Gideons placing New Testaments in the hands of students.

In January 1979, the school district authorized the first written policy of religious activities in the school district. The written policy made no attempt

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[489]Ibid., 14.

[490]Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (1982).

to alter the practices about which the Lubbock Civil Liberties Union had complained as early as 1971 but rather instructed that the practices should be student rather than teacher initiated.

As the suit filed by the Lubbock Civil Liberties Union proceeded toward trial, the school district adopted a new and detailed policy. The new policy stated:

> Wishing not to infringe either upon the belief of any student in a Supreme Being or upon the right of any student not to believe, The School Board places in effect the following policies relating to religion in the school which supersede the policy on religion adopted on January 25, 1979.
>
> 1. The School Board permits the teaching of religion when presented objectively as part of a secular program of education.
>
> 2. The School Board permits study of the Bible and other religious materials for their literary and historic qualities.
>
> 3. Other than as stated in Section 1. and 2. above, the School Board does not permit prayer or reading passages from religious materials aloud or over the loudspeakers during class hours or at functions which students are required to attend..
>
> a.. Except as limited above, this policy permits any student to pray in the school silently or audibly when it is not disruptive.
>
> b. School administrators may set aside a short period for silent thought or meditation by students during the school day.
>
> c. This policy permits teachers to explain the background or significance of religious content and beliefs where appropriate to the subject matter they are teaching.
>
> d. This policy permits both teachers and students to recognize, reiterate or read aloud or over the loudspeakers historical documents or portions thereof or statements from recognized figures, even though such statements include personal religious beliefs.
>
> 4. The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.
>
> 5. Religious literature other than necessary for classroom work shall not be disseminated during class hours but may be purchased, indexed, shelved and circulated as

library material.

a. This policy permits one student to offer religious literature to another student on a private non-intrusive, non-disruptive basis.

b. This policy permits volunteer groups of students to disseminate religious literature on a non-disruptive basis to the members of the group.

c. This policy permits any teacher to use historical documents or patriotic materials in the classroom where appropriate to the subject matter being taught.

6. There shall be no religious tests required of applicants for employment.[491]

The Lubbock Civil Liberties Union also challenged the new August 1980 policy, especially paragraph four of the policy which stated:

> The school board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral religious or ethical purposes so long as attendance at such meetings is voluntary.[492]

The United States District Court for the Northern District of Texas upheld the constitutionality of a school district policy permitting students to gather before or after regular school hours to voluntarily meet for religious purposes. The Lubbock Civil Liberties appealed. The United States Court of Appeals, Fifth Circuit ruled that: (1) school district policy permitting students to assemble at school with supervision either before or after school hours to voluntarily meet for educational, moral, religious or ethical purposes was violative of the establishment clause of the First Amendment and was not

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[491]Ibid., 1041.

[492]Ibid.

necessary to avoid violation of free exercise, and (2) school districts would not be enjoined from continuation of past practices declared to be violative of establishment clause of First Amendment or current policy which was also found unconstitutional where the past practices declared unconstitutional had ceased.

In a 1984 case, Nartowicz v. Clayton County School District,[493] a civil rights suit was brought against the school district, alleging that certain of the school district's practices contributed to the establishment of religion, in violation of the First Amendment of the United States Constitution. The plaintiffs sought to prohibit the defendants from:

> (1) permitting a Youth For Christ Club or any other religious student group to meet on school permises under faculty supervision; (2) authorizing announcements of church sponsored activities by means of the schools' public address systems and bulletin boards; (3) permitting the placing of religious signs on school property; and (4) authorizing student student assemblies that promote or advance religion.[494]

The District Court granted the plaintiffs' motion for a preliminary injunction with respect to all four practices at issue, and the defendants appealed from the injunction as it applied to the first two practices. The school district conceded that it may not grant permission for religion-promoting assemblies, and it has discontinued its practice of placing allegedly religious signs on school property. The United States Court of Appeals for the Eleventh Circuit affirmed the District Court by stating that: (1) the school district's practice of permitting a student religious group to meet on school property

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[493]Nartowicz v. Clayton County School District, 736 F.2d 646 (1984).

[494]Ibid., 647.

under faculty supervision, when judged in light of the school district's apparent support of religious assemblies, religious signs, and announcements of church-sponsored activities via bulletin boards and public address systems, had the effect of enhancing or promoting religion in violation of the establishment clause of the United States Constitution, thus justifying preliminary injunctive relief, and (2) the school district's policy of permitting several schools' public address systems and bulletin boards to be used by churches to announce church-sponsored secular activities and other messages of "public importance" created excessive entanglement with religion in absence of written policy guidelines to assist administrators at different schools in deciding which messages could properly be announced, thus justifying preliminary injunctive relief.

In Bell v. Little Axe Independent School District,[495] parents filed a section 1983 action against public school officials, seeking injunctive relief against the school district for permitting religious meetings to be held on the school premises of the public elementary school during school hours and distribution of Bibles at school, and seeking an injunction against enforcement of the Oklahoma voluntary prayer statute, and challenging the equal access policy subsequently adopted by the school district.

The United States District Court for the Western District of Oklahoma prohibited the religious meetings, found the Bible distribution claim to be moot, decided that the equal access policy was not at face value unconstitutional and that the state prayer statute was not at issue, and refused to award either compensatory or punitive damages. Both sides appealed. The United States

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[495]Bell v. Little Axe Independent School District, 766 F.2d 1391 (1985).

Court of Appeals, Tenth Circuit ruled that:

> (1) parents, who had moved from school district and enrolled their children in a neighboring district, had standing to bring the action; (2) religious meetings were properly prohibited; (3) equal access policy promulgated by district was unconstitutional insofar as the school district or school construed the policy to permit concerted religious activity on the school grounds during the school day; (4) discretion was not abused by refusing to enjoin the enforcement of the prayer statute or the Bible distribution; (5) parents were entitled to an award of compensatory damages for the violation of their First Amendments without proof of consequential harm; and (6) the action would be remanded for reconsideration of the issue of punitive damages.[496]

In May v. Evansville-Vanderburgh School Corporation,[497] Mary May and several other teachers had been meeting before school at Harper Elementary School, kindergarten through fifth grade, to pray, sing hymns, and discuss the Bible. The administration was unaware of the meetings until a new principal started a teachers' newsletter, and Mrs. May asked him to put a notice about the meetings in it. He refused and, after contacting his superiors, ordered the meetings stopped, and he was supported in his decision by the school board.

Mrs. May sued the board, its members, and the superintendent of the school district under section 1 of the Civil Rights Act of 1871, now 42 U.S.C. section 1983, asking they drop the ban on religious meetings and to recover $300,000 in damages. The only issue that she pressed was that the ban

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[496]Ibid., 1392.

[497]May v. Evansville-Vanderburgh School Corporation, 787 F.2d 1105 (7th Cir. 1986).

violated her constitutional right of free speech. She made no free exercise claim. Even though no written policy was evident, the superintendent and the school board had been consistent in prohibiting religious meetings in school facilities. The teacher and the school board asked the district court to grant summary judgment in the case. The reason the teacher requested summary judgment was to avoid the expense of a jury trial. The United States District Court for Southern District of Indiana granted the defendants' motion for summary judgment, and the teacher appealed.

On appeal Mrs. May offered two arguments. First, as an employee of the school, she had the right to exercise free speech on school grounds provided she did not disrupt the school's activities; since the meetings took place before school and the students did not participate, nor as far as anyone knew were even aware of meetings, there was no disruption. Second, her argument was that even if the school authorities could have stopped the meetings not directly related to school business, they didn't do so. The defendants replied that even if they created a public forum, which they denied, they were justified in excluding religious discussion from it because to permit it would have violated the establishment clause of the First Amendment.

The United States Court of Appeals for the Seventh District affirmed the decision of the District Court by stating that: (1) the teacher had no right under the First Amendment's Free Speech Clause to hold prayer meetings on school property before school opened and students arrived, and (2) the Districts Court's decision that school authorities had consistently applied a policy that prohibited school facilities to be used for religious activities, despite the teachers' contention that the school authorities had made the school a

"public forum" by permitting meetings on any subject except religion, was not clearly erroneous.

Bender v. Williamsport Area School District[498] began in September 1981 when a group of high school students in Williamsport, Pennsylvania formed a club called "Petros" for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members."[499] The group obtained permission from the principal to hold an organizational meeting during activity period on school premises. At the meeting Bible verses were read and students prayed. There was no evidence that anyone objected to future meetings of Petros; nevertheless, the principal told the group they could not meet again until he had discussed the matter with the superintendent. The superintendent informed the students that he would respond to the written request for recognition when he received legal counsel from the school district solicitor concerning the formation of a religious club on campus.

In November 1981, the principal and the superintendent met with Petros and advised the group that based on the legal opinion of the school district solicitor their request must be denied. The students were informed that they could meet off school premises and would be given released time during activity period if they could find a meeting place and an adult, preferably a clergyman, for their meetings.

The students appealed in writing to the chairman of the Williamsport

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[498]Bender v. Williamsport Area School District, 563 F.Supp. 697 (M.D. Pa. 1983), 741 F.2d 538 (3rd Cir. 1984) *vacated,* 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986).

[499]Bender v. Williamsport Area School District, 106 S.Ct. 1326, 1327 (1986).

Area School Board. At a board meeting in January 1982, the board upheld the superintendent's decision and denied the appeal based on the solicitor's opinion.

In June 1982, ten of the students filed suit in the United States District Court against the Williamsport Area School District, the nine members of the school board, the superintendent of the school district, and the principal of the high school. The suit alleged that the refusal to allow them to meet on the same basis as other student groups because of their religious activities violated the First Amendment, and they asked for declaratory and injunctive relief. The District Court, on motions for summary judgment ruled in favor of the students but entered no injunction and granted no relief against any defendant in his individual capacity.

The school district did not appeal and complied with the judgment and permitted the students to hold their meetings as requested. However, one member of the school board did appeal. No one questioned his standing to appeal and the United States Court of Appeals for the Third Circuit ruled in his favor. The Supreme Court of the United States held that the school board member did not have standing to appeal; and therefore, the Court of Appeals had no jurisdiction to hear his appeal.

In Garnett v. Renton School District No. 403,[500] students at Lindbergh High School brought action against the high school and the school district to permit religious meetings on school property. The district made classrooms available for students to use for approved "cocurricular" activities during noninstructional time. The district's board of directors and the

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[500]Garnett v. Renton School District No. 403, 865 F.2d 1121 (9th Cir. 1989).

superintendent determined whether to approve an activity based on District Policy 6470 which stated:

> [t]he criteria to be used for approving co-curricular activities should include but not be limited to:
> 1. the purposes and/or objectives shall be an extension of a specific program or course offering,
> 2. the activity shall be acceptable to the community,
> 3. the activity should have carry-over values for lifetime activities,
> 4. the group shall be supervised by a qualified employee,
> 5. the cost of the activity must not be prohibitive to students or District,
> 6. the activity must comply with Title IX requirements,
> 7. the activity must take place on school premises unless approved in advance by the school principal, and
> 8. the activity must not be secretive in nature.[501]

Policy 6470 also states that the district "does not offer a limited open forum."[502]

Richard Garnett and other students asked permission of the principal and the school district to use a classroom in the high school for weekday morning meetings of their nondenominational Christian student group. The group planned to discuss religious and moral issues, read the Bible, and pray. The principal and the school district denied their request because their club was not curriculum related and because permitting the proposed meetings would violate the establishment clause of the First Amendment.

The United States District Court for the Western District of

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[501]Ibid., 1123.

[502]Ibid.

Washington denied the preliminary injunction, and judgment was later entered for the school district on the merits. The students appealed. The United States Court of Appeals for the Ninth District affirmed the ruling of the District Court by stating:

> (1) allowing student religious group to hold meetings in the public high school classroom prior to the opening of the school day would violate the Establishment Clause of the First Amendment; (2) school district's refusal to allow student religious group to meet on public high school campus did not violate the Free Speech Clause of the First Amendment; (3) public high school did not have a "limited open forum," as defined by the Equal Access Act, and school was accordingly not required by mandatory provisions of the Act to allow student religious groups to hold meetings.[503]

In Mergens v. Board of Education of Westside Community Schools,[504] Bridgett Mergens, a student at Westside High School, a public secondary school in Omaha, Nebraska, met with the principal and asked for permission to form a Christian club at school. The club was to be nondenominational and open to all students. Its purpose was to permit students to read and discuss the Bible, enjoy fellowship, and pray together. It would have the same privileges as all other Westside clubs, but it would not have a faculty sponsor. Her request was denied, first by the principal and then by the superintendent on the grounds that a religious club at school would violate the Establishment Clause.

Mergens appealed to the school board which supported the decision of

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[503]Ibid., 1122.

[504]Board of Education of Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1990).

the superintendent. She then challenged the decision in Federal District Court on the basis that it violated the Equal Access Act and her First and Fourteenth Amendment rights to the free exercise of religion. The school board responded that the Equal Access Act did not apply because Westside did not maintain a limited open forum, and even if the school did maintain such a forum, the act was unconstitutional. The District Court supported the school board after determining that the act did not apply because all student clubs at Westside were curriculum related.

The students appealed to the Court of Appeals for the Eighth Circuit which reversed the decision of the District Court. The Court of Appeals ruled that the purpose of the Equal Access Act was to prohibit discrimination against respondents' proposed club on the basis of its religious content, and that the Act did not violate the establishment clause. On certiorari, Justice O'Conner delivered the opinion of the United States Supreme Court which held that: "(1) the scuba diving club, chess club, and service club were noncurriculum-related student groups, triggering district's obligations under the Equal Access Act, and (2) the Act does not violate the establishment clause."[505]

Prayer at Athletic Events

Out of tradition as much as anything, many school districts have continued to permit team members and spectators to participate in prayers and other religious activities at athletic contests in public schools in violation of the Establishment Clause of the First Amendment of the Constitution of the United States. Many school administrators have been reluctant to eliminate

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[505]Ibid.

religious activities in public schools for numerous reasons, one of the chief being their own personal beliefs.

Parents unable to get sufficient satisfaction after appearing before boards of education have turned to the courts for help in eliminating religious practices at athletic events that are in violation of the Establishment Clause of the First Amendment. Such was the case in Doe v. Aldine Independent School District.[506] The following prayer was the source of controversy: "Dear God, please bless our school and all it stands for. Help keep us free from sin, honest and true, courage and faith to make our school the victor, In Jesus' name we pray, Amen."[507] These words were posted in block letters on the wall over the entrance to the gymnasium at Aldine Senior High School and recited or sung by students to music played by the Aldine School band at athletic events, pep rallies, and at graduation ceremonies. These school-sponsored events took place before or after regular school hours in the school gymnasium and at the football stadium which were the property of the school district. Frequently, the school principal or other school employees would initiate the recitation or singing of the school prayer. Even though students were required to assemble in the gymnasium for certain school programs, attendance at any event during which the prayer was to be recited or sung was voluntary. In addition, no one was forced to sing or recite the words, nor was anyone required to stand when the words were recited or sung.

Action was brought by an anonymous plaintiff against the Aldine

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[506]Doe v. Aldine Independent School District, 563 F.Supp. 883 (1982).

[507]Ibid., 884.

Independent School District,[508] a Texas school district, for violation of constitutional rights based on recitation and singing of a school prayer on school district property. The District Court held that the practice or policy of reciting or singing of a school prayer violated the establishment clause of the First Amendment, notwithstanding that the singing or recitation occurred at extracurricular events on school property where practice was state-initiated, encouraged, and supervised. Summary judgment was issued for the plaintiff.

In the fall of 1985 in Jager v. Douglas County School District,[509] a member of the marching band, Doug Jager, objected to his school principal about the practice of having pregame invocations delivered at home football games. In the Spring of 1986 the Douglas County School superintendent, the school system attorney, the Jagers, and their counsel, and two ministers met and discussed two alternative proposals for changing the invocation practices. One proposal was a secular inspirational speech, which was acceptable to the Jagers. The other was an "equal access" plan that would retain some religious content which was rejected by the Jagers.

In the Fall of 1986, the Jagers filed a complaint in the United States District Court for the Northern District of Georgia. The District Court issued a temporary restraining order prohibiting the Douglas County School District from conducting or permitting invocations prior to any athletic event at the school stadium.

The case was tried in the Fall of 1986 and on February 3, 1987, the

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[508]Ibid.

[509]Jager v. Douglas County School District, 862 F.2d 824 (11th Cir. 1989).

District Court

> (1) declared the pregame invocations unconstitutional, (2) denied the Jagers' request for a permanent injunction, (3) rejected the Jagers' claim based on the Free Exercise of Religion Clause of the First Amendment, and (4) rejected the Jagers' claim that the school district violated the Georgia Constitution.[510]

Doe v. Duncanville Independent School District[511] is a case that involved team prayer. Jane Doe's family moved to Duncanville, Texas, when she was twelve years old. She tried out and made the girls' basketball team. Jane learned that the coach regularly began or ended practice with the Lord's Prayer. Jane participated, even though she was uncomfortable and opposed to the practice, so as not to create dissension. At the end of the Jane's first basketball game, the Lord's Prayer was recited in the center of the court, girls on their hands and knees, with the coaches standing over them, heads bowed. In the weeks that followed, prayers were either started by the coaches' signal or at their verbal requests. Prayers had been conducted in this manner for the past seventeen years.

After attending a game and seeing his daughter participate in the prayer, her father asked her how she felt about participating. She told him she preferred not to participate in team prayers. Her father told her she did not have to participate in team prayers ,whereupon she resolved to cease her participation. Her father complained to school authorities and the assistant

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[510]Ibid., 827.

[511]Doe v Duncanville Independent School District, 994 F.2d 160 (5th Cir. 1993).

superintendent agreed to stop prayers at pep rallies but not postgame prayers.

Unable to get sufficient satisfaction from the board of education, he turned to the courts for help. In deciding for the Does, the trial court concluded that the School District's prayer failed all three prongs of the Lemon test. On appeal the School District contended that Board of Education of Westside Community Schools v. Mergens controls. By allowing students and teachers to participate in spontaneous prayer, it is merely accommodating religion in a constitutionally permissible manner. However, the Fifth Circuit distinguished Doe from Mergens for three reasons, (1) Mergens involved non-curriculum-related activities; (2) the prayer as practiced in this case could not be considered student-initiated; and (3) the school district had not established a limited open forum.

Religious Symbols and Holidays

Printed materials, audio-visual materials, dress, jewelry, and religious scenes have caused controversy in the public schools. It is impossible to allow different religious groups to express their religious preference without offending some other group, religious or nonreligious. In 1894 in a Pennsylvania case, Hysong et al. v. School District of Galitzin Borough et al.,[512] John Hysong and others through a bill in equity sought to restrain the school district from permitting sectarian teaching in the common schools and from employing as teachers sisters of the Order of St. Joseph, a religious society of the Roman Catholic Church. A preliminary injunction was granted.

Despite their dress (religious garb), the court reported that there was no

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[512]Hysong et al. v. School District of Gallitzin Borough et al., 164 Pa. 629, 30A. 482 (1894). See also Commonwealth v Herr et al., 229 Pa. 132.

evidence of any religious instruction or religious exercises of any character during school hours. However, the court did find that after school hours the school room was used by the teachers to impart Catholic religious instruction to children of Catholic parents, with the consent of or by request of the parents.

The display of religious symbols--such as a cross, nativity scene, or menorah--is permitted, provided the symbols are used as instructional tools or resources, displayed on a temporary basis, and exhibited as examples of the cultural and religious heritage.

In Lawrence v Buchmueller[513] action was brought by a group of parents of public school children in Hartsdale, New York, for declaration that the board of education of the school district had no authority to permit a display on school grounds of symbols of any deity belonging to any and all religions. The complaint was filed by members of the same faith as the group that had erected the crèche.

The plaintiffs were not opposed to the religion depicted by the symbol; their only objection was to the fact that the crèche was erected on public land. They stated their position in the complaint as:

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

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[513]Lawrence v. Buchmueller, 243 N.Y.S.2d 87 (1963); See also Allen v. Hickel, 424, F.2d 944 (1970).

of a religious symbol upon public property.[514]

The Supreme Court of New York held that resolution of the school board permitting the erection of a creche on the school grounds during a portion of school Christmas recess at no expense to the school district did not constitute unconstitutional establishment of religion.

A court case often cited in the use of religious symbols in public schools is Stone v. Graham.[515] This Kentucky statute required the posting of a copy of the Ten Commandments on the wall of each school classroom in the State. The sixteen-inch by twenty-inch posters were purchased with private contributions. The state trial court upheld the statute passed by the State of Kentucky. The Supreme Court of the Commonwealth of Kentucky affirmed the decision of the trial court.

The United States Supreme Court granted certiorari to the Kentucky commandment case. The Supreme Court ruled that the Kentucky statute violated the cstablishment clause of the First Amendment.

In a South Dakota case, Florey v. Sioux Falls,[516] action was brought contending that the school board's policy violated the establishment clause and seeking injunction requiring that city public school officials be instructed that all Christmas assemblies be absolutely and unalterably secular. The court

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[514]Ibid., 90.

[515]Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 662 L.Ed. 2d 199 (1980); See also Ring v. Grand Forks Public School District No. 1, 483 F.Supp. 272 (D.N.D. 1980).

[516]Florey v. Sioux Falls School District 49-5, 464 F.Supp. 911 (1979).

upheld the school board policy which permitted the use of religious decorations such as crosses, menorahs, crescents, Stars of David, crèches, and symbols of Native American religions--"provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature."[517]

Although not an education case, Lynch v. Donnelly[518] is important to public education because it established that Christmas displays do not advance religion or create an excessive entanglement between church and state. Each year the city of Pawtucket, Rhode Island sponsored a Christmas display in a park owned by a nonprofit organization. The display, a tradition for forty or more years, included a Santa Claus house, a Nativity scene, a Christmas tree, and a "SEASONS GREETINGS" banner. The respondents challenged the Nativity scene in the display on the basis that it violated the establishment clause of the First Amendment. The District Court upheld the challenge and permanently forbade the city from including the Nativity scene in the city display which was affirmed by the Court of Appeals.

The Supreme Court explained that the purpose of the First Amendment religious clauses is "to prevent as far as possible, the intrusion of either [the church or the state] into the precincts of the other."[519] However, at the same time the Court has recognized that "total separation is not possible in an absolute sense. Some relationship between government and

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[517]Ibid., 918.

[518]Lynch v. Donnelly, 465 U.S. 668 (1984).

[519]Lemon v Kurtzman, 403 U.S. 602, 614 (1971).

religious organizations is inevitable."[520] Therefore, the Supreme Court ruled that the city of Pawtucket had not violated the establishment clause of the First Amendment and the judgment of the Court of Appeals is reversed.

Another non-education case of significance is County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter.[521] The American Civil Liberties Union challenged the constitutionality of the crèche in the county courthouse and the menorah outside the city and county building as violations of the First Amendment made applicable to state government by the Fourteenth Amendment. The District Court, relying heavily on Lynch v. Donnelly,[522] which ruled that a city's use of a crèche in a Christmas display did not violate the establishment clause, entered a judgment in favor of the defendants. The Court of Appeals, also used Lynch v. Donnelly,[523] distinguishing it from the current case held that the crèche and menorah must be understood as an impermissible governmental endorsement to Christianity and Judaism and reversed and remanded the case. Certiorari was granted. By a five to four decision the Supreme Court prohibited the inclusion of the crèche in the Pawtucket display, ruling that the inclusion of the crèche did have the impermissible effect of advancing or promoting religion.

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[520]Ibid.

[521]County of Alleghany v. American Civil Liberties Union Greater Pittsburgh Chapter, 109 S.Ct. 3086 (1989).

[522]Lynch v. Donnelly, 465 U.S. 668 (1984).

[523]Ibid.

Moment of Silence

The controversy over prayers in public schools is a continuing debate. A moment of silence is a compromise; neither side wins. Conservatives, such as North Carolina Senator Jesse Helms, want to return open prayer to the classrooms. On Thursday, January 21, 1993, Senator Jesse Helms introduced a resolution proposing an amendment to the United States Constitution; specifically, to restore the right of voluntary prayer in the public schools, including the offering of prayers at public school graduation ceremonies and sports events, such as football and basketball.[524] The Republican landslide in the elections on Tuesday, November 8, 1994, has already given support to introducing a constitutional amendment on voluntary school prayer in the public schools. Newt Gingrich, House Majority Leader, has already stated that he plans to have a vote in the House of Representatives for a constitutional amendment to return voluntary prayer to the public schools. On the other hand, liberals say that religious training is not a matter for the government but a matter for the home.

One misleading assumption often quoted is that prayer has been taken out of the public schools when in reality prayer has never been taken out of the public schools. Students and teachers are free to pray or meditate as long as they do not compel or coerce others to participate. Justice Sandra O'Connor, in an occurring opinion in Wallace v. Jaffree, stated: "Nothing in the United States Constitution as interpreted by this Court . . . prohibits public school students from voluntarily praying at any time before, during, or after

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[524]Congress, Senate, Helms Proposes Constitutional Amendment To Allow Voluntary School Prayer, 103rd Cong, 1st sess., S.R. 3, Congressional Record, vol. 139, No. 5, daily ed. (21 January 21993) S1.

the school day."[525]

In a 1976 case, Gaines v Anderson,[526] students challenged the Massachusetts statute requiring observance of a period of silence for prayer or meditation at the beginning of the school day in public schools. The Three-Judge District Court, District of Massachusetts, ruled that parents of the students would be permitted to join as plaintiffs.

The District Court ruled that the statute did not violate the First Amendment; that the statute did not violate students' rights of free exercise of their religion; and that the statute did not prohibit or inhibit parental right to guide and instruct children in regard to religion. The District Court dismissed the complaint.

In Beck v. McElrath,[527] Duffy v. Las Cruces Public Schools,[528] and Walter v. West Virginia Board of Education[529] each case had a state statute authorizing a moment of silence to be held at the beginning of each school day in the public schools for quiet and private contemplation or introspection. In each state the District Court ruled the statute unconstitutional on the basis that the statute caused excessive entanglement between church and state.

Three cases including a moment of silence were reviewed in an earlier

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[525]Wallace v. Jaffree, 105 S.Ct. 2479 (1985).

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

[527]Beck v McElrath, 548 F.Supp. 1161 (1982).

[528]Duffy v. Las Cruces Public Schools, 557 F.Supp. 1013 (1983).

[529]Walter v. West Virgina Board of Education, 610 F.Supp. 1169 (D.C.W.Va. 1985).

section of Chapter III. See Karen B. v. Treen, pages 143-145; Jaffree v. James, pages 145-147; and Smith v. Board of School Commissioners of Mobile County, pages 147-151.

One of the most noted moment-of-silence cases is Wallace v. Jaffree.[530] It is a landmark decision of the United States Supreme Court. Appellees challenged the constitutionality of three Alabama statutes. Progressive legislation over a period of years supported this allegation; the 1978 statute, section 16-1-20, authorized a one-minute period of silence for meditation; the 1981 statute, section 16-1-20.1 authorized the same moment of silence for "meditation or voluntary prayer;" and the 1982 statute, section 16-1-20.2, gave teachers permission to conduct a voluntary prayer for those students who wished to participate. Even though finding that sec. 16-l-20.l was a concerted attempt to encourage a religious activity, the District Court ruled that the establishment clause of the First Amendment does not prohibit a State from establishing a religion. After review, the District Court dismissed Jaffree's complaint. The case was appealed to the Eleventh Circuit Court of Appeals in regard to statutes enacted in 1981 and 1982. The Court of Appeals ruled both statutes unconstitutional. The case was further appealed to the United States Supreme Court. In 1984, the Supreme Court unanimously affirmed the decision of the District Court and stated that the 1982 Alabama statute, section 16-1-20.2, was unconstitutional. In 1985, the Supreme Court in a six to three vote, struck down the 1981 prayer statute, 16-1-20.1.

In December 1982 the New Jersey Legislature passed, over the Governor's veto, a statute requiring the State's elementary and secondary

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[530]Wallace v. Jaffree, 472 U.S 38 (1985).

public educators to allow their students to observe a minute of silence before the start of each school day. The statute reads as follows:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection. N.J.S.A. 18A:36-4.[531]

Immediately, the New Jersey Attorney General said he would not defend the statute if it were challenged. Within a month after the statute became effective, a New Jersey public school teacher, several public school students, and parents of public school students challenged its constitutionality in federal court. The appellees sued under 42 U. S. C. sec. 1983, alleging that the statute violated the establishment clause of the First Amendment.

After a five-day trial, the District Court ruled the New Jersey statute unconstitutional. Applying the Lemon test in Lemon v Kurtzman,[532] the court held the statute failed all three prongs because (1) its purpose was religious rather than secular; (2) it both advanced and inhibited religion; and (3) it fostered excessive government entanglement with religion.

North Carolina is one of twenty-five states that permits public school teachers to have students observe a moment of silence in their classrooms. In 1985, North Carolina Legislature passed as a general statute a provision allowing a moment of silence.[533] Dr. Wayne Thompson Hall surveyed selected

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[531]May v. Cooperman, 572 F.2d 240, 241 (3rd Cir. 1985).

[532]Lemon v. Kurtzman, 403 U.S. 602 (1971).

[533]North Carolina General Statutes 115C-47 (29), 1985.

principals in public middle and high schools in North Carolina to determine religious practices present in the public schools. He reported that seventy percent of the respondents indicated that their school did not observe a moment of silence.[534] With no mention of prayer, it is reasonable that the North Carolina moment of silence statute will pass constitutional muster.

Secular Humanism

"To be or not to be, that is the question."[535] And that is always the question. Is secular humanism a religion? It all depends on whom you ask. The supporters for religion in the schools frequently base their arguments on the premise that public schools are advancing a religion called "secular humanism" at the expense of theistic religions. Areas and topics in the curriculum that are susceptible to such a challenge are evolution, values clarification, sex education, globalism, death education, journal entries, situation ethics, and any topic dealing with self-analysis. The religious fundamentalists focus on The Humanist Manifesto I and II, and A Secular Humanist Declaration, as an emphasis. They also alude to John Dewey, the father of American Education, who signed Manifesto I, and the other noticeable educators who signed subsequent documents. The imperative influence of these documents, especially The Humanist Manifesto I, is presented in the following:

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[534]Wayne Thompson Hall,"Legal Aspects of the Practice of Religious Activities in Selected Public Schools in North Carolina" (Ed. D. University of North Carolina at Greensboro, 1993), 77.

[535]William Shakespeare, Hamlet, With an introduction by Sylvan Barnet (New York: New American Library, 1982), 93.

> It reflected all of the influences of science, evolution and the new psychology which were reshaping American education. It called for the abandonment of traditional religion and replaced it with a new secular religion better able to accommodate the new moral relativism inherent in a man-centered, godless world.[536]

Religion is an emotional issue and secular humanism complicates the issue. Critics from both sides of the issue have joined the ideology battle.

> Some humanists have asserted that the absolutist morality championed by conservative evangelicals poses a threat to reason, democracy, and freedom.
>
> On the other hand, some fundamentalists have referred to humanism as "Satan's philosophy," which promises ultimate doom unless it is completely eradicated.[537]

There are two issues that emerge when religious fundamentalists insist that public schools are advancing a new religion called secular humanism: (1) legally schools cannot teach religion and (2) public education is a human activity supporting the philosophy that schools should always be sensitive to student needs.[538] The major argument develops from the lack of a definition of secular humanism which is accepted by religious

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[536] Samuel L Blumenfeld, NEA Trojan Horse in American Education (Boise: Paradigm, 1984), 226.

[537] Martha M. McCarthy, A Delicate Balance: Church, State, and the Schools (Bloomington, Ind.: Phi Delta Kappa Educational Foundation, 1993), 90.

[538] Joseph E. Bryson, "Conservative Pressures on Curriculum," in School Law Update, (Topeka: National Organization for Legal Problems of Education, 1982), 138.

fundamentalists and humanists scholars, school boards, and school administrators. The fundamentalists define secular humanism as follows:

> Humanism is faith in man instead of faith in God. Humanism was officially ruled a religion by the U. S. Supreme Court. Humanism promotes: (1) situation ethics, (2) evolution, (3) sexual freedom, including public sex education courses, and (4) Internationalism.
>
> Humanism centers on "self" because it recognizes no higher thing to which man is responsible....
>
> This eliminates coming to Christ for forgiveness of sin. It eliminates the Christian attributes of meekness and humility. Where does self-esteem end and arrogance begin?
>
> Such terms as self-concept, self-esteem, self-awareness, self-acceptance, self-fulfillment, self-realization, body awareness, etc., are frequently used. All leave the students occupied primarily with themselves and this is wrong. There are others to consider. Self-centered persons are seldom an asset to themselves, to friends, family, or country.[539]

Religious fundamentalists view secular humanist as:

> Anti-God. The secular humanist wants to tear God down from His throne and make Man the sovereign of the universe.
>
> Anti-democracy. The secular humanist hopes to do away with present governments and make the world one huge, totalitarian state.
>
> Anti-family. The secular humanist undermines the family concept, denies Christian values that are taught in the home, and preaches to the youth of America that there are no absolute morals.
>
> Anti-Christian. The secular humanist preaches the religion

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[539]Eli M. Oboler, ed, Censorship and Education, The Reference Shelf, Vol. 53, No 6 (New York: H. W. Wilson, 1981), 59.

> of Secular Humanism through textbooks and by means of the following teaching techniques: value clarification, moral education, human development, family life and human relations, affective education, and psychological learning, to name a few.[540]

Religious fundamentalists are supported by such well known groups as Jerry Falwell's Moral Majority, and Phyllis Schlafly's Eagle Form. The humanists on the other hand are equally advanced by sound scholarship. Alfred Braunthal in Salvation and the Perfect Society: The External Quest defines secular humanism as:

> The ultimate goal of secular humanism--the perfection of society through human efforts--presupposes not the gratuitous grace of God, but rather the full responsibility of man for his own thoughts or deeds.[541]

Paul Kurtz, a humanist scholar who was an expert witness in Smith v. Board of School Commissioners of Mobile County, said

> Humanism as a philosophy is opposed to all forms of mythological illusions (religious or ideological) about man and his place in the universe .... Any theistic interpretation of the universe and any eschatological drama about divine beginnings and ends is rejected because it is logically meaningless and empirically unverified.[542]

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[540]Robert H. Rhodes, "Is Secular Humanism the Religion of the Public Schools?" Dealing with Censorship, ed. James E. Davis (Urbana: National Council of Teachers of English, 1979), 120.

[541]Alfred Braunthal, Salvation and the Perfect Society: The Eternal Quest (Amherst: University of Massachusetts Press, 1979), 279.

[542]Paul Kurtz, "Is Everyone a Humanist?" The Human Alternative: Some Definitions of Humanism, ed, Paul Kurtz (Buffalo: Prometheus Books, 1973), 178.

In Smith, Judge Brevard Hand maintained that secular humanism was a religion and Alabama schools could no longer promote such. Continuing, Kurtz inisted that humans were capable of creating, guiding, and directing the human destiny.[543]

In arguing cases in which secular humanity is an issue, attorneys rely heavily on a 1961 case, Torcaso v. Watkins.[544] This case dealt with a man who challenged the Office of Notary Public of Maryland when denied a job because he did not express a belief in God. The Supreme Court held that Torcaso denial was an improper and impermissible denial basis for job exclusion. Justice Hugo Black in writing the majority insisted:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in religion." Neither can it constitutionally pass belief laws to impose requirements which can aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[545]

The Supreme Court inadvertently advanced the religious fundamentalists cause in footnote eleven by suggesting that:

> Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Cultures, Secular Humanism, and others.[546]

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[543]Ibid., 178-186.

[544]Torcaso v. Watkins, 367 U.S. 488 (1981).

[545]Ibid.

Many Buddhists and Taoists would take issue with Justice Black's mandate, for they do believe in God. At any rate, religious fundamentalists have relied heavily on footnote eleven in secular human pursuits.

Moreover, religious fundamentalists often refer to Abington School District v. Schempp[547] as additional judicial support regarding secular humanism in schools In that case, the Court held:

> [I]t is insisted that unless these religious exercises are permitted, a "religion of secularism" is established. We agree of course that a State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe."[548]

In Malnak v. Yogi,[549] the Third Circuit Court of Appeals attempted to narrow the meaning of footnote eleven in Torcaso regarding religions that do no teach what would generally be a belief in God. The Third Circuit Court maintained that footnote eleven's meaning should be that "Torcaso does not stand for the proposition that 'humanism' is a religion although an organized group of 'Secular Humanists' may be. "[550]

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[546]Ibid., 495.

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

[548]Ibid., 225.

[549]Malnak v. Yogi, 592 F.2d 197 (3rd. Cir. 1979).

[550]Ibid., 212.

United States v. Seeger[551] is another case often presented by religious fundamentalists. In Seeger the Court held the plaintiff--in this case a conscientious objector wished to be excused from mitilary duty predicated on "a sincere and meaningful belief" instead of "filled by God." The Supreme Court held that such belief ran "parallel to belief in God" thus the plaintiffs were excused from military duty.[552] The case suggests that religion may be God filled or moral based. The religious fundamentalists maintain that Seeger levels the playing field between secular humanism and theisim.

Regardless of cases cited above, fundamentalists were unable to establish the fact that humanism in public school was the same ideology presented in Humanist Manifesto I and II. Moreover, there is no ideological nexus between educational parameters in schools and those of the publications. Yet throughout America the controversy continued to accelerate. In 1974 a textbook ideological battle developed in Kanawha County, West Virginia. Fundamentalists maintained they were victims of a decaying society--the liberal left was in charge of schools and old-fashioned values and religion were being crushed.[553]

Parents, Gry and Shonet Williams, challenged the school district maintaining that certain textbooks and other materials were anti-religious and in effect violated their rights to free religion and privacy. The challenged

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[551]United States v. Seeger, 380 U.S. 163 (1965).

[552]Ibid.

[553]Joe L. Kincheloe, Understanding the New Right and Its Impact on Education (Bloomington, Ind.: Phi Delta Kappan Educational Foundation, 1983), 7.

textbooks were alleged to contain "stories promoting and encouraging disbelief in a Supreme Being, and encouragement to use vile and abusive language, and encouragement to violate the Ten Commandments."[554] The court ruled that even though some of the subject content might be offensive to the sincerely held beliefs of the plaintiffs, the use of the textbooks was not a violation of their constitutional rights. Justice Hall insisted that First Amendment "does not guarantee that nothing about religion will be taught in the schools nor that nothing offensive to any religion will be taught in the schools." [555] Judge Hall insisted school boards were only prohibited from advancing or inhibiting a religion. In spite of judicial decision for the school district, Kincheloe maintained that national attention awarded the case "gave conservatives around the country a new sense of confidence."[556]

In the 1982 Fink v. Board of Education of the Warren County School District[557] case the court implied that even though secular humanism was a religion the court did not indicate any First Amendment prohibition.[558]

In the 1983 Crockett v. Sorenson[559] case Judge Kiser held that a Bible class for fourth and fifth grade students staffed and controlled by a ministerial alliance organization was in Constitutional violation--there was no

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[554]Williams v. Board of Education, 388 F.Supp. 93, 95 (S.D.W.V. 1975).

[555]Ibid., 96.

[556]Kincheloe, 7.

[557]Fink v. Board of Education of the Warren County School District, 442 A.2d 837 (Pa. Commonwealth 1982).

[558]Ibid., 853.

[559]Crockett v Sorenson, 568 F.Supp. 1422 (1983).

secular purpose. Even though Justice Kiser said schools should not be insulated from any mention of God, the Bible or religion, he maintained that "when such insulation occurs, another religion, such as secular humanism, is effectively established."[560]

In the 1985 Grove v. Mead School District No. 354,[561] case both mother and daughter objected to reading material required by the teacher as anti-Christian values and offensive language. The Learning Tree was written by black writer Gordon Parks. Even though the student was given an alternate assignment and did not otherwise participate in classroom activities regarding the book, the mother filed action against the school board insisting the reading assignment was a religion--secular humanism-- an establishment of religion prohibited by the Constitution. Justice Eugene Wright insisted that legal counsel had misinterpreted Torcaso[562] footnote eleven and reading materials violated neither First Amendment free exercise or establishment clauses.

In the 1986 Mozert v. Hawkins County Public Schools[563] case parents contested the Holt basal reading series predicated on values clarification, witchcraft, idol worship, situational ethics, and euthanasia--a secular humanists reading series. Even though, early on, the schools provided

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[560]Ibid., 1425.

[561]Grove v. Mead School District No. 354, 753 F.2d 1528 (1985).

[562]Torcaso v. Watkins, 367 U.S. 488.

[563]Mozert v. Hawkins County Pubic Schools, 647 F. Supp. 1194 (E.D. Tenn 1986).

alternative reading assignments, without school board approval the alternative ceased. At this point students fled the public school for a Christian private school and initiated legal action.

Educators testified to the value of the individualized education program. The court ruled that the state did not require uniformity. The school district should be allowed to accommodate the beliefs of the students involved and such accommodation "would not wreak havoc in the school system."[564]

Judge Hull's ruling (1) prohibited the school board from assigning the Holt reading series; (2) allowed home schooling (a statute provided for such) for reading; and (3) limited his decision to plaintiffs involved-- all others must be made "on a case by case basis."[565]

> While not specifically raised as an issue in this case, religious objections to a humanistic education seem to be couched in the argument that humanistic values, of which some are non sectarian in nature, are being taught as a religion of secular humanism.[566]

In the 1987 Smith v. Board of School Commissioners of Mobile County[567] case plaintiffs filed action against a local school board for

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[564]Kirsten Goldberg, "Textbook DecisionFuels Debate on Role of Religion in Schools, Rights of Parents," Education Week 6, No. 9 (November 5, 1986): 18.

[565]Ibid., 19.

[566]Kenneth Nuger, "Accommodating Religious Objections to State Reading Programs: Mozert v. Hawkins County Schools," Mozert v. Hawkins County Public Schools." West's Education Law Reporter, Vol. 36 (St. Paul: West Publishing Company, 1987) 255.

[567]Smith v. Board of School Commissioners of Mobile County, 655 F.Supp. 939 (S. D. Alabama 1987).

advancing secular humanism as religion through the use of history, home economics, and social studies textbooks. Furthermore, plaintiffs insisted the textbooks left out important documents regarding the contributions of religion to American life. Finally, plaintiffs suggested that secular humanism religion constrained their own religious beliefs and practices.

This case is punctuated with a lengthy list of expert witnesses on both sides of the argument and a judge--Justice Brevard Hand– who was willing to make not only the talk, but the walk. Justice Hand held: (1) that secular humanism was a religion, with a belief system that exalted humankind as moral but denied the "transcendent and/or supernatural: there is no God, no creator, no divinity";[568] (2) "that theistic religions were effectively discriminated against";[569] (3) and, thus the textbooks involved violated the establishment clause of the First Amendment of religious advancement.

Justice Hand stated:

> The question arises how public schools can deal with topics that overlap with areas covered by religious belief. Mere coincidence between a statement in a textbook and a religious belief is not an establishment of religion. However, some religious beliefs are so fundamental that the act of denying them will completely undermine that religion. In addition, denial of that belief will result in the affirming of a contrary belief and result in the establishment of an opposing religion.[570]

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[568]Ibid., 979.

[569]Ibid., 981.

[570]Ibid., 987

In 1995, secular humanism is still a topic of converstion in the public schools. Religious fundamentalist groups want to return prayer to the classroom to combat what they perceive as the nonreligion of secular humanism.

> If the Supreme Court eventually should rule that it is a religious belief and that public schools are unconstitutionally advancing this dogma . . . the implications would be staggering. Practically all facets of the public school curriculum would seem vulnerable to First Amendment challenge.[571]

Graduation Exercises

In America the graduation tradition began in 1642 at Harvard. The president of the institution prayed and members of the graduating class delivered addresses. Public high school commencement exercises began in 1842 and followed the same university format which included prayer.[572]

Following long established traditions, public schools continue to open the commencement exercise with an invocation and close the program with a benediction even after the school prayers decisions of the 1960s.[573] Beginning in the 1970s, some students and their parents began challenging the constitutionality of the inclusion of prayers in graduation exercises.

In a 1972 Pennsylvania case, Wood v. Mt. Lebanon Township School

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[571]Martha M. McCarthy, "Emerging and Reemerging Issues in Church-State Relations," School Law in Changing Times, ed. M. A. McGhehey (Topeka: National Organization on Legal Problems of Education, 1982), 66.

[572]John W. Whitehead, The Rights of Religious Persons in Public Education (Wheaton, Illinois: Crossway Books, 1991), 209.

[573]Engel v. Vitale, 370 U.S. 421 (1962) and Abington School District v. Schempp, 374 U.S. 203 (1963).

District,[574] the plaintiffs claimed that having an invocation and a benediction as parts of the graduation ceremony violates the establishment clause, and is an improper use of tax monies. Based on the fact that attendance is not compulsory at graduation ceremonies, the District Court ruled that the practice of including invocation and benediction by a clergyman did not violate establishment or free exercises clauses, and the complaint was dismissed.

The issue in Lemke v Black[575] was where to hold graduation. The 1973 graduating class of the Ashwaubenon High School voted to hold their graduation at the Nativity Roman Catholic Church. The 1974 graduating class also voted to hold its ceremony at the same church. Two graduating seniors and the father of one of the students objected to holding a public school graduation in a Roman Catholic church. They sought and were granted a preliminary injunction to halt graduation in the church. The District Court held that the proposed use of the Roman Catholic church for graduation was unconstitutional; therefore, the superintendent and the board members were ordered not to hold the graduation ceremony at the church involved.

Both Grossberg v Deusebio[576] and Weist v Mt. Lebanon School District,[577] filed complaints seeking to enjoin their respective school districts

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[574]Wood v. Mt. Lebanon School District, 342 F.Supp. 1293 (1972).

[575]Lemke v. Black, 376 F.Supp. 87 (1974). See also Miller v. Cooper 244 P.2d 520 (1952).

[576]Grossberg v. Deusebio, 380 F.Supp. 285 (E.D.Va. 1974).

[577]Weist v. Mt. Lebanon School District, 457 Pa. 166, 320 A.2d 362, *cert. denied,* 419 U.S. 967 (1974).

from including an invocation and benediction from the high school graduation ceremonies. In Grossberg v. Deusebio, the District Court ruled that the school district had not violated the Establishment Clause. In Weist v. Mt. Lebanon School District, the District Court dismissed the complaint, and the plaintiffs appealed to the Supreme Court of Pennsylvania. However, the Supreme Court of Pennsylvania affirmed the decision of the District Court. The decision was technically moot because the plaintiffs had already graduated.

In Graham v. Central Community School District of Decatur,[578] a civil rights action was filed challenging the constitutionality of including invocation and benediction as a part of the high school graduation ceremonies conducted by the school district. For at least twenty years the defendant's graduation ceremonies have been opened by an invocation prayer by a Christian minister and closed by Christian minister's benediction. The plaintiff asked that the invocation and benediction be removed from the graduation ceremonies.

Plaintiff Robert Graham testified that he is a Unitarian Universalist, and that he is personally offended by the use of Christian prayers at public school functions including graduation exercises. Three expert witnesses were called by the plaintiff, and all of them opined that invocations and benedictions at graduation exercises serve a religious purpose, not a secular purpose. All three opined that a public school offering an invocation and benediction at public school events, such as graduation exercises, is advocating religion.

Only two witnesses testified for the defendant, Virginia Webb, a member of the defendant's board of directors, and Thomas Spear, the

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[578]Graham v. Central Community School District of Decatur, 608 F.Supp. 531 (D.C.Iowa 1985).

defendant's new superintendent. Mrs. Webb gave no opinion as to the purpose of the invocation and benediction at graduation exercises. She stated as far as she knows the school has always done it. Superintendent Spear testified that during his education career he has attended many graduation exercises, and each one began with an invocation and ended with a benediction. He opined that the main purpose of having an invocation and benediction in graduation exercises is "tradition." He also testified that he believes that it lends a "serious note" to the ceremony. He also stated he does many things in school requiring a "serious note," and that he does them without an invocation in advance. He also testified that in his opinion the invocation and benediction also serve a religious purpose.

The court decision in this case was based on the evidence developed at the hearing and on applying the evidence to the three-part Lemon test. The District Court ruled that the inclusion of the religious invocation and benediction violated the establishment clause of the First Amendment. It was the judgment of the court that the defendant is prohibited from including in its graduation exercises this year and subsequent years any religious invocation or religious benediction.

Three other courts, Doe v. Aldine Independent School District,[579] Kay v. David Douglas School District No. 40,[580] and Bennett v. Livermore Unified School District,[581] have held that graduation prayer violates the

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[579]Doe v. Aldine Indepedent School District, 563 F.Supp. 883 (1982).

[580]Kay v. David Douglas School District No. 40, 738 P.2d 1389 (Or. 1987).

[581]Bennett v. Livermore Unified School District, 193 Cal. App. 3rd

establishment clause. The courts ruled that the practice violates all three parts of the Lemon test.

In Stein v. Plainwell Community Schools[582] a federal district court upheld the use of prayers as invocations and benedictions in high school graduation exercises in two Michigan Communities. The practice in Steinwell High School permitted a brief invocation and benediction by a graduating senior, with no censorship of the prayers by the school administration. The custom in Portage Central High School called for recitation of an invocation and a benediction by members of the clergy selected by representatives of the graduating class. The minister was not asked to present the prayers for approval, but he was asked to keep them brief and "nondenominational." In supporting these practices, the court stressed four general factors:

> . . . attendance at graduation is voluntary; the presence of parents and other adults minimizes the proselytizing potential of the prayers; the prayers are isolated events that take only a few moments once a year, rather than daily rituals; and no evidence suggested that speakers had intended to use prayers to promote a particular religious beliefs.[583]

On appeal, the Sixth Circuit Court of Appeals ruled that "non-sectarian" and "nonproselytizing" prayers could be delivered as invocations. The court decision was based on the public nature of graduation, the buffering

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1012, 238 Cal Rptr. 819 (Cal. Ct. App, 1987).

[582]Stein v. Plainwell Community Schools, 610 F.Supp 43 (W.D. Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

[583]Benjamin B. Sendor, "Religion and the Public Schools," Education Law in North Carolina 1 (January 1988): 16-7.

presence of parents, and the fact that graduation exercises are just ceremonial functions rather than instructional activities designed to transmit knowledge or values. In this particular case, however, the court found that the prayers used violated the establishment clause because of their specific Christian content.[584]

In 1989, in Sands v. Morongo Unified School District,[585] plaintiffs brought suit against the school district to restrain it from including invocations and benedictions in the district's graduation exercises. The Superior Court prohibited the school district from having invocations and benedictions in the graduation exercises in the district's four high schools. The school district appealed the decision of the trial court. The Court of Appeal held that nonsectarian invocations and benedictions did not violate the establishment clause of the First Amendment or provisions of the California Constitution forbidding the school district from aiding religious or sectarian purpose or teaching.

In a recent landmark decision Lee v. Weisman,[586] the Supreme Court addressed the issue of prayers at graduation exercises. Deborah Weisman, a middle school student, and her parents had sought a temporary restraining order forbidding public school officials from incorporating prayers in the graduation ceremony. Shortly before the ceremony, the District Court denied the motion of the Weisman family for lack of adequate time to consider it.

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[584]Ibid.

[585]Sands v. Morongo Unified School Dist., 262 Cal.Rptr. 452 (Cal.Ct. App. 1989).

[586]Lee v. Weisman, 112 S.Ct. 1649 (1992).

Deborah and her family attended the graduation exercise, and the rabbi gave the prayers. The rabbi gave thanks to God for "the legacy of America, where diversity is celebrated and the rights of minorities are protected."[587]

Subsequently, Weisman sought a permanent injunction barring Providence public school officials from inviting clergy to deliver invocations and benedictions at future graduations. It seemed likely that such prayers would be conducted at Deborah's high school graduation. The District Court forbade school officials from continuing the use of invocations and benedictions on the grounds that it violated the establishment clause of the First Amendment. The Court of Appeals affirmed the decision of the District Court. Petition for certiorari was granted. In a vote of five to four, the Supreme Court held that allowing prayers at graduation exercises is unconstitutional.

In Jones v. Clear Creek Independent School District,[588] graduating seniors and their parents brought suit to prohibit the school district from permitting invocations and benedictions at public high school graduation exercises. The District Court ruled in favor of the school district and appeal was taken. The Court of Appeals affirmed the decision of the District Court. The students and their parents petitioned for writ of certiorari. The Supreme Court of the United States granted the petition, vacated the judgment, and remanded. On remand, the Court of Appeals held that:

> (1) primary effect of resolution was secular; (2) resolution's

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[587]Nancy Gibbs, "America's Holy War," Time 138, no. 23 (December 9, 1991) 62.

[588]Jones v. Clear Creek Independent School District, 930 F.2d 416 (5th Cir. 1991), 977 F.2d 963 (5th Cir. 1992).

> proscription of sectarianism did not in itself excessively entangle government with religion; (3) resolution was not an unconstitutional endorsement of religion by the government, as it merely permitted nonsectarian, nonproselytizing invocation if the seniors chose to have one; and (4) resolution did not unconstitutionally coerce participation of objectors in a government-directed formal religious exercise.[589]

In a 1994 case, Harris v. Joint School District[590] students and a parent of students challenged the inclusion of prayer in their high school graduation ceremony. They asserted that the inclusion of prayer violated the Idaho Constitution and the establishment clause of the United States Constitution. Although the District Court declined to review state law claims, it concluded that prayers did not violate the establishment clause.

On appeal, the Ninth Circuit, relying on Lee v. Weisman,[591] considered the extent of state involvement in the graduation program as well as the obligation of students to participate in the activity. Using Lee,[592] the court concluded that the facts demonstrated state involvement and obligatory student participation in the religious activity. The court ruled that the inclusion of school prayer in the high school graduation program violated the establishment clause of the First Amendment of the United States Constitution.

The conflict over prayers at graduation exercises is not over. The Lee

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[589]Ibid.

[590]Harris v. Joint School District No. 241, 821 F.Supp. 638 (9th Cir. 1994).

[591]Lee v. Weisman, 112 S.Ct. 2649 (1992).

[592]Ibid.

Court[593] decision only ruled that school officials cannot invite a member of the clergy to offer a prayer at a school-sponsored event. While the Court held that it violated the establishment clause for school officials to invite clergy to pray at school-sponsored events, the Court reaffirmed the Mergens[594] decision which allows student-initiated prayer and Bible study on campus: "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and other students. See Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226 (1990)."[595]

Nothing in the Lee opinion decreases students' rights with regard to voluntary prayer and Bible Clubs. Instead, by reaffirming Mergens, the Lee Court, in effect, repeated its concern over perceived hostility to religious speech on campus: "The establishment clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."[596]

Distribution of Religious Literature

Gideon Bibles

Gideon International is a nonprofit corporation organized under the laws

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[593]Ibid.

[594]Westside Community Board of Education v. Mergens, 496 U.S. 226 (1990).

[595]Lee v. Weisman, 112 S.Ct. 2649, 2661 (1992).

[596]Westside Community Board of Education v. Mergens, 496 U.S. 226, 248 (1990) (citing McDaniel v Paty, 435 U.S. 618, 641 (1978).

of the State of Illinois, whose object is "to win men and women for the Lord Jesus Christ, through . . . (c) placing the Bible--God's Holy Words--or portions thereof in hotels, hospitals, schools, institutions, and also through the distribution of same for personal use."[597] The Gideon Society has been distributing portions of the Bible in elementary schools since 1908. Gideon Bibles distributed contain the New Testament, Psalms, and the Book of Proverbs from the King James Version of the Bible. Customarily, the Gideons would write the school superintendent requesting permission to go into individual schools and give one of the books to each student in grade five through high school.[598] Such was the case in 1951 when the Gideon Society sent a letter to the Rutherford, New Jersey Board of Education requesting permission to furnish free a copy of God's word to each public school student in grades five through high school. The school board approved the proposal and each child whose parents signed a letter granting permission for his child to receive a Gideon Bible was given one without obligation on the part of the parent or the board of education. However, there was opposition at the meeting from a Catholic parent and a Jewish parent. Both claimed that the Gideon Bible is "a sectarian work of peculiar religious value and significance to members of the Protestant faith."[599]

The plaintiff, Bernard Tudor, of the Jewish faith, claimed that the distribution of the Gideon Bible to children of the Jewish faith violated the

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[597]Tudor v. Board of Education, 100 A.2d 857, 858 (1953).

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

[599]Tudor v. Board of Education, 100 A.2d 857, 859 (1953).

teachings, tenets and principles of Judaism, while plaintiff Ralph Lecoque, of the Catholic faith, claimed its distribution to children of the Catholic faith violated the teaching, tenets and principles of Catholicism. After the action was commenced, the child of Ralph Lecoque transferred from public school to a Catholic parochial school; therefore, his action as a parent became moot. Originally, the State of New Jersey was named as a defendant party, but the action was dismissed.

On the advice of legal counsel, the school board developed a distribution system for the Gideon Bibles. Before the books were distributed, a temporary injunction was granted to halt distribution. After a hearing, the New Jersey Superior Court, Law Division, ruled in favor of the school board and lifted the injunction. On appeal, the court reinstated the injunction as requested, and the case was heard by the New Jersey Supreme Court.

The New Jersey Supreme Court saw the practice as sectarianism. The defendant school board was accused of showing a preference by permitting the distribution of the King James Version which was unacceptable to Catholics and Jews. This violated the mandate of the First Amendment, as applied to states by the Fourteenth Amendment prohibiting the making of any law "respecting an establishment of religion,"[600] and the requirement of Article I, paragraph 4 of the New Jersey Constitution that "there shall be no establishment of one religious sect, in preference to another."[601] As stated by Mr. Justice Black in his majority opinion in Everson: " The 'establishment of religion' clause of the First Amendment means at least this: Neither a state

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[600]Ibid., 864.

[601]Ibid.

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."[602] Mr. Justice Douglas in his majority opinion in Zorach stated: "The government must be neutral when it comes to competition between sects."[603]

The court insisted that activities, especially those of a religious nature, which separated and 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)[604]

Distribution of the Gideon Bible was judged to be more than an accommodation of religion. The New Jersey Supreme Court ruled that the distribution of the Gideon Bibles violated the constitutions of New Jersey and the Federal Government.

In Brown v. Orange County Board of Public Instruction,[605] parents

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[602]Everson v. Board of Education, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

[603]Zorach v. Clauson, 343 U.S. 306, 314, 72 S.Ct. 679, 684, 96 L.Ed. 954, 962 (1952).

[604]State ex rel. Weiss v. District Board, 76 Wis. 2177, 44 N.W. 967, 7 L.R.A. 330 (S.Ct. 1890).

[605]Brown v. Orange County Board of Public Instruction, 128 So.2d 181

brought action seeking declaratory and injunctive relief against school officials who approved the distribution of the King James version of the Bible in the public schools. The plaintiffs claimed that as taxpayers and as parents of children attending public schools in Orange County they had standing in the case. The plaintiffs' complaint covered the history of the Gideon Society, and claimed that the distribution of the Gideon Bible violated the tenets of their religious faith and favored the tenets of the Protestant faith. The defendants' distribution of this book also violated certain rights of the defendants under the United States and Florida Constitutions.

The defendants filed a motion to dismiss the case on the grounds that the plaintiffs had failed to state a cause of action; that the plaintiffs had no standing in the case; that the plaintiffs had failed to allege sufficient facts entitling them to declaratory or injunctive relief; and that the plaintiffs had not alleged any facts tending to show a violation by the defendants of any rights guaranteed to the plaintiffs by the Constitutions of the United States and the State of Florida.

The lower court chose to dismiss the defendants' motion but did not give any particular reason for dismissal. The plaintiffs chose not to amend their complaints; a final judgment was entered on the dismissal and the plaintiffs appealed to the Supreme Court.

The Supreme Court transferred the case to the District Court of Appeal. The District Court of Appeal ruled that the distribution of Gideon Bibles tended to impair the rights of the plaintiffs and their children to be free from governmental action which discriminated in their free exercise of

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(Fla. 1960).

religious belief, thus reversing the decision of the lower court.

Two cases involving the distribution of Bibles were reviewed earlier in Chapter III. See Goodwin v. Cross County School District No. 7, pages 134-136 and Meltzer v. Board of Public Instruction of Orange County, Florida, pages 136-142.

In Berger v. Rensselaer Central School Corporation,[606] a father challenged the school's policy for the distribution of religious literature in the classrooms. The written policy stated:

> 5501.1 In the best interest of the student body, no person, group, or other organization shall distribute, display, or exhibit any book, tract, map, picture, sign, or other publication of any type on the Rensselaer Central School Corporation premises unless authorized by the superintendent and the building principal.
> 5501.2 Approval for the distribution, display or exhibit of any materials by any persons, group, or organization not sponsored by the school must be cleared 72 hours (three (3) school days) in advance of any distribution, display, or exhibit through the superintendent and the building principal[']s offices. If permitted, the time and location of distribution, display, or exhibit is to be determined by the administration. * * *
> 5505.5 Any person, group, or organization not a part of the Rensselaer Central School Corporation[ ] that does not abide by the above policy, at the request of school officials, shall be considered guilty of trespass and reported to local civil authorities.
> 5505.6 Questions concerning the distribution of materials on school premises that are not answered by the above policy shall be presented to the Board of School Trustees for clarification.[607]

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[606]Berger v. Rensselaer Central School Corporation, 982 F.2d 1160 (7th Cir. 1993).

[607]Ibid., 1162-1163.

The superintendent and the principal had total discretion to grant or deny access to school property. There were no guidelines in the policy to assist the superintendent and the principal on how to exercise their discretion except the general reminder to act in students' best interests. The policy did not cover when non-school personnel could make presentations and distributions during times ordinarily reserved for instruction.

In the fall of 1989, Allen Berger sent a letter to the Rensselear Central School Corporation requesting they discontinue the practice of permitting Gideons to distribute Bibles to fifth grade students. The board of education discussed the letter and decided not to alter its policy regarding the Gideons. Unable to get the school board to change its policy of distribution of Bibles by the Gideons, Allen Berger filed a suit on behalf of his children, Moriah and Joshua Berger, seeking to have the Corporation's practice declared unconstitutional as a violation of the First Amendment directive that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[608] The District Court dismissed the Bergers' suit on summary judgment. On appeal, the Court of Appeals for the Seventh Circuit ruled that the District Court had erred in finding no establishment clause violation under Lemon.[609] The Court of Appeals reversed the decision of the circuit court in ruling that classroom distribution of Gideon Bibles to fifth grade public school students violated the establishment clause of the First Amendment. The Rensselaer Central School Corporation

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[608]U. S. Constitution, Amendment I.

[609]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

petitioned for a rehearing *en banc*, and the petition was denied.

Other Materials

Distributing religious literature on school grounds is more than a religious issue. It is a part of the right of free speech. Both are protected by the First Amendment.

In Burch v. Barker,[610] present and former students and parents sued the school district, the principal, the superintendent, and the board of directors challenging high school policy requiring prior approval before distribution of student-written materials. Five students had distributed an anonymous newspaper, *Bad Astra*, without knowledge of school authorities. The general content of the articles in the paper was critical of the school administration policy. It contained no profanity or obscene language.

Several days after the distribution of the newspaper, school authorities identified the student authors who had used pen names. The students were disciplined in the form of a letter of reprimand to be placed in each student author's school record. The student authors appealed to the superintendent who supported the principal's disciplinary action. They did not appeal to the School Board as required by the old policy. Before, during, and after the distribution of *Bad Astra*, the Renton School Board and School Superintendent were in the process of revising the old policy. The new policy also required prior approval of student writings before distribution.

The United States District Court for the Western District of Washington held that: (1) the new high school prior approval policy, as a

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[610]Burch v. Barker, 651 F.Supp. 1149 (W.D.Wash. 1987)

whole, was substantially constitutional; (2) that section of the policy prohibiting distribution of unapproved written material on school premises or in a manner reasonably calculated to arrive on school premises was unconstitutional; (3) that section of policy prohibiting expression that encourages actions which endanger health and safety of students was unconstitutionally vague; (4) that section of policy governing procedure was unconstitutional to the extent it did not provide time limits for decision making at every level of the appeal process; (5) the question of facial constitutionality of old policy was moot; (6) failure of present and former high school students and parents to exhaust administrative remedies did not preclude consideration of constitutionality of policy as applied to student authors; and (7) the old policy was constitutionally applied.

In Thompson v. Waynesboro Area School District,[611] students brought suit against the school district alleging that limitations placed on students' distribution of religious newspapers violated their First Amendment rights. On April 28, 1986, Bryan Thompson and Marc Shunk, students at Antietam Junior High School, distributed copies of a newspaper entitled *Issues and Answers* in the hallway before school began. *Issues and Answers* is a religious newspaper, published in Illinois by a group known as "Student Action for Christ." The newspaper contains articles and cartoons which supports religious tenets such as a personal relationship with God and the adherence to the principles of the Bible. Thompson's and Shunk's reason for distributing *Issues and Answers* was to communicate the Christian message to fellow

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[611]Thompson v. Waynesboro Area School District, 673 F.Supp. 1379 (M.D.Pa. 1987). See also Hemry and Hemry v. School Board of Colorado Springs School District No. 11, 760 F.Supp. 856 (D.Colo. 1991).

students.

A teacher gave the principal, Robert Mesaros, a copy of the newspaper. The principal consulted the superintendent and met with Bryan Thompson and Thompson's father on April 28, 1986, concerning the newspaper. The principal claimed that there was a school policy which required prior preview before distributing literature.

The next day the principal wrote a memorandum to the Thompsons outlining certain restrictions which would be imposed on further distributions of *Issues and Answers*. Bryan would only be permitted to distribute *Issues and Answers* before 7: 50 a.m. outside the school building, on the sidewalk and the parking lot. During the school day Bryan would be required to keep extra copies in his locker. The reason for this action was a policy which required prior approval before materials could be displayed, posted, or distributed on school property. In the past, the principal had generally prohibited nonstudent groups from distributing literature which was not sponsored by the school.

On May 8, 1986, Bryan Thompson, Marc Shunk, and Christopher Eakle again distributed copies of *Issues and Answers* in the hallways before the opening of school. A teacher asked the three boys to stop giving out the newspapers. They continued to distribute papers and were approached by an assistant principal. They were placed on in-class suspension and informed by the principal that if they continued to disregard his instructions for distributing the newspapers, they would no longer be allowed to distribute *Issues and Answers* at any time.

On May 12, 1986, Marc Shunk and Bryan Thompson again distributed *Issues and Answers* in the hallways before school. Again they were confronted

by a teacher and taken to the principal's office. This time they were placed in in-school suspension for the entire day and the principal informed the parents in writing that the reason for the boys' suspension was "willful disregard for school district policy and direct disobedience of [Mesaros'] directive."[612] The three distributions listed above did not cause any disturbance.

In addition to the conditions surrounding the plaintiff' distribution of *Issues and Answers*, other issues were relevant to the claims made by the plaintiffs. For example, students at Antietam Junior High School had the opportunity to participate in noncurriculum activities, such as student clubs which met after school. The Newspaper Club was one such club, which published a school newspaper entitled *Round-Up* . A faculty member from the English curriculum supervised the *Round-Up* staff which was made up of students. The school newspaper was distributed to students during homeroom. It contained articles, poems, and lists prepared by students. The school principal supervised its content for the purpose of removing or editing materials which were obscene, libelous, or substantially disruptive. The plaintiffs did not request permission to form a club or to meet during the after-school activity period.

On motions for summary judgment the United States for the Middle District of Pennsylvania ruled that:

> (1) students' distribution of religious newspapers in the hallways of junior high school during noninstructional time was not a "meeting" under the Equal Access Act and was not protected by the Act; (2) school district violated the students' freedom of speech in violation of First Amendmentby restricting

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[612]Ibid., 1381.

> students' distribution of religious literature to area outside the school; and (3) school district did not violate students' First Amendment right to free exercise of religion by requiring the students to distribute religious newspapers outside school building.[613]

In Miller v. Cooper,[614] the plaintiffs bought suit as taxpayers and members of the Board of Directors of the Lindrith School District in Rio Arriba County against the officers of the State Board of Education, the County Board of Education, the State Director of the Department of Certification , the principal of the school, three of its teachers, its janitor and the minister of the Baptist Church at Lindrith. The plaintiffs sought to have the principal and teachers permanently barred from teaching in the public schools of New Mexico because they claimed teachers were teaching religion in the public school at Lindrith and distributing religious magazines among the pupils and other acts which they claimed violated provisions of the federal and the state constitution relating to the separation of church and state. They sought to invoke the penalty of Section 55-1102 of the New Mexico Constitution, which reads:

> No teacher shall use any sectarian or denominational books in the schools or teach sectarian doctrine in the schools, and any teacher violating the provisions of this section shall be immediately discharged, his certificate to teach school revoked, and be forever barred from receiving any school moneys and employment in the public schools of the state. Provided, that this section shall not be construed to interfere with the use of school buildings for other purposes authorized by the county

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[613]Ibid., 1379.

[614]Miller v. Cooper, 244 P.2d 520 (1952).

board after school hours.[615]

The trial court entered judgment of dismissal against all defendants except against the principal and one teacher. The judgment enjoined the principal and the teacher from teaching religion in the school but denied the other relief sought against them, and that denial was the sole bases of the appeal. On appeal, the Supreme Court of New Mexico reversed in part the decision of the trial court by ruling that the trial court had erred when it refused to enjoin the distribution of sectarian religious magazines among the pupils, and affirmed in part the decision of the trial court, by ruling that it had acted properly in refusing to permanently bar the principal and the teacher from teaching in the public schools. The case was remanded to the trial court with instructions to enter a new judgment prohibiting the distribution of religious literature in the school.

Bible Study Courses

It is constitutional to teach about religion, but it is unconstitutional to teach religion in public schools. Numerous secondary schools in North Carolina teach a course in the Bible. The Iredell-Statesville Board of Education voted in March 1994, to add a Bible course at each of the four high schools. A private community organization agreed to raise the funds for the teachers of the Bible classes. The Iredell-Statesville Board of Education will control the curriculum to be taught and the hiring of the teachers. The Bible course will be offered as a social studies elective and will teach the historical

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[615]Ibid.

and literacy influence of the Bible.[616]

In Wiley v. Franklin,[617] students and their parents initiated action against the boards of education and their members for declaratory and injunctive relief to prohibit the permitting and sponsoring a course of Bible study and instruction in the city and county elementary schools. The cases were combined for trial. The plaintiffs contended that the defendant Boards of Education of Chattanooga and Hamilton County, Tennessee and their membership had violated their religious freedom.

The Bible study courses were first offered in 1922 by a citizens' group who agreed to fund the Bible teachers' salaries. Over the years the citizens' sponsoring group organized itself into a committee known as the "Public School Bible Study Committee." This committee raised funds for the payment of the Bible teachers, selected and assigned teachers, prepared the Bible study curricula, and conducted teacher-training sessions. Though assigned and paid by the Bible study committee, the Bible teachers were subject to supervision and removal by the principals of school where they served. While it appeared no certain religious commitment was required for membership in the Public School Bible Committee, membership was made up principally, if not entirely, of persons associated with the Christian religious faith and with Protestant evangelical churches within that faith.

The Bible study courses were financed by contributions from churches

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[616]Audrey Montgomery, "Bible Course Will Be Offered In Schools," Statesville Record and Landmark, 15 March 1994, sec. 1A, p. 3.

[617]Wiley v. Franklin, 468 F.Supp 133 (1979), 474 F.Supp. 525 (1979), 497 F.Supp. 390 (1980).

and "Love Offerings" from the parents of those children who participated in the Bible study classes. In 1977, the committee raised and expended $230,000 in financing the public school Bible study courses. No public funds were spent for the Bible study classes except for incidental expenses associated with cleaning and supervising the classes used by the Bible teachers.

The policy statement of the Chattanooga School Board regarding the Bible study course was set forth 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 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.[618]

The policy of the Hamilton County School Board regarding the Bible study course was set forth 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

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[618]Wiley v. Franklin, 468 F.Supp. 133, 137.

> pervading influences in the country's government, history, and the very fabric of American society.[619]

During the 1977-78 school year and in prior years the policies governing the Bible study courses by both school boards provided that the courses were to be elective only and that students were to be enrolled only upon written request from their parents. Grading students was to be optional with the Bible teacher, but such grades were not to be a part of the student's academic record. Students not attending the Bible classes were to remain in the regular classroom and be under the instruction and supervision of the regular classroom teacher. In compliance with theses policies, Bible study courses were offered in all fifty of the City and County elementary schools during the 1977-78 school year. A total of 19, 924 students out of 21, 356 elementary students in the two school systems were enrolled in the Bible study courses during that school year. The classes were taught in kindergarten through sixth grades for thirty minutes each week for a total of thirty two weeks thus providing a total of eight hours per semester or sixteen hours each school year.

Prior to the 1978-79 school year a number of Bible courses were taught in regular classrooms in violation of Board policy, and in some cases there were students in the class who had not elected to take the course. These students were sent elsewhere and often given busy work assignments or were otherwise omitted from any meaningful classroom assignment or supervision.

After the filing of the lawsuit and upon advice of trial counsel, and in an effort to correct these matters, both boards modified their policies for governing the offering of Bible courses during the current school year. Students in Bible

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[619]Ibid.

classes were to be taught in a classroom other than the student's regular classroom with programs and activities of educational value being conducted in the regular classrooms. To accomplish this, only one-half of the students who were enrolled in the Bible classes were to receive such instructions in any one school semester, thus assuring that the students who did not enroll in the Bible classes would remain in their regular classrooms with a majority of their fellow students. These modifications in effect reduced the amount of Bible instruction at each grade level by one-half for the current school year.

Although Bible teachers were under the supervision of the principals and other supervisory personnel, the selection of the teachers was made by the Public School Study Committee. There were no set standards for the selection of such teachers other than that they had previously taken Bible study courses either in religious or secular schools or colleges. The State of Tennessee did not have certification standards in the elementary level in the specific subject of Bible instruction. There was no sectarian religious test given in selecting Bible teachers, but one member of the selection team stated that in interviewing prospective teachers she inquired as to whether they had a "love of God."[620] A majority of the 18 teachers teaching Bible courses in the elementary schools had some college training, and a few were college graduates. Two or three held teacher's certificates either in Tennessee or other states. All were members of Protestant churches. All of the Bible teachers had attended at least one workshop conducted by the Public School Committee with the following basic instruction:

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[620]Ibid., 138.

> We are to let the Bible speak for itself. Under no circumstances are we 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.[621]

Bible teachers were not required to use any particular translation or version of the Bible, although the King James version was most frequently used. The most frequently used method of instruction was story-telling.

The United States District Court for the Eastern District of Tennessee found the Bible study courses were not primarily history, literature, or otherwise secular, but rather were of a religious nature, that the courses tended to advance the Christian religious faith. Also, with a Bible study committee independent of the boards setting curriculum, and selecting, training and supervising teachers, the Bible study programs constituted an excessive entanglement between government and religion. The District Court held that the Bible study courses previously taught, including the modifications made in the 1978-79 school year violated the religious freedom provisions of the First Amendment. The Bible study courses were stayed for forty-five days to permit the boards of education to devise, adopt, and submit to the District Court the following changes in the elementary school Bible study courses:

> (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

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[621]Ibid.

> 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 personnel 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.[622]

None of the foregoing instructions prevented the defendant school boards from entering into an agreement with any individual or organization including the Public School Study Committee for the funding of the elementary school courses. Also, the instructions of the District Court did not bother with elective polices and practices already in effect.

The school board made the instructed revisions. In the second stage of the suit, Wiley v. Franklin,[623] the District Court reviewed the revised Bible course guidelines. The District Court held that the proposed curriculum guidelines would be approved if: (1) under the teacher standards, the part that gave permission for employment of Bible teachers with only 12 hours in Bible

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[622]Ibid., 152.

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

literature were eliminated; (2) the court retained jurisdiction of the lawsuit during the initial year of operation of the court-approved plan for Bible Studies; (3) the proposed lesson on teaching of the resurrection of Jesus as recounted in the New Testament were eliminated. The District Court warned the school boards that:

> 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 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 classroom instruction.[624]

After the school boards used the revised guidelines for Bible study courses for one year, the District Court in the third stage of Wiley v. Franklin,[625] found no violation of the First Amendment in the Bible study courses as taught and conducted in the Chattanooga public elementary schools; therefore, they denied the plaintiff's motion to prohibit that program. On the other hand, the District Court found that three lessons taught in the

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[624]Ibid., 531.

[625]Wiley v. Franklin, 497 F.Supp. 390 (1980).

elementary schools of Hamilton County were religious in nature; therefore, they granted the plaintiff's motion to prohibit that program.

In the case of Crockett v. Sorenson,[626] the issue was the constitutionality of a Bible study program for fourth and fifth grade students in the public schools of Bristol, Virginia. The Bible teaching classes had been provided for over forty years. The classes were taught for forty-five minutes once a week in six elementary schools. Students did not receive a grade or academic credit for the classes.

A ministerial alliance had complete control over staffing and curricular decisions for the program. In 1978, another private group, the Bristol Council of Religious Education, began sponsoring the program. In 1982, the group was renamed Bible Teaching in the Public Schools. Members of the group were ministers and lay representatives from the different Protestant denominations in the area.

The Ministerial Association had prepared a course of study outline, objectives to be taught, materials to be used, and the portions of the Bible to be taught. Teachers used the outline from its inception until 1982 with no substantial modifications. Until February 1982, the class routine consisted of Bible teaching, prayers and singing of hymns. After February 1982, the prayers and singing of hymns were discontinued from the program. Although not specified by the Ministerial Association, teachers used the King James version of the Bible.

Classes were voluntary and parents signed a request card to enroll children in Bible classes. Until 1982, students not attending the Bible classes

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[626]Crockett v Sorenson, 568 F.Supp. 1422 (1983).

were assigned to the principal's office or the library. Since 1982, an attempt was made to give the nonparticipating students a more meaningful experience. They were sent to the extension center where, in theory, they choose one of several options. In reality, their choice was study hall or physical education because the other options were classes the students had already attended in regular curriculum.

There was a certain amount of pressure for the students to enroll in the Bible classes, not from school officials or Bible teachers, but peer pressure from fellow students. This was demonstrated during the 1982-83 school year when only eighteen of 589 fourth and fifth grade students in the elementary schools chose not to participate in the Bible classes.

Though attendance was voluntary, Justice Kiser concluded that the courses were a violation of the United States Constitution because there was no secular purpose and control had been relinquished by the state. However, Justice Kiser maintained:

> The First Amendment was never intended to insulate our public institutions from any mention of God, the Bible or religion, because when such insulation occurs, another religion, such as secular humanism, is effectively established.[627]

The court did support the legality of Bible study in the schools when the purpose was educational and not religious.

Compulsory Attendance

Over the years, courts have supported the idea that states have the

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[627]Ibid., 1425.

right to establish compulsory attendance laws. There is a commonly held belief that an enlightened citizenry is necessary for the progress and stability of the United States. "Between 1918 and 1954, all states had statutes of compulsory attendance."[628] The integration movement, beginning in the fifties, caused some states to abandon compulsory attendance statutes. Today, home schooling had added a new dimension to compulsory attendance statutes.

An Illinois case in 1901, State v. Bailey,[629] set the precedent for the foundation for compulsory attendance laws. In upholding the state's authority to compel school attendance, even with parent opposition, the court said:

> The welfare of the child and the best interest of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education. Statutes making it compulsory upon the parent, guardian, or other person having the custody and control of children to send them to public or private schools for longer or shorter periods during certain years of the life of such children have not only been upheld as strictly with the constitutional power of the legislature, but have generally been regarded necessary to carry out the express purposes of the constitution itself.[630]

In a 1925 case, Pierce v. Society of Sisters,[631] at issue was an Oregon statute which required every child, ages eight to sixteen, to attend public school only. A private Catholic school challenged the Oregon attendance statute as

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[628]Hudgins and Vacca, 263.

[629]State v. Bailey, 61 N.E. 730 (Ill. 1901).

[630]Ibid., 731-732.

[631]Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 510, 69 L.Ed. 1070 (1925).

violative of their property rights and business interests as private schools and the right of teachers to practice in their profession. In declaring the Oregon statute unconstitutional, the Supreme Court of the United States declared: "[T]he fundamental theory of liberty upon which all governments in this Union rest excluded any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[632]

Wisconsin v. Yoder[633] is a landmark decision on compulsory attendance handed down by the Supreme Court in 1972. In this case, parents were seeking voluntary exclusion from public school after the eighth grade. Wisconsin's compulsory attendance law required students attend public or private school until reaching the age of sixteen.

Jonas Yoder and Wallace Miller, Old Order Amish members, and Adin Yutzy, a member of the Conservative Amish Mennonite Church, refused to send their children to school beyond the eighth grade. The men were charged and convicted of violating Wisconsin's compulsory school-attendance law. They defended their position on the basis that Wisconsin's compulsory school attendance law violated their rights under the First and Fourteenth Amendments. On appeal the Wisconsin Circuit Court also ruled against Yoder, Miller, and Yutzy.

When the case was appealed to the Wisconsin Supreme Court, the Amish brought in expert witnesses to testify on their way of life. Dr. John Hostetler testified that:

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[632]Ibid.

[633]Wisconsin v. Yoder, 406 U.S. 205 (1972).

> Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separated from, rather than integration with, contemporary worldly society.
>
> Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and the ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life.[634]

It was pointed out that the Amish were not opposed to schooling, since their children did attend elementary school. They agreed that their children needed the basic skills in the "three R's" in order to the read the Bible, be good farmers and citizens, and be able to communicate with the non-Amish people in the course of daily life.

It was further emphasized that sending Amish children to high school may not only cause psychological harm to Amish children, but may eventually destroy their way of life which had remained constant for many years. Aided by a three hundred year history as an identifiable religious group and a long history as a successful and self-sufficient segment of American society, the Amish have demonstrated their religious beliefs and their way of life.

The Wisconsin Supreme Court recognized the importance of the state's compulsory school-attendance laws and, at the same time, recognized the importance of the Amish being able to keep their children out of school beyond the eighth grade. The Wisconsin Supreme Court reversed the decision of the lower courts.

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[634]Ibid., 211.

On petition by the State of Wisconsin, the Supreme Court of the United States granted a writ of certiorari to review a decision of the Wisconsin Supreme Court which ruled that convictions of Amish parents for violating the State' s compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment as applied to the States by the Fourteenth Amendment. After reviewing the case, the United States Supreme Court agreed with the ruling of the Wisconsin Supreme Court.

In a 1981 case, Church of God (Worldwide Texas Region) v. Amarillo Independent School District,[635] members of the church brought suit against the school board to prohibit the school board from enforcing an attendance policy which limited the number of excused absences for religious holidays to two days each school year. In granting the plaintiffs' motion for summary judgment the United States District Court, Northern District Texas, Amarillo Division held that the school district attendance policy, which limited the number of excused absences for religious holidays to two days each school year and provided that students receive zeros for days for which they had unexcused absences, violated free exercise of religious beliefs of plaintifffs, who were members of a church which required abstinence from secular activity on seven annual holy days.

The students belonged to the Church of God which is a religious organization with congregations throughout the United States, Canada, and fifty other countries. The church traces its beginning to the establishment of the New Testament Church as recorded in Chapter Two of the Book of Acts of

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[635]Church of God (Worldwide Texas Region) v. Amarillo Independent School District, 511 F.Supp 613 (1981).

the New Testament. The present era of the church started with a congregation in Eugene, Oregon in 1934, and the broadcast of the Radio Church of God. The current church membership is 68,000, not including children and unbaptized family members who also attend the church.

A fundamental belief of the Church of God is that members must abstain from secular activity on seven annual holy days. The foundation for these holy day is the Book of Leviticus in the Old Testament and they are fixed in accordance with the Hebrew calendar. Members are also required to attend a seven-days convocation on the Feast of Tabernacles. With the exception of the seven-day convocation all holy days are observed in each local church. The seven-day convocation is observed at a regional site designated by the church. Failure to participate in the annual holy days and the seven-day convocation is considered a sin and may result in the loss of membership in the church.

Students who are members of the Church of God miss from eight to ten school days while observing the annual holy days and seven-day convocation. Sometimes an additional two days of school is missed in travel to and from the seven-day convocation depending on its date and location. Before the adoption of the new policy on March 5, 1979, there was no set number of excused absences for religious holidays. Instead, it was left up to the discretion of the principals in the school district to determine if an absence would be considered excused. Routinely, principals had excused absences and permitted students to make up school work missed while observing the holy days and seven-day convocation and to receive a grade for that work.

Under the new policy adopted on March 5, 1979, school work missed may be made up whether an absence was excused or unexcused; however,

students with an unexcused absence would not be given credit for work made up. If a daily or test grade was recorded for the day of the absence, the student whose absence was unexcused received a zero for a grade. If no grade is recorded for students in attendance no grade will be recorded for students who are absent. Work missed for an excused absent must be made up within five school days after a student returns to school from an absence. Exceptions would be granted for a student absent for an extended period of time due to illness.

The new policy granted students a maximum of two days for religious holidays in each school year. During the1980-1981 school year the plaintiffs were given only two excused absences for school days missed while observing their holy days and seven-day convocation. The plaintiffs were given zeros for tests and daily work missed on the remaining days of absence.

The plaintiffs contended that the district's excusal policy was unconstitutional because:

> (1) it violated the free exercise of their religion as guaranteed by the first and fourteenth amendments to the United States Constitution; (2) it violates the equal protection clause of the first and fourteenth amendment of the United States Constitution by discriminating against the Plaintiffs on the basis of their religious beliefs, and; (3) it violates the due process clause of the fourteenth amendment to the United States Constitution by creating an irrebuttable presumption that the Plaintiffs are absent without justification.[636]

The court concluded that the school district's policy imposed a real and substantial burden on the plaintiffs' right to the free exercise of their religion as

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[636]Ibid., 615

guaranteed by the First and Fourteenth Amendments. The court did not find that the interests advanced by the defendants in support of the policy justified that burden. The court further concluded that the school district did not foster the establishment of the Church of God by accommodating the religious belief of the plaintiffs. Due to the court's resolution of these issues it was not necessary for the court to decide the plaintiffs' equal protection and due process arguments.

The plaintiffs' motion for summary judgment was granted. The judgment rendered prohibited the enforcement of the Amarillo Independent School District's excusal absence policy insofar as it limited the number of excused absences for religious holidays.

In State of West Virginia v. Bobby E. Riddle and State of West Virginia v. Ester Riddle,[637] parents Bobby and Ester Riddle were arrested on information given to the school attendance officer for failing to send their children to the public schools. Trial before a magistrate resulted in a conviction and a fine of ten dollars each. Appellants appealed to the Circuit Court of Harrison County where a trial *de novo* involving extensive expert testimony was held. The second trail resulted in a conviction. The appellants appealed to the Supreme Court of Appeals of West Virginia on the grounds that West Virginia Code, 18-8-1 [1951], the Compulsory School Attendance Law, was an unconstitutional violation of their rights under the First and Fourteenth Amendments to the United States Constitution because it abridged their free exercise of religion. The Court of Appeals affirmed the circuit court by holding

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[637]State of West Virginia v. Bobbie E. Riddle and State of West Virginia v. Ester Riddle, 285 S.E.2d 359 (W.Va. 1981).

that: (1) no person may ignore the compulsory school attendance law and then claim the First Amendment free exercise of religion defense to a criminal prosecution for violation of that law, and (2) sincerely held religious beliefs are never a defense to total noncompliance with the compulsory school attendance law.

Bobby and Esther Riddle were "Biblical Christians" who belonged to a Methodist sect, the Wesley, which broke away from the mainstream Methodist communion before the Civil War. Biblical Christian means they believe in the Bible as God's holy word. Bibical Christians dress plainly and do not wear makeup or jewelry. One of the very important tenets of their belief is that one who sins after being saved loses his/her salvation. In essence they find themselves separated from, and at odds with, the values of the world.

The Riddles had two children of compulsory school age. Briefly, they enrolled the children in a school called Emmanuel Christian Academy but withdrew them because they disagreed with the school's teaching that once saved always saved. They strongly believed that a person may be saved, once, but if he/she sins again, he/she "will be lost." They were committed to having their children totally indoctrinated and educated in their beliefs.

According to all accounts, the Riddles did an excellent job of educating their children at home. The head of the Christian academy that furnished the teaching aids praised the Riddles' for their work with the children. A member of a Christian school in Florida testified that the achievements of both children as measured on tests were excellent.

Duro v. District Attorney, Second Judicial District of North Carolina[638] is a North Carolina court case where Peter Duro, parent, initiated action against the district attorney because he alleged that the North Carolina compulsory attendance law infringed on his religious beliefs. Duro and his wife were members of the Pentecostal Church which did not require children to be taught at home. In fact, the majority of the members who attended the Pentecostal Church with the Duros enrolled their children in a public school.

Duro and his wife had six children. Five of whom were of school age. He refused to enrolled his children in either a public or private school. Duro stated that exposing his children to those of different religious beliefs would corrupt his children. He was opposed to what he termed the "unisex movement where you can't tell the difference between boys and girls and the promotion of secular humanism . . . ."[639] Duro also objected to physicians and refused medical attention for all physical ailments because he believed the Lord would heal any problem.

Mrs. Duro attempted to teach the children in the home; even though, she did not posses a teaching certificate and had never been trained as a teacher. She used the same self-teaching program that was used by the only private school in the county.

The District Court granted summary judgment for Duro and the district attorney appealed. The United States Court of Appeals for the Fourth District ruled that North Carolina had shown enough interest in compulsory education

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[638]Duro v. District Attorney, Second Judicial District of North Caroilina, 712 F.2d 96 (4th Cir. 1983).

[639]Ibid., 97.

to override the religious interest claimed by Duro. Therefore, the Court of Appeals reversed the judgment of the circuit court. The Supreme Court of the United States denied certiorari to the case.

In a 1988 case, Jeffery v. O'Connell,[640] parents and children brought suit against public school superintendents to challenge the constitutionality of Pennsylvania's Compulsory Attendance Law, 24 P.S., Section 13-1327, specifically the private tutorial provision. Plaintiffs initiated a civil rights action under 42 U.S.C., Section 1983 in which they sought both declaratory and injunctive relief.

Plaintiffs were Bible-believing Christians who chose to educate their children at home because of their deeply held religious beliefs. None of the religious sects to which they belonged required the children be educated at home. In fact, many of the plaintiffs as well as their children had been educated in the public schools.

Defendants counterclaimed asking for declaratory and injunctive relief against plaintiffs to require them to obey the Pennsylvania statute. The District Court decided the tutorial provision was unconstitutionally vague and refused to grant defendants relief.

The District Court ordered, adjudged, and decreed that:

(1) the tutorial provision of the Pennsylvania Compulsory Attendance Law, 24 P.S. 13-1327, was unconstitutionally vague;

(2) the counter claims of the defendants were dismissed;

(3) the defendants were prohibited from prosecuting the plaintiffs for violating provisions of the Pennsylvania Compulsory Attendance

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[640]Jeffery v. O'Connell, 702 F.Supp. 516 (M.D. Pa. 1988).

Law;

(4) the effective date of this Order, except for the part pertaining to the criminal prosecution of plaintiffs, was stayed until December 31, 1988, or until legislature enacts new legislation or the Secretary of Education makes new regulations, whichever comes first;

(5) the right of appeal available to both parties was unaffected by this Order if it was determined than no new enactments will occur or the making of new regulations will not take place;

(6) the Clerk of Court will close the case.

Immunization

For years states have set conditions for enrollment in the public schools. One such condition is immunization against certain contagious diseases. This requirement is an attempt by the states to protect the health and well-being of its citizens. Most objections to immunization are based on religious beliefs.

Avard v. Dupuis[641] is a 1974 case in which a six-year old-child was dismissed from kindergarten in New Hampshire because his parents had failed to comply with the state's immunization laws. The father challenged the constitutionality of the standard which allowed religious exemptions. The plaintiff sought an injunction prohibiting the dismissal of his child for failure to comply with the state statute. The court ruled that the portion of the state statute which allowed local units to exempt children for religious reason was unconstitutional. The religious exemptions were vague for lack of standards,

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[641]Avard v. Dupuis, 376 F.Supp. 479 (D.N.H. 1974). See also Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905).

and thus, in violation of the due process clause of the Fourteenth Amendment. The remaining portion of the statute remained in effect; thus, the court denied the plaintiff an injunction against the local school board.

Brown v. Stone[642] is a Mississippi case brought by a father seeking an injunction to compel a local school district to admit his son without being immunized against certain diseases as required by the state. The Mississippi statute stated:

> Except as provided hereinafter, it shall be unlawful for any child to attend any school, kindergarten or similar type facility intended for the instruction of children (hereinafter called "schools"), either public or private, unless they shall first have been vaccinated against those diseases specified by the State Health Officer.
>
> A certificate of exemption from vaccination for medical reasons may be offered on behalf of a child by a duly licensed physician and may be accepted by the local health officer when, in his opinion, such exemption will not cause undue risk to the community. A certificate of religious exemption may be offered on behalf of a child by an officer of a church of a recognized denomination. This certificate shall certify that parents or guardians of the child are bona fide members of a recognized denomination whose religious teachings require reliance on prayer or spiritual means of healing.[643]

A certificate of exemption was filed by the minister of the Church of Christ in which he stated that the Church of Christ as a religious body does not teach against the use of medicines, immunization or vaccination as prescribed by a duly licensed physician. He also emphasized that their local chiropractor,

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[642]Brown v. Stone, 378 So.2d 218, 219 (Miss. 1979). See also Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964).

[643]Ibid., 219.

a member of the Church of Christ, had strong convictions against the use of any kind of medications and they respected his views.

The father's strong and sincere religious beliefs did not permit him to allow his son to receive immunizations. The county court ruled in favor of the local school board, and the father appealed to the Mississippi Supreme Court. The Mississippi Supreme Court held that:

> (1) statute requiring immunization against certain crippling and deadly diseases before child could be admitted to school served overriding and compelling public interest; (2) to extent that statute could conflict with religious beliefs of parents, interest of school children prevailed; (3) statute was reasonable and constitutional exercise of police power; and (4) provision of statute providing exception for immunization requirement based on religious beliefs was in violation of equal protection clause.[644]

The Mississippi Supreme Court held that to exempt from immunization for religious reason was a violation of the Fourteenth Amendment. They further held that all other provisions of the statute were valid and constitutional, thus they affirmed the decision of the lower court.

Hanzel v. Arter[645] is a 1985 case where parents challenged the state statute of requiring immunization before children could enter public school. The Ohio statute gave local boards of education the authority to make rules to insure the immunization of public school students. There was an exemption to

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[644]Ibid., 218.

[645]Hanzel v. Arter, 625 F.Supp. 1259 (S.D.Ohio 1985). See also Dalli v Board of Education. 358 Mass. 753, 267 N.E.2d 219 (1971); State v. Miday, 263 N.C. 747, 140 S.E.2d 816 (1964); Itz v. Penick, 393 S.W.2d 506 (Tex. 1973); and Kleid v. Board of Education, 406 F.Supp. 902 (W.D. Ky. 1976).

the immunization requirement which provided:

> A pupil who presents a written statement of his parent or guardian in which the parent or guardian objects to the immunization for good cause, including religious conviction, is not required to be immunized.[646]

The parent's belief in "chiropractic ethics" did not permit them to allow their children to receive immunizations. Chiropractic ethics is a belief which teaches that injection of foreign substances into the body is of no benefit and can only be harmful. Stanley and Tisha Hanzel's mother met with the superintendent and explained why her children could not be immunized. She also sent two letters to the superintendent in which she repeated that her personal philosophy and belief in chiropractic ethics had lead her to refuse immunization for her children, and she requested an exemption from vaccination under provision of Ohio statute related to exemptions. An informal hearing was held in which she repeated her views against immunization. After the hearing, the superintendent informed the plaintiffs in writing that their belief in chiropractic ethics did not constitute "good cause" for their children under Ohio statute, and that their children would have to be immunized in order to remain in the public schools.

Parents filed a complaint seeking either that the Ohio immunization laws be declared unconstitutional or that declaratory judgment be issued that parents' personal belief amount to good cause for children to be exempted from immunization. They also complained that their rights to privacy, due process, and equal protection were infringed upon by the Ohio statute requiring

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[646]Ibid., 1260.

immunization. Parents also sought a permanent injunction against expulsion of their children from the public schools. Plaintiffs' children would be allowed to remain in school without being immunized pending a decision in the case.

The District Court rejected motion for summary judgment for the plaintiffs but agreed to accept motion for summary judgment from the defendant. The District Court held that:

> (1) statute did not violate privacy rights of the children; (2) no fundamental right was burdened to implicate due process; and (3) grant of "good cause" exemptions to those with religious reasons did not make denial to those children an equal protection violation.[647]

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[647]Ibid.

CHAPTER 1V

ANALYSIS OF SIGNIFICANT DECISIONS

Introduction

This chapter presents an in-depth analysis of significant judicial decisions, including all landmark Supreme Court decisions relating to religious activities in public schools. The methodology of reporting the cases include (1) facts of the case, (2) decision of the court, and (3) a discussion of the significance of the ruling. Categories and cases are listed below:

1. Released Time For Religious Instruction

   On Campus

   McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461 (1948).
   Vaughn v. Reed, 313 F.Supp. 431 (W.D.Va. 1970).

   Off Campus

   Zorach v. Clauson, 343 U.S. 306. 72 S.Ct. 679 (1952).
   Smith v. Smith, 523 F.2d 121 (1975).

   Shared Time

   Fisher v. Clackamas County School District, 507 P.2d 839 (1973).
   Grand Rapids School District of the City of Grand Rapids v. Phylllis Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985).

2. School-Sponsored Prayer and Bible Reading

   Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962).
   Abington School District V. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963).
   Meltzer v. Board of Public Instruction of Orange County, 548 F.2d 559 (1977), 577 F.2d 311 (5th Cir. 1978) (*en banc*) (*per curiam*) *cert. denied*, 439 U.S. 1089 (1979).

Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913, 107 S.Ct. 1267 (1982).
Jaffree v. James, 544 F.Supp 727 (1982), 554 F.Supp, 1130 (S.D.Ala.1983), *aff'd in part, rev'd in part sub nom.*
Smith v. Board of School Commissioners of Mobile County, 655 F.Supp. 939 (S.D.Ala. 1987), 827 F.2d 684 (11th Cir. 1987).

3. Patriotic Exercises

Minersville v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940).
West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).
Palmer v. Board of Education of City of Chicago, 603 F.2d 1271 (1979).
Sherman v. Community Consolidated school District of Wheeling Township, 714 F.Supp 932 (N.D.Ill. 1989).

4. Creationism and Evolution: Balanced Treatment

Scopes v. State, 289 S.W. 363 (Tenn. 1927).
Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).
Daniel v. Waters, 399 F.Supp. 510 (M.D.Tenn. 1975), 515 F.2d 485 (6th Cir. 1975).
Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985), *reh'g denied*, 779 F.2d 225 (5th Cir. 1985), *jurisdiction noted*, 482 U.S. 578, 106 S.Ct. 1947 (1987).

5. Equal Access and Religious Groups on Campus

Brandon v. Board of Education of the Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).
Widmar v. Vincent, 635 F.2d 1310 (8th Cir. 1980), *aff'd*, 454 U.S. 263, 102 S.Ct. 269, 70 L. Ed. 2d 44 (1981).
Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (1982).
Bender v. Williamsport Area School District, 563 F.Supp. 697 (M.D. Penn. 1983), 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534, 105 S.Ct. 1167 (1985), *reh'g denied*, 476 U.S. 1132 (1986).
Garnett v. Renton School District No. 403, 675 F.Supp. 1268 (1988), 865 F.2d 1121 (9th Cir. 1989), *appeal filed*, 119 S.Ct. 362 (1989).
Board of Education of Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1990).

6. Prayer at Athletic Events

Doe v. Aldine Independent School District, 563 F.Supp. 883 (1982).
Jager v. Douglas County School District, 862 F.2d 824 (11th Cir. 1989).

7. Religious Symbols and Holidays

Florey v. Sioux Falls 464 F.Supp. 911 (1979).
Stone v. Graham, 449 U.S. 39, 101 S.Ct. 192, 662 L.Ed.2d 199 (1980).
Lynch v. Donnelly, 465 U.S. 668 (1984).
County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 109 S.Ct. 3086 (1984).

8. Moment of Silence

Gaines v. Anderson, 421 F.Supp. 337 (1976).
Beck v. McElrath, 548 F.Supp 1161 (1982).
Duffy v. Las Cruses Public Schools, 557 F.Supp. 1013 (1983).
Walter v. West Virginia Board of Education, 610 F.Supp. 1169 (D.C.W.Va. 1985).
Wallace v. Jaffree, 705 F.2d 1526 (5th Cir. 1983), *aff'd.*, 472 U.S. 38 (1985).
May v. Cooperman, 780 F.2d 240 (3rd Cir. 1985).

9. Secular Humanism

Crockett v. Sorenson, 568 F.Supp. 1422 (1983).
Grove v. Mead School District No. 354, 735 F.2d 528 (9th Cir. 1985), *cert denied* 106 S.Ct. 85, 88 L.Ed.2d 70 (1985).
Mozert v. Hawkins County Board of Education, 647 F.Supp. 1194 (E.D. Tenn. 1986) , 827 F.2d 1058 (6th Cir. 1987).
Smith v. Board of School Commissioners of Mobile County, 655 F.Supp. 939 (S.D.Ala. 1987), *reversed and remanded*, 827 F.2d 684 (11th Cir. 1987).

10. Graduation Exercises

Wood v. Mt. Lebanon School District, 342 F.Supp. 1293 (1972).
Lemke v. Black, 376 F.Supp. 87 (1974).
Weist v. Mt. Lebanon School District, 320 A.2d 363 (Pa.), *cert denied*, 419 U.S. 967 (1974).
Grossberg v. Deusevio, 380 F.Supp. 285 (E.D.Va. 1974).
Graham v. Central Community School District of Decatur, 608 F.Supp. 531 (D.C.Iowa 1985).
Stein v. Plainwell Community Schools, 610 F.Supp. 43 (W.D.Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

Sands v. Morongo Unified School District, 212 Cal.Rptr. 452 (Cal.Ct.App. 1989).
Lee v. Weisman, 908 F.2d 1090 (1st Cir. 1990), 112 S.Ct. 2649 (1992).
Jones v. Clear Creek Independent School District, 930 F.2d 416 (1991), 977 F.2d (5th Cir. 1992).
Harris v. Joint School District No. 241, 821 F.Supp. 638 (1994).

11. Distribution of Religious Literature

Gideon Bibles

Tudor v. Board of Education, 100 A.2d 857 (N.J. 1953), *cert. denied*, 348 U.S. 816 (1954).
Berger v. Rensselaer Central School Corporation, 982 F.2d 1160 (7th Cir. 1993).

Other Materials

Burch v. Baker, 651 F.Supp. 1149 (W.D.Wash. 1987).
Thompson v. Waynesboro Area School District, 673 F.Supp. 1379 (M.D.Pa. 1987).

12. Bible Study Courses

Wiley v. Franklin, 486 F.Supp. 133 (E. D. Tenn. 1979) ("Wiley I"); 474 F.Supp. 525 (1980) ("Wiley II"); 497 F.Supp. 390 (1980) ("Wiley III").
Crockett v. Sorenson, 568 F.Supp 1422 (W.D.Va. 1983).

13. Compulsory Attendance

Wisconsin v. Yoder, 406 U.S. 205 (1972).
Duro v. District Attorney, Second Judicial District of North Carolina, 712 F.2d 96 (1983).

15. Immunizations

Avard v. Dupuis, 376 F.Supp. 479 (D.N.H. 1974).
Brown v. Stone, 378 So.2d 281 (Miss. 1979).
Hanzel v. Arter, 625 F.Supp. 1259 (S.D.Ohio 1985).

Released Time For Religious Instruction

On Campus

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

Facts

The local board of education in Champaign, Illinois, had agreed to provide released time for religious instruction in schools during regular school hours for students whose parents had signed a request form. Outside religious teachers were furnished by a religious council representing various religious faiths, subject to the approval of the superintendent. Attendance records were maintained and reported to school authorities in the same way as for other classes. Students not attending religious instruction classes were required to continue with their regular secular classes.

Vashti McCollum had a child enrolled in a public school in Champaign, Illinois. She requested a court order forcing the school board to

> adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools . . . and in all public school houses and buildings in said district when occupied by public schools.[648]

Her argument was that tax-supported schools were promoting religion in violation of the First and Fourteenth Amendments.

Decision

The Illinois state courts denied her petition and she appealed to the Supreme Court of the United States where the decision of the state supreme court was reversed. The Court held, in an opinion by Justice Black, released time

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[648]McCollum v. Board of Education, 333 U.S. 203, 205.

arrangement was in violation of the constitutional provision of separation of church and state, as expressed in the First Amendment, and applied to the states by the Fourteenth Amendment. Therefore, the state courts had acted erroneously in refusing to deny relief to the complainant, parent and taxpayer, against the continued use of school buildings for released-time religious instruction.

Discussion

In writing the Court's majority opinion, Justice Hugo Black stated, "this is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[649] Justice Black once again expressed views announced by the majority and minority in Everson--even repeating Everson's articulate First Amendment definition. Justice Black then acknowledged that:

> the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere, Or, as we said in the Everson case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.[650]

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

> 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,

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[649]Ibid., 210.

[650]Ibid., 212.

> not to say fusing, what the Constitution sought to keep strictly apart. "The great American principle of eternal separation"-Elihu Root's phrase bears repetition--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.[651]

In dissenting, Justice Reed stated that "the co-operative 'released-time' arrangement did not involve either an 'establishment of religion' or 'aid' to religion by the state, sufficient to justify the Supreme Court in interfering with local legislation and customs."[652]

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

Facts

Since 1942, a private organization, the Week-Day Religious Education Council, had sent teachers into grades three, four, and five of the Martinsville elementary schools for religious instruction. These programs were conducted weekly for one hour. These classes were held in regular classrooms during school hours. The regular teacher was temporarily replaced by the teacher employed by the Council. At the beginning of the school year, the regular teachers gave out cards prepared by the Council for the purpose of obtaining permission of the parents to permit their children to participate in this program. Students without permission to take the religious program were sent to a study hall.

Decision

Action to prohibit religious education program in elementary schools.

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[651]Ibid., 231.

[652]Ibid., 203.

The District Court held:

> that weekly classes which were conducted by teachers sent to school by outside private organization and purported to teach about religion rather that to indoctrinate students and from which students whose parents had not signed cards were excused for study period violated the First Amendment.[653]

Discussion

In 1970, plaintiffs, fathers of children who attended the Martinsville School System, sought an injunction against the religious education program being held in the Martinsville elementary school. Defendants claimed that the program did not violate the First Amendment because it is an attempt to teach the students about religion rather than to indoctrinate to religion, even though they admitted that the textbook, My Adventure in Christian Living, amounted to the practice of religion.

The District Court decided that the controlling authority for this case was McCollum v. Board of Education.[654] Justice Black, in writing the majority opinion for the Supreme Court, found that the First Amendment was violated when tax-supported public schools are used by religious groups to spread their teachings. The following is his objection to the religious program in McCollum:

> 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

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[653]Vaughn v. Reed, 313 F.Supp. 431 (W.D.Va. 1970).

[654]McCollum v. Board of Education, 33 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

> it helps to provide pupils for their religious classes through use of the state's compulsory school machinery. This is not separation of Church and State.[655]

In a separate concurring opinion, Justice Jackson laid the foundation for what may be taught in the public schools concerning religion:

> The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity--both Catholic and Protestant--and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.[656]

Justice Clark, writing the majority opinion for the Supreme Court in Schempp, refined and expanded Jackson's language:

> [I]t 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. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.[657]

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[655]Ibid., 212.

[656]Ibid., 236.

[657]Vaughn v. Reed, 313 F.Supp. 431, 433 (1970).

Returning to the facts in this case, the facts are very similar to those of McCollum. The following changes, mainly procedural, would have to be made to the present program constitutional. First, the fact that students were permitted to leave made the court question the religious indoctrination. If the course were taught within constitutional limits, then every child should be required to attend. Second, the fact that state-supported schools were being used by teacher paid and controlled by an outside religious group suggested that is supporting religion in violation of the establishment clause of the First Amendment. It would be better for the school board to employ and control the teachers. Finally, the teachers would have to consciously refrain from any action which would amount to the indoctrination or practice of religion and should keep the program free from criticism on this basis.

The defendants were free to develop a constitutional plan to replace the present plan. The court suggested, but did not require, the system used in Zorach v. Clauson[658] as an alternative.

In issuing the injunction against the present program the court stated that if the defendants, or those in authority, wish to have a religious educational program, they must comply with the above guidelines.

Off Campus

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

Facts

Zorach is similar to McCollum,[659] except for the location of the classes.

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[658]Zorach v. Clauon, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

[659]McCollum v. Board of Education, 333 U.S. 203 68 S.Ct. 461, 92 L.Ed. 649 (1948).

A New York City education law permitted students, with permission from their parent, to leave the school buildings and grounds to attend religious centers for religious instruction or devotional exercises. The same law made school attendance compulsory and students not released stayed in the classrooms. Churches reported attendance of students released from public schools who failed to report for religious instruction.

Tax-payers and residents of New York City whose children attended the public schools challenged the New York Education Law that permitted students to leave school for religious instruction. They contended the released time law was not different from McCollum because the school program was dictated by a program for religious instruction.

Decision

The New York Court of Appeals sustained the New York Education Law which permitted students to leave school during regular school hours for religious instruction. On appeal the United States Supreme Court in a six to three vote sustainted the lower court decision that released time program for religious instruction was not unconstitutional and did not violate religious freedoms guaranteed by the First Amendment.

Discussion

The majority in Zorach did not see where the New York City School System had either prohibited the free exercise of religion or made a law respecting an establishment of religion within the meaning of the First Amendment. Justice William O. Douglas writing for the majority 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 classrooms of the public schools. A student need not take religious instruction. He is left to his own desire as to 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.[660] The present record indeed tells us that the school authorities are neutral in 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.[661] 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.[662]

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

[661]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 a 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 preceding. See *Louisville & Nashville R. Co. v Woodford*, 234 U.S. 46,51; *Atlantic Coast Line R. Co. v Mims*, 242 U.S. 532, 535; *American Surety Co. v. Baldwin*, 287 U.S. 156, 169.

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.

[662]Zorach v. Clauson, 343 U.S. 306, 311-12 (1952).

Moreover, Justice Douglas insisted than Zorach was different than McCollum:

> 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 that accommodate their schedules to a program of outside religious instruction.[663]

The three dissenting justices maintained the program used "a secular institution to force religion" on school children. Justice Jackson stated that:

> Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more that subtlety of mind to deny that this is governmental constraint in support of religion. It is as unconstitutional, in my view, when exerted by indirection as when exercised forthrightly.[664]

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

Facts

For forty years the Harrisonburg school system had permitted a religious organization, Rockingham Council of Week-Day Religious Education (WRE), to present religious instruction in the classrooms. WRE was a nonprofit organization supported by the Virginia Council of Churches. In 1963, the program moved from public school classrooms to trailers parked on city streets adjacent to schools, or in nearby churches. The trailers were not permitted to park on school property.

The challenged program was operated in three elementary schools. WRE

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[663]Ibid., 315.

[664]Ibid., 324.

obtained a list of students from school administrators at the beginning of the school year and mailed cards to parents asking permission for their children to participate in the program. The children deposited the cards at school. WRE collected the cards and informed the school which students should be released. Public school officials did not encourage the children to attend WRE classes. WRE officials were not permitted to enter the schools to solicit students.

Twenty-seven classes of children received approximately one hour of WRE instruction each week. Public school principals and WRE officials worked together to coordinate schedules. Each WRE class was taken from a regular class. The small number of students not attending the program remained in the regular class with the teacher but with no formal instruction.

Decision

Action was brought to challenge a "release-time" program. The United States District Court held that the WRE program as administered was First Amendment establishment and issued an injunction disallowing the release-time program in Harrisonburg, Virginia. On appeal, the United States Court of Appeals for the Fourth Circuit 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.[665]

The Court of Appeals reversed the decision of the District Court.

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[665]Smith v. Smith, 523 F.2d 121 (4th Cir. 1975).

Discussion

The Harrisonburg School Board approved the WRE program by allowing the schools to accommodate the scheduling of religious instruction during the school day. No public school funds were spent directly on the program and school personnel were not used in the program.

Plaintiffs challenged that the WRE program violated the Free Exercise and Establishment Clause of the First Amendment. Although, the District Court concluded that the WRE program was invalid, they admitted that the WRE program was "not readily distinguishable" from the New York City program which the Supreme Court held Constitutional in Zorach v. Clauson.[666] The District Court pointed out that the Supreme Court did not have the benefit of the tripartite test in ruling on Zorach. The challenged state action was valid if it had a "(1) secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not excessively entangle the state with religion."[667] In applying the tripartite test the District Court found the Harrisonburg release-time program unconstitutional, because its effect was to advance the WRE's religious training.

The Court of Appeals found that, although Zorach was decided many years before the Supreme Court fashioned the tripartite test, the Meek[668] citation shows that Zorach is not inconsistent with the tripartite test. The District Court found that the Harrisonburg public school's cooperation with the WRE program by itself did not necessarily advance or prohibit religion. Therefore, the

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[666]Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

[667]Smith v. Smith, 523 F. 121, 122-123 (4th Cir. 1975).

[668]Meek v. Pittenger,421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975).

Harrisonburg release-time program was not unconstitutional as applied to the tripartite test or as understood by the continuing validity of Zorach. The Court of Appeals reversed the decision of the District Court.

Shared Time

Fisher v. Clackamas County School District 12, 507 P.2d 839 (Ore. App. 1973).

Facts

A suit in equity was bought by plaintiff taxpayers to prohibit the defendants, school district, its board clerk, and superintendent from using classrooms in St. John the Baptist school to conduct classes for students of the parochial school. St. John's school was a parochial school under the control of the Catholic church. The plaintiffs contended that the furnishing of teachers, textbooks, and instructional materials to the students of St. John's constituted a benefit to religion institutions in violation of the Oregon Constitution, Article 1, Section 5 which stated:

> No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly.[669]

The defendants and intervenors claimed that the teachers and textbooks were not being furnished to St. John's school, but to two bona fide public schools using classroom space in St. John's school, namely, Rowe Junior High Annex and Milwaukie Elementary Annex.

Decision

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[669]Fisher v. Clackamas County School District 12, 507 P.2d 839, 840-841 (Ore. App. 1973).

The Circuit Court ruled that the "shared time" program was unconstitutional, but approved the "released time" program. On appeal, the Court of Appeals, affirmed that both the "shared time" and "released time" programs violated prohibition on benefit to religious institution, but reversed that the public school annexes in parochial school building were "public schools" since only parochial school students were enrolled.

Discussion

The "shared time" program started in 1968. Seventh and eighth students attended the program for seven periods. Four periods they had public school teachers who taught language arts, social studies, math, and science. Four classroom were set aside for the teachers and all religious symbols were removed. The three remaining subjects, art, music, and religion, were taught by St. John teachers in other classrooms in the same building, where there were some religious symbols. The parochial school was responsible for physical education, study halls, cafeteria, and auditorium used by all students enrolled at St.John's school.

Students in this program were registered by St. John's school, which in turn, provided a registration list to Rowe Junior High School Annex. From this list students were enrolled in the Annex, thus each student had dual enrollment.

Testimony at the trial indicated St. John's school had requested the "shared time" program because of financial difficulties. The defendant school board agreed to the program because it was less expensive than assuming all the responsibility for the parochial students' education. All the students attending Rowe Junior High Annex consisted entirely of St. John's students.

The "released time" program started in 1969. Fifth and sixth grade students enrolled in the program were full-time students at Milwaukie Elementary Annex. They received instruction in a self-contained classroom. Religious symbols were removed from the two classrooms used by the program. The students were released for 120 minutes each week for religious instruction in accordance with the provisions of ORS 339.420, which provided: "Upon application of his parent or guardian, a child attending the public school may be excused from school for periods not exceeding 120 minutes in any week to attend weekday schools giving instruction in religion."[670] There were four thirty-minute sessions for religious instruction provided by Catholic Sisters teaching at St. John's school. The religious instruction was provided in classrooms other than those used by Milwaukie Elementary Annex program.

There were other fifth and sixth grade students being taught in the physical facilities of St. John's school. The administration of St. John's school made the decision as to which students attended Milwaukie Elementary School and which students attend St. John's school.

The St. John's school had requested the "released time" program. The defendant school district agreed, because it was financially to their benefit. Like Rowe Junior High Annex, all the students attending Milwaukie Elementary School consisted entirely of students of St. John's school.

The trial judge held that the "shared time" program for the seventh and eighth grade violated the constitutions of Oregon and the United States. He issued an injunction prohibiting continuation of the program.

He found the "released time" program constitutional except the

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[670]Ibid., 842.

administration of St. John's school decided which of its students should attend the public school program. The injunction against the "released time" program was denied, except that the defendants were prohibited from permitting St. John's school to participate in selecting students for the program.

Both programs in effect used religious affiliation as a requirement for admission. This was true whether or not the St. John's school administration decided which of its students shall attend which program, so long as only St. John's students were eligible for the "public" school program.

No matter what the defendants claimed, the exclusion of all but parochial school students from consideration for enrollment, and deciding placement of students on religious rather than the customary geographical criteria were fatal to their claim that Rowe Junior High School Annex and Milwaukie Elementary Annex were public schools. Under these programs the state paid the salaries of the teacher who taught only parochial school students. This subsidy to a parochial school violated Article 1, section 5 of the Oregon Constitution.

Grand Rapids School District of the City of Grand Rapids v. Phyllis Ball, 10 S.Ct. 3216 (1985).

Facts

Shared time programs had been operated in Michigan for sixty years. Initially the shared time programs provided instruction for nonpublic school students at public school locations in mathematics, reading, physical education, and art--subjects widely regarded as secular. Grand Rapids School District began its variation of the shared time program in 1976. In the 1981-82 school year of forty-one private schools in the Grand Rapids shared time

program, forty were identifiable religious schools. Over the years twenty-eight Roman Catholic schools, seven Christian schools, three Lutheran schools, and one Seventh Day Adventist school and one Baptist school participated in the challenged programs.

The Shared Time Program, provided at public expense, offered classes to nonpublic school students in classrooms leased from nonpublic schools. The programs made available classes during the regular school day that were intended to supplement the "core curriculum" courses required by the State. The shared time teachers were full-time employees of the public school, many of whom had previously taught in nonpublic schools. The Community Education Program offered voluntary classes at the conclusion of the regular school day, some of which were not offered in the public schools. Community Education teachers were part-time public school employees, most of whom were employed full-time in the nonpublic schools where the Community Education classes were held. The students enrolled in both programs are the same students who otherwise would attend the particular school in which the classes were held. Taxpayers filed a suit against the school district and a number of state officials, challenging that the school district's shared time and community education programs violated the establishment clause of the First Amendment.

Decision

The United States District Court for the Western District of Michigan, ruled in favor of the taxpayers and enjoined further operation of the programs. On appeal the United States Court of Appeals for the Sixth District affirmed the decision of the lower court and the defendants petitioned for certiorari. On

certiorari, the United States Supreme Court affirmed the decision of the lower court.

Discussion

Justice Brennan, in delivering the majority opinion of the Supreme Court, stated that the shared time and community education programs, which offered classes to nonpublic students at public expense in classrooms leased from nonpublic religious institutions, had the "primary of principal" effect of advancing religion and therefore violated the dictates of the establishment clause of the First Amendment. The shared time and community education programs violated the establishment clause by impermissibly advancing religion in three ways:

> first, the teachers involved may intentionally or inadvertently become involved in inculcating particular religious beliefs; second, the programs may create a symbolic link between government and religion, giving students an impression of government support of their religious denomination; and third, the program may directly promote religion by subsidizing the religious institutions involved.[671]

School-Sponsored Prayer and Bible Reading

Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

Facts

Acting in its official capacity under state law, the Board of Education of Union Free School District No. 9, New Hyde Park, New York, directed the School District's principal to have the following prayer be said aloud by each class in the presence of a teacher at the beginning of each school day:

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[671]School District of the City of Grand Rapids v. Phyllis Ball, 87 L.Ed. 267, 268 (1985).

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."[672] The daily procedure was adopted by the New York State Board of Regents, a governmental agency created by State Constitution to which the New York Legislature had granted extensive supervisory, executive, and legislative powers over the State's public school system.

Soon after the practice of reciting the Regents' prayer was adopted by the School District, the parents of ten students brought action in a New York Court insisting that the use of the official prayer in the public schools was in conflict with their beliefs, religions, or religious practices of both themselves and their children. They challenged the constitutionality of the state law authorizing the use of the prayer and the recitation of the prayer on the ground that the actions of state officials violated the First and Fourteenth Amendments.

Decision

Parents were unsuccessful in the trial court and in the New York Court of Appeals. On certiorari the Supreme Court of the United States ruled the Regent's prayer unconstitutional. Justice Black in expressing the majority view of five members of the Court, ruled that by using its public school system to encourage recitation of the prayer, the state of New York adopted a practice completely inconsistent with the establishment clause of the First Amendment, made applicable to the states by virtue of the Fourteenth Amendment.

Discussion

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[672]Engel v. Vitale, 370 U.S. 421, 422 (1962).

In delivering the opinion of the Court, Justice Black stated:

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment.[673]

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.[674]

Justice Douglas, in a concurring opinion, stated:

> The point for decision is whether the Government can constitutionally finance a religious exercise .... I think it an unconstitutional undertaking whatever form it takes.[675]

The "finance" issue Justice Douglas refers to is the amount of time needed to recite the prayer; there are no other finance issues in the case. In addition, Justice Douglas apparently realized the judicial dichotomy in Everson and recanted his support of Everson:

> The Everson case seems in retrospect to be out of line with the

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[673]Ibid., 430

[674]Ibid., 431.

[675]Ibid., 437

> First Amendment. Its result is appealing as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children of parochial schools--lunches, books, and tuition being obvious examples.[676]

The lone dissenter, Justice Stewart, 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.[677]

The conspicuous point of Engel is that prescribed prayer in public school classrooms, with teachers leading the recitation and with children reciting, will be ruled unconstitutional. This case is important in school prayer cases, since it is used as a measuring instrument for similar cases.

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

Facts

At the beginning of each school day at Abington Senior High School ten verses were read over the intercommunications system from the Holy Bible, followed by the reciting of the Lord's Prayer, also over the intercommunications system. Students in the classrooms were asked to stand

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[676]Ibid., 443.

[677]Ibid., 450.

and repeat the Lord's Prayer in unison. The exercises were closed with the flag salute and announcements of interest to students.

Students could select the verses to be read from any version of the Bible, although the school only furnished the King James version, copies of which were given to each teacher by the school district. During the time in which the exercises were conducted, the King James, the Douay and the Revised Standard versions of the Bible were used, as well as the Jewish Holy Scriptures. There were no comments or interpretations presented during the exercises. Students and parents were informed that any student could absent himself from the class or remain in the class without being required to participate in the exercises. Participation in the opening exercises, as outlined in the statute, was voluntary.

The opening exercises were conducted in accord with Pennsylvania Statute Number 15-1515, as amended Public Law 1928 which required:

> At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.[678]

The Schempp family brought suit to prohibit the enforcement of the above statute. Roger and Donna were students of the Abington, Pennsylvania school district. An older brother, Ellory Schempp, had graduated from high school and was voluntarily dismissed from the action. Their parents were Edward Lewis and Sidney Schempp. They were all active members of the

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[678]Abington School District v.Schempp, 374 U.S. 203, 205 (1963).

Unitarian Church. The Schempps claimed that the statute violated their rights under the Fourteenth Amendment and would continue to do so unless the statute was declared unconstitutional as violating these provisions of the First Amendment.

Decision

A three-judge statutory District Court for the Eastern District of Pennsylvania held that the statute violated the Establishment Clause of the First Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment and direct appropriate injunctive relief. The trial court found that:

> The reading of the verses, even without comment, possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercise is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's Prayer. The fact that some pupils, or theoretically all pupils, might by excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony for . . . Section 1516 . . . unequivocally requires the exercises to be held every school day in every school in the Commonwealth. The exercises are held in the school buildings and perforce are conducted by and under the authority of the local school authorities and during school sessions. Since the statute requires the reading of the 'Holy Bible.' a Christian document, the practice . . . prefers the Christian religion. The record demonstrates that is was the intention of . . . the Commonwealth . . . to introduce a religious ceremony into the public schools of the Commonwealth.[679]

The school district appealed the decision of the federal district court to the United States Supreme Court, which upheld the decision of the federal

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[679]Ibid., 210-211.

district court by a vote of eight to one.

Discussion

Justice Clark drew heavily from Engel,[680] Everson,[681] and Zorach[682] in writing the opinion of the Court. He pointed out in Cantwell v. Connecticut[683] that the Court had decided that the Fourteenth Amendment embraced the freedoms guaranteed in the First Amendment. Justice Clark pointed out that the separation of state from any form of religious entanglement outlined in the First Amendment 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 teaching 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 clause may overlap. As we have indicated, the Establishment Clause has been 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.[684]

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

[681]Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504 (1947).

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

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

[684]Abington School District v. Schempp, 374 U.S. 203, 222 (1963).

In Schempp a state statute required the reading of at least ten Bible verses and the recitation of the Lord's Prayer at the beginning of each day. The Supreme Court held that requiring the religious exercises was in violation of the establishment clause of the First Amendment.

In a concurring opinion, Justice Brennan wrote:

> 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 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 delicate 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."[685]

In dissenting, Justice Stewart wrote that the two cases before the Court were so fundamentally deficient that it was impossible to make an informed or

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[685]Ibid., 231.

responsible determination of the constitutional issues presented. He went on to write:

> 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 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.[686]

Analyzing the past two decades of church-state history in public education, the Court stated:

> The test may be stated as follows: What are the purposes and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary

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[686]Ibid., 308-309.

effect that neither advances nor prohibits religion.[687]

Continuing, the Court maintained that to allow encroachments even though minor would allow "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent, and in the words of Madison, it is proper to take alarm at the first experiment on our liberties ."[688] Justice Douglas, in a separate concurring opinion, insisted that "through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others."[689]

The Schempp ruling reinforces Engel concerning prescribed Bible reading and the Lord's Prayer. Another important aspect of Schempp is the beginning of the tripartite test that will become completely developed in Lemon I.[690] Also, the neutral accommodations theory is obviously silent in curriculum cases dealing with religion. In curriculum cases involving religion, where public funds are being used to advance religion, the practice is a violation of the First Amendment.

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[687]Ibid., 222.

[688]Ibid., 225.

[689]Ibid., 228.

[690]Lemon v. Kurtzman, 91 S.Ct. 2111 (1971).

Meltzer v. Board of Public Instruction of Orange County, 548 F.2d 559 (1977), 577 F.2d 311 (5th Cir. 1978) (*en banc*) (*per curiam*) *cert. denied*, 439 U.S. 1089 (1979).

Facts

The Orange County Board of Education had allowed the public schools to begin the day with Bible readings and devotional exercises. Parents of children attending public schools brought suit for injunctive and declaratory relief from morning Bible readings, distribution of Bibles, and requiring teachers to inculcate the practice of every Christian virtue.

Decision

The United States District Court denied relief and the parents appealed. The United States Fifth Circuit of Appeals handed down its decision on March 11, 1977, and a rehearing en banc was granted on May 25, 1977. On July 31, 1978, the court of appeals, en banc, held that the resolution requiring Bible reading and prayer in the public schools was unconstitutional. In addition, the appeals court, by a equally divided vote, affirmed that District Court's rulings that there was no case or controversy or threat of imminent harm requiring either injunctive relief or declaratory judgment as to the guidelines for distribution of Gideon Bibles and the Christian virtue statute. The entire course of this case was in the District Court and the Court of Appeals for eight years. In 1980 the United States Supreme Court agreed to let stand the ruling of the court of appeals reaffirming the unconstitutionality of religious exercise in public school.

Discussion

At the August 24, 1970, board meeting the Orange County Board of Education adopted a resolution calling for a five- to seven-minute morning

exercise in every school for "a period of meditation which shall include the opportunity for individual prayer and Bible reading or devotional or meditation presented by groups or organizations or an individual,"[691] followed by a patriotic exercise. At the same meeting a member of the Gideon group asked for and received approval to distribute Gideon Bibles in the public schools.

At the next meeting of the Orange County Board of Education on September 15, 1970, the eventual plaintiffs in this case complained that the resolution adopted at the August 24, 1970, board meeting violated their religious rights. The board deferred action on the complaints until it could survey the Orange County Public Schools to see how the August 24, 1970, resolution was being implemented and to obtain time to confer with their counsel regarding the legality of those policies and their implementation.

At the third board meeting, the results of the survey ordered in the September 15, 1970, meeting were released. This survey revealed that seventy of the ninety-seven schools in Orange County were practicing daily Bible reading, generally read aloud by students or the classroom teacher. In some public schools, the Bible reading was given over the school public address system. Only four of the ninety-seven schools had neither prayer nor Bible reading. At this meeting the eventual plaintiffs renewed their complaints against the devotional and the distribution of Gideon Bibles. However, counsel for the Orange County Board of Education gave his opinion that the morning exercises were not illegal, citing in part Chapter 231.09(2) of the Florida Statutes:

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[691]Meltzer v. Board of Public Instruction of Orange County, Florida, 548 F.2d 559, 561 (1977).

> The policy aids school officials to carry out their specific duties set forth in 231.09 among which are to "inculcate, by precept and example . . . the practice of every Christian virtue . . . ." Those who feel that the policy is unconstitutional should bring their case to Court.[692]

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 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.[693]

Taking advice from its counsel, the Orange County Board of Education refused to modify its policy regarding opening day exercises or to direct any change in its implementation.

On October 16, 1970, the plaintiffs filed their suit in District Court as a class action against the Orange County Board of Education claming that

> (1) Florida statute section 231.09(2) is unconstitutional on its face because it commands the inculcation of Christian virtue; (2) that the August 24, 1970, resolution the morning excerises conducted pursuant to it are unconstitutional; (3) that the distribution of Gideon Bible is unconstitutional; and (4) that a Southern Baptist program planned for October 19 and 20, 1970, is unconstitutional, all being in violation of the First Amendment as made applicable to the states through the Fourteenth

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[692]Ibid., 562.

[693]Ibid.

Amendment.[694]

The plaintiff had failed to show that the possibility of irreparable injury or to show findings of fact as to morning exercises and the Bible distribution. The District Court went on to conclude that reference to the Bible is permitted under the First Amendment, if it is inspirational rather than devotional and it is voluntary by an individual student instead of school or teacher sponsored.

The plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit. The appeals court held that there was no evidence that the statute had or would be applied; thus, there was no reason for an injunction. The appeals court in remanding the case to the District Court questioned whether the likelihood that the statute would be enforced was so minuscule as to present no case or controversy, thus denying the District Court of jurisdiction to grant even a declaratory judgment, or whether there was still a case or controversy present enough even though the danger of harm was not great and imminent enough to warrant an injunction.

It became apparent during the trial in District Court that the Orange County Board of Education had made no changes in its policy, except changing "devotional" to "inspirational," concerning Bible reading, devotions, and the distribution of Bibles. During the second round of appeal, the United States Circuit Court of Appeals agreed with the district court that the imminency of harm from the recurrence of the practices complained of was not sufficient to warrant the issuance of injunctive relief. The Court of Appeals disagreed with the District Court that there was no case and thus, no reason for declaratory

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[694]Ibid. 563.

relief. The appeals court found the ever-present threat of enforcing the statute to be a continuous and brooding presence and issued a declarative judgment against the defendant.

Bible reading and devotional exercises were declared unconstitutional under the First and Fourteenth Amendments, even though individual students were allowed to absent themselves from the exercises upon parental request. The practice of handing out Gideon Bibles in the classroom or at a central place on campus in this case was more an encroachment of First Amendment freedoms than Tudor.[695] In Tudor parents were asked to sign for their child to receive the Gideon Bible. In Meltzer Gideon Bibles were to be distributed without parental permission. In short, the school board's decision to use the school system to distribute the Gideon Bible, at least in the eyes of the students and perhaps their parents, places its stamp of approval on the Gideon version of the Bible, thus favoring one religion over another which is unconstitutional.

The "Christian virtue" clause of the Florida statute 231-09(2) was declared unconstitutional as worded. As written it favors the Christian religion, but the appeals court agreed that if the word "Christian" were deleted, the statute would probably be constitutional.

Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913, 107 S.Ct. 1267 (1982).

Facts

The Jefferson Parish School Board adopted a resolution establishing

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[695]Tudor v. Board of Education, 100 A.2d 857 (1953).

guidelines to implement section 17:2115(B) in parish schools. Its guidelines permitted a minute of prayer followed by a minute of silent meditation. Under the school board guidelines each teacher was to ask if any student wished to offer a prayer; if no student volunteered a prayer, then the teacher was allowed to offer a prayer on his own. Students had to have written permission from their parents and make a verbal request to participate in the exercise. Students without permission could either report to class, where they would remain seated and quiet throughout the morning exercises, or remain outside the classroom under other supervision. Parents of public school students sought declaratory and injunctive relief concerning the Louisiana statute and derivative Jefferson Parish School Board regulations which established guidelines for student participation in prayers in public schools.

Decision

The United States District Court for the Eastern District of Louisiana denied relief and the parents appealed. The United States Court of Appeals for the Fifth Circuit ruled that the Louisiana statute section 17:2115 (1981), subsection B, and Jefferson Parish guideline permitting student and teacher prayers in the public schools violated the establishment clause of the First Amendment. The appeals court reversed and remanded the case to the District Court. The United States Supreme Court affirmed the judgment on January 25, 1982.

Discussion

Louisiana Revised Statute section 17:2115 (1981) had two parts. Subsection A provided for each parish and city school board to permit a brief period of silence at the beginning of each day with no reference to a religious

exercise. Parents had no quarrel with the meditation provision, and it is not part of the litigation.

The challenged provision, subsection B, was basically enabling legislation. It provided that a school board may authorize appropriate school officials to allow students and teachers to pray. Prayers were limited to five minutes. No student or teacher was compelled to pray. With written permission, students who objected to prayers, were not required to participate or be present during the time the prayer was being offered.

School District officials defended the policy by stating:

> The purpose of the school prayer program was to increase religious tolerance by exposing school children to beliefs different from their own and to develop in students a greater esteem for themselves and others by enhancing their awareness of the spiritual dimensions of human nature.[696]

Justice Clark, as noted in the following statement, asserted that the purpose of the prayer activity was basically religious and not secular:

> Prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people. Indeed, since prayer is a primary religious activity in itself, its observance in public school classrooms has, if anything, a more obviously religious purpose than merely displaying a copy of a religious test to the classroom.[697]

The court concluded that the statute and policies served to create excessive government entanglement.

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[696]Karen B. v. Treen, 653 F.2d 897, 899 (5th Cir. 1981).

[697]Ibid., 901.

Jaffree v. James, 544 F.Supp 727 (1982), 554 F.Supp, 1130 (S.D.Ala.1983), *aff'd in part, rev'd in part sub nom.*

Facts

In this case plaintiffs brought suit challenging the constitutionality of Alabama statutes seeking to return voluntary prayer to the public schools. They asked for a preliminary injunction to prohibit enforcement of the statutes.

Decision

The District Court, Chief Judge Hand, ruled that even though the statutes were permissive in form, they indicated state involvement respecting the establishment of religion, and therefore, since the plaintiffs had shown a substantial likelihood of success on the merits, the enforcement of the statutes would be forbidden. The preliminary injunction requested by the plaintiffs was granted.

Discussion

It was contended by the plaintiffs that Alabama Code Section 16-1-20.1 and Senate Bill 8, Alabama Act 82-735, popularly known as the "James Prayer Law," if carried out would be violative of their constitutional rights as proscribed by the Constitution. Senator Holmes testified that his purpose in sponsoring Alabama Code Section 16-1-20.1 (1981) was to return voluntary prayer to the public schools. Section 16-1-20.1 provides in pertinent part:

> 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 may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.[698]

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[698]Ibid., 731.

Senate Bill 8, provides in pertinent part:

> To provide for a prayer that may be given in the public schools and educational institutions of this state.
> BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:
> Section 1. From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, *may lead willing students in prayer*, or may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, *in the sanctity of our homes* and in the classrooms of our schools *in the name of our Lord.* Amen.[699]

There was no testimony presented to the District Court as to whether or not the statutes under scrutiny had or had not been enforced. The District Court made the following discoveries of fact:

> l. Both statutes were properly enacted and are on the books of the State of Alabama.
>
> 2. The plaintiff's children are students of the public schools of he State of Alabama.
>
> 3. The statute is drawn in the permissive and would authorize students and teachers to pray in the schools if they so desired.
>
> 4. The plaintiff is an agnostic and finds prayer offensive.
>
> 5. The plaintiff contends that he does not desire that his children be indoctrinated along religious lines so they can, at some future date, open-mindedly consider whether or not religion is for them and if anything of a religious nature is given to them now it will serve to poison their minds against the open-mindness.

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[699]Ibid.

6. Religion is more than just the Christian faith. Religion can be Christianity, Judaism, Mohammedanism, Buddhism, Atheism, Communism, Socialism, and a whole host of other concepts.

7. Students feel deprived if they are not permitted a free expression of their religion at any place or time they might elect or choose.

8. Religious freedoms are denied when the school authorities prohibit expression of religious conviction by denying the right to pray or otherwise express themselves.

9. Parental authority is abused and parents feel their rights are trespassed when their teachings to their children are contradicted by the schools or the state when it refuses to allow free expression of religious belief on the campuses of the schools or when their children are required to hear prayers that they do not wish them to hear.

10. Any governmental activity, be that by the federal government through its legislative, judicial or executive branches or any state or county legislative or authority, through its board, bureaus, legislatures, courts or executives, that prescribes or proscribes the conduct of religion is offensive to all citizens and the Constitution.[700]

The enactment of the Alabama statutes was an attempt by the State of Alabama to encourage religious activity and return voluntary prayer to the public schools.

Smith v. Board of School Commissioners of Mobile County, 655 F.Supp. 939 (S.D.Ala. 1987), 827 F.2d 684 (11th Cir. 1987).

Facts

This case was a continuation of the Alabama school prayer cases, beginning with Jaffree v. James[701] in 1982. In May 1982 Ishmael Jaffree

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[700]Ibid., 729-730.

[701]Jaffree v. James, 544 F.Supp. 727 (1982). Also see Jaffree v. Board of School Commissioners, 554 F.Supp. 1104 (S.D. Ala. 1983), *aff'd in part, rev'd in part sub nom*; Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *Cert. denied sub nom*; Board of School Commissioners v. Jaffree, 466 U.S. 926,

filed a complaint on behalf of his three minor children against the Mobile County School Board, various school officials, and three teachers seeking, among other things, a declaratory judgment that certain classroom prayer activities conducted in the Mobile public school system violated the establishment clause of the First Amendment and an injunction against classroom prayer. By his second complaint, Jaffree added as defendants the Governor of Alabama and other state officials, including Appellant Board, and challenged three Alabama statutes relevant to the school prayer issue as violative of the establishment clause. Douglas T. Smith and others ("Appellees") filed a motion to intervene in the Jaffree action claiming that an injunction against religious activity in the public schools would violate their right to free exercise of religion. The District Court allowed Douglas T. Smith and others ("Appellees") to intervene as plaintiffs. Later, Appellees filed a motion entitled "Request for Alternate Relief" in which the Appellees asked that, if an injunction were granted in favor of Jaffree, that injunction be enforced "against the religious secularism, humanism, evolution, materialism, agnosticism, atheism, and others" or, alternatively that Appellees be allowed to produce additional evidence showing that these religions had been established in the Alabama public schools.

Decision

The District Court divided the claims against Mobile County and local defendants and the claims against state officials into two branches. The

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104 S.Ct. 1707, 80 L.Ed.2d 181 (1984); Jaffree v. James, 554 F.Supp. 1130 (S.D. Ala. 1983), *aff'd in part, rev'd in part sub nom*; Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 178 (1984.).

District Court granted Jaffree's motion for a preliminary injunction against the enforcement of two of the challenged statutes, Ala. Code Ann., Sections 16-1-20.1 and 16-1-20.2,[702] but determined after trial on the merits that Jaffree was not entitled to relief in either action because the Supreme Court of the United States was in error in holding that the establishment clause of the First Amendment prohibits the states from establishing a religion.[703] Therefore, the District Court dismissed Jaffree's compliant for failure to state a claim upon which relief could be granted.[704]

The Court of Appeals reversed the decision of the District Court, finding that both the school room prayer activities and sections 16-1-120.1 and 16-1-20.2 violated the establishment clause, and remanded the action to the District Court with directions that the District Court "award costs to appellant and forthwith issue and enforce an order enjoining the statutes and activities held in this opinion to be unconstitutional."[705] The United States Supreme Court

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[702]Ibid.

[703]Jaffree v. Board of School Commissioners, 554 F.Supp. 1104, 1128 (S.D.Ala. 1983), *aff'd in part, rev'd in part sub nom*; Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *cert denied sub nom*; Board of School Commissioners v. Jaffree, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984); Jaffree v. James, 554 F.Supp. 1130, 1132 (S.D. ALA 1983). *Aff'd in part, rev'd in part sub nom*; Jaffree v. Wallace, 705 F.2d 1526 (11th Cir 1983), *aff'd* 472 U.S. 38, 1095 S.Ct. 2479, 86 L.Ed.2d 29 (1985), 466 U.S. 924, 104 S.Ct. 1704, 80 L.Ed.2d 178 (1984).

[704]Jaffree v. Board of County Commissioners, 554 F.Supp. 1104, 1132 (S.D.Ala. 1983).

[705]Jaffree v. Wallace, 705 F.2d 1526, 1536-37 (11th Cir. 1983), *cert. denied in part sub nom*; Board of School Commissioners v. Jaffree, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984), *aff'd in part*, 472 U.S. 38, 105 S. Ct. 2479, 86 L.Ed2d 29 (1985); 466 U.S. 924, 104 S.Ct. 1704, 80 L.Ed.2d 178 (1984).

denied certiorari with regard to the nonstatutory school prayer practices[706] and affirmed the Court's decision with regard to the statutory provisions.[707]

Discussion

In its opinion denying relief in Jaffree, the District Court had stated that "[i]f the appellate courts disagree with this Court in its examination of history and conclusion of constitutional interpretation thereof, then this Court will look again at the record in this case and reach conclusions which it is not now forced to reach."[708]

The Appellees claimed that the exclusion from the curriculum of "the existence, history, contributions, and role of Christianity in the United States and the world"[709] violated their constitutional rights of equal protection, free speech of teacher and student, the student's right to receive information, and teacher and student free exercise of religion. The District Court interpreted the position of the Appellees as that

> if Christianity is not a permissible subject of the curriculum of the public schools, then neither is any other religion, and under the evidence introduced it is incumbent upon this Court to strike down those portions of the curriculum demonstrated to contain other

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[706]Board of School Commissioners v. Jaffree, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984).

[707]Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985); Wallace v. Jaffree 466 U.S. 924, 104 S.Ct. 1704, 80 L.Ed.2d 178 (1984).

[708]Jaffree v. Board of School Commissioners, 554 F.Supp at 1129 (S.D.Ala. 1983).

[709]Ibid.

religious teachings.[710]

The District Court voluntarily realigned the parties and ruled that the use of home economics, history, and social studies textbooks in the Mobile County School System violated the establishment clause of the First Amendment, in that the textbooks had the primary effect of advancing the religion of secular humanism.

On appeal, the Court of Appeals for the Eleventh Circuit held that the use of textbooks did not advance secular humanism or inhibit theistic religion in violation of the establishment clause, even assuming secular humanism was religion.

Patriotic Exercises

Minersville v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940).

Facts

Minersville v. Gobitis[711] was the first flag salute case decided by the United States Supreme Court. This case involved two children, Lillian Gobitis, age twelve, and her brother William, age ten, Jehovah's witnesses who were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise.

The local board of education required both teachers and students to participate in the pledge of allegiance ceremony. The right hand was placed over the breast and the following pledge was recited in unison: "I pledge

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[710]Smith v. Board of School Commissioners of Mobile County, 827 F.2d 684, 688 (11th Cir. 1987).

[711]Minersville v Gobitis, 310 U.S. 586, 60 S. Ct. 1010, 84 L.Ed. 1375 (1940).

allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all."[712] (Note that the words "Under God" were not a part of the pledge. They were added in 1954.) While the words were spoken students extended their right hands in salute to the flag. The Gobitis family were affiliated with "Jehovah's Witnesses," for whom the Bible as the Word is the supreme authority. The children had been brought up to believe that their only allegiance was to Jehovah.

The Gobitis children were of age to be under the compulsory attendance law of Pennsylvania. They were denied a free education and their father had to enroll them in a private school. To obtain relief from the financial burden of private school, their father, on behalf of the children and his own behalf brought this suit.

On May 3, 1937, counsel for Walter Gobitis filed a bill of complaint in the United States District Court, denouncing the regulation and the expulsion thereunder as violative of the Eighth and Fourteenth Amendments and requested an injunction against their continued enforcement against the Gobitis children.

Decision

From 1937 until 1940, first in the District Court and later in the Circuit Court of Appeals, the case was marked with much bickering, confusion, conflicting testimony, and presentation of lengthy briefs. Finally, on March 4, 1940, the United States Supreme Court gave the matter full consideration and granted a writ of certiorari. The United States Supreme Court reversed the decision of the Third Circuit Court of Appeals and upheld the District

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[712]Ibid., 591.

Court's decision supporting the Minersville School District's requirement that students must salute the American flag as a condition for school attendance.

Discussion

Justice Felix Frankfurter, who expressed trepidation in tackling the case delivered the majority opinion of the Court in these words:

> 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.[713]

> We must decide whether the requirement of participation in 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.[714]

> Our present task then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other. But, because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith.[715]

> The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the the citizen from the discharge of political responsibilities.[716]

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[713]Ibid.

[714]Ibid., 592-593.

[715]Ibid., 594.

[716]Ibid., 594-595.

In the lone dissent, Justice Harlan F Stone, strongly emphasized that even though the state may exercise considerable control over pupils, that control is limited where it interferes with civil liberties guaranteed by the Constitution. He stated in part:

> 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.[717]

The tone of the dissent by Justice Stone suggested an accommodation between church and state.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

Facts

In 1943, the United States Supreme Court in West Virginia State Board

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[717]Ibid., 606-607.

of Education v. Barnette[718] had another opportunity to rule on the constitutionality of a flag salute case involving Jehovah's Witnesses. This case was the result of a requirement of the West Virginia State Board of Education that required that the salute to the flag become a regular part of the day's activities in every public school in the state. Students who refused to participate in the flag salute were expelled from school. Expelled students were denied readmission to the school until they complied with the flag salute requirement.

On January 9, 1942, the Board of Education adopted a resolution containing recitals taken mainly from the Court's Gobitis[719] opinion and ordering that the salute to the flag become a part of the program of activities in all public schools. All teachers and students were required to participate in the salute honoring the nation represented by the flag. Refusal to participate would be regarded as an act of insubordination and would be dealt with accordingly.

Objections to the salute as being too much like the Nazi salute were raised by the Parents and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs. Some modification seems to have been made for these groups, but no concession was made to Jehovah's Witnesses. The salute required a stiff arm with the right arm raised and the palm turned up while repeating the following: "I pledge allegiance to the Flag of

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[718]West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

[719]Minersville v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940).

the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."[720]

Failure to conform with the salute was insubordination dealt with by expulsion. Readmission was denied by statute until compliance. An expelled child was unlawfully absent and parents were subject to prosecution. If convicted the maximum fine was fifty dollars and a jail term not to exceed thirty days.

Appellees, citizens of the United States and West Virginia, brought suit in the United States District Court asking for an injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. Their religious belief required that they give their allegiance to Jehovah. Their belief includes a literal interpretation of Exodus, Chapter 20, verses 4 and 5, which states: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them."[721] They refused to salute the flag because they considered it an "image" with this command.

Decision

In Barnette the United States Supreme Court reversed their Gobitis decision and by so doing ruled that requiring students to salute the flag of the United States while reciting a pledge of allegiance as a requirement to attend school was an unconstitutional exercise of governmental authority. To force

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[720]West Virgina State Board of Education v. Barnette, 319 U.S. 624, 628-629 (1943)

[721]Ibid., 629.

students to participate in flag salute activities in violation of their religious beliefs was a violation of students' First Amendment rights.

Discussion

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

> It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. 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 the Bill of Rights which guards the individual's right to his own mind, left it open to public authorities to compel him to utter what is not in his mind.[722]

> 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.[723]

Justice Frankfurter used the same arguments in dissenting in Barnette as he used in expressing the majority opinion in Gobitis. In his lone dissent he stated:

> I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely the

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[722]Ibid., 633-634.

[723]Ibid., 642.

> promotion of good citizenship, by employment of the means here chosen.[724]

He was of the opinion that: "The Court has no reason for existence if it merely reflects the pressures of the day."[725]

Palmer v. Board of Education of City of Chicago, 603 F.2d 1271 (1979).

Facts

In a 1979 case, Palmer v. Board of Education of City of Chicago,[726] a probationary kindergarten teacher, who was a member of the Jehovah's Witnesses religion, filed civil rights practices challenging her proposed discharge for failure to follow the prescribed curriculum as violative of her First Amendment right of religious freedom. She had notified her principal that because of religious reasons she could not teach any subject dealing with patriotism, the American flag, or other such matters.

Decision

The United States District Court for the Northern District of Illinois entered summary judgment for defendants, and the plaintiff appealed. The United States Court of Appeals, Seventh Circuit, in affirming the decision of the lower court held that:

> (1) a public school teacher is not free to disregard the prescribed curriculum concerning patriotic matters notwithstanding claim

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[724]Ibid., 647.

[725]Ibid., 665.

[726]Palmer v. Board of Education of City of Chicago, 603 F.2d 1271 (1979).

> that adherence thereto would conflict with his or her religious principles, and (2) plaintiff had no due process right to an adversary hearing prior to dismissal since her religious freedom was not being extinguished, no state statute or other rule or policy created a protected interest for an untenured teacher in similar circumstances and there was no claim that plaintiff had suffered stigma by reason of discharge.[727]

Discussion

For a teacher to pick and choose what she was willing to teach would provide students with a distorted and unbalanced view of the history of the United States. She had a right to her own religious views and practices, but she had no constitutional right to force her views on others and to cause them to forgo a portion of their education they would otherwise be entitled to enjoy.

The court stated:

> Parents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please.[728]

The court went on to say:

> In this unsettled world, although we hope it will not come to pass, some of the students may be called on to defend and protect our democratic system and Constitutional rights, including plaintiff's religious freedom. That will demand a bit of patriotism.[729]

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[727]Ibid., 1271.

[728]Ibid., 1274.

[729]Ibid.

Sherman v. Community Consolidated School District 21 of Wheeling Township, 714 F.Supp. 932 (N.D.Ill. 1989).

Facts

In a 1989 flag salute case from Illinois, the parents of a first grade student sued the school district over an Illinois statute that provides that the pledge "shall be recited each day" by pupils in public elementary schools. In this case the principal announced to all classrooms over the intercom for all students to: "Please rise for the all-school pledge. I pledge allegiance to the flag of the United States of American and to the republic for with it stands, one nation under God, indivisible, with liberty and justice for all."[730]

Richard Sherman, a first grade student, is publically asked to stand, put his hand over his heart, and pledge allegiance to the flag. His parents are practicing atheists, who belong to the Society of Separatists. The Society is a Maryland corporation licensed to conduct business in Illinois. Historically, the Society had played a role in government-coerced Church and State separation issues for many years.

The suit alleged that the salute and recitation of the pledge violated the Constitution's establishment clause, by requiring this ritual with a religious element, and the free exercise clause, by, in effect, forcing their first grade son to perform a religious act that he otherwise would not have performed.

Decision

The school system asked the court to dismiss the suit. The court denied the request of the school system. The District Court held that the parents'

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[730]Sherman v. Community Consolidated School District 21 of Wheeling Township, 714 F.Supp. 932, 933 (N.D.Ill. 1989).

allegations justified civil rights claim against school district and school officials.

Discussion

The defendants claimed the Society did not have standing to act a party plaintiff on its own behalf. The defendants were right. The Society itself did not have a right to claim the constitutionally protected rights curtailed by the statute. However, the Society could bring suit on behalf of its members if

> (a) the membership would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) nether the claim asserted not relief requested requires the participation of individual members in the lawsuit.[731]

Given the facts of the complaint the court was unable to determine at this point whether the Society had standing to continue claims on behalf of its membership. The Shermans did have standing and were pursuing the case on their own.

The plaintiffs contended that Illinois Revised Statute, Chapter 122, Section 27-3 violated the establishment clause of the First Amendment. The third clause of the statute provided that: "The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds."[732] The court did uphold the establishment clause claim of the plaintiffs.

"Other courts have found that the inclusion of the phrase 'In God We

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[731]Ibid., 934.

[732]Ibid., 934.

Trust' on coinage and currency does not violate the establishment clause."[733] The reason given was that reference to the Deity in our ceremonies and our coinage and seals reflect our history and no longer have any potentially entangling theological reference. In Aronow, the Ninth Circuit stated that:

> [i]t is quite obvious that the national motto and slogan on coinage and currency "In God We Trust" had nothing to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to government sponsorship of a religious exercise.[734]

Although the Supreme Court has not specifically ruled on this question, the Court has strongly intimated that the recitation of the Pledge by public school students does not violate the establishment clause. The Court repeatedly has stated that: "[w]e are a religious people whose institutions presuppose a Supreme Being."[735]

The plaintiffs also claimed the statute violated the free exercise clause by requiring Richard Sherman to recite the Pledge of Allegiance. In a seminal pledge of allegiance case, the Supreme Court ruled that the compulsory flag salute and pledge required by local authorities were unconstitutional. In that case the Court stated that:

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[733]Aronow v.United States, 432 F.2d 242,243 (9th Cir. 1970); Hall v. Bradshaw, 630 F.2d 1018, 1022 (4th Cir. 1980, cert. denied , 450 U.S. 965, 101 S.Ct. 1480, 67 L.Ed.2d 613 (1981).

[734]Aronow v.United States, 432 F.2d 242,243 (9th Cir. 1970).

[735]Zorach v. Clauson, 343 U.S. 306,313, 72 S.Ct.679, 684, 96 L.Ed. 954 (1952); Lynch v. Donnelly, 465 U. S. 668, 675, 104 S.Ct. 1355, 1360, 79 L.Ed.2d 604 (1984).

> [i]f 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.[736]

The finding in Barnette had been repeatedly applied and reaffirmed by numerous lower courts.

The defendants tried to distinguish this case from Barnette. They claimed that Richard Sherman was not required to recite the pledge. However, under Illinois law Richard Sherman was required to attend school. The Supreme Court has repeatedly stated that school children are impressionable and often influenced by peer pressure. Justice Brennan in a concurring opinion in Abington stated: "even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists."[737] In effect, the daily recitation may force the first grade student to join in, and that would violate his right to free exercise of religion, which includes the right freely to choose not to engage in any religious practice.

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[736]West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

[737]Abington School District v. Shempp, 374U.S. 203, 290, 83 S.Ct. 1560, 1607 (1963).

Creationism and Evolution: Balanced Treatment

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

Facts

In 1927, C.J. Scopes was convicted in a Tennessee state circuit court for teaching Darwinian evolution in public schools instead of Biblical creationism. His conviction was based on his failure to follow chapter 27 of the Acts of 1925, known as the Tennessee Anti-Evolution Act, which stated:

> An act prohibiting the teaching of the evolution theory in all Universities, normals and other public school of 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.
>
> Section 1. Be it enacted by the General Assembly of the state of Tennessee, that it shall be unlawful for any teacher in any of the Universities, normals and all other public schools of the state which are supported in whole or in part by the public school funds of the state, 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.
>
> Section 2. Be it further enacted, that any teacher found guilty of the violation of this act, shall be guilty of a misdemeanor and upon conviction shall be fined not less that one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars for each offense.
>
> Section 3. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.[738]

His conviction was appealed to the Tennessee Supreme Court.

Decision

The jury found Scopes guilty, but assessed no fine. The trial judge imposed a maximum one hundred dollar fine authorized by statute. The judge erred however, because the Constitution of Tennessee required any fine above fifty dollars must be levied by a jury. Since Scopes was no longer a teacher, the

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[738]Scopes v. State, 289 S.W. 363-364 (Tenn. 1927).

Supreme Court of Tennessee saw no reason to prolong the case. The state would be better served to enter nolle prosequi and move on to more important matters of the state.

Discussion

The two well-known lawyers added to the excitement of the celebrated "monkey trial." Charles Darrow, the foremost lawyer of his time, represented the defense. William Jennings Bryan, a former presidential nominee, represented the prosecution. The case was initiated as a statutory violation. However, defense counsel insisted the statute violated the First Amendment establishment clause. Since this case focused on Darwinian evolution verses creationism, it was not necessary to determine the exact religious scope of the religious preference clause of the Constitution.

Epperson v. Arkansas, 393 US. 97, 89 sect. 266, 21 228 (1968).

Facts

Susan Epperson was a graduate of the Arkansas' school system and obtained a master's degree in zoology from the University of Illinois. She was employed as a biology teacher by the Little Rock school system in fall of 1964 to teach tenth grade biology at Central High School. In fall of 1965 she was faced with the dilemma that if she used a new biology textbook she would presumably teach a chapter on Darwinian evolution and thus subject to dismissal or criminal prosecution. She brought action against the State of Arkansas in the state Chancery Court requesting that the statute be voided. A parent of children enrolled in the public schools intervened in support of the action. The Arkansas statute stated:

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.

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.[739]

Decision

The plaintiffs' challenge was based on constitutionality of the anti-evolution statute that was anchored in the 1925 Tennessee "monkey law." The Arkansas Chancery Court held the statute violated the Fourteenth Amendment of the United States Constitution. On appeal the Arkansas Supreme Court reversed the Chancery Court. The Arkansas Supreme Court insisted that statute was a legitimate exercise of state authority establishing public school curriculum. On appeal the United States Supreme Court (seven to two) reversed the Arkansas Supreme Court based on the First and Fourteenth Amendment of the United States Constitution. Justice Abe

[739]Epperson v. Arkansas, 393, U.S. 97, 99, (1968).

Fortas delivered the Court's majority opinion. Justice Fortas maintained that, "plainly the law is contrary to the mandate of the First and in violation of the Fourteenth Amendment to the Constitution."[740] Continuing, Justice Fortas asserted that:

1. State and the Federal government must remain neutral in religious theory, doctrine and practices. Government may not aid, foster, or promote one religion or religious theory over another. Government may neither oppose religion nor advocate non-religion.

2. Courts are reluctant to interfere with the daily operation of public schools. However, where there is violation of basic constitutional values the judiciary must intrude. The First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."[741] They are a violation of the freedom of religion provision of the First Amendment.

3. The Supreme Court is always concerned with the invasion of academic freedom.

4. Study of the Bible and religions from a historical and literary viewpoint is a legitimate exercise of the secular program of education. However, the First Amendment insists that states may not adopt curriculum programs and/or practices that foster or oppose any religion.

5. Finally, the state's authority to prescribe curricula does not include punishing teachers, on pain of criminal penalty, if the prohibiting--in this case teaching Darwin's theory of evolution--is flawed with First Amendment violations.[742]

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[740]Ibid., 109.

[741]Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[742]Epperson v. Arkansas, 393 U.S. 97, 103-109 (1968).

Discussion

In Epperson, there was little doubt that Arkansas sought to prevent teachers from discussing Darwinian evolution because it was contrary to the Old Testament Book of Genesis and must be the only source regarding human origins. While the Arkansas General Assembly legislative action is the center point of Epperson, other states have enacted "Genesis" statutes. In 1968, only Arkansas and Mississippi had such "anti-evolution" or "monkey" laws on the books. Tennessee (repealed in 1967) and Oklahoma (repealed in 1926) had such laws but they had been repealed. Florida and Texas had passed resolutions against the teaching of evolution between 1921 and 1929. In all, twenty states had introduced bills against teaching the theory of evolution. Thus, whenever there are legislative mandates, school board policies, and/or school administrator discretion governing religion and the education process--regardless of the complaint-- the Epperson dictum provides a judicial guideline for avoiding conflict regarding the advancing of one religion over another in the public schools.

Finally, in early 1981 the Arkansas General Assembly passed another "Genesis" statute known as the "balanced treatment statute." The statute required that balanced treatment be given when teaching human origins--balanced treatment between scientific evolution theory and scientific creationism. In McLean v. Arkansas Board of Education,[743] civil rights action was initiated to prohibit state education officials from enforcing the balanced treatment statute. The Federal District Court in Little Rock, with

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[743]McLean v. Arkansas Board of Education, 529 F.Supp. 1255 (E.D.Ark. 1982).

Justice Overton writing the opinion declared the statute unconstitutional as First Amendment religious advancement.

Daniel v. Waters, 399 F.Supp. 510 (M.D. Tenn. 1975), 515 F.2d 485 (6th Cir. 1975).

Facts

In 1973, a newly enacted Tennessee statute required that all public school biology textbooks give equal treatment to evolution and the Biblical account of the origin of man and expressly to that evolution be labeled as mere theory. The part of the Tennessee statute in question was Chapter 377 of the Public Acts of 1973.

Section 1. Tennessee Code Annotated, Section 49-2008, was amended by adding the following paragraph:

> Any biology textbook used for teaching in the public schools, which expresses an opinion of, or relates to a theory about origins or creation of man and his world shall be prohibited from being used as a textbook in such system unless it specifically states that it is a theory as to the origin and creation of man and his world and is not represented to be scientific fact. Any textbook so used in the public education system to which expresses an opinion or relates to a theory or theories shall give in the same textbook and under the same subject commensurate attention to, and an equal amount of emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account of the Bible. The provisions of this section shall not apply to use of any textbook now legally in use, until the beginning of the school year of 1975-1976 provided, however, that the textbook requirements stated above shall in no way diminish the duty of the state textbook commission to prepare a list of approved standard editions of textbooks for use in the public schools of the state as provided in this section. Each local school board may use textbooks or supplementary material as approved by the state board of education to carry out the provisions of this section. The teaching of all occult or

> satanical beliefs of human origin is expressly excluded from this Act.
> Section 2. Provided, however, that the Holy Bible shall not be defined as a textbook, but is hereby declared to be a reference work and shall not be required to carry the disclaimer above provided for textbooks.[744]

The underlined sections above were the parts which the plaintiffs-appellants asserted were violative of the First and Fourteenth Amendments of the Constitution of the United States. The Tennessee statute, while not prohibiting the teaching of evolution, specified that if evolution were taught, then creationism must be given equal treatment. Even though Creationism was exempt--the Bible was a reference book not a science book--to teach Darwinian evolution a teacher had to teach it as a theory only, not a fact. In practice, instruction in evolution was required to deny it entirely as a theory, while the statute exempted the creation story in Genesis from such a disclaimer on the basis that the Bible was a reference book, not a textbook.

Decision

The United States Court of Appeals for the Sixth Circuit with Justice Edwards writing the opinion concluded that the Tennessee law was violative of the establishment clause of the First Amendment. Continuing Justice Edwards stated that:

> The requirement that some religious concepts of creation, adhered to presumably by some Tennessee citizens, be excluded on such ground in favor of the Bible of the Jews and the Christians represents still another method of preferential treatment of particular faiths by state law and, of course, is forbidden by the Establishment Clause of the First

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[744]Daniel v. Waters, 515 F.2d 485, 487 (6th Cir. 1975).

Amendment.[745]

Discussion

Justice Edwards of the Sixth Circuit Court of Appeals expressed hesitancy about intervening in daily operation of schools, but maintained that such action must be taken when statutes and regulations infringe upon constitutionally protected rights. Justice Edwards maintained that government must be neutral in religion and nonreligious matters. Justice Edwards further maintained that government "may not aid, foster, or promote one religion or religious theory against another or against the militant opposite."[746]

Finally, Justice Edwards suggested that it would be next to imposible for the the Tennessee Textbook Commission to determine which religious theories should be considered satanical or occult without first resolving theological arguments which have embroiled and frustrated theologians through the ages. Justice Edwards maintained that throughout human history "the God of some men has frequently been regarded as the Devil incarnate by men of other religious persuasions."[747]

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[745]Ibid., 491.

[746]Ibid., 490.

[747]Ibid., 491.

Edwards v Aquillard, 765 F.2d 1251 (5th Cir. 1985), *reh'g denied*, 779 F.2d 225 (5th Cir. 1985), 482 U.S. 578, 106 S.Ct. 1947 (1987).

Facts

In 1987 the Supreme Court handed down a landmark decision in Aquillard.[748] The case arose when the Louisiana Legislature enacted a law entitled the "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction." The statute maintained that instruction on the human origins would not be required in any public school. However, in the event that such instruction was presented, it must include teaching of both evolution and creation science. Parents, teachers, and several religious leaders joined in challenging the statute as violation of the state and federal constitutions.

Decision

The United States District Court (Eastern District of Louisiana) held that the statute violated the state constitution. However, on appeal the Fifth Circuit Court of Appeal reversed and remanded. Justice Adrian Duplantier, Jr. writing for the District Court "reasoned that the doctrine of creation-science necessarily entailed teaching the existence of a divine creator and the concept of a creator was an inherently religious tenet."[749] Thus, said Justice Duplantier the purpose of Louisiana's statute was to promote religion--and that was First Amendment establishment.

The state had argued the statute promoted academic freedom. The Court of Appeals rejected that argument and Justice Jolly maintained the

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[748]Edwards v. Aguillard, 765 F.2d 1251 (5th Cir. 1985).

[749]Ibid., 1254.

statute had a different purpose of discrediting "evolution by counterbalancing its teaching at every turn with the teaching of creationsim."[750]

Plaintiffs had argued that statute was "simply another effort by fundamentalist Christians to attack the theory of evolution and to incomporate in the public school education the Bible theory of creation described in the Book of Genesis."[751] Regarding the secular purpose prong of the tripartite test Justice Jolly acknowledged that many religious groups embraced creationism. However, after reviewing Karen B.[752] and Lubbock[753] Justice Jolly concluded the statute was without secular purpose. Justice Jolly lamented "the act continues the battle William Jennings Bryan carried to his grave,"[754] and was intended to "discredit evolution by counterbalancing its teachings at every turn with the teaching of creationism, a religious belief."[755] Thus, the statute failed the first prong of the Lemon [756] test.

The Supreme Court voted seven to two with Justice Brennan writing

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[750]Ibid., 1257.

[751]Ibid., 1254.

[752]Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem, 455 U.S. 913, 107 S.Ct. 1267 (1982).

[753]Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982), *reh. denied*, 680 F.2d 424 (5th Cir. 1982), *cert denied*, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed. 1003 (1983).

[754]Edwards v. Aguillard, 765 F.2d 1251, 1257 (5th Cir. 1985).

[755]Ibid.

[756]Lemon v. Kurtzman, 403 U.S. 602 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

the majority opinion that state advanced religion.

Discussion

Justice Brennan reviewing history of Louisiana's statute maintained that primary intent was religious advancement--the 1981 statute " 'was clearly to advance the religious viewpoint that a supernatural being created humankind' and not to advance the cause of academic freedom as the state maintained."[757] Continuing Justice Brennan acknowledged that of all scientific subjects taught in schools this one emerged in legislation--"Out of many possible science subjects taught in the public schools, the legislature chose to effect the teachings of the one scientific theory that historically has been opposed by certain religious sects."[758] Thus maintained Justice Brennan, the statute fails all three prongs of the Lemon tripartite test.

Justice Scalia, joined by Chief Justice Rehnquist, dissented. In his dissenting opinion, Justice Scalia suggested that the Court had an "intellectual predisposition created by the facts and legend"[759] of the famous 1925 Scopes trial. In expressing his amazement, Justice Scalia concluded the following: "We have . . . no adequate basis for disbelieving the purpose set forth in the act itself, or for concluding that it is a sham enacted to conceal the legislators' violation of their oaths of office."[760]

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[757]Tom Mirgo, "Creationism Law in Louisana is Rejected by Supreme Court," Education Week 6, No 39 (June 24, 1987): 1.

[758]Ibid., 6.

[759]Ibid.

[760]Ibid.

Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), *cert denied*, 454 U.S. 1123, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981).

Facts

In 1978, several students at Guilderland High School organized a group called Students for Voluntary Prayer. In September 1978 they requested permission from the principal to hold communal prayer meetings in a classroom before the beginning of the school day. The group noted that it was not requesting supervision or faculty involvement. Its activities were voluntary and would not interfere with any other school activities.

In a letter dated September 23, 1978, the principal denied their request. Lister, the superintendent also refused their request. On December 19, 1978, and again on March 19, 1979, the Guilderland Board of Education voted to deny the group's request. In June 1979, six members filed suit individually and on behalf of the group for declaratory, injunctive, and monetary relief against the principal, the superintendent, the board of education and its individual members for denying their group communal prayer meetings in the public school immediately before the beginning of the school day. They claimed their First and Fourteenth Amendment rights to the free exercise of religion, freedom of speech, freedom of association, and equal protection were being violated.

Decision

On April 16, 1980, the United States District Court for the Northern District of New York, Judge McCurn presiding, granted the defendants judgment and dismissed the complaint. The students appealed to the United States Court of Appeals, Second Circuit. Irving R. Kaufman, Circuit Judge,

affirmed the decision of the District Court by ruling that:

> (1) plaintiffs' free exercise rights were not limited by school board's refusal to permit communal prayer meetings to occur on school premises, and authorization of student-initiated voluntary prayer would have violated the establishment clause by creating an unconstitutional link between church and state, and (2) school board's refusal did not violate plaintiffs' right to free speech, freedom of association, or equal protection.[761]

The Supreme Court decided not to review the decision of the Appellate Court.

Discussion

The District Court found that the establishment clause restricted the school from permitting the students to hold prayer meetings in a classroom. In applying the Lemon[762] test, Judge McCurn found that even though a school's decision might have a secular purpose, the granting of the group's request would have the impermissible effect of advancing religion. In addition, if prayer meetings were held the school would need to provide supervision. School supervision would cause excessive entanglement between a supposedly secular school and clearly religious activities.

Further, Judge McCurn found that the school's denial did not violate the students' rights to freely exercise their religious beliefs. Moreover, even if some infringement occurred, it was justified by the state to protect the interest of maintaining separation between church and state. The arguments of freedom of speech and association were rejected by Judge McCurn. Finally, the court found that the equal protection clause of the Fourteenth Amendment did not

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[761]Ibid., 972.

[762]Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105 (971).

demand that a religious organization be treated in the same manner as secular student groups permitted to use the school facilities.

Widmar v. Vincent, 635 F.2d 1310 (8th Cir. 1980), *aff'd,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 44 (1981).

Facts

Cornerstone, a student religious group, wished to conduct public meetings at the University of Missouri for prayer, Bible reading, and sharing religious experiences. A university policy prohibited use of university buildings for religious purposes. Eleven students litigated the policy on grounds that policy violated their First Amendment religious rights.

Decision

The United States District Court in Chess v. Widmar[763] held that the university policy was not only permissible but required by the establishment clause of the United States Constitution. The United States Court of Appeals for the Eighth Circuit rejected the analysis of the District Court and reversed the decision.

The Supreme Court, with Justice Louis Powell writing the majority opinion--eight to one vote-- crafted the Court's decision in the following manner. First the decision must be narrow:

> Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to

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[763]Chess v. Widmar, 480 F.Supp. 907 (1979)

justify this violation under applicable constitutional standards.[764]

Discussion

The University of Missouri at Kansas City had a stated policy to encourage participation by student groups. Over one hundred groups were officially recognized by the University. Students paid an activity fee to help defray the costs to the University. A registered religious group named Cornerstone had asked and received permission from 1973-1977 to conduct meetings in University facilities. In 1977, the group was informed it could no longer conduct meetings on the campus because of a University regulation passed in 1972 which prohibited the use of University buildings or grounds for the purpose of religious worship or religious teaching. The Supreme Court ruled that it was discriminatory to exclude from such a forum any group on the religious content of the group's speech unless it could justify that "its regulation is necessary to serve a compelling state interest and that is narrowly drawn to achieve that end."[765] Such was not the issue in this case.

Justice Powell applied the Lemon I[766] tripartite test. The Supreme Court maintained that the first and third prongs were met when the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion. The Court further maintained that the primary effect of a public forum was not to advance religion; thus the second

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[764]Widmar v. Vincent, 454 U.S. 263 (1981).

[765]Ibid.

[766]Lemon v. Kurtzman, 403 U.S. 602 (1971).

prong was cleared. It was also stated that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices."[767] Since any impact would be both incident and minimal, the decision of the Appellate Court could be affirmed.

In an effort to establish limits on the ruling, the Court noted the following:

> University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion.[768]

Justice Powell is thus suggesting that if students were younger--elementary and secondary students--the decision would have been different.

Lubbock Civil Liberties Union v. Lubbock Independent School District, 669F.2d 1038 (5th Cir. 1982), *reh. denied* 680 F.2d 424 (5th Cir. 1982) *cert. denied*, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983).

Facts

The Lubbock Independent School District adopted a policy prohibiting student activities lacking a secular purpose during school. However, students were allowed to schedule voluntary secular activities, if scheduled before and after school. The Lubbock Civil Liberties Union, which had objected to the old policy, also objected to the new policy, especially paragraph four of the policy which stated:

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[767]Widmar v. Vincent, 454 U.S. 263, 274 (1981)

[768]Ibid.

> The school board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.[769]

The Lubbock Civil Liberties Union also challenged the new policy on the basis that allowing voluntary student religious activities was a violation of the establishment clause of the First Amendment.

Decision

The trial court held that the new policy was not facially unconstitutional. The court specifically noted that paragraph four was not unconstitutional because it permitted student groups of all types to gather at the school as long as attendance at the meetings was voluntary. The Lubbock Civil Liberties Union appealed to United States Court of Appeals for the Fifth Circuit. That court affirmed the judgment of the trial court in refusing to enter an injunction with respect to the practices in effect before the adoption of the new policy. By applying the tripartite test, the Appellate Court reversed the decision of the District Court on the constitutionality of the new policy.

Discussion

The Court of Appeals (Fifth Circuit) after reviewing past history which included distributing Gideon Bibles in elementary schools, classroom prayers led by staff members, and morning Bible readings over the school public address systems found that board policy was First Amendment advancment.

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[769]Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (1982).

Bender v. Williamsport Area School District, 563 F.Supp. 697 (M.D. Penn. 1983), 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534, 105 S.Ct. 1167 (1985), *reh'g denied*, 476 U.S. 1132 (1986).

Facts

In September 1981, a group of high School students in Williamsport, Pennsylvania formed a club called "Petros" for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members."[770] The group obtained permission from the principal to hold an organizational meeting during activity period on school premises. At the meeting Bible verses were read and students prayed. There was no evidence that anyone objected to future meetings of Petros; nevertheless, the principal told the group they could not meet again until he had discussed the matter with the superintendent. The superintendent informed the students that he would respond to the written request for recognition when he received legal counsel from the school district solicitor concerning the formation of a religious club on campus.

In November 1981, the principal and the superintendent met with Petros and advised the group that, based on the legal opinion of the school district solicitor, their request must be denied. The students were informed that they could meet off school premises and would be given released time during activity period if they could find a meeting place and an adult, preferably a clergyman, for their meetings.

The students appealed in writing to the chairman of the Williamsport Area School Board. At a board meeting in January 1982, the board upheld the superintendent's decision and denied the appeal based on the solicitor's opinion.

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[770]Bender v. Williamsport Area School District, 106 S.Ct. 1326, 1327 (1986).

In June 1982, ten of the students filed suit in the United States District Court against the Williamsport Area School District, the nine members of the school board, the superintendent of the school district, and the principal of the high school. The suit alleged that refusal to allow them to meet on the same basis as other student groups because of their religious activities violated the First Amendment, and they asked for declaratory and injunctive relief.

Decision

The District Court, on motions for summary judgment ruled in favor of the students but entered no injunction and granted no relief against any defendant in his individual capacity. The school district did not appeal and complied with the judgment and permitted the students to hold their meetings as requested. However, one member of the school board did appeal. No one questioned his standing to appeal and the United States Court of Appeals for the Third Circuit ruled in his favor. The Supreme Court of the United States held that the school board member did not have standing to appeal; and therefore, the Court of Appeals had no jurisdiction to hear his appeal or to decide the merits of the case. The Supreme Court ordered the judgment of the Court of Appeals vacated and the case was remanded with instructions to dismiss the appeal for lack of jurisdiction.

Discussion

Willamsport High School held an activity period for thirty minutes on Tuesdays and Thursdays for student groups to conduct meetings. It was a part of the school day. Students not participating in a club were allowed to study in the library, visit the school's computer room, examine career or college placement materials, or remain in their homerooms until time for the next

class period. Participation in activities was completely voluntary, although each student was required to be on school grounds and accounted for during activity period.

Each student club was required to have a sponsor which was usually a faculty member. The only qualification for an activity was that it "contribute to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper."[771]

Petros, a student group, requested permission to meet during activity period. To the knowledge of the principal Petros was the only student group ever denied permission to meet. Petros had a monitor present at its organizational meeting who used the time to grade papers and did not participate in the meeting.

The appellate court used the following questions in analyzing the constitutionality of Petros meeting during activity period:

1. Did the student members of Petros have a free speech right guaranteed by the first amendment?

2. If we conclude, the Williamsport school district did create a forum limited to accommodating student activities which would promote the intellectual and social development of of its students as part of the secondary school educational process, then did the students in the Petros program come within the prescribed parameters of the limited open forum so created?

3. Assuming an affirmative answer to the preceding inquiries, may the school district validly object to the presence of Petros within the school, based on the potential violation of the Establishment Clause?

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[771]Bender v. Williamsport Area School District, 741 F.2d 538, 544 (1984).

> 4. If we conclude, as we do, that allowing Petros to meet within the school would violate the Establishment Clause, then which of two provisions of the first amendment should control, where the students, on the one hand, have a free speech right, but the school district, on the other hand, would be in violation of the Establishment Clause if it permitted the religious activity and speech of Petros?[772]

The appellate court concluded that since the parameters for student group meetings were so broad, the activities of Petros were within the bounds of a "limited forum" as it existed at Willaimsport High School. Therefore, the student members of Petros had a valid First Amendment interest to participate in their proposed activity.

With the limited forum issue settled, the issue turned to determining if the school could constitutionally impose restrictions on the free speech rights of the students. The only reason given by WilliamsportHigh School for denying permission for Petros to organize was that such permission might be a violation of the establishment clause.

In applying the tripartite test the appellate court concluded that Williamsport failed two of the three prongs. The general activity period at Williamsport High School had no religious objective or nonsecular purpose. Allowing Petro to meet would have the effect of advancing religion. Meeting on school property and providing supervision for Petros would create an unavoidable excessive governmental entanglement in religion.

A case was presented in this litigation to apply the Widmar[773] decision

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[772]Ibid.

[773]Widmar v. Vincent, 635 F.2d 1310 (8th Cir. 1980), aff'd, 454 U.S. 263 (1981).

to secondary schools. Williamsport and Widmar were similar but in general the secondary school is a more restrictive environment than the university. Another important factor was the maturity level of the students.

It is worth noting that the Williamsport case started in the District Court before the passage of the Equal Access Act[774] and concluded in the Supreme Court after its passage. It is surprising that the Equal Access Act did not become more involved in the Williamsport decisions.

Garnett v. Renton School District No. 403, 675 F.Supp. 1268 (1988), 865 F.2d 1121 (9th Cir. 1989), *appeal filed*, 110 S.Ct. 362 (1989).

Facts

Richard Garnett and other students asked permission of the principal and the school district to use a classroom in the high school for weekday morning meetings of their nondenominational Christian student group. The group planned to discuss religious and moral issues, read the Bible, and pray. The principal and the school district denied their request because their club was not curriculum related and because permitting the proposed meetings would violate the establishment clause of The First Amendment. Members of the Christian group brought action against the high school and the school district to permit religious meetings on school property.

Decision

The United States District Court for the Western District of Washington denied the preliminary injunction, and judgment was later entered for the school district on the merits. The students appealed. The United

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[774]Pub. Law No. 98-377, 802-805, 98 Stat. 1302 (1984) [codified at 20 U.S.C. 4071-4074 (1988)].

States Court of Appeals for the Ninth District affirmed the ruling of the District Court by stating:

> (1) allowing the student religious group to hold meetings in public high school classroom prior to start of the school day would violate the establishment clause of the First Amendment; (2) school district's refusal to allow student religious group to meet on the public high school campus did not violate First Amendment free speech clause; and (3) public high school did not have a "limited open forum," as defined by the Equal Access Act, and school was accordingly not required by mandatory provisions of the Act to allow student religious groups to hold meetings.[775]

Discussion

Lindbergh High School is a public high school in the Renton School District. The district made classrooms available for students to use for approved "cocurricular" activities during noninstructional time. The district's board of directors and the superintendent determined whether to approve an activity based on District Policy 6470 which stated:

> [t]he criteria to be used for approving cocurricular activities should include but not be limited to:
> 1. the purposes and/or objectives shall be an extension of a specific program or course offering,
> 2. the activity shall be acceptable to the community,
> 3. the activity should have carry-over values for lifetime activities.
> 4. the group shall be supervised by a qualified employee,
> 5. the cost of the activity must not be prohibitive to students or District,
> 6. the activity must comply with Title IX requirements,
> 7. the activity must take place on school premises unless approved in advance by the school principal, and

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[775]Garnett v. Renton School District No. 403, 865 F.2d 1121, 1123 (9th Cir. 1989).

8. the activity must not be secretive in nature.[776]

Policy 6470 also states that the district "does not offer a limited open forum."[777]

Permitting the Christian group to meet in a public high school classroom at a time closely associated with the school day would violate the establishment clause. It could be argued that the action might have a secular purpose by permitting equal access to school facilities. This argument fails because the school district had a written policy which stated the school district did not offer a limited open forum. It would also violate the establishment clause because it fails the second and third prongs of the Lemon[778] test. It would both advance and entangle the high school with religion.

Other circuits in exploring use of school facilities for religious meeting have held that such meetings unconstitutionally advance religion. Even under a neutral equal access policy, the Brandon[779] court found that permitting prayer meetings in a high school would impressionably advance religion. The court pointed out the appearance of school sponsorship that would arise:

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities

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[776]Ibid., 1122.

[777]Ibid.

[778]Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed2d 745 (1971).

[779]Brandon v. Board of Education 635 F.2d 971 (2d Cir. 1980).

> might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.[780]

Refusing to permit a student religious group to meet on campus did not violate the free speech clause of the First Amendment. Lindbergh High School did not have a public limited forum. As the Supreme Court held in Hazelwood:

> school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," . . . or by some segment of the public, such as student organizations. . . .[781]

Since the Renton School District had not created a pubic forum it could exclude the religious group. Policy 6740 of the Renton School District only applied to student clubs in the high school. They had been consistent in applying the policy. Clubs were allowed to meet only after they received district approval.

The requirements of the Equal Access Act did not apply because all the clubs at Lindbergh were related to the curriculum. This case was the first time the Equal Access Act had been used by a plaintiff in an attempt to force a high school to allow a Christian group to meet in a classroom on campus.

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[780]Ibid., 971. See also Bellv Little Axe Independent School District, 766 F.2d 1391 (10th Cir. 1985); Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir. 1984); Bender v. Williamsport Area School District, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986); Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F,2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983).

[781]Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 568, 98 L.Ed.2d 592 (1988).

Board of Education of Westside Community Schools v. Mergens, 110 S.Ct. 2356, 110 L.Ed.2d 191(1990).

Facts

Bridgett Mergens, a student at Westside High School, a public secondary school in Omaha, Nebraska, met with the principal and asked for permission to form a Christian club at school. The club was to be nondenominational and open to all students. Its purpose was to permit students to read and discuss the Bible, enjoy fellowship, and pray together. It would have the same privileges as all other Westside clubs, but it would not have a faculty sponsor. Her request was denied, first by the principal and then by the superintendent, on the grounds that a religious club at school would violate the establishment clause.

Mergens appealed to the school board which supported the decision of the superintendent. She then challenged the decision in federal district court on the basis that it violated the Equal Access Act and her First and Fourteenth Amendment rights to the free exercise of religion. The school board responded that the Equal Access Act did not apply because Westside did not maintain a limited open forum, and even if the school did maintain such a forum, the act was unconstitutional.

Decision

The United States District Court held that the Equal Access Act did not apply because all student clubs at Westside High School were curriculum related. The students appealed to the Court of Appeals for the Eighth Circuit which reversed the decision of the District Court. The Court of Appeals ruled that the purpose of the Equal Access Act was to prohibit discrimination against respondents' proposed club on the basis of its religious content, and

that the Act did not violate the establishment clause. On certiorari, Justice O'Connor delivered the opinion of the United States Supreme Court which held that: "(1) the scuba diving club, chess club, and service club were non curriculum related student groups, triggering district's obligations under the Equal Access Act, and (2) the Act does not violate the establishment clause."[782]

Discussion

Westside High School, a public secondary high school that receives federal financial assistance, permitted students, on a voluntary basis, to form clubs and hold meetingsafter school hours on school property. There were approximately thirty groups, including a chess club, a scuba diving club, and a service group working with special education classes. Each club was required to have a sponsor. There were no written guidelines as to the formation of student clubs. Students wishing to form a club would present their request to a school official. The school official would decide whether the proposed club was consistent with school board policies and the district's commitment to teaching skills and values.

A group of students at the high school requested permission to form a Christian club for the purpose of permitting students to read and discuss the Bible, enjoy fellowship, and pray together. The club was to be nondenominational and open to all students. It would have the same privileges as all other Westside clubs, but it would not have a faculty sponsor.

School officials denied the request for the Christian club to meet citing

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[782]Board of Education of Westside Community Schools v. Mergens, 110 S.Ct. 2356, (1990).

the establishment clause and the club's lack of a faculty sponsor. Members of the Christian club asserted their denial to meet on campus

> violated the Equal Access Act, which prohibits public secondary schools that receive federal assistance and that maintain a "limited open forum" from denying "equal access" to students who wish to meet with the forum on the basis of "religious, political, philosophical, or other content" of the speech at such meetings.[783]

Justice O'Connor in delivering the majority opinion of the Court pointed out that the petitioners violated the Equal Access Act by denying official recognition of the respondents' proposed club. A schools' equal access is triggered if the school permits one or more noncurriculum-related groups to meet on the school premises. The Equal Access Act did not define noncurriculum-related groups but that term is best interpreted through the act's language, logic, and nondiscriminatory purpose, and Congress' intent to mean any student group's subject matter that is not taught as a part on the regular school subject matter.

Westside High School offered a limited open forum by permitting one or more noncurriculum groups to meet on campus. The denial by school officials for the religious group to meet on school premises during noninstructional time, as other student groups did, violated the Equal Access Act which prohibits school officials from discriminating against students based on the content of students' speech.

The denial of the respondents' request to form a religious club was a denial of "equal access" to the schools limited open forum. Apparently, the

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[783]Ibid., 2359.

school permitted the students to meet informally before or after school but they were seeking formal recognition so they would have the same privileges as other clubs, such as access to the intercom system, bulletin boards, school newspaper, and the annual Club Fair. Their denial based on the religious content of the meetings in the school's limited open forum violated the Equal Access Act.

Justice O'Conner, joined by Chief Justice Rehnquist, Justice Wbite, and Justicce Black, concluded that Part III of the Equal Access Act did not conflict with the Establishment Clause. They expressed à view that by applying the logic of Widmar v. Vincent,[784] which applied the tripatite test of Lemon v. Kurtzman,[785] the Equal Access Act in this case did not violate the Establishment Clause because it (1) served a secular purpose; (2) did not advance religion; (3) did not risk entanglement between government and religion.

In dissenting, Justice Stevens asserted the majority had misinterrupted the intent of the Equal Access Act approved by the Congress of the United States. Did Congress intend to order every public high school that sponsors a chess club, a scuba diving club, or a French club, without having formal classes in those subjects, to open its doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? Justice Stevens stated:

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[784]Widmar v. Vincent, 454 U.s. 263, 271-275, 102 S.Ct. 269 275-277, 70 L.Ed.2d 440.

[785]Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745.

> I think not. A fair review of the history to the Equal Acces Act . . ., discloses that Congress intended to recognize a much narrower forum than the Court has legistated into existence today.[786]

Prayer at Athletic Events

Doe v. Aldine Independent School District, 563 F.Supp. 883 (1982).

Facts

An anonymous plaintiff brought action against a Texas school district for violation of constitutional rights based on recitation and singing of a school prayer on school district property. The following prayer was the source of controversy: "Dear God, please bless our school and all it stands for. Help keep us free from sin, honest and true, courage and faith to make our school the victor. In Jesus' name we pray, Amen."[787] These words were posted in block letters on the wall over the entrance to the gymnasium at Aldine Senior High School and recited or sung by students to music played by the Aldine School band at athletic events, pep rallies, and at graduation ceremonies. These school-sponsored events took place before or after regular school hours in the school gymnasium and at the football stadium which were the property of the school district. Frequently, the school principal or other school employees would initiate the recitation or singing of the school prayer. Even though students were required to assemble in the gymnasium for certain school programs, attendance at any event during which the prayer was to be

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[786]Ibid., 2383.

[787]Doe v. Aldine Independent School District, 563 F.Supp. 883, 884 (1982).

recited or sung was voluntary. In addition, no one was forced to sing or recite the words, nor was anyone required to stand when the words were recited or sung.

Decision

The district court held that the practice or policy of reciting or singing a school prayer violated the establishment clause of the First Amendment, notwithstanding that the singing or recitation occurred at extracurricular events on school property where practice was state-initiated, encouraged, and supervised. The plaintiff's motion for summary judgment was granted.

Discussion

In this case, the court had to deal with two interrelated questions:

> (1) whether the activities of the defendants violated the establishment clause or (2) whether, as defendants contend, the restriction of those activities would mean an impermissible encroachment on the individual student's constitutional right to freely exercise his or her religion.[788]

There was no questions that the words of the Aldine school song constituted a prayer since they called on God for His blessing and contained an avowal of divine faith. In applying the Lemon test, the Aldine school song failed all three prongs.

The defendants claimed that the Aldine school song was secular because it was intended to instill school spirit and pride. Its use would have the beneficial effect of increasing morale and reducing disciplinary problems in the school. The court responded that a school district or other governmental body

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[788]Ibid., 885.

cannot seek to advance nonreligious goals and values, no matter how laudatory, through religious means. In Hall v. Bradshaw, the court stated:

> If a state could avoid the application of the first amendment in *this manner [by using religious means to further nonreligious* goals], any religious activity of whatever nature could be justified by public officials on the basis that it has a beneficial secular purposes.[789]

Therefore, as a matter of law, the defendants claim fails the Supreme Court's secular purpose test.

The defendants contended that singing or reciting the prayer neither advanced nor inhibited religion because the students were not required to participate and state employees only had a limited involvement. The defendants also pointed out that the challenged activities did not take place in a religious setting. The court found that the defendants could not satisfactorily defend the question of primary effect. The reason was that when viewed in its entirety, the natural consequences of these actions would be the advancement of religion by indicating to students that the state advocates religious belief.

The defendants contended that they had avoided an excessive entanglement with religion by reciting the prayer only at times which did not encroach on the educational operation of the school, and both attendance and participation at events where the prayer was sung or recited was voluntary. Analysis of the entanglement issue was involved with procedural matters. The relevant examination was whether the state must provide supervision for religious activity.[790]

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[789]Hall v. Bradshaw, 630 F.2d 1018, 1020-1021, (4th Cir. 1980).

[790]Brandon v. Board of Education of Guilderland Central School

In this case it was apparent that Aldine High School personnel were active in their supervision of religious activity. The facts of Aldine were similar to those of Lubbock[791] in which the court found that in compliance with Texas state law, the school district had provided supervision of students who were meeting voluntarily before and after school on school grounds for religious activity. In Lubbock the court stated: "If the state must so supervise, then church and state are excessively intertwined."[792] The ruling in Lubbock controls on the entanglement issue. Therefore, as a matter of law, the Aldine court concluded that the defendant did not avoid an excessive entanglement with religion and thus failed the third prong of the Lemon test.

The defendants took the position that to limit the activity at issue would have been a violation of the students' rights to the free exercise of religion. However, the activity that the court addressed was not the issue of independent, unofficial invocation of God's help by students, but rather a recurring state-sponsored and supervised activity on school property during extracurricular events which were an important part of the school's program. The difference was important and controlling. "The former is an inviolable right; the latter, according to the purpose, effect, and entanglement analysis of the Supreme Court, is an impermissible establishment of religion."[793]

District, 635 F.2d 971, 979 (2d Cir. 1980).

[791]Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982).

[792]Ibid., 1047.

[793]Doe v. Adline Independent School District, 563 F. Supp. 883, 888 (1982).

Jager v. Douglas County School District, 862 F.2d 824 (11th Cir. 1989).

Facts

In the fall of 1985, Doug Jager, a member of the marching band, objected to his school principal about the practice of having pregame invocations delivered at home football games. The invocations often began with the words "let us bow or heads"[794] or "let us pray"[795] and frequently made reference to Jesus Christ or ended with the words "in Jesus' name we pray."[796] These invocations were in conflict with the Jagers' sincerely held religious beliefs. The principal made the band director aware of Doug Jager's objections to the prayers. The band director witnessed to Doug on Christianity.

Decision

In the Fall of 1986, the Jagers filed a complaint in the United States District Court for the Northern District of Georgia. The court issued a temporary restraining order prohibiting the Douglas County School District from conducting or permitting invocations prior to any athletic event at the school stadium.

The case was tried in the Fall of 1986 and on February 3, 1987, the District Court

> (1) declared the pregame invocations unconstitutional,
> (2) denied the Jagers' request for a permanent injunction,
> (3) rejected the Jagers' claim based on the Free Exercise of Religion Clause of the First Amendment, and (4) rejected the

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[794]Jager v. Douglas County School District, 862 F.2d 824, 826 (11th Cir. 1989)

[795]Ibid.

[796]Ibid.

> Jagers' claim that the School District violated the Georgia Constitution.[797]

Discussion

In the Spring of 1986, the Douglas County School superintendent, the school system attorney, the Jagers and their counsel, and two ministers met and discussed two alternative proposals for changing the invocation practices. One proposal was a secular inspirational speech, which was acceptable to the Jagers. The other was an equal access plan that would retain some religious content which was rejected by the Jagers.

The District Court held that the equal access plan, which involved randomly selecting innovation speakers, was constitutional on its face and did not violate the establishment clause of the First Amendment. On appeal the Jagers' challenged this holding.

The Court of Appeals stated that the equal access plan was adopted with the purpose of endorsing and perpetuating religion. The District Court found that pregame invocations serve four purposes:

> (1) to continue a long standing custom and tradition; (2) to add a solemn and dignified tone to the proceedings; (3) to remind the spectators and players of the importance of sportsmanship and fair play; and (4) "to satisfy the genuine, good faith wishes on part of a majority of the citizens of Douglas County to publicly express support for Protestant Christianity."[798]

The Court of Appeals found that the equal access plan failed the first

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[797]Ibid., 827.

[798]Ibid 829.

two prongs of the Lemon[799] test, secular purpose and primary effect. The court asserted that the equal access plan in this case was adopted with the purpose of endorsing and perpetuating religion. The school district's rejection of an alternative plan to have only secular invocations makes it clear that the school district's purpose for pregame invocations was religious. School district's claim that it was not entangled with religion because it did not monitor the content of the invocations and the Douglas County Ministerial Association no longer selected the invocation speaker or delivered the pregame prayer did not change the intent of the pregame invocations.

The school district offered arguments claiming that the invocations at pregames were constitutional. Their first argument was that the pregame prayers occurred outside the instructional environment of the classrooms. The Doe court rejected this argument:

> Pep rallies, football games, and graduation ceremonies are considered to be an integral part of the school's extracurricular program and as such provide a powerful incentive for students to attend. . . . "It is the Texas compulsory education machinery that draws the students to the school events and provides any audience at all for the religious activities. . . ." Since these extracurricular activities were school sponsored and so closely identified with the school program, the fact that the religious activity took place in a nonreligious setting might create in a student's mind the impression that the state's attitude toward religion lacks neutrality.[800]

The next argument from the school district was that football

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[799]Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971)

[800]Doe V. Aldine Independent School District, 563 F.Supp. 883, 887 (S.D.Tex. 1982).

invocations did not invoke the teacher-student relationship, and were directed to a far less impressionable audience of adults and sixteen- to eighteen-year-olds. However, the equal access plan did permit teachers to deliver religious invocations. The permitting of prayers by authority figures gave support to the idea that the state was endorsing religion.

Another argument by the School District was that the invocations were constitutional since they were given at voluntary events. In upholding invocations at graduation ceremonies courts have stressed that attendance was voluntary. However, the Supreme Court and this court have not held that voluntary attendance makes prayers constitutional . The Supreme Court in Engel stated: "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the establishment clause."[801]

The final argument of the School District was that the school prayer cases constitute a *de minimus* violation of the establishment clause because they last from sixty to ninety seconds. The establishment clause does not focus on the amount of time for an activity, but rather examines the religious nature of the activity. As the Fourth Circuit stated in Bradshaw, "[a] prayer , because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the establishment clause."[802]

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[801]Engel v. Vitale, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266-1267, 8 L.Ed.2d 601 (1962)

[802]Hall v. Bradshaw, 630 F.2d 1018, 1021 (4th Cir. 1980).

Religious Symbols and Holidays

Florey v. SiouxFalls School District 49-5, 464 F.Supp. 911 (1979).

Facts

The Sioux Falls public schools had presented a variety of Christmas assemblies for a number of years. During the 1977 Christmas season, two Sioux Falls kindergarten classes presented a Christmas assembly for parents. The assembly was filled with religious content including a responsive quiz between the teacher and the class. "The Beginners 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.[803]

Roger Florey, the father of Justin Florey, one of the kindergarten students in the program, made a complaint about the program. The

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

superintendent in response to this complaint and others in the past about Christmas programs set up a citizens' committee to study the issue of church and state in relationship to school district functions.

In the fall of 1978 the school board adopted the committee's policy statement and rules for observance of religious holidays. Plaintiffs brought suit against the school district claiming the policy and rules adopted by the school board violated the establishment lause of the First Amendment. They asked the court to prohibit the school board from enforcing and from failing to instruct all Sioux Falls public officials that all Christmas assemblies must be secular.

Decision

The United States District Court denied the plaintiff's request for a permanent injunction. The court held:

> that school board's rules, which made it abundantly clear that schools could observe holidays that had both a religious and secular significance, which sought to assure that schools could present holiday assemblies that contained religious art. literature, or music as long as such materials were presented in prudent and objective manner, and which allowed display of religious symbols under certain circumstances, did not violate the establishment clause.[804]

Discussion

At the beginning, the District Court noted that the Christmas program presented in 1977 clearly exceeded theboundary of what is constitutionally acceptable under the establishment clause. The new policy would not allow such a program since that program was neither prudent nor objective. The

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[804]Ibid., 911.

new rules permitted the observance of holidays in Sioux Falls public schools that had a religious and secular basis, such as Christmas and Easter, but denied observance of holidays with a purely sectarian significance, such as Pentecost, Ash Wednesday, and Good Friday. The rules for observance of religious holidays in the Sioux Falls School District were 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 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, Hannukah, 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.[805]

The District Court concluded that if the above rules were properly applied the programs and treatment of religious subjects in the Sioux Falls public schools could withstand constitutional attack. In order to pass constitutional muster the challenged practice must be able to pass all three

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[805]Ibid., 918.

prongs of the Lemon[806] test, a secular purpose, primary effect neither prohibits nor inhibits religion, and no excessive entanglement with government.

Religious institutions and orientations are an important part of the human experience, past and present. An education without this experience would be incomplete. "It is essential that the teaching *about*--and not *of*--religion be conducted in a factual objective and respectful manner."[807]

Religion in the curriculum 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 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.[808]

The Sioux Falls School District recognized that traditions were a cherished part of community life and expressed an interest in keeping those

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[806]Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[807]Florey v. Sioux Falls School District 49-5, 464 F.Supp, 911, 918 (1979).

[808]Ibid., 919.

traditions which were important to the community. These ceremonies should recognize the religious diversity of the community.

Dedications and commencements in the Sioux Falls School District shall be as follows:

1. A dedication ceremony should recognize the religious pluralism of the community and be appropriate to those who use the facility. An open invitation should be extended to all citizens to participate in the ceremony.
2. Traditions, i. e., invocation and benediction, inherent in commencement ceremonies, should be honored in spirit of accommodation and good taste.
3. Because the baccalaureate service is traditionally religious in nature, it should be sponsored by agencies separate from the Sioux Falls School District.[809]

Justice Jackson, in a concurring opinion in McCollum, made observations that are applicable to this case. He stated:

> Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, *even from a secular point of view.... The fact is that, for good or for ill, nearly everything* in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity--both Catholic and Protestant--and other faiths accepted by a large part of the world's peoples.[810]

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[809]Ibid.

[810]McCollum v. Board of Education, 333 U.S. 203, 236, 68 S.Ct. 461, 477, 92 L.Ed. 649 (1948).

Stone v. Graham, 499 U.S. 39 (1980).

Facts

This case involved a Kentucky statute which required the posting of a copy of the Ten Commandments on the wall of each public school classroom in the State. The sixteen-inch by twenty-inch posters were purchased with private contributions. The state legislature required the following notation at the bottom of each display: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."[811] Petitioners sought an injunction to prohibit the enforcement of the statute, claiming that the statute violated the establishment and free exercise clauses of the First Amendment.

Decision

The state trial court upheld the statute passed by the State of Kentucky. The Supreme Court of the Commonwealth of Kentucky, in a split decision, affirmed the decision of the trial court. The United States Supreme Court granted certiorari to the Kentucky commandment case. The Supreme Court in a split decision, five to four, ruled that the Kentucky statute violated the establishment clause of the First Amendment.

Discussion

The trial court claimed that the statute requiring the posting of the Ten Commandments in public school classrooms served a secular purpose, even though they stated it was "self serving." The Supreme Court stated that the

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[811]Stone v. Graham, 449 U.S. 39 (1980).

purpose of posting the Ten Commandments in classroom was religious in nature.

The Supreme Court had developed a three-part test for determining whether a challenged state statute violated the establishment clause of the First Amendment:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally the statute must not foster "an excessive entanglement with religion."[812]

If a statute fails either of the above, the statute must be struck down under the establishment clause. They concluded that the Kentucky statute requiring the posting of the Ten Commandments in public school classrooms had no secular purpose, and was therefore unconstitutional.

The Supreme Court pointed out that just because the trial court avowed the statute was secular did not avoid conflict with the First Amendment. The Supreme Court held the daily Bible reading in Schempp[813] unconstitutional, even though the school district had asserted a secular purpose of "the promotion of moral values, the contradiction to materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."[814]

The Supreme Court said it did not matter that the posted copies of the Ten Commandments were financed by private funds; the mere posting of the

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[812]Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

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

[814]Ibid., 223.

copies in the classroom by requirement of the state legislature provides the "official support of the State . . . Government" that the establishment clause prohibits.[815] It was not important that the Bible verses were posted on the wall, rather than read aloud as in Schempp and Engel for "it is no defense to urge that the religious practices here may be relatively minor encroachment of the First Amendment."[816]

In his dissent, Justice Rehnquist pointed out that: "The establishment clause does not require that the public sector be insulated from all things which may have a religious significance or origin."[817] As the Supreme Court had shown that "religion has been closely identified with our history and government"[818] and that "the history of man is inseparable from the history of religion,"[819] Kentucky had decided to make students aware of this fact by showing the secular influence of the Ten Commandments.

Lynch v. Donnelly, 465 U.S. 668 (1984).

Facts

Each year the city of Pawtucket, Rhode Island, sponsored a Christmas display in a park owned by a nonprofit organization. The display, a tradition for forty or more years, included a Santa Claus house, a Nativity scene, a

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[815]Ibid., 222; See also Engel v. Vitale, 370 U.S. 421, 431 (1962).

[816]Ibid., 225.

[817]Stone v. Graham, 449 U.S. 39, 46-47 (1980).

[818]Abington School District v. Schempp, 374 U.S. 203, 212.

[819]Engel v. Vitale, 370 U.S. 421, 434 (1962).

Christmas tree, and a "SEASONS GREETINGS" banner. The respondents challenged the Nativity scene in the display on the basis that it violated the establishment clause of the First Amendment, as made applicable to the states by the Fourteenth Amendment.

Decision

The District Court upheld the challenge and permanently forbade the city from including the Nativity scene in the city display. This was affirmed by the Court of Appeals. On certiorari the Supreme Court ruled that the city of Pawtucket had not violated the establishment clause of the First Amendment and reversed the decision of the Court of Appeals.

Discussion

Although not an education case, Lynch v. Donnelly is important to public education because it established that Christmas displays do not advance religion or create an excessive entanglement between church and state. The Supreme Court explained that the purpose of the First Amendment religious clauses is "to prevent as far as possible, the intrusion of either [the church or the state] into the precincts of the other."[820] However, at the same time the Court has recognized that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."[821]

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[820]Lemon v Kurtzman, 403 U.S. 602, 614 (1971).

[821]Ibid.

County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 109 S.Ct. 3086 (1989).

Facts

This litigation involved the constitutionality of two recurring holiday symbols on public property in downtown Pittsburgh. The first was a crèche containing a nativity scene placed in a prominent place in the Allegheny County Courthouse. The Holy Name Society, a Catholic group, donated the crèche with a sign signifying such. The words "Gloria in Excelsis Deo," meaning "Glory to God in the Highest" were on a banner held by an angel. The second display was an eighteen-foot Chanukah menorah which was placed outside the City-County Building near a forty-five foot decorated Christmas tree. The menorah was owned by Chabad, a Jewish group, but the city stored, erected, and removed the menorah each year. At the foot of the Christmas tree was a sign with the mayor's name and a "salute to liberty." The American Civil Liberties Union and seven local residents challenged the constitutionality of the crèche in the county courthouse and the menorah outside the city and county building as violations of the First Amendment made applicable to state government by the Fourteenth Amendment.

Decision

The United States District Court for the Western District of Pennsylvania, citing Lynch,[822] ruled in favor of the defendants. On appeal, the United States Court of Appeals for the Third District, also citing

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[822]Lynch v. Donnelly, 465 U.S. 668 (1984).

Lynch,[823] reversed and remanded the case. On certiorari the Supreme Court, by a vote of five to four, held that: "(1) display of crèche violated establishment clause, and (2) display of menorah next to Christmas tree did not have unconstitutional effect of endorsing Christian and Jewish faiths."[824] The Supreme Court affirmed in part, reversed and remanded the cases to the Court of Appeals.

Discussion

Although, not an education case, this case helped to further define what is permissible under the establishment clause related to church and state relationships. In Lynch, the Supreme Court ruled that the use of a nativity scene in a Christmas display was permissible under the establishment clause of the First Amendment. The District Court cited Lynch in deciding in favor of the defendants. The Court of Appeals, also citing Lynch, distinguished this case from Lynch and held that the crèche and the menorah were impermissible governmental endorsement of Christianity and Judaism under the Lemon[825] test.

In refining what unconstitutionally advances religion under the establishment clause, the Supreme Court has used the words endorsement, favoritism, preference, or promotion, but the primary element remains the same: "The Clause, at very least, prohibits government from appearing to

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[823]Ibid.

[824]County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 109 S.Ct. 3086 (1989).

[825]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' "[826] The Constitution requires that government remain secular, rather than affiliating itself with religious beliefs or institutions, explicitly to avoid discriminating against citizens on the basis of their religious faiths. Thus, the claims that keeping the government from celebrating Christmas as a religious holiday discriminates against Christians in favor of nonadherents are unfounded, since they run contrary to the fundamental assumption of the establishment clause. In contrast, limiting the government's own Christmas celebration to the holiday's secular aspects does not favor the religious beliefs of non-Christians over those of Christians, but simply allows the government to recognize the holiday without expressing an impermissible allegiance to Christian beliefs.

In ruling on the use of the crèche and the menorah in the Allegheny case, the Supreme Court reversed the Court of Appeals on the crèche and affirmed on the menorah. In Lynch the Supreme Court had ruled that since the crèche in that case was a part of a secular display it did not violate the Establishment Clause. Since the crèche with the Christian message in Allegheny was the focus of the display in the courthouse its presence advanced religion in violation of the establishment clause. The menorah, a religious symbol, as a part of display on the grounds next to the Christmas tree, a secular symbol, was not in violation of the establishment clause.

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[826]Lynch v. Donnelly, 465 U.S. 668, 687 (1984).

Moment of Silence

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

Facts

In Framingham, Massachusetts, twelve students who attended the public schools,challenged the constitutionality of a school board policy that required students to observe a minute of silence for the purpose of meditation or prayer. The policy was adopted by the school committee to comply with the Massachusetts law that required a period of silence at the beginning of the school day.

Decision

The Three-Judge District Court, District of Massachusetts, ruled that parents of the students would be permitted to join as plaintiffs. The District Court ruled that the statute did not violate the First Amendment, that the statute did not violate students' rights of free exercise of their religion, and that the statute did not prohibit or inhibit parental right to guide and instruct children in regard to religion. The District Court dismissed the complaint.

Discussion

The Massachusetts Legislature adopted a statute providing for a period of silence. Massachusetts General Laws chapter 71, section 1A reads:

> 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 and no activities engaged in.[827]

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[827]Gaines v. Anderson, 421 F.Supp. 337, 339 (1976).

On January 12, 1976, the Framingham School Committee passed a resolution to comply with the Massachusetts law. On January 27, 1976, the school committee adopted guidelines to meet the statutory provisions. The established guidelines were implemented on February 2, 1976, the day the twelve students initiated court action.

Twelve students and their parents challenged the guidelines. The plaintiffs claimed that the statute as amended and the guidelines violated their rights under the First and Fourteenth Amendments in the following manner:

> (1) they establish a religious exercise in the public schools in violation of the Establishment Clause of the First Amendment, (2) they mandate a particular format for the religious exercise in violation of the First Amendment, and (3) they interfere with the parents' due process rights exclusively to supervise the religious upbringing of their children in violation of the Fourteenth Amendment.[828]

The District Court applied the first two prongs of the tripartite test. The court examined the legislative history of the statute and decided that the law had a neutral, secular purpose of promoting a reflective climate for study, self- discipline, and respect for authority. The court asserted that meditation is not necessarily religious--it encompasses serious reflection about either religious or secular topics. The court further stated that the statute's reference to prayer was not constitutionally fatal because it was used in the disjunctive, giving students a choice between meditation and prayer.

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[828]Ibid., 339-340.

Beck v. McElrath, 548 F.Supp. 1161 (1982).

Facts

In 1982, the Tennessee General Assembly enacted a statute requiring that every public school class in the state begin the day with a period of silence not to exceed one minute for prayer meditation, or personal beliefs. Plaintiffs brought civil action against the state on the grounds that the statute was in violation of the First and Fourteenth Amendments to the United States Constitution, and Article 1, Section 3 of the Tennessee Constitution.

Decision

The District Court ruled that the Tennessee statute did not meet the requirements of the establishment clause. The law was never meant to be neutral; thus the state was favoring and advancing religion.

Discussion

The 1982 Tennessee statute stated:

> 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 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 or personal beliefs and during any period, silence shall be maintained.[829]

The court analyzed questions relating to the statute in terms of purpose and effect. The court pointed out that the statute did not merely call for a moment of silence, but rather a moment of silence to be used for "meditation or prayer or personal beliefs."[830] Although two of the terms were

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[829]Beck v. McElrath, 548 F.Supp. 1161 (1982).

[830]Ibid., 1163.

secular, meditation and personal beliefs, the court was unable to agree that the statute reflected a clearly secular purpose. Thus the court stated:

> Individual terms within a statute are not to be construed in a purely abstract sense or in a vacuum, however. As all terms in the statute are viewed together and accorded reasonable meaning, it is difficult to escape the conclusion that the purpose was advancement of religious exercises in the classroom.[831]

Because of the ambiguous nature of the statute, the court explored the legislative intend of its sponsors. While the defendants asserted that the statute merely provided for a moment of silence, it is clear from the record that the "overwhelming intent among legislators supporting the bill, including the sponsors, was to establish prayer as a daily fixture in the public schoolrooms of Tennessee."[832] In the words of one legislature, "If there is one thing the people of this state want, they want prayer in public schools."[833]

The defendants, like the defendants in Lubbock,[834] contended that the statute was constitutionally sound because participation was voluntary.[835] The court disagreed.

> [A] mere cursory reading of the legislative history discloses that the purpose for which the statute was enacted remained constant--the legislature sought to set aside a time for daily

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[831]Ibid.

[832]Ibid.

[833]Ibid., 1164.

[834]Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1044 (1982).

[835]Beck v. McElrath, 548 F. Supp. 1161, 1164 (1982).

religious exercises in public schools.[836]

Relying on the legislative intent, the court found the statute failed the purpose test.

Primary effect was the next phase investigated. "The court is convinced that the primary effect of this statute must be the promotion of religious exercise."[837] In reaching this decision, the court addressed the legislature's lack of guidelines for implementation. Without these guidelines, the statute could be implemented in a variety of ways varying from one classroom to another. One teacher could call for a moment of silence, another for meditation, and yet another, specifically for prayer. "Unavoidably, students will understand that they are encouraged, not only to be silent, but also to engage in religious exercise."[838]

The judge decided that because the purpose and effect tests so clearly indicated a violation of the establishment clause it would not be necessary for the court to address the possibility of excessive entanglement.[839]

> In light of conclusions discussed above, a detailed examination of potential administrative entanglements under the third prong of the Nyquist [Lemon] test is not necessay here. . . Varying degrees of potential entanglement are as difficult to enumerate as are potential effect, and appear to be no less problematical.[840]

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[836]Ibid.

[837]Ibid., 1165.

[838]Ibid.

[839]Ibid

[840]Ibid.

The court concluded that legislation respecting the establishment of religion was unconstitutional no matter how popular a measure might be. Inasmuch as the legislation was not neutral, it had to be struck down as violative of the establishment clause.

Duffy v. Las Cruces Public Schools, 557 F.Supp. 1013 (D.N.M. 1983).

Facts

Jerry Duffy, as a taxpayer and citizen, and on behalf of his son, brought suit against the Las Cruces Public School District and school board members challenging the constitutionality of the statute authorizing local school boards to implement a daily moment of silence in the public schools. His son was also a citizen of New Mexico and attended public school in the Las Cruces Public School District.

Decision

The District Court declared the challenged statute to be unconstitutional because the legislation had no secular purpose , impermissibly advanced religion, and resulted in excessive entanglement between church and state.

Discussion

In 1981, the New Mexico legislative body enacted a statute that provided for the following:

> Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities

are undertaken.[841]

William O'Donnell, a member of the House of Representatives, asked William McEuen, a ranking official in the state department of education, to draft a bill which would permit students to pray in school. In drafting the bill, McEuen relied heavily on the Massachusetts statute which was at issue in Gaines v. Anderson.[842] In that case, the court upheld the constitutionality of a statute much like the one being challenged in this case. H. B. 205 was identical to the Massachusetts statute, with the exception that the word "contemplation" had been added in H. B. 205, purportedly to demonstrate the neutrality of the statute. Although there is no written legislative history of H. B. 205, clearly the intent was to establish a devotional exercise in the classrooms of New Mexico public schools.

The defendants asserted that inclusion of the words "contemplation" and "meditation" constitutionally balanced legislatures with regard to the people's right to freedom of religion. Judge Burciaga was not swayed as indicated by the following statement:

> The Court views the inclusion of these words as a transparent ruse meant to divert attention from the statute's true purpose. Viewed in this light, it can hardly be said that the statute reflects sensitivity to the right to religious freedom. Indeed, it reflects the opposite.[843]

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[841]Duffy v. Las Cruces Public Schools, 557 F.Supp. 1013, 1015 (1983).

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

[843]Duffy v. Las Cruces Public Schools, 557 F.Supp. 1013, 1019 (1983).

Therefore, the court maintained the statute had no secular purpose. Moreover, the statute advanced religion in the public schools by allowing religious exercise on school campus during the instructional day and with teacher supervision. Teacher supervision created excessive entanglement.

Walter v. West Virginia Board of Education, 610 F.Supp. 1169 (D.C.W.Va. 1985).

Facts

In 1985, a group of parents challenged the constitutionality of legislative action providing prayer in schools. Through class action plaintiffs maintained the legislation be declared unconstitutional as First Amendment establishment. They also sought to have the Court permanently prohibit implementation of the Prayer Amendment in the public schools of West Virginia.

Decision

Judge Hallanan concluded that the West Virginia Prayer Amendment violated the First Amendments rights of the plaintiffs. Judge Hallanan granted plaintiffs relief for declaratory judgment and he ordered that defendants be enjoined and restrained from implementation of the Prayer Amendment. Finally, Judge Hallanan maintained that "nothing in this order prohibits or impedes the right of any West Virginia citizen, young or old, to pray in his or her own manner, any place, anytime."[844]

Discussion

The legislative body of the state of West Virginia enacted legislation, W.

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[844]Walter v. West Virginia Board of Education, 610 F.Supp. 1169, 1178 (D.C.W.Va. 1985).

Va. Const. Art. III, section 15-a, requiring the following:

> Public schools shall provide a designated brief time at the beginning of each school day for any student desiring to exercise their right to personal and private contemplation, meditation, or prayer. No student of a public school may be denied their right to personal and private contemplation, meditation or prayer nor shall any student be required or encouraged to engage in any given contemplation, meditation or prayer as a part of the school curriculum.[845]

In the case at bar extensive hearings were held with school children and parents regarding their thoughts and feelings. Children and parents from various religious backgrounds testified in this case. One Jewish boy testified that another student said to him that "if I prayed all the time, maybe I could go to heaven with all the Christians when Jesus came for the second time instead of, as he put it, going down with all the other Jews."[846] At this point another child joined the conservation and said something to the effect "Jews weren't worth saving because they killed Christ."[847] A Roman Catholic boy testified he was afraid to disobey teacher's religious directions because he might be punished for "doing wrong or disobeying the teacher."[848] Parents testified against the Prayer Amendment. Representatives from the Baptist, Lutheran, Roman Catholic, Moslem, and Jewish faiths testified against the Prayer Amentment. In addition, professionals in teaching and psychology testified

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[845]Ibid., 1170.

[846]Ibid., 1172.

[847]Ibid.

[848]Ibid. 1173.

against the Prayer Amendment.

Citing other cases, the court, even though a majority of West Virginia citizens voted for the Prayer Amendment, had little difficulty reaching the decision that the legislation was First Amendment establishment.

Wallace v. Jaffree, 705 F.2d 1526 (5th Cir. 1983), *aff'd*, 472 U.S. 38 (1985).

Facts

In 1982, Ishamel Jaffree, the father of three elementary school children enrolled in Mobile County School System, Alabama, brought suit in federal district court challenging the constitutionality of three Alabama statutes. Statute 16-1-20, passed in 1978, provided for a period of "meditation."[849] The 1981 statute, 16-1-20.1, provided a period for "meditation" or "voluntary prayer."[850] The third statute, 16-1-20.2 passed in 1982, authorized teachers in public schools to lead students in voluntary prayer or in a prayer prescribed by the legislature.[851] He objected to activities which were occurring in his children's public schools. He claimed that teachers led regularly scheduled prayers which the children cited in unison. He pointed out that if the children did not participate, they were ostracized by their peers. He voiced his complaints to the teachers, the principals, and superintendent. Unable to obtain any satisfaction, he petitioned for relief.

Decision

After review, the District Court dismissed Jaffree's complaint. The

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[849]Wallace v. Jaffree, 472 U.S. 38, 40 (1985).

[850]Ibid.

[851]Ibid.

case was appealed to the Eleventh Circuit Court of Appeals in regard to statutes enacted in 1981 and 1982. The court ruled both statutes unconstitutional. The case was further appealed to the United States Supreme Court. In 1984, the Supreme Court unaminously affirmed the decision of the District Court and stated that the 1982 Alabama statute, section 16-1-20.2, was unconstitutional. In 1985, the Supreme Court in a six-to-three vote, struck down the 1981 prayer statute, 16-1-20.1.

Discussion

At issue was the claim that several Alabama statutes were designed to return prayer to the public schools. Progressive legislation over a period of years confirmed this allegation. The first statute, section 16-1-20, enacted by the state legislature in 1978, required public school teachers to enforce a one-minute period of silence for the purpose of "meditation."[852] In 1981, the legislature enacted a bill , section 16-1-20.1, that authorized only a period of silience for "meditation or voluntary prayer."[853] In 1982, a statute, section 16-1-20.2, was passed that authorized teachers in public schools to lead students in voluntary prayer or in the following prayer prescribed by the legislature:

> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your Justice , Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.[854]

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[852]Ibid.

[853]Ibid.

[854]Ibid., 40-41.

In issuing a preliminary injunction the District Court found section 16-1-20 constitutional, stating: "It is a statute which prescribes nothing more than a child in school shall have the right to meditate in silence and there is nothing wrong with a little meditation and quietness."[855]

The plaintiffs did not disagree with the judge's ruling. However, by applying the tripartite test, the court found the other two statutes promoted religious activity. The intent of each was to return prayer to the schools.

In this case at bar the District Court did not find the statutes unconstitutional as First Amendment advancement. However, Justice Hand engaged in an unusal practice. Rejecting past Supreme Court decisions and after complete analysis of statutes and opinions, Justice Hand maintained the Supreme Court had erred in First Amendment church-state matters and thus past decisions did not apply to this case. He stated: "This Court's independent review of the relevant historical documents and its reading of the scholarly analysis convinces it that the United States Supreme Court has erred in its reading of history."[856]

Thus, Justice Hand 's ideological bases provided no logic for him to issue an injunction. Moveover, Justice Hand maintained if the case was remanded by the Court of Appeal he would hold that secular humanism was a religion and was being promoted in schools and he would insist that public schools were

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[855]Jaffree v. James, 544 F. Supp 727, 732 (S.D.Ala. 1982).

[856]Jaffree v. Board of School Commisssioners of Moblie County, 544 F.Supp. 1104, 1128 (1983).

advancing a religion.

The Court of Appeals for the Eleventh Circuit did reverse Justice Hand's decision. The appellate court using the tripartite test of Lemon I declared both statutes, section 16-1-20.1 and section 16-1-20.2 unconstitutional. After examining Supreme Court church-state decisions , and especially within the historical context insisted that Justice Hand's decision was a fallacious interpretation of the First Amendment.

The Supreme Cout in 1984 with a nine to zero vote sustained, without comment, the Court of Appeals' decision that section 16-1-20.2 was unconstitutional. The Court had one more statute to examine--section 16-1-20.1 regarding a moment of silence for "meditation or voluntary prayer."[857] However, before ruling on that question, Justice Stevens reviewed the Court's historical ideological bases on church-state and individual freedom. Justice Stevens said:

> how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.[858]

Justice John Paul Stevens, writing for the majority, held that 16-1-20.1, had no secular purpose, thus failing the first part of the tripartite test. A review of Legislative record revealed that "his purpose in sponsoring statute

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[857]Wallace v. Jaffree, 472 U.S 38, 40 (1985).

[858]Ibid., 48-49.

16-1-20.1 was to return voluntary prayer to the public schools."[859] Moreover, the Legislator wanted to "provide children the opportunity to share in their spiritual heritage of Alabama and of this country."[860] Finding no secular purpose, the Supreme Court held the law was in violation of the Constitution. Finally, Justice Stevens pointed out that the 1978 statute was limited to "meditation" and the 1981 statute included "meditation or voluntary prayer."[861] Thus, by including prayer the statute was religious advancement.

Justice O'Conner stated in a separate concurring opinion that: "Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day."[862] Justice O'Connor was expressing a new ideological concept--the endorsement test--the nature of religious endorsement as primary in analyzing rationale for practice and /or statutes. The endorsement test fit part two of Lemon nicely.

Chief Justice Burger dissented along with and Justices Rehnquist and White. Their great concern encapsulated major fallacies in Lemon I test.

May v. Cooperman, 780 F.2d. 240 (3rd Cir. 1985).

Facts

In 1982, the New Jersey General Assembly enacted a statute

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[859]Ibid., 44.

[860]Ibid.

[861]Ibid., 40.

[862]Ibid., 67.

authorizing a minute of silence for "quiet and private contemplation or introspection."[863] The statute was challenged by Jeffrey May, a teacher, and parents and their children. The parents and children, both religious and nonreligious, objected to what they regarded as either required participation in a religious activity, or endorsement of religion. When May, who considered the minute of silence as religious, had refused to conduct such an exercise, school officials threatened disciplinary action if he failed to comply.

Decision

The United States District Court maintained that the statute flunked the Lemon test in all three parts.[864] On appeal to the United States Court of Appeals--Third Circuit--found a split three-judge panel with the majority sustaining the lower court's decision--the statute lacked a secular purpose. On appeal, the Supreme Court dismissed the case for want of jurisdiction--defendants, former officers of the New Jersey Senate and General Assembly, had lost their right to pursue the case. In 1986, the New Jersey Senate and General Assembly withdrew from the case.[865]

Discussion

With the enactment of this statute New Jersey continued efforts to return prayer back to the public school classroom. The district judge reviewed the history of the efforts to adopt similar legislation which would have revived prayer in public schools. Gubernatorial vetoes had occurred in 1969, 1971,

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[863]May v. Cooperman, 780 F.2d. 240, 241 (3rd Cir. 1985).

[864]Lemon v Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[865]Karcher v. May, 484 U.S. 72, 74-75 (1987).

1978, and 1981. Many other bills were introduced but failed. Several of the witnesses testified that on numerous occasions, Assemblyman Zangari, sponsor of the bill, had stated his purpose was to return prayer to the schools.

Initially, the Governor of New Jersey vetoed the statute. The New Jersey Legislature enacted the following:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student, before opening exercise of each school day for quiet and private contemplation or introspection.[866]

Also, the Attorney General had expressed his opinion that the bill was a violation of the First Amendment. The words "prayer" and "meditation" that had been ruled unconstitutional in Wallace v. Jaffree[867] were omitted from this statute.

Legislators and friends supporting the statute contended the statute was constitutional because there was no requirement basis to the statute--it was voluntary. Moreover, the statute provided "for quiet and private contemplation or introspection."[868] Legislators and friends maintained the law's secular purpose was "providing a calm transition from nonschool life to school work."[869]

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[866]May v. Cooperman, 780 F.2d 240, 241 (3rd Cir. 1985).

[867]Wallace v.Jaffree, 705 F. 2d 1526 (5th Cir. 1983), aff'd., 472 U.S. 38 (1985).

[868]May v. Cooperman, 780 F.2d 240, 241 (3rd Cir. 1985).

[869]Ibid., 244.

The Court of Appeal (Third Circuit) sustained the lower court decision that the statute was First Amendment advancement. As already indicated, on appeal, the Supreme Court dismissed the case for want of jurisdiction--defendants who remained party to the suit had no legal standing to sue.[870]

Secular Humanism

Crockett v. Sorenson, 568 F.Supp 1422 (1983).

Facts

For over forty years, the Bristol Virginia public schools had provided a Bible class program to fourth and fifth grade students. The classes were sponsored by an alliance of Protestant ministers and it was responsible for selecting, hiring, supervising, and paying the teachers and preparing a course of study outline for the curriculum. Classes were voluntary and parents signed a request card to enroll children in Bible classes. The classes met forty-five minutes once a week. Until 1982, students not attending the Bible classes were assigned to the principal's office or the library. Since 1982, an attempt was made to provide the non-participating students more meaningful experience. They were sent to an extension center where, in theory, they choose one of several options. In reality, their choice was study hall or physical education, because other options were classes the students had already attended in regular curriculum. Parents of fifth grade student, Kathleen Crockett, challenged the program as violative of First Amendment advancement of religion.

Decision

Justice Kiser held that the establishment clause does permit a course in

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[870]Karcher v. May, 484 U.S. 72, 74-75 (1987).

the Bible to be taught in the public schools. However, Judge Kiser maintained that the Bible class for fourth and fifth grade students staffed and controlled by a ministerial alliance organization was a Constitutional violation--there was no secular purpose.

Discussion

By ruling in favor of the plaintiffs, Justice Kiser's decision added fuel to the fire of those who claim that public schools are supporters of secular humanism. Justice Kiser reasoned:

> The First Amendment was never intended to insulate our public institutions from any mention of God, the Bible, or religion. When such insulation occurs, another religion, such as secular humanism, is effectively established.[871]

In Torcaso (1961) at footnote eleven, the Supreme Court recognized that secular humanism is a religion analogous to Buddhism, Taoism, . . . , and others religions.[872] Moreover, in Schempp,[873] the Court in reply to Justice Stewart's well-reasoned dissent, stated:

> [i]t is insisted that unless these religious exercises are permitted, a "religion of secularism" is established. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, this "preferring those who believe in one religion over those who do believe."[874]

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[871]Crockett v. Sorenson, 568 F.Supp. 1422, 1425 (1983).

[872]Torcaso V. Watkins, 367 U.S. 488, 495 n.11, 81 S.Ct. 1680, 1684 n. ll, 6 L.Ed.2d 982 (1961).

[873]Abington School District v. Schempp. 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

[874]Ibid., 225, 1573.

Thus Justice Kiser acknowledged that establishment clause violations could occur and without hostilitytoward traditional theistic religions. Justice Kiser floated an interesting quote from Whitehead and Conlan to support his position:

> On the fundamental religious issue, the modern university intends to be, and supposes that it is, neutral, but is not. Certainly it neither inculcates nor expressly repudiates belief in God. But it does what is far more deadly than open rejection; it ignores Him. . . . It is in this sense that the university today is atheistic. . . . It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary, you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism, you simply take it for granted and therefore insinuate it silently, insidiously, and all but irresistibly.[875]

Even though the above logic applies to a university, Justice Kiser applied the concept to public schools--both are learning institutions. Knowledge provides a more complete analogy of western literature's influence on education. And no one is completely educated without this knowledge. And if the Bible course advanced literary and history knowledge, then it would pass constitutional muster.

Grove v. Mead School District No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert.denied*, 106 S.Ct. 85 , 88 L.Ed.2d 70.

Facts

In this 1983 case, a high school sophomore and English class was assigned Gordon Park's, The Learning Tree, a novel set against a background

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[875]Crockett v. Sorenson, 568 F.Supp. 1422, 1426 (1983).

of life in black rural America. After initially reading sections of the book, Cassie found the book repugnant to her religious beliefs. Cassie and mother protested to the teacher and Cassie received another assignment and was excused during discussions of The Learning Tree--however, Cassie chose to remain in class. In time, Mrs. Grove filed a formal complaint with the school system and lost on review--the school board accepted the review committee's recommendation that the book was appropriate. At this point the Groves filed action against the school board insisting the book violated First Amendment establishment clause.

Decision

The District Court found no Constitutional violation and granted summary judgment for the defendants. On appeal, Justice Wright, Ninth Circuit Court of Appeals, maintained that the school board acted within scope of responsibility and violated no Constitutional imperative. Moveover, The Learning Tree did not establish a religion.

Discussion

Cassie and her mother insisted The Learning Tree had the "primary effect of inhibiting their religion, fundamentalist Christianity, and advancing the religion of secular humanism."[876] In analyzing possible Free Exercise Clause violations Justice Wright investigated three facotrs: "(1) the extent of the burden upon the exercise of religion, (2) the existence of a compelling state interest justifying the burden, and (3) the extent to which accommodation of the complaint would impede the state's objectives."[877] The Free Exercise

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[876]Grove v. Mead School District No.354 , 753 F.2d 1528, 1534 (9th Cir. 1985).

[877]Ibid., 1533.

Clause issue was minimal--Cassie was provied an alternative assignment and permission to leave the classroom during discussion of The Learning Tree, thus no free exercise clause violation. Moreover, The Learning Tree contained minor religious efforts in providing a balanced education. Quoting Justice Jackson: "If we are to eliminate everything that is objectionable to any of [the religious bodies existing in the United States] or inconsistent with any of their doctrines, we will leave public education in shreds."[878]

Finally, Justice Wright acknowledged the book to be secular in nature--the eyes of a teenage boy in a working class black family. Justice Canby filed a concurring opinion focusing on the secular humanism issue. Justice Canby insisted that plaintiffs had erroneously made "secular" and "humanist" to be synonymous with "anti-religious."[879]

Plaintiffs' had argued that secular humanism was a religion. Justice Canby suggested that plaintiffs' use of footnote eleven in Torcaso v. Watkins[880] was overboard. Continuing Justice Canby insisted that the definition of religion may be dependent on the type of case involved. In Torcaso,[881] a Free Exercise case, a more liberal and expansive definition of religion might be acceptable, but "the same expansiveness in interpreting the

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[878]McCollum v. Board of Education, 333 U.S. 203, 235, 68 S.Ct. 461, 477, 92 L.Ed. 649 (1948).

[879]Grove v. Mead School District No. 354, 753 F.2d 1528, 1535. (9th Cir. 1985).

[880]Torcaso v. Watkins, 363 U.S. 488, 495 n. 11, 81 S.Ct. 1680, 1684 n. 11, 6 L.Ed.2d 982 (1961).

[881]Ibid.

establishment clause is simply untenable in an age of such pervasive governmental activity."[882]

Even though The Learning Tree contained minor anti-Christian features Justice Canby insisted religion was not the primary forcus of the book--thus, Justice Canby lamented "instead, the issue is whether its selection and retention by school officials 'communicat[es] a message of government' of those elements."[883] The Learning Tree, Justice Canby insisted neither instills nor inhibits religion and is simply a book about the hardships of rural black life and culture. The book does not offend the First Amendment establishment clause. Finally, Justice Canby maintained:

> Distinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion. Plaintiffs allege that they believe that "eternal religious consequences" would result from Cassie Grove's exposure to The Learning Tree. Such a belief might well require her being excused from such exposure. Mere offense, however, would not require her being excused, nor does mere offense at having The Learning Tree in the curriculum bring the free exercise clause to the aid of the plaintiffs. There has been no violation of free exercise in this case.[884]

Mozert v. Hawking County Public Schools, 647 F.Supp 1194 (E.D.Tenn 1986), *reversed* (6th Cir. 1987).

Facts

In early 1983, the Hawkins County Public Schools adopted Holt,

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[882]Grove v. Mead School District No. 354, 753 F.2d 1528, 1537 (9th Cir. 1985).

[883]Ibid., 1539

[884]Ibid., 1543.

Rhinehart, and Winstion reading series, Riders on the Earth, for use in elementary grades, one through eight. Terms such as euthanasia, situational ethics, idol worship, witchcraft, and value clarification were reasons many parents objected to the reading series. Initially students--parents who objected to the Holt series were given alternative reading assignments. In November 1983, the Hawkins County School Board suspended all alternative reading assignments. Students who refused to participate in the reading program were suspended from school. Many suspended students were either home schooled or enrolled in private religious schools, or attended school outside Hawkins County.

On December 2, 1983, the parents filed action against the school superintendent, school board, and four principals maintaining that plaintiffs had sincere religious beliefs which were contrary to values taught or inculcated in reading series. Requiring children to use the Holt reading series,without an alternative reading program was a clear violation of free exercise of religion guaranteed by the First and Fourteenth Amendments to the United States Constitution. The parents insisted that schools should provide an alternative reading program. Moreover, school board should reimbuse plaintiffs for education expenses incurred when students were removed from public schools.

Decision

Initially, the District Court ruled against the plaintiffs, and granted school board motion for summary judgment on basis that reading series was neutral on religious issues. On appeal to the Sixth Circuit Court of Appeals the District Court was reversed and the case remanded with instructions. The Circuit Court instructed the District Court:

> to determine whether the school board's action did, in fact, create a burden on the plaintiffs' free exercise rights; and if so, whether the infringement was justified by a compelling state interest, and then whether the state used the least restrictive means of achieving that compelling interest.[885]

On remand, the District Court held that the rights of the plaintiffs had been unconstitutionally violated--that Holt reading series might be religiously offensive to plaintiffs.

Discussion

As already indicated plaintiffs maintained that the Holt reading series presented a panoply of anti-Christian values--from situational ethics , idol worship, to being disobedient to parents. Exposure to anti-Christian ideology--secular humanism-- was offensive and First Amendment Advancement of a religion--secular humanism.

Early on, when parents protested the Holt series school board provided an alternative reading assignment and later rescended that policy. Parents responded by disallowing students to attend Holt series classes. School board responded by suspending students. In time, parents withdrew students from classes and enrolled them in alternative educational settings and filed suit against school board and requested suspension of the Holt series as religious advancement and requested reimbursement for money spent on alternative education of children.

On remand and with instructions from the Circuit Court of Appeals the

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[885]Laurie Mesibov, "Tennessee Students Who Have Religious Objections to the Reading Textbooks May Be Taught Reading at Home," School Law Bulletin 18, no. 2 (Spring 1987): 37.

District Court found the Holt series offensive to plaintiffs religion--sincerely held religious beliefs. A critical issue in this case at bar was whether the state could establish a compelling rational for using the Holt series-- school officials argued along three fronts:

> (1) Providing alternative programs would be difficult to administer; (2) it would be impossible to develop a program acceptable to the plaintiffs; and (3) if plaintiffs were allowed an alternative, the school would be flooded with similar requests for alternative programs.[886]

The District Court, with Judge Hull writing the opinion, insisted there were many reading series approved for Tennessee schools and no one particular series was absolute. Moreover, while many educational consultants suggested that individual instruction would be better and with the first part of school official argument vanishing down the logic hole, Justice Hull suggested that: "Accommodating the beliefs of a small group of students involved in this case would not wreak havoc in the school system by initiating a barrage of requests for alternative reading materials."[887]

Continuing Justice Hull suggested that no reading series might satistfy, plaintiffs then perhaps, should be given permission to instruct children at home. And, that was permissible acccording to Tennessee statute, "home schooling for a single subject was a reasonable alternative that would not

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[886]Ibid.

[887]Kristen Goldberg, "Textbooks Decision Fuels Debate on Role of Religion in Schools, Rights of Parents." Education Week 6, no. 9 November 5, 1986) : 18.

violate either plaintiffs' free exercise right or the establishment clause."[888] This remedy was suggested because "considerable evidence indicated that no single, secular reading series on the state's approval list would be acceptable to the plaintiffs without modifications."[889]

Judge Hull limited the scope of his decision with the following:

> This opinion shall not be interpreted to require the school system to make this option available to any other person or to these plaintiffs for any other subject. Further accommodations, if they must be made, will have to be made on a case-by-case basis by the teachers, school administrators, board, and department of education in the exercise of the expertise, and failing that, by the Court.[890]

Smith v. Board of School Commissioners of Mobile County, 655 F.Supp., 939 (S.D.Ala. 1987), *reversed and remanded* (11th Cir. 1987).

Facts

Douglas Smith and others filed a motion to intervene in the Jaffree[891] action insisting religious activity--secular humanism-- in public schools violated their right to free exercise of religion. The District Court allowed them to intervene as plaintiffs. Among other concerns, plaintiffs insisted that Alabama's public school curriculum not only advanced religion--secular humanism-- but "excluded history of the contributions of Christianity to the American way of life, denied to teachers and students free speech and free

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[888]Mesibov, "Tennessee Students," 38.

[889]Goldberg, "Textbook Decision," 18

[890]Ibid., 19.

[891]Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983).

exercise of their religion and violated the Code of Alabama."[892] History, social studies, and home economics became the center of controversy.

Decision

This case emerged from an earlier Alabama case Jaffree v. James[893] regarding prayer and meditation in Alabama classrooms. Justice Brevard Hand, the original judge in Jaffree,[894] also presided in Smith.[895] Justice Hand made a major decision early on in this case that "secular humanism" was a religion. Moreover, Justice Hand after reviewing Alabama public school textbooks insisted the textbooks failed to acknowledge significant contributions made by religion in American life. Finally, Justice Hand maintained that fixed moral values--personal responsibilities--were missing-- too much situational ethics. In effect the Alabama textbooks promoted a religion--secular humanism. For this, forty-four textbooks were banned in Alabama public schools (see Appendix B). On appeal the United States Court of Appeals for the Eleventh Circuit, Judge Johnson held that Alabama textbooks did not advance religion--secular humanism-- or inhibit theistic religion in violation of the establishment clause, even assuming secular humanism was religion. The decision was reversed and remanded with directions.

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[892]Smith v. Board of School Commissioners of Mobile County, 655 F.Supp. 939, 940 (S.D.Ala. 1987).

[893]Jaffree v. James 544 F.Supp 727 (1982)..

[894]Ibid.

[895]Smith v. Board of School Commissioners of Mobile County, 655 F.Supp. 939 (S.D.Ala. 1987).

Discussion

Plaintiffs, i. e., teachers, citizens, and others argued that Alabama textbooks were anti-Christian, i. e., "Lord's name in vain,"[896] contrary to "Christian views,"[897] promoted "secular humanism,"[898] and held that "humans are strictly a result of some biological process and nothing more,"[899] affirmed "there are no absolutes, such as right and wrong."[900] The state responded: (1) that textbooks had a secular purpose; (2) that if the state tried to satisfy all religious organizations then it would be difficult to administer schools; and (3) that even though social studies and history books did neglect contributions of religion the Alabama State Superintendent would begin to correct that situation.

Expert witnesses appeared on both sides of the issue. For the humanists, attempts were made to (1) define humanism; (2) what Humanist Manifesto II really proclaimed: "It is a scientific method of unfettered opportunity to investigate any domain of human interest without perceptions of a religious nature,"[901] and (3) within the humanists organizations there were differences regarding--whether secular humanism was a religion or not--the Humanists Association had "undertaken efforts to obtain First

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[896]Ibid., 943.

[897]Ibid.

[898]Ibid.

[899]Ibid.

[900]Ibid.

[901]Ibid., 967.

Amendment constitutional immunities and the protections afforded theistic religions."[902]

With all testimonies complete Justice Hand stamped his imprimatur on the case. This case, insisted Justice Hand ,"was not prayer in schools, not censorship of school materials, and not an attempt of narrow-minded or fanatical proreligionists to force a public school system to teach only those opinions and facts they find digestible."[903] This case turned on one major ideological consideration: Was secular humanism "religious advancement" within schools? Continuing Justice Hand after review of Supreme Court church-state decisions proclaimed secular humanism a religion for the following reasons:

> [M]akes a statement about supernatural existence a central pillar of its logic; defines the nature of man; sets forth a goal or purpose for individual and collective human existence; and defines the nature of the universe, and thereby delimits its purpose.[904]

After insisting that secular humanism was a religion, Justice Hand examined textbooks and other school materials to see if they promoted religion--secular religion. Regarding social studies and history textbooks, Justice Hand made this analysis:

> Omissions, if sufficient, do affect a person's ability to develop religious beliefs and exercise that religious freedom guaranteed

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[902]Ibid., 968.

[903]Ibid., 972.

[904]Ibid., 978.

> by the Constitution. Do the omissions in these history books cross that threshold? For some of them, yes. In addition to omitting particular historical events with religious significance, these books uniformly ignore the religious aspects of most American culture.[905]

For home economics textbooks Justice Hand concluded: "Teaching that moral choices are purely personal and can only be based on some autonomous, as yet undiscovered and unfulfilled inner self, is a sweeping fundamental belief that must not be promoted by the public schools."[906]

Justice Hand in encapsulating his decision rejected using the Lemon tripartite test concluded that textbooks were religious establishment and violated the First Amendment. Justice Hand concluded he was "thus compelled to grant plaintiffs their requested relief barring the further advancement of the tenets of the religion of secular humanism."[907]

On appeal, the Court of Appeals (Eleventh Circuit) rejected every imperative of Justice Hand's decision. First regarding what constitutes a religion the court said:

> The Supreme Court has never established a comprehensive test for determining the "delicate question" of what constitutes a religious belief for purposes of the first amendment, and we need not attempt to do in this case. . . . Appellees have failed to prove a violation of the establishment clause. . . .[908]

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[905]Ibid., 985.

[906]Ibid. 987.

[907]Ibid., 988.

[908]Smith v. Board of School Commissioners of Mobile County, 827 F.2d 684, 689 (11th Cir. 1987).

The Court of Appeals reiterated validity of the Lemon tripartite test and spelled out the triparte test guidelines:

> First, the statute must have a secular legislative purpose: second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion" of the first amendment.[909]

Then the Court of Appeals reviewed several establishment clause cases Stone v. Graham,[910] Marsh v. Chambers,[911] and Grand Rapids School District v. Ball[912] as examples of using Lemon critera.

For the case at bar, however, the court could simply set the first part--"religious purpose"-- and third part--"excessive entanglement" aside. All parties were in agreement and thus no issue. However, the second part--"primary effect of advancing or inhibiting religion"-- was the primary concern. After reviewing all Alabama textbooks in question the Circuit Court insisted the home economics, social studies, and history textbooks did not violate the First Amendment establishment clause. The case was remanded once again to the District Court to dissolve the injunction and terminate the litigation.

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[909]Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105 2111, 29 L.Ed. 745 (1971).

[910]Stone v. Graham 449 U.S. , 40-41, 101 S.Ct. 192, 193, 66 L.Ed.2d 199 (1980).

[911]Marsh v. Chambers, 463 U.S. 783 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983).

[912]Grand Rapids School District v. Ball, 473 U.S. 373, 383, 105 S.Ct. 3216, 3222, 87 L.Ed.2d 267 (1985).

Graduation Exercises

Wood v. Mt. Lebanon School District, 342 F.Supp. 1293 (1972).

Facts

Amy Breecher and her parents brought a civil rights action against the school board to prohibit the inclusion of a pronouncement of an invocation and benediction at the high school graduation ceremonies to be conducted on June 7, 1972. They specifically claimed that having an invocation and a benediction as parts of the graduation ceremony amounts to the establishment of religion, impairment of freedom of religion, and an improper use of tax monies.

Decision

The District Court ruled the school district was not a "person" subject to suit under civil rights statute. It also ruled that where high school graduation is not required, the practice of including an invocation and a benediction by a clergyman did not violate the establishment or the free exercise clauses. Thus the complaint was dismissed.

Discussion

The court pointed out that since the graduation ceremonies were held after the conclusion of all formal requirements for graduation had been met they were purely voluntary ceremonies. There was no requirement to attend graduation ceremonies to receive a high school diploma.

The fact that distinguishes this case from Engel, which required a state prayer as part of the formal school day, is that the program is ceremonial and not a part of the day-to-day routine of the school curriculum to which is attached compulsory attendance.

The court recognized from Engel that the establishment clause is

violated even though there is no direct government compulsion. However, they decided since the graduation ceremony was voluntary and separate from the school routine, it did not violate any of the plaintiffs' First Amendment rights.

On the issue of tax dollars the amount of money used in connection with the invocation and benediction would be *de minimis*. In short, plaintiffs' would not be hurt monetarily by the brief moments used by the invocation and benediction.

The court concluded from the facts presented that the ceremony to be held is primarily secular. Therefore, the graduation ceremony in no way constitutes religious instruction.

Lemke v. Black, 376 F.Supp. 87 (1974).

Facts

The 1973 graduating class of the Ashwaubenon High School voted to hold their graduation at the Nativity Roman Catholic Church. The 1974 graduating class also voted to hold their ceremony at the same church. Two graduating seniors and the father of one of the students objected to holding a public school graduation in a Roman Catholic church. They sought a preliminary injunction to halt graduation in the church.

Decision

The District Court held that the proposed use of the Roman Catholic church for graduation was unconstitutional; therefore, the superintendent and the board members were ordered not to hold the graduation ceremony at the church involved.

Discussion

Prior to 1973, graduation ceremonies were held in the high school gym or auditorium. In 1973, the graduating class held its graduation program in Nativity Roman Catholic Church. The 1974 graduating class again voted to to hold the ceremony at the same church. In both years, some members of the school district complained about holding the ceremony in a church.

The defendants pointed out the Ashwaubenon High School graduation ceremony is the responsibility of graduating seniors. They select the site and are responsible for paying for the ceremony. Attendance is voluntary and no sanctions are imposed by the school board against students who do not attend.

Chief Judge Reynolds asserted that in light of the circumstances in this case there is an unconstitutional relationship between church and state. There is conflict in the community over this issue. Some members of the community cannot attend the ceremony in a Catholic Church without violating their consciences. Holding the graduation program in a church cannot be permitted unless there is an overriding secular need to use those particular facilities.

Allowing the students to plan the ceremony is not determinative. Graduation exercises are a normal and traditional function of the public schools in this state and the nation. School administrators cannot delegate the responsibility of planning a public activity to a nongovernmental body and allow that body to proceed in an unconstitutional manner.

The fact that only a few students and members of the community objected is insignificant. As Justice Brennan stated in Schempp, it did not "matter that few children had complained of the practice, for the measure of seriousness of a breech of the establishment clause has never been thought to

be the number of people who complain of it."[913]

The defendants' contention that student participation is voluntary is misleading. Graduation represents completion of several years of scholastic achievement and symbolizes transition into a more mature society than was previously available to the students. It is unfair to force any individual to violate his conscience in order to participate in such an important event in the individual's life.

There was no evidence the defendants or the students who planned the graduation exercises were motivated by religious beliefs. Rather, the decision to hold a public activity in a church was made in the midst of sectarian or religious opposition to that decision. Under these circumstances, it was only natural that the religious disputes would eventually become politicized. "History cautions that political fragmentation on sectarian lines must be guarded against."[914]

Chief Judge Reynolds concluded that if the graduation program were held in the church the plaintiffs' constitutional rights and freedom of religion would be impaired. Therefore, the plaintiffs' request for a preliminary injunction to prohibit holding the graduation ceremony in a church was granted.

Weist v. Mt. Lebanon School District, 457 Pa 166 320 A.2d 362, cert denied, 419 U.S. 967 (1974).

Facts

On April 26, 1973, fifty-four students filed a complaint in equity asking

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[913]Abington School District v. Schempp, 374 U.S. 203, 264 (1963).

[914]Waltz v. Tax Commission of the City of New York, 397 U.S. 664, 695 (1970).

the Court of Common Pleas, Civil Division of Allegheny County to prohibit the Mt. Lebanon School District from including an invocation and benediction at the graduation ceremonies of Mt. Lebanon High School scheduled for June 12, 1973. The plaintiffs complained the inclusion of prayers violated the establishment clause and their free exercise rights of the First Amendment, and Article I, section 3, of the Pennsylvania Constitution. A three-judge court was specially convened to hear the case.

Decision

Judge Homer S. Brown, of the Court of Common Pleas, dismissed the complaint and the plaintiffs appealed. Chief Judge Jones of the Pennsylvania Supreme Court held that the case was technically moot because the students had already graduated; however, the court could not dismiss the appeal because of the short time between the commencement announcement and the actual commencement exercises. The inclusion of invocation and benediction at voluntary graduation exercises offended neither the free exercise nor the establishment clauses of the Federal Constitution nor that provision of the Pennsylvania Constitution governing free exercise and establishment of religion.

Discussion

The Mt. Lebanon School District had a sixty-year history of holding graduation exercises after seniors completed the required course of study. Attendance at the programs was voluntary, but approximately ninety percent of the graduation classes are in attendance. Students who do not attend may obtain their diplomas at the high school principal's office any time the day after commencement.

The trial court dismissed the appellants free exercise claim and the appeals court agreed. Since attendance at graduation was voluntary, there was no allegation or showing that the inclusion of an invocation and benediction in the commencement program would have any coercive effect upon the appellants in the practice of their religion.

Using various sections of opinions of the Supreme Court, the appellants could gain support for their position on the establishment clause. However, the Court has ruled that even technical infringement upon the First Amendment need not be enjoined. Otherwise, in the words of Mr. Justice Douglas:

> Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamation making Thanksgiving Day a holiday; "'so help me God" in our courtroom oaths--these and all other references to the Almighty that run through our laws, our public rituals, or ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."[915]

The appellants' claim on violation of the establishment clause was also dismissed. The District Court reasoned the commencement program was strictly a public ritual or ceremony and did not serve to advance religion. The Court of appeals agreed that the commencement program is a permissible accommodation between church and state.

The appellants' third claim was thatthe invocation and benediction at the high school commencement was in derogation of Article I, section 3, of the

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[915]Zorach v. Clauson, 343 U.S. 306, 312-313, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952).

Pennsylvania Constitution of 1874, which reads as follows:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishment or modes of worship.[916]

The lower court did not feel the invocation and benediction was the type of exercise at which this section of the Pennsylvania Constitution was aimed; therefore, they dismissed the appellants' claim. The appeals court affirmed the decision of the lower court.

Grossberg v. Deusebio, 380 F.Supp. 285 (E.D.Va. 1974).

Facts

In 1974, students who were members of the graduating class at Douglas Freeman High School, a public high school in Henrico County, Virginia, requested that an audible prayer not be a part of the upcoming graduation ceremony. The School Board of Henrico County refused to prohibit the inclusion of an invocation and a benediction at the graduation program. The high school students and their parents sought injunctive relief against the school board because the inclusion of an invocation and a benediction in the graduation program would be an infringement of their rights of religious liberty.

Decision

The District Court concluded that with the evidence available at the hearing on the motion for preliminary injection there was not sufficient threat

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[916]Weist v. Mt. Lebanon School District, 320 A.2d 362, 366 (1974).

of establishment of religion to warrant a preliminary to prohibit an invocation and a benediction from the upcoming graduation program.

Discussion

The high school had a history of including an invocation and a benediction in the graduation exercises. The decision to have a prayer was made by the senior class acting through class representatives. All expenses except diplomas were the responsibility of the senior class. Attendance at graduation was voluntary and seniors not attending could pick up their diplomas at any time after the graduation ceremony or have the diplomas mailed to them.

Plaintiffs claimed the inclusion of an audible prayer at the upcoming graduation program by the defendants would constitute a "law respecting the establishment of religion."[917] The establishment clause prohibits the government from aligning itself with any or all religions. "When government . . . allies itself with one particular form of religion, the inevitable result is that it incurs 'the hatred, disrespect and even contempt of those who held contrary beliefs.' "[918]

An invocation is a prayer, and it is hard to believe the purpose or effect of allowing a prayer being anything other than the advancement of religion. The defendants claimed that they were not responsible for the invocation since it was voted on by the senior class. They could not get out of the responsibility

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[917]Grossberg v. Deusebio, 380 F.Supp. 285, 287 (E.D.Va. 1974).

[918]Abington School District v. Schempp, 374 U.S. 203, 221-222, 83 S.Ct 1560, 1571, 10 L.Ed. 844 (1063).

of the invocation because the graduation ceremony was held on public school grounds, administered by public school personnel, with diplomas awarded by the administration. No vote of the majority of the senior class could absolve conduct which abridges constitutional rights.

Defendants pointed out that invocations similar to theirs have a long history in this country. Invocations to open state and federal legislative chambers are commonplace. Three lower courts which addressed prayers in graduation programs found them to be permissible.

"The history of man is inseparable from the history of religion."[919] The District Court could not conclude that the state through the school board was so enmeshed in religious affairs as to warrant its intervention. The court refused to grant injunctive relief for the plaintiffs. The court also denied the defendants' motion to dismiss the plaintiff' action for failing to state a claim on which relief could be granted, because if granted, it would change what was a preliminary hearing into a final adjudication on the merits. The District Court left open the opportunity for the plaintiffs to present further evidence.

Graham v. Central Community School District of Decatur, 608 F.Supp. 531 (D.C.Iowa 1985).

Facts

A civil rights action was filed by Robert Graham, father of Rebecca Graham, a senior at Central Decatur High School, challenging the constitutionality of including an invocation and a benediction as a part of the high school graduation ceremonies conducted by the school district. Central

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[919]Engel v. Vitale, 370 U.S. 421, 434,, 82 S.Ct. 1261, 1268, 8 L.Ed.2d 601 (1962).

Decatur High School is the only public high school in the school district. For at least twenty years, the defendant's graduation ceremonies have been opened by an invocation prayer by a Christian minister and closed by a Christian minister's benediction. The plaintiff asked that the invocation and benediction be removed from the graduation ceremonies.

Decision

The District Court ruled that the inclusion of the religious invocation and benediction violated the establishment clause of the First Amendment. It was the judgment of the court that the defendant is prohibited from including in its graduation exercises this year and subsequent years any religious invocation or religious benediction.

Discussion

The defendants emphasized the graduation exercise was a voluntary ceremony which seniors were not required to attend in order to receive a diploma. By shifting sponsorship for the graduation program to the Ministerial Alliance, school authorities erroneously assumed that the exercises would pass constitutional muster.

Plaintiff Robert Graham testified that he is a Unitarian Universalist, and that he is personally offended by the use of Christian prayers at public school functions including graduation exercises. Three expert witnesses were called by the plaintiff; all of them opined that invocations and benedictions at graduation exercises serve a religious purpose, not a secular purpose. All three opined that a public school offering an invocation and benediction at public school events, such as graduation exercises, is advocating religion.

Only two witnesses testified for the defendant, Virginia Webb, a

member of the defendant's board of directors, and Thomas Spear, the defendant's new superintendent. Mrs. Webb gave no opinion as to the purpose of the invocation and benediction at graduation exercises. She stated as far as she knows the school has always done it. Superintendent Spear testified that during his education career he has attended many graduation exercises, and each one began with an invocation and ended with a benediction. He opined that the main purpose of having an invocation and benediction in graduation exercises is "tradition." He also testified that he believes that it lends a "serious note" to the ceremony. He also stated he does many things in school requiring a "serious note," and that he does them without an invocation in advance. He also testified that in his opinion the invocation and benediction also serve a religious purpose.

The court decision in this case was based on the evidence developed at the hearing and on applying the evidence to the three-part Lemon test. By applying the tripartite test, the court concluded the invocation and benediction served a Christian, but not a secular purpose. The trial court also believed the practices in question had the primary effect of advancing religion. Since the plaintiffs did not question the issue of excessive entanglement, the court did not rule on that issue.

Stein v. Plainwell Community Schools, 610 F.Supp. 43 (W.D.Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

Facts

Two public school districts in Michigan regularly included an invocation and a benediction in their graduation ceremonies. Both programs were held at outdoor facilities with attendance being voluntary. Attendance was in no way

a condition for receiving a diploma.

At Plainwell High School the invocation and benediction were given by two students chosen from a group of honor students. The students determined the contents of the invocation and benediction.

At Portage Central High School the content of the graduation ceremony was organized and developed by the graduating seniors. For at least fifteen years they had elected to include an invocation and a benediction in the commencement program. Senior class representatives had chosen local ministries and clergy to deliver the invocation and the benediction.

In 1985, action was brought challenging the use of an invocation and a benediction at high school graduation ceremonies. The plaintiffs contended the prayers violated the religious clauses of the First Amendment of the United States Constitution.

Decision

The District Court concluded the inclusion of an invocation and a benediction in a high school graduation ceremony advanced a secular purpose, and did not have the primary effect of advancing religion and did not foster excessive government entanglement with religion. The court found the inclusion of a prayer was both religious and ceremonial. In this case there was no claim that the school district was using the prayers to convert the audience to accept the tenets of any particular faith. Using the above reasoning the District Court dismissed the plaintiffs' claims on the merits.

On appeal, the United States Court of Appeals for the Sixth District held that:

> (1) ceremonial invocations and benedictions could be delivered at high school commencement ceremonies without

> violating First Amendment, provided they preserved substances of principle of equal liberty of conscience, and (2) invocations and benedictions in question violated First Amendment in that they symbolically placed Government's seal of approval on Christian view of religion.

The Court of Appeals found that the prayers used in the graduation ceremonies violate the establishment clause because of their expressly Christian content. The decision of the District Court was reversed and remanded to the District Court for further proceeding and the granting of equitable relief.

Discussion

The practice in Steinwell High School permitted a brief invocation and benediction by a graduating senior, with no censorship of the prayers by the school administration. The custom in Portage Central High School called for recitation of an invocation and a benediction by members of the clergy selected by representatives of the graduating class. The minister was not asked to present the prayers for approval, but he was asked to keep them brief and "nondenominational." In supporting these practices, the court stressed four general factors:

> . . . attendance at graduation is voluntary; the presence of parents and other adults minimizes the proselytizing potential of the prayers; the prayers are isolated events that take only a few moments once a year, rather than daily rituals; and no evidence suggested that speakers had intended to use prayers to promote particular religious beliefs.[920]

The school boards argued that the limitations on school prayer

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[920]Benjamin B. Sendor, "Religion and the Public Schools," Education Law in North Carolina. 1 (January 1988): 16-7.

developed for officially sponsored classroom prayer under a series of cases beginning with Engel[921] simply did not apply because graduation prayers are only annual occasions of a festive, celebratory nature. They pointed out that voluntary graduation programs held in auditoriums or athletic stadiums, with parents and friends in attendance, were different from the classroom.

The plaintiffs, using the same line of Supreme Court school prayer decisions as well as the decision in Graham[922] prohibiting prayer at commencement decisions, argued to the contrary. They asserted that all invocations and benedictions in the school context that invoke the image of God or Supreme Being, including sectarian, Christian, Jewish or other invocations of the deity, violate the First Amendment. The contended that the graduation exercises, like regular school classes, were directed at public school children. They claimed the same First Amendment values of liberty of conscience, state neutrality and noninterference with religion that prohibit school prayer should also be applied to invocations and benedictions at graduation exercises.

The District Court concluded that the annual graduation exercises in this case were analogous to the legislative and judicial sessions referred to in Marsh[923] and should be governed by the same principles. To entirely prohibit the long established tradition of invocations at graduation exercises while supporting the tradition of invocations for judges, legislators, and public

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[921]Engel v. Vitale, 370 U.S. 421, 82 S.Ct.1261, 8 L.ed.2d 601 (1962).

[922]Graham v. Central Community School District of Decatur, 608 F.Supp. 531 (D.C.Iowa 1985).

[923]Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983).

officials did not seem to be a consistent application of the principle of equal liberty of conscience.

In the same vein, the invocations and benedictions delivered at graduation exercises should not be framed in language unacceptable under Marsh. The invocations and benedictions delivered at the two high schools did not pass the Marsh test because they were framed in language that placed the government's seal of approval of the Christian view rather than civil invocations and benedictions used in public legislative and judicial sessions described in Marsh.

Sands v. Morongo Unified School District, 262 Cal.Rptr. 452 (Cal.Ct.App. 1989).

Facts

James Sands and Jean Bertelette, taxpayers, sued the school district for declaratory and injunctive relief, seeking to prohibit the school district from including invocations and benedictions in public high school graduation ceremonies. The four high schools in the school district traditionally included an invocation and a benediction in graduation ceremonies. Typically, the invocations and benedictions included a prayer.

Decision

The Superior Court of San Bernardino County, California, prohibited the school district from including invocations and benedictions in the four public high school in the school district and the school district appealed. The Court of Appeal, Fourth District, Division 2, held that nonsectarian invocations and benedictions did not violate the establishment clause of First Amendment or provisions of the California Constitution prohibiting the school district from

aiding a religious or sectarian purpose or teaching sectarian or denominational doctrine in common schools. The Court of Appeals reversed the decision of the lower court.

Discussion

The plaintiff brought suit under a California statute that allowed citizens to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. The school district claimed the plaintiffs did not have a personal interest in the case since they did not have children attending the school district. The school district misconstrued the ruling in Blair[924] that allowed a taxpayer to bring a lawsuit even though there was no individual damage. Plaintiffs as taxpayers had a statutory right to bring this suit.

Plaintiffs challenged the graduation prayers under both the federal and state constitutions. As an administrative act, a graduation ceremony must comply with state and federal standards. Courts have held that the establishment clause does not prohibit legislative sessions from opening with a religious invocation. In this case, the school district suggested the court should follow the principles set forth in Marsh,[925] rather than the principles established by Lemon.[926] The court choose to use the Lemon test. In examining other court decisions related to invocations and benedictions,

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[924]Blair v. Pitchess, 5 Cal.3d 258, 96 Cal.Rptr. 42, 486 P.2d 1242 (1971).

[925]Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983).

[926]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed2d 745 (1971).

including Bennett,[927] the only other case in California which ruled invocations and benedictions violated state and federal Constitutions, the court concluded that in this case the invocations and benedictions had a secular purpose, did not prohibit or advance religion, and would not excessively involve the school district with religion. The Supreme Court had not yet considered the constitutionality of religious invocation and benedictions at public high school graduation ceremonies.

Lee v. Weisman, 902 F.2d 1090 (1st. Cir. 1990), 112 S.Ct. 2649 (1992).

Facts

For years, invocations and benedictions had been a part of the graduation ceremonies in the Providence, Rhode Island, school system. High school and middle school principals of public schools were permitted to invite local clergy to deliver the prayers. Principal Robert E. Lee, Deborah Weisman's principal, gave the rabbi a pamphlet containing guideline to use in developing nonsectarian prayers.

In 1989, four days before graduation, Deborah Weisman, a Nathan Bishop Middle School student in Providence, Rhode Island, and her parents sought a temporary restraining order forbidding public school officials from incorporating prayers in the graduation ceremony. Shortly before the ceremony, the District Court denied the motion of the Weisman family for lack of adequate time to consider it. Deborah and her family attended the graduation exercise, and the rabbi gave the prayers. The rabbi gave thanks to God for "the legacy of America, where diversity is celebrated and the rights of

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[927]Bennett v. Livermore Unified School District, 238 Cal. Rptr. 819 (Cal.App. 1 Dist. 1987).

minorities are protected."[928]

Subsequently, Weisman sought a permanent injunction barring Providence public school officials from inviting clergy to deliver invocations and benedictions at future graduations. It seemed likely that such prayers would be conducted at Deborah's high school graduation.

Decision

The District Court prohibited school officials from continuing the use of invocations and benedictions at graduation ceremonies on the grounds that it violated the establishment clause of the First Amendment. On appeal, the Court of Appeals affirmed the decision of the District Court. Petition for *certiorari* was granted. In a vote of five to four, the Supreme Court held that allowing prayers at graduation exercises is unconstitutional.

Discussion

For years, courts in many areas of the country had wrestled with the inclusion of invocations and benedictions as a part of graduation ceremonies. The court decisions were about equally divided as to whether the prayers in graduation ceremonies were constitutional or unconstitutional. This landmark case is important because it was the first case on graduation prayers to reach the Supreme Court. Many observers feared the decision of the Court would destroy forty years of separation between church and state and turn toward some form of accommodation of religion in the public schools. Their fears were founded on the pressures of Presidents Ronald Reagan and George Bush who pushed for a constitutional amendment to return prayers to the public schools.

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[928]Nancy Gibbs, "America's Holy War," Time 138, no. 23 (December 9, 1991) 62.

In holding thatthe inclusion of prayers by clergy as part of an official public school graduation ceremony is prohibited by the establishment clause, the Supreme Court gave the following reasons:

(a) The Court chose not to revisit the tripartite test developed in Lemon.[929] The government's desire to accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the establishment clause. The establishment clause guarantees that the government cannot force anyone to support or participate in religion or its exercise or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."[930]

(b) The attempt by the school officials to make the prayers nonsectarian and acceptable to most people did not relieve the state, acting through the school system. The state could not establish an official or civic religion as a way of avoiding the establishment of religion.

(c) The establishment clause was developed to protect citizens against an indoctrination or coercion of religion. The prayer cases of Engel[931] and Schempp[932] protected the indirect coercion of elementary and secondary students. Arguing that the prayers were of a *de minimis* character does not excuse a prayer from violating the objectors' rights.

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[929]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[930]Lynch v. Donnelly, 465 U.S. 668, 678, 104 S.Ct. 1355, 1361, 79 L.Ed2d 604 (1984).

[931]Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 LEd.2d 601 (1962).

[932]Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

(d) The Court rejected the petitioner's argument thatmaking the graduation exercises voluntary excused the threat of coercion. It pointed out that in our society graduation is one of life's most significant occasions and there is much peer pressure on students to attend graduation ceremonies. The Court also emphasized that the state failed to acknowledge that what for many was a spiritual imperative was for the Weismans religious conformance required by the state.

(e) Constitutional differences between the public school system and a session of a state legislature distinguish this case from Marsh.[933] In public schools students are a captive audience required to follow school policies. Graduation is one of the most important events for students to attend. In a state legislature's opening, adults are in an atmosphere where they are free to enter and leave with little comment and for any number of reasons.

For the separationists the decision in Lee[934] was a great victory, to the accommodationists a great defeat. The debate is not over;the conservative Christian fundamentalists are still seeking a constitutional amendment to return prayer to the public schools.

Jones v. Clear Creek Independent School District, 930 F.2d 416 (5th Cir. 1991), 977 F.2d 963 (5th Cir. 1992).

Facts

Traditionally, Clear Lake High School included in its graduation ceremonies invocations and benedictions voluntarily written and delivered by

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[933]Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983).

[934]Lee v. Weisman, 112 S.Ct. 2649 (1992).

members of the graduating senior class. Before 1986,, Clear Lake graduation invocations included overt references to Christianity. In 1986 Clear Lake's graduation invocation mentioned "Lord," "Gospel," "Amen," and God's omnipotence. Two graduating seniors and their fathers claimed that Clear Creek's policy and actions of permitting invocations consisting of traditionally Christian prayer at high school graduation ceremonies violated the establishment clause of the First Amendment. They brought suit against the school district to prohibit it from permitting invocations and benedictions at high school graduation ceremonies.

Decision

The District Court ruled in favor of the school district and denied the students and their parents injunctive and declaratory relief from the Clear Creek invocation and benediction policy. On appeal, the Court of Appeals affirmed the decision of the District Court. The students and their parents petitioned for writ of certiorari. The Supreme Court of the United States granted the petition, vacated the judgment, and remanded. On remand, the Court of Appeals held that:

> (1) primary effect of resolution was secular; (2) resolution's proscription of sectarianism did not in itself excessively entangle government with religion; (3) resolution was not an unconstitutional endorsement of religion by the government, as it merely permitted nonsectarian, nonproselytizing invocation if the seniors chose to have one; and (4) resolution did not unconstitutionally coerce participation of objectors in a government-directed formal religious exercise.[935]

For the second time, the Court of Appeals affirmed the district court's

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[935]Jones v. Clear Creek, 977 F.2d 963 (5th Cir. 1992)

judgment and denied the students and their parents injunctive and declaratory relief from the Resolution.

Discussion

On December 5, 1987, three weeks before the case was to be tried in District Court, Clear Creek's Board of Trustees adopted a resolution which provided:

> 1. The use of an invocation and/or benediction at high school graduation exercises shall rest with the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
>
> 2. The invocation and benediction, if used, shall be given by a student volunteer; and
>
> 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.[936]

The resolution was adopted by the Clear Creek Independent School District at the request of its attorney. He used the judge's opinion in Stein[937] to draft the resolution for the Clear Creek Independent School District.

In reviewing the finding of the District Court the Court of Appeals applied the Lemon[938] test, rather than the historical approach in Marsh.[939]

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[936]Jones v. Clear Creek, 930 F.2d 416, 417 (5th Cir. (1991).

[937]Stein v. Plainwell Community Schools, 610 F.Supp 43 (W.D.MICH. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

[938]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

[939]Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983).

The Court of Appeals concluded the resolution served a secular purpose, its primary purpose was to solemnize graduation ceremonies, not advance religion, and requiring the invocation and benediction to be nonsectarian and nonproselytizing in nature did not excessively entangle the government with religion. The Court of Appeals found that Lee[940] did not render Clear Creek's invocation policy unconstitutional. In Lee the Supreme Court struck down a Rhode Island school's practice of inviting clergy members to a graduation ceremony and providing guidelines for an invocation. The Supreme Court did not rule on prayers written and delivered by students themselves. In this case the prayers were student initiated and delivered by student volunteers. The resolution did not require a prayer but permitted one if so desired by the seniors.

Harris v. Joint School District No 241, 821 F.Supp. 638 (9th Cir. 1994).

Facts

In this 1994 case, students and a parent of students challenged the inclusion of prayer in their high school graduation ceremony. They asserted that the inclusion of prayer violated the Idaho Constitution and the establishment clause of the United States Constitution.

Decision

Although the District Court declined to review state law claims, it concluded that prayers did not violate the establishment clause. On appeal, the Court of Appeals for the Ninth Circuit concluded that the inclusion of school prayer in the Grangeville High School graduation exercises violated the

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[940]Lee v Weisman, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

establishment clause.

Discussion

The school district asserted that since the Grangeville High School senior class planned the graduation program, including making the decision to include or not to include a prayer during graduation, the inclusion of prayer was not unconstitutional. Intervenors contended that students have a right under the free speech and free exercise clauses to the Constitution to have a prayer during graduation exercises. The plaintiffs claimed the seniors did not control all parts of graduation exercises. Furthermore, some students voted against the inclusion of prayer in the graduation program. Finally, the plaintiffs asserted that under the current school policy, school officials would permit the senior class to plan a graduation program equivalent to a religious service.

The Ninth Circuit, relying on Lee,[941] considered the extent of state involvement in the graduation program as well as the obligation of students to participate in the activity. The court noted that the seniors had the authority to plan graduation only because the school permitted them to exert such authority. In addition, the school maintained some control over the speeches, timing, and content of the program. Further, the school district provided the facility and other expenses, and graduation programs were paid for by money the senior class was allotted from student registration funds. The court further concluded that students were obligated to attend the graduation program and participate by at least maintaining a respectful silence during graduation prayers. Using Lee,[942] the court concluded that the facts demonstrated state

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[941]Lee v. Weisman, 112 S.Ct. 2649 (1992).

[942]Ibid.

involvement and obligatory student participation in the religious activity.

On the issue of free speech and free exercise claims, the court observed that students were free to worship before and after graduation. The court further concluded, since the planning of state-controlled, state-sponsored events such as graduation was involved, the establishment clause applied.

Distribution of Religious Literature

Gideon Bibles

Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857 (1953).

Facts

The plaintiff, Bernard Tudor, of the Jewish faith, claimed that the distribution of the Gideon Bible to children of the Jewish faith violated the teachings, tenets, and principles of Judaism, while plaintiff Ralph Lecoque, of the Catholic faith, claimed its distribution to children of the Catholic faith violated the teaching, tenets and principles of Catholicism. After the action commenced, the child of Ralph Lecoque transferred from public school to a Catholic parochial school; therefore, his action as a parent became moot. Originally, the State of New Jersey was named as a defendant party, but was dismissed from the action.

On the advice of legal counsel, the Rutherford Board of Education developed a distribution system for the Gideon Bibles in grades five through eight. Before the books were distributed, parents had to sign for their children to receive the Gideon Bibles.

Decision

A temporary injunction was granted to halt the distribution in the schools. After a hearing, the New Jersey Superior Court, Law Division, ruled in

favor to the school board and lifted the injunction. On appeal, the court reinstated the injunction as requested, and the case was heard by the New Jersey Supreme Court. The New Jersey Supreme Court ruled that the distribution of the Gideon Bibles violated the constitutions of New Jersey and the federal government.

Discussion

The New Jersey Supreme Court saw the practice of distributing Gideon Bibles as sectarian. The defendant school board was accused of showing a preference by permitting the distribution of the King James Version which was unacceptable to Catholics and Jews. This practice violated the mandate of the First Amendment, as applied to states by the Fourteenth Amendment prohibiting the making of any law "respecting an establishment of religion,"[943] and the requirement of Article I, paragraph 4 of the New Jersey Constitution that "there shall be no establishment of one religious sect, in preference to another."[944] As stated by Mr. Justice Black in his majority opinion in Everson:

> "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, nor can they pass laws which aid one religion, aid all religions, or prefer one religion over another."[945]

Mr. Justice Douglas in his majority opinion in Zorach stated: "The government

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[943]Tudor v. Board of Education, 100 A.2d 857, 864 (N.J. 1953).

[944]Ibid.

[945]Everson v. Board of Education, 330 U.S. 1, 15 (1947).

must be neutral when it comes to competition between sects."[946]

The court insisted that activities, especially those of a religious nature which separated and 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 fellow, 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)[947]

Distribution of the Gideon Bible was judged to be more than an accommodation of religion. The New Jersey Supreme Court ruled that the distribution of the Gideon Bibles violated the constitutions of New Jersey and the federal government.

Berger v. Rensselaer Central School Corporation, 982 F.2d 1160 (7th Cir. 1993).

Facts

In the fall of 1989, Allen Berger sent a letter to the Rensselaer Central School Corporation requesting they discontinue the practice of permitting Gideons to distribute Bibles to fifth grade students. The board of education

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[946]Zorach v. Clauson, 343 U.S. 306, 314, 72 S.Ct. 679, 684, 96 L.Ed. 954, 962 (1952).

[947]State ex rel. Weiss v. District Board, 76 Wis. 2177, 44 N.W. 967, 7 L.R.A. 330 (S.Ct. 1890).

discussed the letter and decided not to alter its policy regarding the Gideons. There were no guidelines in the policy to assist the superintendent and the principal on how to exercise their discretion except the general reminder to act in students' best interests. The policy did not cover when nonschool personnel could make presentations and distributions during time ordinarily reserved for instruction. The superintendent and the principal had total discretion to grant or deny access to school property.

Unable to get the school board to change its policy of distribution of Bibles by the Gideons, Allen Berger filed suit on behalf of his children, Moriah and Joshua Berger, seeking to have the corporation's practice declared unconstitutional as a violation of the First Amendment directive that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[948]

Decision

The District Court dismissed the Bergers' suit on summary judgment. On appeal, the Court of Appeals for the Seventh Circuit ruled that the District Court had erred in finding no establishment clause violation under Lemon.[949] The Court of Appeals reversed the decision of the District Court in ruling classroom distribution of Gideon Bibles to fifth grade public school students violated the establishment clause of the First Amendment. The Rensselaer Central School Corporation petitioned for a rehearing *en banc*, and the petition was denied.

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[948]U. S. Constitution, Amendment I.

[949]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

Discussion

There was no difficulty with the Rensselaer Central School Corporation distribution policy until Mr. Berger protested to the corporation. The policy in question did not treat religion directly; therefore, on its face there were no establishment clause concerns. The Bergers' concern was the distribution of Gideon Bibles to fifth grade students. In 1985, Allen Berger's first grade son Joshua and other students received a book, My Favorite Book, published by the Jesus Love Foundation. Mr. Berger thought the book was nondenominational but religious in its treatment of citizenship and lifestyle. He did not protest the book. In 1989, Mr. Berger did challenge the board policy on the distribution of Gideon Bibles on behalf of his children, Moriah and Joshua Berger.

Having opened the school property to nonschool personnel, the school system was obligated to treat all speakers equally. In this case the Bibles were distributed by Gideons, not school personnel, but for young children in classrooms it may be difficult to distinguish the difference.

The school system claimed that it was neutral in reference to the distribution policy and that it could not exclude the Gideons without engaging in content discrimination, yet by her own admission, the superintendent had excluded at least one publication and that she would exclude groups she found offensive to the "moral being" of children.

The defendants used Widmar[950] for the proposition that having opened its classroom for public use, it was required to keep the invitation open to all,

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[950]Widmar V. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70L.Ed.2d 440 (1981).

including the Gideons. There is one major difference between this case and Widmar. In Widmar the organization sought access to the school facilities after school. In this case, the Gideons sought access to the school facilities during school hours. The fifth grade students were a captive audience.

The analogous case is not Widmar but McCollum v. Board of Education.[951] In McCollum nonschool employees used the public schools in Illinois to advance their religious doctrine. The Gideons used the public schools of Rensselaer to distribute religious materials to fifth graders.

The defendant was also wrong in thinking that the First Amendment interest in free expression automatically rules over the First Amendment prohibition on state-sponsored religious activity. The opposite is true in the coercive context of public schools. The conflict between free speech and the establishment clause interest is the result of most religious activity being expressive. This expression may be suppressed in the government's vigilance to remain neutral toward religion. More specifically, the First Amendment is intended to restrict the religious activity of the government not the religious activity of individuals. As the Supreme Court stated in Engel:

> It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.[952]

The conflict arises when individuals unduly involve the government in

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[951]McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

[952]Engel v. Vitale, 370 U.S. 421, 435, 82 S.Ct. 1261, 1269 (1962).

their expressive rights. In this case the defendant's attempt to remove the establishment clause jurisprudence must fail. A public school cannot sponsor nonreligious speech in an attempt to remove an endorsement of religion forbidden under the establishment clause.

The Rensselaer Central School Corporation acted with state authority by permitting the Gideons into the public schools; therefore, its actions were subject to the dictates of the First Amendment. Under the establishment clause, "the government may not aid one religion, aid all religions or favor one religion over another."[953] The Supreme Court stated in Zorach:

> There cannot by the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment, within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter.[954]

The Court of Appeals compared Rennselaer to Lee.[955] Lee and Rensselaer were both resolved without using Lemon;[956] however, Lemon

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[953]Everson v. Board of Education, 330 U.S. 1,15, 67 S.Ct. 504, 511, 91 L.Ed 711 (1947).

[954]Zorach v. Clauson, 343 U.S. 306, 312, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952).

[955]Lee v. Weisman, 112 St.Ct. 2649, 2655 (1992).

[956]Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

remains the law of the land. Even though the District Court decision in Rensselaer was rendered before Lee, the District Court erred in finding no establishment clause violation under Lemon.

> Such a decision is tone deaf to the Constitution's mandate that the government must not establish a state religion, and is utterly insensitive to the special concern about coercive influences on impressionable public school children."[957]

The Court of Appeals reversed the decision of the District Court and ruled that the Gideons could not distribute Bibles in Rensselaer public schools during class time for nonpedagogical purposes.

Other Materials

Burch v. Barker, 651 F.Supp. 1149 (W.D.Was. 1987).

Facts

Five students had distributed an anonymous newspaper, *Bad Astra,* without knowledge of school authorities. The general content of the articles in the paper was critical of the school administration policy. It contained no profanity or obscene language.

Students had produced the newspaper, *Bad Astra*, at their own expense and off school property. The paper was delivered to school by the mother of one of the student authors. Approximately three hundred and fifty copies of the newspaper were distributed on the school grounds. The mother, who was president of the Lindbergh High School Parent Teacher Association, put a copy of the newspaper in the mailboxes of faculty and staff members.

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[957]Berger v. Rensselaer Central School Corporation, 982 F.2d 1160, 1169 (7th Cir. 1993).

Several days after the distribution of the newspaper, school authorities identified the student authors who had used pen names. The students were disciplined in the form of a letter of reprimand to be placed in each student author's school record. The student authors appealed to the superintendent who supported the principal's disciplinary action. They did not appeal to the School Board as required by the old policy. Before, during, and after the distribution of *Bad Astra*, the Renton School Board and School Superintendent were in the process of revising the old policy. The new policy also required approval of student writings before distribution on school grounds. Present and former students and their parents sued the school district, the principal, the superintendent, and the board of directors challenging high school policy requiring prior approval before distribution of written materials.

Decision

The United States District Court for the Western District of Washington held that:

> (1) new high school prior restraint policy, as a whole, was substantially constitutional; (2) that portion of policy prohibiting dissemination of unapproved written material on school premises or in a manner reasonably calculated to arrive on school premises was unconstitutional; (3) that portion of policy prohibiting expression that encourages actions which endanger health and safety of students was unconstitutionally vague; (4) that portion of policy governing procedure was unconstitutional to the extent it did not provide time limits for decision making at every level of the appeal process; (5) question of facial constitutionality of old policy was moot; (6) failure of present and former high school students and parents to exhaust administrative remedies did not preclude consideration of constitutionality of policy as applied to the student authors; and (7) old policy was constitutionally applied.[958]

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[958]Burch v. Barker, 651 F.Supp. 1149 (W.D.Was. 1987)

Discussion

The court was faced with two distinct questions of law: (1) the constitutionality of the new policy regulations 5220, 5220R, and 1130 and constitutionality of the old policy regulation 5133. The first question was the constitutionality of the new policy. Following the history of interest balancing test of the First Amendment there is no clear-cut answer to this question. Substantially, the court found the new policy to be constitutionally sound; however, some of the provisions of regulation 5220R were vague and needed to be revised to satisfy constitutional requirements.

A strong presumption against prior approval restraint of speech can be traced to the earliest days of the United States, and this presumption applies to children as well as adults. Secondary students do not "shed their constitutional rights to freedom of speech or expression at the school house gate."[959] A policy of prior restraint in a secondary school is not unconstitutional per se. However, the burden is on the defendants to prove that a prior approval requirement is needed.

This court found that the uncensored writing of students could create a substantial disruption with the operation of the school or impinge on the rights of other students at Lindbergh High School. The court realized that a student who was willing to knowingly publish obscenity would probably be as likely also toviolate the prior approval requirement. However, school authorities who use a prior approval process have a constitutional obligation to attempt to

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[959]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

handle potential harm in any reasonable way before resorting to prohibiting distribution of written materials on school grounds.

In this case there was testimony at the trial concerning the community's right to monitor speech in the school. The community does have the right and responsibility to make decisions concerning public education and school authorities have the right to reasonably control the time, place, and manner of distribution of student underground newspapers.
However, regardless of community sentiment, neither the community nor school authorities have the right to use a prior approval policy to censor student-written materials except in certain specifically excepted instances when no time, place, or manner regulations would avert potential harm. Although, in this case the court found the prior approval requirement constitutional, school officials should follow this maxim: "When in doubt, do not censor."[960]

Although the court found the new policy substantially acceptable, several provisions were impermissibly vague. The first paragraph under the provision entitled "Distribution of Written Material," Regulation 5220R, prohibits distribution of unapproved written material on school premises "or in a manner reasonably calculated to arrive on school premises."[961] School officials have no right to control dissemination of student-written material off school premises.

Number seven under the section of Regulation 5220R entitled, "Conditions which may cause verbal or written expression to be restricted or

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[960]Burch v. Barker, 651 F.Supp. 1149, 1155 (W.D.Wash. 1987).

[961]Ibid.

prohibited," allows prohibition of an expression that "encourages actions which endanger the health and safety of students."[962] The court concluded this provision was too vague and was also redundant.

The last paragraph of this section states in part:

> In order for verbal or written expression to be disruptive or hazardous, there must exist clear and specific facts upon which it would judge that a clear and present likelihood of an immediate and substantial disruption would result if expression were allowed to occur.[963]

The second question facing the court was the constitutionality of the old policy, Regulation 5133. This involved a three-part inquiry. The first inquiry was whether or not the court could rule upon the facial constitutionality of the old policy. This was a moot point, since the old policy had not been used since the introduction of the new policy on August 13, 1983.

The second inquiry dealt with the plaintiffs' failure to exhaust state administration remedies. The old policy provided for appeals to the principal, the superintendent, and the school board. In this case the plaintiffs appealed to the principal and the superintendent, but failed to appeal to the school board. The question was whether or not failure to exhaust the administrative remedies of Regulation 5133 precluded consideration of the constitutionality of the old policy as applied to the student authors. The court determined that it did not.

The plaintiffs did not deny that the student authors violated Regulation

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[962]Ibid., 1155-56.

[963]Ibid., 1156.

5133, or that the disciplinary action taken by the principal was appropriate if the old policy was applied to the student authors in a constitutional manner. Instead, the issue was whether Regulation 5133 was constitutional as it was applied to the student authors. The court concluded that school board administrative remedies did not have to be exhausted before the issue may be considered.

The final question was whether or not Regulation 5133 was constitutional as applied to the student plaintiffs. The question was a very narrow one which only applied to this case. Students were disciplined for failure to submit *Bad Astra* to the school board and because they did not sign the articles appearing in *Bad Astra*. If they had presented *Bad Astra* to the principal and had approval denied, but continued to distribute the newspaper, the court would have been faced with the task of determining whether or not the criteria and procedures of the old policy were constitutional.

The court held that Regulation 5133 was applied to the student authors in a constitutional manner. The court did not interfere with the disciplinary action of the principal. It was suggested that the defendants may wish to consider voluntarily removing the discipline letters from the student authors' files for the assistance the student authors gave to the school board in developing a new policy.

Thompson v. Waynesboro Area School District, 673 F.Supp. 1379 (M.D.Pa. 1987).

Facts

On April 28, 1986, Bryan Thompson and Marc Shunk, students at Antietam Junior High School, distributed copies of a newspaper entitled *Issues*

and Answers in the hallway before school began. *Issues and Answers* was a religious newspaper published in Illinois by a group know as "Student Action for Christ." The newspaper contained articles and cartoons which supported religious tenets such as a personal relationship with God and adherence to the principles of the Bible. Thompson's and Shunk's reason for distributing *Issues and Answers* was to communicate the Christian message to fellow students.

A teacher gave the principal, Robert Mesaros, a copy of the newspaper. The principal consulted with the superintendent and met with Bryan Thompson and Thompson's father on April 28, 1986, concerning the newspaper. The principal claimed that there was a school policy which required prior preview before distributing literature.

The next day the principal wrote a memorandum to the Thompsons outlining certain restrictions which would be imposed on further distributions of *Issues and Answers*. Bryan would only be permitted to distribute *Issues and Answers* before 7:50 a. m. outside the school building, on the sidewalk and the parking lot. During the school day Bryan would be required to keep extra copies in his locker. The reason for this action was a policy which required prior approval before materials could be displayed, posted, or distributed on school property. In the past, the principal had generally prohibited nonstudent groups from distributing literature which was not sponsored by the school.

On May 8, 1986, Bryan Thompson, Marc Shunk, and Christopher Eakle again distributed copies of Issues and Answers in the hallways before the opening of school. A teacher asked the three boys to stop giving out the newspapers. They continued to distribute papers and were approached by an assistant principal. They were placed on in-class suspension and informed by

the principal that if they continued to disregard his instructions for distributing the newspapers they would no longer be allowed to distribute *Issues and Answers* at any time.

On May 12, 1986, March Shunk and Bryan Thompson again distributed *Issues and Answers* in the hallways before school. Again they were confronted by a teacher and taken to the principal's office. This time they were placed in in-school suspension for the entire day and the principal informed the parents in writing that the reason for the boy's suspension was "willful disregard for school district policy and direct disobedience to [Mèsaros'] directive"[964] Students brought suit against the school district alleging that limitations placed on students' distribution of religious newspapers violated their First Amendment rights.

Decision

On motions for summary judgment by both the plaintiffs and defendants the United States District Court for the Middle District of Pennsylvania ruled that:

> (1) students' distribution of religious newspapers in the hallways of a junior high school during noninstructional time was not a "meeting" under the Equal Access Act, therefore not protected by Act; (2) school district violated students' freedom of speech in violation of First Amendment by restricting students' distribution of religious literature to area outside school; and (3) school district did not violate the students' First Amendment right to free exercise of religion by requiring the students to distribute religious newspapers outside school building.[965]

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[964]Thompson v. Waynesboro Area School District, 673 F. Supp. 1379, 1381 (M.D.Pa. 1987).

[965]Ibid., 1379.

Discussion

In addition to the conditions surrounding the plaintiffs' distribution of *Issues and Answers*, other issues were relevant to the claims made by the plaintiffs. For example, students at Antietam Junior High School had the opportunity to participate in noncurriculum activities such as student clubs which met after school. The newspaper was one such club, which published a school newspaper entitled *Round-Up*. A faculty member from the English curriculum supervised the Round-Up staff which was made up of students. The school newspaper was distributed to students during homeroom. It contained articles, poems, and lists prepared by students. The school principal supervised its content for the purpose of removing or editing materials which were obscene, libelous, or substantially disruptive. The plaintiffs did not request permission to form a club or to meet during the after-school activity period.

Four issues were raised for the court to address:

> whether the distribution by plaintiffs of a religious newspaper in the hallways of Antietam Junior High School during noninstructional time is conduct which is protected by the Equal Access Act, whether defendant created a public forum at Antietam Junior High School throught its policies with respect to student activities, whether the restrictions which defendant placed on plaintiffs' distribution of *Issues and Answers* are constitutionally valid in context to the forum which exists at Antietam Junior High School; and whether defendant's restrictions infringe unconstitutionally on plaintiffs' right to exercise their religion freely.[966]

The court concluded that the distribution of *Issues and Answers* did not fall under the protection of the Equal Access Act. Rather than seeking to

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[966]Ibid., 1382.

obtain a meeting place for religious activity, the plaintiffs chose to place themselves in a position where many students were likely to pass.

The defendants argued that they had not created a limited open forum that covered the plaintiff's activities. However, the defendants did not argue that they had no limited open forum. In fact, there were twenty-nine noncurriculum student clubs meeting on school premises twice a week during noninstructional time.

The defendants did not contest that the distribution by plaintiffs of *Issues and Answers* is not speech protected by the First Amendment. In Martin v. Struthers[967] the Supreme Court clearly held that the right to free speech includes the right to distribute literature. The court concluded that the distribution of the religious newspaper by the plaintiffs was a form of protected speech.

The plaintiffs had restricted their activities to the hallways of Antietam Junior High School; however, the parties apparently rested their arguments on the assumption that the plaintiffs sought general access to the school. Therefore, the court focused its forum analysis on the entire school rather than limiting itself to the hallways.

A seminal case involving freedom of speech is Tinker v. Des Moines Independent Community School District.[968] In that case students sued the school district for prohibiting them from wearing black armbands in protest of

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[967]Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 863, 87 L.Ed. 1313 (1943).

[968]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

the Vietnam War. The Supreme Court began with a very basic statement that,

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.[969]

In Widmar v. Vincent,[970] an evangelical Christian organization brought action against the University of Missouri claiming that the school had violated their free speech by denying them access to university facilities. The Court held that the university had created an open or public forum for use by student groups.

In a more current opinion, Perry Education Association v. Perry Local Educators' Association,[971] the Supreme Court summarized the different types of forums. "The 'quintessential' or traditional, public forum is a place such as a street or park which has been traditionally held open to the public for purposes of assembly, communication of thoughts, and discussion of public issues."[972] The second type of forum is "public property which the State has opened for use by the public as a place for expressive activity."[973] The Court

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[969]Ibid., 506.

[970]Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

[971]Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d794 (1983).

[972]Ibid., 45.

[973]Ibid.

realized that the created public forum may be limited for use by certain groups and that if the public forum is a limited one, " the constitutional right of access would in any event extend only to other entities of similar character."[974] The final type of forum is the nonpublic forum, property ". . . which is not by tradition or designation a forum for public communication. . . ."[975]

In Perry the issue involved a school district's interschool mailing system. The Court held that mailing system was not a public forum because it was not open for use by the general public.

Bender v. Williamsport Area School District[976] is somewhat analogous to this case. In Bender students were denied permission to meet at the defendant's high school for purposes of praying and reading the Bible. The District Court held that denying access to the group was unconstitutional because the school had created a limited open forum by establishing an activity hour in which over twenty other student groups participated.

The court concluded by applying Widmar and the decision of the District Court in Bender to this case the defendants did not violate the establishment clause of the First Amendment by permitting the distribution of *Issues and Answers* in Antietam Junior High School. The court found that the defendant

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[974]Ibid., 48

[975]Ibid., 46.

[976]Bender v. Williamsport Area School District, 563 F.Supp. 697 (M.D.Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984, vacated, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986), *reh'g denied*, ___ U.S. ___, 106 S. Ct. 2003, 90 L.Ed.2d 682 (1986).

had established a limited public forum at the school and the plaintiffs, as students of the school, would be free to distribute their literature in that forum according to reasonable time, place, and manner restrictions. Such a policy would pass the Lemon[977] test of secular purpose, advancement or inhibition of religion, and entanglement.

The court held that the defendant did not unconstitutionally infringe on plaintiffs' right of free exercise of religion by requiring them to distribute *Issues and Answers* outside the school building. The records showedd that the plaintiffs were not asked to neglect their religious beliefs or forfeit the state benefit of an education. Plaintiffs were just required to select either another area or another method in which to continue the conduct mandated by their beliefs.

Bible Study Courses

Wiley v. Franklin, 486 F.Supp. 133 (E. D. Tenn. 1979) ("Wiley I"); 474 F.Supp.525 (1980) ("Wiley II"); 497 F.Supp. 390 (1980) ("Wiley III").

Facts

In this case students and their parents initiated action against the boards of education and their members for declaratory and injunctive relief to prohibit the sponsoring of a course of Bible study and instruction in city and county elementary schools. The cases were combined for trial. The plaintiffs contended that the defendant Boards of Education of Chattanooga and Hamilton County, Tennessee, and their membership had violated their religious freedom.

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[977]Lemon v. Kurtzman, 403 U.S. 602, 612, 613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

Decision

The United States District Court for the Eastern District of Tennessee found that the Bible study courses were not primarily history, literature, or otherwise secular, but rather were of a religious nature and that the courses tended to advance the Christian religious faith. Also, with a Bible study committee independent of the boards setting curriculum and selecting, training, and supervising teachers, the Bible study programs constituted an excessive entanglement between government and religion. The District Court held that the Bible study courses previously taught, including the modifications made in the 1978-79 school year violated the religious freedom provisions of the First Amendment.

Discussion

The Bible study courses were stayed for forty-five days to permit the boards of education to devise, adopt, and submit to the District Court the following changes in the elementary school Bible study courses:

> (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 teacher 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 personnel 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 and elementary school curriculum.[978]

None of the foregoing instructions prevented the defendant school boards from entering into an agreement with any individual or organization including the Public School Study Committee for the funding of the elementary school courses. Also, the instructions of the District Court did not bother with elective polices and practice already in effect.

The school board made the instructed revisions. In the second stage of the suit, Wiley v. Franklin,[979] the District Court reviewed the revised Bible course guidelines. The District Court held that the proposed curriculum guidelines would be approved if: (1) under the teacher standards, the part that gave permission for employment of Bible teachers with only 12 hours in Bible literature were eliminated; (2) the court retained jurisdiction of the lawsuit during the initial year of operation of the court-approved plan for Bible Studies; (3) the proposed lesson on teaching of the resurrection of Jesus as recounted in the New Testament was eliminated. The court warned the school boards that:

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[978]Wiley v. Franklin, 468 F.Supp 133, 152 (1979).

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

> 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 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 classroom instruction.[980]

After the school boards used the revised guidelines for Bible study courses for one year, the District Court in the third stage of Wiley v. Franklin,[981] found no violation of the First Amendment in the Bible study courses as taught and conducted in the Chattanooga public elementary schools; therefore, they denied the plaintiffs' motion to enjoin that program. On the other hand, the District Court found that three lessons taught in the elementary schools of Hamilton County were religious in nature; therefore, they granted the plaintiff's motion to enjoin that program.

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[980]Ibid., 531.

[981]Wiley v. Franklin, 497 F.Supp. 390 (1980).

Crockett v. Sorenson, 568 F.Supp 1422 (1983).

Facts

The parents of a fifth grade student challenged the constitutionality of a Bible study program for fourth and fifth grade students in the public schools of Bristol, Virginia. The Bible teaching classes had been provided for over forty years. The classes were taught for forty-five minutes once a week in six elementary schools. Classes were voluntary and students did not receive a grade or academic credit for the classes.

Decision

The United States District Court for the Western District of Virginia, Justice Kiser, held that the courses were a violation of the United States Constitution because there was no secular purpose and control had been relinquished by the state. However, Justice Kiser maintained:

> The First Amendment was never intended to insulate our public institutions from any mention of God, the Bible or religion, because when such insulation occurs, another religion, such as secular humanism, is effectively established.[982]

The court did support the legality of Bible study in the schools when the purpose was educational and not religious.

Discussion

A ministerial alliance had complete control over staffing and curricular decisions for the program. In 1978, another private group, the Bristol Council of Religious Education, began sponsoring the program. In 1982, the group was

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[982]Ibid., 1425.

renamed Bible Teaching in the Public Schools. Members of the group were ministers and lay representatives from the different Protestant denominations in the area.

The Ministerial Association had prepared a course of study outline, objectives to be taught, materials to be used, and the portions of the Bible to be taught. Teachers used the outline from its inception until 1982 with no substantial modifications. Until February 1982, the class routine consisted of Bible teaching, prayers and singing of hymns. After February 1982, the prayers and singing of hymns were discontinued from the program. Although not specified by the Ministerial Association, teachers used the King James version of the Bible.

Classes were voluntary and parents signed a request card to enroll children in Bible classes. Until 1982, students not attending the Bible classes were assigned to the principal's office or the library. Since 1982, an attempt was made to give the nonparticipating students a more meaningful experience. They were sent to the extension center where, in theory, they choose one of several options. In reality, their choice was study hall or physical education because the other options were classes the students had already attended in regular curriculum.

There was a certain amount of pressure for the students to enroll in the Bible classes, not from school officials or Bible teachers, but peer pressure from fellow students. This was demonstrated during the 1982-83 school year when only eighteen of 589 fourth and fifth grade students in the elementary schools chose not to participate in the Bible classes.

Compulsory Attendance

Wisconsin v. Yoder, 406 U.S. 205 (1972).

Facts

Parents were seeking voluntary exclusion from public school after the eighth grade. Wisconsin's compulsory attendance law required students to attend public or private school until reaching the age of sixteen.

Jonas Yoder and Wallace Miller, Old Order Amish members, and Adin Yutzy, a member of the Conservative Amish Mennonite Church, refused to send their children to school beyond the eighth grade. They defended their position on the basis that Wisconsin's compulsory school attendance law violated their rights under the First and Fourteenth Amendments.

Decision

The men were convicted in Green County Court of violating Wisconsin's compulsory school-attendance law and were each fined five dollars. On appeal the Wisconsin Circuit Court also ruled against Yoder, Miller, and Yutzy. The case was appealed to the Wisconsin Supreme Court,which reversed the decision of the lower courts and ruled in favor of the respondents. On petition by the State of Wisconsin, the Supreme Court of the United States granted a writ of certiorari to review a decision of the Wisconsin Supreme Court which ruled that convictions of Amish parents for violating the State' s compulsory school-attendance law were invalid under the free exercise clause of the First Amendment as applied to the States by the Fourteenth Amendment. The Supreme Court agreed with the ruling of the Wisconsin Supreme Court.

Discussion

This is a landmark case dealing with compulsory attendance in conflict

with established religious beliefs. When the case was appealed to the Wisconsin Supreme Court, the Amish brought in expert witnesses to testify on their way of life. Dr. John Hostetler testified that:

> Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separated from, rather than integration with, contemporary worldly society.
>
> Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and the ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life.[983]

It was pointed out that the Amish were not opposed to schooling, since their children did attend elementary school. They agreed that their children needed the basic skills in the "three R's" in order to the read the Bible, be good farmers and citizens, and be able to communicate with the non-Amish people in the course of daily life.

It was further emphasized that sending Amish children to high school may not only cause psychological harm to Amish children, but may eventually destroy their way of life which had remained constant for many years. Aided by a three hundred year history as an identifiable religious group and a long history as a successful and self-sufficient segment of American society, the Amish have demonstrated their religious beliefs and their way of life.

The Wisconsin Supreme Court recognized the importance of the state's

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[983]Wisconsin v. Yoder, 406 U.S. 205, 211 (1972).

compulsory school-attendance laws and, at the same time, recognized the importance of the Amish being able to keep their children out of school beyond the eighth grade. After reviewing the case, the United States Supreme Court agreed with the ruling of the Wisconsin Supreme Court. The Supreme Court held:

> 1. The State's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children.[984]
>
> 2. Respondents have amply supported their claim that enforcement of the compulsory formal education requirement after the eighth grade would gravely endanger if not destroy the free exercise of their religious beliefs.[985]
>
> 3. Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish have demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continuing survival of Old Order Amish communities, and the hazards present by the State's enforcement of a statute generally valid as to others, Beyond this, they have carried the difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of the overall interests that the State relies on in support of its program of compulsory high school education. In light of this showing, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show more particularity how its admittedly strong interest in compulsory education would be adversely

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[984]Ibid., 213-215.

[985]Ibid., 215-219.

affected by granting an exemption to the Amish.[986]

> 4. The State's claim that it is empowered, as *parens patriae*, to extend the benefit of secondary education of children regardless of the wishes of their parents cannot be sustained against a free exercise claim of the nature revealed by this record, for the Amish have introduced convincing evidence that accommodating their religious objections by forgoing one or two additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.[987]

Duro v. District Attorney, Second Judicial District of North Carolina, 712 F.2d 96 (4th Cir. 1983).

Facts

In this North Carolina case, Peter Duro, parent, initiated action against the district attorney because he alleged that the North Carolina compulsory attendance law infringed on his religious beliefs. Duro and his wife were members of the Pentecostal Church which did not require children to be taught at home. In fact, the majority of the members who attended the Pentecostal Church with the Duros enrolled their children in a public school.

Duro and his wife had six children, five of whom were of school age. He refused to enroll his children in either a public or private school. Duro stated that exposing his children to those of different religious beliefs would corrupt his children. He was opposed to what he termed the "unisex movement where you can't tell the difference between boys and girls and the promotion of

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[986]Ibid., 219-229, 234-236.

[987]Ibid., 229-234.

secular humanism ."[988] Duro also objected to physicians and refused medical attention for all physical ailments because he believed the Lord would heal any problem.

Mrs. Duro attempted to teach the children in the home, even though she did not posses a teaching certificate and had never been trained as a teacher. She used the same self-teaching program that was used by the only private school in the county.

Decision

The District Court granted summary judgment for Duro and the district attorney appealed. The United States Court of Appeals for the Fourth District reversed the judgment of the Circuit Court. The Supreme Court of the United States denied certiorari to the case.

Discussion

The District Court relied heavily on Yoder[989] in ruling that North Carolina's compulsory law was unconstitutional, as it applied to Duro. The District Court concluded that Duro, like the parents in Yoder, expressed a sincere religious belief that school enrollment would corrupt his children.

The Court of Appeals for the Fourth Circuit ruled that the District Court had misinterpreted Yoder in applying it to the present case. In balancing Duro's interest against North Carolina's interest in compulsory education, the Court of Appeals found the balance tips in favor of the state.

The Court of Appeals found this case was distinguishable from the

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[988]Duro v. District attorney, Second Jucdicial District of North Carolina, 712 F.2d 96, 97 (4th Cir. 1983).

[989]Wisconsin v. Yoder, 406 U.S.205 (1972).

situation in Yoder. Unlike the Amish, the Duros were not members of a community which has existed for three hundred years and has a history of being a successful segment of American society. The Amish sent their children to school through the eighth grade. Duro refused to send his children to public or private school for any length of time, yet he expected them to be a part of the modern world by the age of eighteen. He had not shown that home instruction would adequately equip his children to be self-sufficient individuals in modern society or enable them to participate intelligently in thepolitical system, which, as the Supreme Court stated, is a compelling interest of the state.

Immunizations

Avard v. Dupuis, 376 F.Supp. 479 (D.N.H. 1974).

Facts

John Avard, a six-year-old kindergarten student, was dismissed from school in Manchester, New Hampshire, because his parents had failed to comply with the state's immunization laws. The statute provided for exemptions based on medical and religious reasons with local school boards having discretion to determine whether a child may be excused from immunizations. The father asked for and was denied an exemption for religious reasons. He then challenged the constitutionality of the standard which allowed religious exemptions. The plaintiff sought an injunction against the local school board prohibiting the dismissal of his child for failure to comply with the state statute.

Decision

The court ruled that the portion of the state statue which allowed local

school boards to exempt children for religious reason was unconstitutional. The remaining portion of the state statute remained in effect; thus, the court denied an injunction against the local school board.

Discussion

In 1971, New Hampshire passed a state statute, NH RSA 200:38, for the control and prevention of communicable diseases. In September of 1973, John Avard's father was informed that John would have to be vaccinated in order to be permitted to remain in school. John's father applied for a religious exemption. On December 10, 1973, the local school board denied his request, and he appealed to the State Board of Education which reaffirmed the denial. On January 14, 1974, the local school board reaffirmed its earlier decision and dismissed John from school until he was vaccinated.

The New Hampshire statute, NH RSA 200:38, for the control and prevention of communicable provided as follows:

> I. All children shall be immunized prior to school entrance according to the current recommendations of the state public health agency.
>
> II. Any child may be exempted from the above immunizations requirements if he presents evidence from his physician that immunization will be detrimental to his health. *A child may be excused from immunization for religious reasons at the discretion of the local school board.*
>
> III. All children shall be examined prior to school entrance to detect symptoms of tuberculosis and may be periodically examined during his [sic] school experience.[990]

The plaintiff contended that section two of the NH RSV 200:38 was

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[990]Avard v. Dupuis, 376 F.Supp. 479, 481 (1974).

unconsitutional because it was vague for lack of standards and thus in conflict with the due process clause of the Fourteenth Amendment. The defendant's counsel conceded that there were no standards or guidelines for the local board to follow in granting exemptions to the statute. Since the plaintiff did not have standards to follow in knowing what material to present to the local board to request an exemption, the court concluded that section two of the statute was unconstitutionally vague and in violation of the due process clause of the Fourteenth Amendment. However, the court decided that since the intent of the legislature was to protect the health of school children, ruling the section granting religious exemption invalid did not significantly impair the rest of the statute. Therefore, the court ruled that the remaining sections of the statute would remain in effect and denied the plaintiff's request for an injunction against the local school board prohibiting the dismissal of John Avard from attendance in the Manchester public schools.

Brown v. Stone, 378 So.2d 218 (Miss. 1979).

Facts

Chad Allan Brown, six-year-old son of Charles H. Brown, was denied admission to school because he had not been vaccinated against those diseases specified under Senate Bill No. 2650 (Mississippi Code Annotated section 41-23-37), enacted April 21, 1978. His father did not permit his son to be vaccinated because of his own strong and sincere religious beliefs that he actively practiced and followed. He was a member of the Church of Christ, a religious body, which did not teach against the use of medicines, immunizations or vaccinations prescribed by a physician. The father had sought a religious exemption to excuse his son from vaccination but it was denied because the

certificate did not comply with Senate Bill No. 2650. The father brought suit against the Houston Municipal Separate School District seeking an injunction to force the board of trustees to admit his son as a student without compliance with the immunization requirements of Misissippi Code Annotated section 41-23-37. He claimed the code was invalid because it forced complainants to join a religious organization in order to practice their religious tenets and the denial of admission of his son violated the complainants' rights protected by the First Amendment to the United States Constitution.

Decision

The Chancery Court of Chickasaw County, Mississippi ruled in favor of the Houston Municipal Separate School District and the father appealed to the Mississippi Supreme Court. The Mississippi Supreme Court held that:

> (1) statute requiring immunization against certain crippling and deadly diseases before child could be admitted to school served overriding and compelling public interest; (2) to extent that statute could conflict with religious beliefs of parents, interest of school children prevailed; (3) statute was reasonable and constitutional exercise of police power; and (4) provision of statute providing exception for immunization requirement based on religious beliefs was in violation of equal protection clause.[991]

The Mississippi Supreme Court held that to exempt from immunization for religious reason was a violation of the Fourteenth Amendment, and it affirmed the decision of the lower court.

Discussion

A certificate of exemption was filed by the minister of the Church of

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[991]Brown v. Stone, 378 So.2d 218 (Miss. 1979).

Christ in which he stated that the Church of Christ as a religious body does not teach against the use of medicines, immunization, or vaccination as prescribed by a duly licensed physician. He also emphasized that their local chiropractor, Mr. Charles H. Brown, a member of the Church of Christ, had strong convictions against the use of any kind of medications and they respected his views.

The main purpose of the Mississippi Legislature in the passage of Senate Bill 2650, Mississippi Annotated section 41-23-37, was to afford protection for school children against crippling and deadly diseases by immunization. The Mississippi statute stated:

> Except as provided hereinafter, it shall be unlawful for any child to attend any school, kindergarten or similar type facility intended for the instruction of children (hereinafter called "schools"), either public or private, unless they shall first have been vaccinated against those diseases specified by the State Health Officer.
>
> A certificate of exemption from vaccination for medical reasons may be offered on behalf of a child by a duly licensed physician and may be accepted by the local health officer when, in his opinion, such exemption will not cause undue risk to the community. A certificate of religious exemption may be offered on behalf of a child by an officer of a church of a recognized denomination. This certificate shall certify that parents or guardians of the child are bona fide members of a recognized denomination whose religious teachings require reliance on prayer or spiritual means of healing.[992]

The court recognized that immunization has been done effectively and safely over a period of years. If the religious exemptions to immunizations were granted only to member of certain recognized sects or denominations

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[992]Ibid., 219.

whose doctrines forbid it, and, as contended by appellants, whose private and personal religious beliefs will not permit them to permit immunization of their children. The religious exemptions would have defeated the purpose of the Mississippi immunization statute.

The court pointed out that in cases too numerous to mention, it has been held, in effect, that a person's right to exhibit religious freedom ceases when it infringes on the rights of others. The United States Supreme Court stated in Prince v. Commonwealth of Massachusetts: "The right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death."[993] Earlier in Jacobson v. Commonwealth of Massachusetts,[994] the United States Supreme Court held that a state law requiring compulsory immunization did not deny a citizen of liberty guaranteed by the United States Constitution.

The Misissippi Supreme Court held that to exempt from immunization for religious reason was a violation to the Fourteenth Amendment. However, the court held that all other provisions of the statute were valid and constitutional and embodied a reasonable exercise of the police power of the state. Therefore, they affirmed the decision of the lower court.

Handle v. Artier, 625 v. F.Supp. 1259 (S.D.Ohio 1985).

Facts

In this 1985 case, parents of Stanley and Tisha Hanzel, in New

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[993]Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct., 88 L.Ed. 645 (1944).

[994]Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 25 S.Ct. 358, 49 L.Ed. 643 (1905).

Lebanon, Ohio, challenged the state statute, Ohio Rev. Code section 3313. 671(A), of requiring immunization before children could enter public school. They filed a complaint seeking either that the Ohio immunization statute be declared unconstitutional or that declaratory judgment be issued that the parents' personal beliefs amount to good cause for children to be exempted from immunization. They also complained that their rights to privacy, due process, and equal protection were infringed upon by the Ohio statute requiring immunization. Parents also sought a permanent injunction against expulsion of their children from the public schools. Plaintiffs' children would be allowed to remain in school without being immunized, pending a decision in the case.

Decision

The District Court rejected motion for summary judgment for the plaintiffs but agreed to accept motion for summary judgment from the defendant. The District Court held that:

> (1) statute did not violate privacy rights of the children; (2) no fundamental right was burdened to implicate due process; and (3) grant of "good cause" exemptions to those with religious reasons did not make denial to those children an equal protection violation.[995]

Discussion

The parent's belief in "chiropractic ethics" did not permit them to allow their children to receive immunizations. Chiropractic ethics is a belief which teaches that injection of foreign substances into the body is of no benefit and can only be harmful. Stanley and Tisha Hanzel's mother met with the

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[995]Hanzel v. Arter, 625 F.Supp. 1259, 1260 (S.D. Ohio 1985).

superintendent and explained why her children could not be immunized. She also sent two letters to the superintendent in which she repeated that her personal philosophy and belief in chiropractic ethics had led her to refuse immunization for her children, and she requested an exemption from vaccination under provision of Ohio statute, Ohio Rev. Code section 3313.671 (A)(3), related to exemptions. An informal hearing was held in which she repeated her views against immunization. After the hearing, the superintendent informed the plaintiffs in writing that their belief in chiropractic ethics did not constitute "good cause" for their children under Ohio statute, and that their children would have to be immunized in order to remain in the public schools.

The Ohio statute gave local boards of education the authority to make rules to insure the immunization of public school students. There was an exemption to the immunization requirement, Ohio Rev. Code Section 3313.671 (A) (3), which provided;

> A pupil who presents a written statement of his parent or guardian in which the parent or guardian objects to the immunization for good cause, including religious conviction, is not required to be immunized.[996]

Parents challenged the immunization requirement of privacy grounds, contending that the constitutional right to privacy was broad enough to apply to the decision to subject one's children to immunization. If the right of privacy were to protect individual decisions relating to immunization, then such decisions would implicate a "fundamental right." There is no mention of a right

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[996]Ibid.

of privacy in the United States Constitution and the Supreme Court has not recognized a general right to privacy. Rather, the Supreme Court has found the right of privacy to protect certain individual decisions. While protecting several aspects of personal choice, the Constitution does not protect all aspects of individual privacy.

Long before the concern of the right of privacy, in Jacobson v. Massachusetts,[997] a Massachusetts resident urged the Supreme Court to invalidate a compulsory vaccination statute on the basis that the statute amounted to a deprivation of liberty and that it was hostile to the individual's own freedom of care for his or her body. The Supreme Court rejected the challenge, holding that the Constitution's guarantee of liberty did not include an absolute right to individual freedom from restraint, and that the collective interest in health and safety outweighed the petitioner's interest.

In deciding bodily integrity, the Jacobson court's view was quoted in Roe v. Wade.[998] Justice Blackmun in attempting to describe the parameters of a woman's right to abortion stated:

> In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decision. The Court has refused to recognize an unlimited right of this kind in the past.[999]

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[997]Jacobson v. Massachusetts, 197 U.S. 11, 26 S.Ct. 358, 361, 49 L.Ed. 643 (1905).

[998]Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705.

[999]Ibid.

The District Court concluded that since the defendants had only granted two exemptions for "good cause" at the filing of the motion in this case it was unnecessary to resolve the issue of whether the immunization decision was encompassed within the right of privacy. The statute did not violate the rights of the children.

The plaintiffs argued that Section 3313.671 (A)(3) as applied by Dr. Arter and ratified by the defendants violated the Fourteenth Amendment's guarantee of due process. The plaintiffs did not contend they were not given an opportunity to be heard, rather the statutory exemption to Ohio's immunization requirement authorizes local school officials to burden a fundamental right without providing guidelines for the officials' exercise of authority. The plaintiffs contended that, as in Cantwell[1000] and Niemotko,[1001] defendant's lack of guidelines for what constitutes "good cause" for exemptions from vaccination was also unconstitutional given the "close parallel" between the cited cases and the present case. The District Court did not agree. It stated both cases did involve the exercise of administrative discretion, the place of religious beliefs in our constitutional framework, and the protection accorded them, are without parallel in the realm of secular beliefs. They cited Yoder[1002] in which the Supreme Court reflected the view that, "even if the values and objectives of two groups are identical,

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[1000]Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 99, 84 L.Ed. 1213 (1940).

[1001]Niemotko v. Maryland, 340 U.S. 268,269, 71 S.Ct. 325, 326, 95 L.Ed. 267 (1951).

[1002]Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

their claims will receive differing treatment under the Constitution depending on whether or not their claims are based upon religious tenets."[1003] The District Court did not accept the due process claim of the plaintiffs.

The plaintiffs claimed the defendants had violated the equal protection clause of Fourteenth Amendment by denying them an exemption accorded to similarly situated individuals. Once again the District Court disagreed. Using the Supreme Court ruling in Yoder,[1004] they stated that, "philosophical beliefs do not receive the same deference in our legal system as do religious beliefs, even when the aspirations flowing from each such set of beliefs coincide."[1005] The District Court concluded the defendants did not violate the plaintiffs' right to the equal protection of the laws.

[1003]Hanzel v. Arter , 625 F.Supp. 1259 (S.D.Ohio 1985).

[1004]Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

[1005]Hanzel v. Arter, 625 F. Supp. 1259 (S.D.Ohio 1985).

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

The upheaval of political, economic, and social conditions in Europe that led to the Renaissance and Protestant Reformation aided the settlement of this country. Early settlers brought to this country their religious beliefs and practices. One of the early reasons for establishing public schools was to teach children to read the Bible to save them from Satan. The Bible and other religious materials were used in teaching children to read.

During the one hundred fifty years of colonization, the colonists transplanted an educational system based on home, church, and school. The home was the main source for educating the youth, followed by the church, and then the schools. The early colonial schools were seen as instruments of religion which over a period of many years became instruments of the state.

During the seventeenth century, many ethnic groups settled in the new world, but the English culture became the dominant force for law, language, and custom. The Puritans, who settled in New England, had the greatest influence on the course of American education.

By the eighteenth century, three types of schools had emerged in America. New England was dominated by strong Calvinistic ideas of a religious state, supporting a system of common schools, higher Latin Schools, and colleges, both for religious and civic needs. The parochial school practice dominated the middle colonies and stood for church control of all educational

effort. It resented interference from the state and stood as a stumbling block to state organization and control of education. The third type of educational practice was conceived by the Church of England as public education mainly for orphans and children of the poor for which the State was under little or no obligation to support. Middle- and upper-class children attended private schools or were taught by tutors in their homes.

By 1750, the religious motive for maintaining schools began to wane. The American Revolution was disastrous to all types of schools. Due to the harsh conditions of the war, including finances, education can best be described as almost nonexistent. Educational opportunities continued to decline after the war.

At the end of the war, the newly formed federal government was heavily in debt and struggling to survive. The leaders in the states as well as the nation, who were responsible for the government, were too preoccupied with problems of organization, finance, and order to think much about other things. After government issues were settled, leading statesmen of the time began to express a need for general education.

Educated men developed the Constitution of the United States, but the word *education* is not mentioned. Considering the time, it is not surprising that the founders of the American republic did not deem the subject of public education important enough to warrant consideration in the Constitutional Convention or the Constitution. Education of the period was mainly a private matter and mainly under the control of the various churches. The leaders were products of the old aristocratic doctrine of education, of the theory that schools were intended for the leaders and for those who could afford the privilege of

education. Fortunately, there were notable exceptions who supported a general education and promotion of science and literature. They realized that education for all the people was necessary to the survival of the republic.

The federal government's first involvement in education was in the settlement of the land west of the Alleghenies and east of the Mississippi River. In 1785, Congress through, "Congressional Townships," provided that the sixteenth township was to be used for school support. In adopting the Northwest Ordinance of 1787, Congress expanded the land grants in each state, except Texas (which owned its own land when admitted), and West Virginia and Maine (which were carved out of other states).

By 1820, state constitutional recognition of education was found in thirteen of twenty-three states. Seven states--Massachusetts, Maine, Connecticut, New Hampshire, New York, Ohio, and Vermont--had statutes establishing school systems. The schools were supported through a variety of school-finance schemes--property tax, education "fee" or tuition, fishing tax, salt-working tax, lotteries, funds from congressional and state land grants, occupational tax, insurance-premium tax, bank tax, and liquor tax. In 1836, the federal treasury surplus was distributed to the states for education purposes.

The American school system began in the 1800s and has been evolving since. Religious instruction consumed a major portion of time and effort in American education in the 1800s. Educational leaders such as Horace Mann, W. T. Harris, and Elisha Potter, however, insisted on teaching moral values instead of sectarian religion.

By 1840, church-state separation had occurred in every state in the

nation. The differences between Protestants and Catholics over separation of church and state were becoming an important philosophical issue among educational leaders. The secularization of the public schools moved in two distinct fronts--(1) the curriculum, and (2) school finance. According to Mann, public education religious instruction should give to all "so much religious instruction as is compatible with the rights of others and with the genius of the government." He believed there was a common core of Christian religious beliefs that could be taught in the common school without objection, and that it was up to the home and the church to elaborate on these commonly held beliefs. He supported a nonsectarian doctrine that would exclude specific sectarian doctrines or man-made creeds.

The Catholic Church and Catholic parents were not interested in nonsectarian instruction. The Catholic Church wanted either the right to bring their own dogma into the public schools for the teaching of their children, or a part of the public school funds for the support of Catholic parochial schools. American Protestantism, because of the principle of separation of church and state, or because of antagonism, would not yield to either demand. Protestants were even willing to remove Protestant religion from the schools, which resulted in the secularization of public education in America.

Western migration in the latter part of the nineteenth century brought about social and cultural upheaval when masses of people from different backgrounds shared ideas. Sectarian principles were modified as civilization moved westward and developed new cultures.

Twentieth-century education emerged from a period of unrest in the 1890s when there appeared to be a profound realization on the part of

American leaders and the general public that a major transformation had been fashioned in American society. The great social trend and experimental teaching at the turn of the century influenced public school curricula. In addition, urbanization, mass immigration, enormous industrial growth, increased railroad travel, and newspaper circulation were themselves agents of change for the American population. The ordinary American citizen was beginning to worry about what kind of world the twentiethcentury would bring.

Americans looked more and more to schools as a catalyst for addressing social problems. The increasing number of children entering school was reason for concern. In 1890, less than seven percent of adolescents from fourteen to seventeen attended school. Four decades later more than half of adolescents fourteen to seventeen were enrolled in high school.

Industrial and social growth in post-war America caused lay people and educators to examine the content of study in educational courses. Production of automobiles and other products through assembly-line procedures provided the incentive for industrial growth, making available more money to spend and a freer atmosphere in society. Education became synonymous with social and economic mobility.

Many of the previously accepted education practices were questioned and reassessed by legislative action or by court action. American schools mirrored the problems that were common in the larger society. As the nation grew and the population increased, individual states assumed the responsibility to provide public education for their children based on the Tenth Amendment. The states were only restricted in action by the provisions of the United States Constitution and by subsequent acts of the state's legislature.

Today, school boards and school administrators are empowered to provide a comprehensive education for each child. Developing the curriculum offerings is often easier said than done. One area that has caused much difficulty is how to handle religious activities in public schools. Few topics stir human emotions more strongly than the mention of religious activities in the public schools.

Beginning in the 1940s, individuals (through civil liberty groups and sectarian organizations) challenged religious activities in the public schools. The challenges often led to court decisions which established precedents for future school board policy considerations. Consistently, the court decisions have established and maintained a wall of separation between church and state.

Judicial decisions consistently maintained that religious activities are unconstitutional in public schools. Judicial decisions have ruled that it is constitutional to teach about religion but not to teach religion in public schools.

Schools, as public institutions, operate in total society and experience pressures and influences from both sectarian and secular groups. The scope of this study is limited to a review of religious influences on public schools. Chapter II provided a review of the professional literature concerning the development of public schools and their conflicts with religious activities. Chapter III provided the legal aspects of religious activities in the public schools. Chapter IV reviewed and analyzed significant judicial court decisions establishing precedents in cases involving religious activities in the public schools.

Questions and Answers

In the introductory material in Chapter I, some basic questions relating to the topic of this dissertation were proposed. Discussion developed around those four questions will provide insight concerning religious activities in the public schools.

1. What legal guidelines can be set forth to aid school officials in policy-making and practices of religion in the public schools?

The major judicial decisions have ruled that it is unconstitutional for public school officials to accommodate religious activities in public schools. School officials must remain neutral in religious activities. At present, school officials need to apply the tripartite test to decide whether religious activities will pass constitutional muster. If a religious activity fails any part of the test, it is unconstitutional.

2. What are the major legal issues regarding religion in the curriculum of public schools?

Moment of silence, prayers, equal access, graduation exercises and student initiated prayers in public schools are legal issues causing the most discussion today. One alternative for satisfying interest in religion in public schools is to add Bible courses to the curriculum as electives in social studies. These courses teach Bible from a historical and literary point of view. Major judicial decisions have ruled that it is constitutional to teach about religion, but not to advance any particular religious belief.

Moment of silence is one issue where state statutes and school board policies have tried to accommodate individuals wishing to return prayers to the classrooms. Federal courts have consistently ruled that it is permissible to

have a moment of silence, provided it is nonstructured, and no one is given instructions on how to observe it.

Prayers in public schools were ruled unconstitutional in 1962. Again in 1963, the Supreme Court held that school-sponsored prayer is unconstitutional. This ruling should have ended the conflict related to prayers in the public schools. However, the debate over this issue continues.

In the 1980s there was much confusion about whether it was constitutional for religious groups to meet on school grounds. Regarding religious groups meeting on school grounds, the passage of the Equal Access Act of 1984 by the United States Congress gave religious groups permission to meet on school grounds provided the schools had a limited open forum.

Religious activities such as invocations, religious songs, and benedictions have been a part of graduation exercises for many years. In the 1970s, students and their parents began challenging the constitutionality of prayers in graduation exercises. Even though federal courts have not been consistent in their rulings, the Supreme Court ruling in Lee v. Weisman held that prayers as a part of graduation exercises are unconstitutional. However, if the graduation prayers are student initiated, they may be deemed constitutional.

3. Are there discernible patterns and trends that are identified from analysis of judicial decisions?

The federal courts have not always been consistent in their decisions regarding religious activities. No geographic area, grade level, or educator is immune from being challenged if they practice religious activities that are in conflict with the religious provisions of the First Amendment of the United

States Constitution.

Emerging as the most litigous today are moment of silence, prayers, equal access, graduation exercises, and student initiated prayers in public schools. During the 1995 session, the North Carolina General Assembly debated making a moment of silence mandatory in the public schools of North Carolina. Newt Gingrich, Speaker of the United States House of Representatives, proposed introducing a constitutional amendment in the one hundred fourth Congress to return prayer to the classrooms.

4. Based on established legal precedents, what are the legally acceptable criteria for permitting religious practices in the curriculum of public schools?

It is permissible to teach about religion but not to teach religion in the public schools. Religious symbols for religious holidays are permissible if they are used to show religious customs and not to advance a particular religious doctrine. The legally acceptable criteria for judging whether a religious activity is constitutional is the tripartite test. Public schools must be neutral regarding religious activities.

Conclusions

An analysis of judicial court decisions does not always reveal consistent and definitive solutions for resolving litigious issues. The time, place, and particular set of circumstances involved account for the sometimes varied rulings by the courts. The following general conclusions, however can be made concerning the legal aspects of religious activities in the nation's public schools.

1. Courts are likely to become involved in the daily operation and administration of public schools when the constitutionality of a statute and/or

a school board policy is in question or when constitutional rights of students and/or employees are an issue.

2. Parents' rights to determine the course of education of their children in the public schools as opposed to school board authority or teacher judgment to prescribe curricula are likely to continue to be litigated.

3. The courts have consistently upheld the right of the state legislatures to specify certain subject matter for all children.

4. School-sponsored prayer and Bible reading for devotional purposes or to advance a particular religion are unconstitutional.

5. Silent voluntary prayer is, and always has been, constitutional.

6. It is constitutional to release school students from public school attendance to attend religious classes off the school campus; however, it is unconstitutional to release students for on-campus religious instruction, including shared time programs.

7. To determine the constitutionality of a religious activity, the courts will often apply the tripartite test--secular purpose, inhibits or advances religion, and excessive government entanglement.

8. Religious symbols may be displayed in public schools if they are used to teach about religious customs, depict art, culture, or literary works, and not advance any particular religious belief.

9. Evolution may be taught in the public schools as a scientific theory, however, teaching balanced treatment of scientific creationism is unconstitutional.

10. It is unconstitutional to require students to participate in school activities that conflict with sincerely held religious beliefs.

11. Academic courses in religion are constitutional if the courses are used to teach about religion but not teach religion.

12. Distribution of religious materials in public schools is unconstitutional.

13. It is permissible for school officials to present instructional materials that some individuals or groups may find in conflict with their religious beliefs.

14. School curriculum decisions should be based on secular reasons.

15. Religious groups may use school facilities for meetings provided the school has a limited open forum.

16. Secular humanism is a term used by religious groups to denote that theistic religious activities have been removed from the public schools.

Recommendations

Based on a review of the professional literature and an analysis of judicial rulings in the federal court system the following recommendations are offered:

1. School boards should take a leadership seminar in cultural diversity, especially as it relates to religious activities, in order to create a more sensitive environment regarding minority religious activities.

2. School personnel should be educated about the legalities of what is permissible related to religion in the public school curriculum.

3. School boards and school administrators should be aware of the plurality of religious beliefs in the school district and adopt written policies that are neutral in intent and effect.

4. School boards and administrators should guarantee that policies

dealing with religious activities are legal as interpreted by the courts.

5. School boards and administrators should not adopt any policy or promote any activity which requires students to participate in a school sponsored prayer.

6. School boards and administrators should develop, adopt, and implement a policy that provides a procedure for responding to challenges that: (a) instructional materials allegedly advances or prohibits religion, (b) curricular or extracurricular activities advances or prohibits religion, and (c) particular courses or specific course content advances or prohibits religion.

7. School boards and administrators should ensure that the scientific theory of evolution is taught as science. Any Biblical interpretation of creationism should be addressed in literature, social science, or comparative religion courses.

8. School boards and administrators should ensure students and employees that they will not be required to participate in any school sponsored activities that are in conflict with sincerely held religious beliefs.

9. School boards and administrators should have a community schools contact person that has ready access to local media, community group leaders, and parent groups so that false information and misunderstandings can be quickly corrected.

10. School boards and administrators should have a formal policy to obtain in writing any charges made against school personnel or the instructional program regarding religious activities for students and employees.

11. School boards and administrators should be sensitive to the complaints from all groups within the community. School boards and

administrators should take appropriate action if constitutional rights of students and employees are violated. School personnel should not, however, make changes in constitutionally justifiable activities simply because of community pressure.

12. School boards and administrators should have a clearly defined policy concerning the use of school facilities. Fee schedules for the use of school facilities should be established and administered equally for all groups, whether civic or religious.

13. School boards and administrators should make policies based on First Amendment guarantees that are beyond the reach of public sentiment and cannot be compromised by personal, political, or religious ideology.

14. School boards and administrators should be aware that celebration of holidays having a secular connotation is constitutional, while the celebration of holidays of purely religious nature is unconstitutional.

15. School boards and administrators providing religious studies in the curriculum should ensure that the program is a secular study about religion rather than a program that advances a religious doctrine.

16. School boards and administrators should not permit the distribution of religious materials or the posting of announcements promoting religious activities on or off school grounds.

17. School boards and administrators should not deny religious groups from meeting on the school campus if the school has a limited open forum.

18. School boards and administrators should change the names of sectarian breaks from school to secular names. Examples: Change Christmas Holidays to Winter Break, and Easter Holidays to Spring Break.

19. School boards and administrators should accommodate the religious holidays of all students and employees.

Recommendations for Further Study

While no school board can guarantee that students' religious rights will not be violated, school boards and administrators can reduce the probability by being current on the issues relating to religious activities in the public school curriculum. It is imperative that school boards and administrators protect the constitutional rights of all students and school personnel.

Today, members of the Supreme Court are not in total agreement on religious issues in the public schools. The tripartite test is still used as a measurement in ruling on cases involving religion in the public schools. Another chapter is yet to be written on how the Court will swing in the future. Continued pressure from Christian fundamentalist conservative groups may sway the Court to their position.

Further study is recommended to assist school boards and administrators in developing, adopting, and implementing policy to address the issues emerging from recent judicial decisions that, while protecting individual religious rights, do not give religious concerns control over all secular interests in the public schools. It is recommended therefore that studies be undertaken of the following subjects:

1. The current Supreme Court's attitude toward accommodation of religious activities in public schools.
2. The current impact of the Christian fundamentalist movement on public schools.
3. Teachers', administrators', students', and parents', attitudes

toward religious activities in the public schools.

4. Cases charging secular humanism is being promoted as a secular religion over sectarian religion in public schools.
5. Whether judicial imperatives and legislation are being followed by school administrators relating to religious activities in the public school curriculum.

POSTSCRIPT

What never fits neatly into formal research is an analysis of why issues, especially in this case, religious issues continue to arise. One would think that after over two hundred years of religious controversy and litigation we would have already resolved all the religious issues. Alas though, there has been a dramatic increase in religious activities within public schools and litigation. The recent surge in the mid 1960s and continuing in 1995 tracks the rise of a new historical period called the "Information Age." Narrow religious and ethnic ideologies collide head-on with the rise of the information age and nowhere is this more felt than in American public education.

TABLE OF CASES

Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

Adams v. Engelking, 232 F.Supp. 666 (D.Idaho 1964).

Aguillard v Edwards, 765 F.2d 1251 (5th Cir. 1985), *reh. denied*, 779 F.2d 225 (5th cir. 1985), *jurisdiction noted*, 106 S.Ct. 1946 (1987).

Aguillard v. Treen, 440 So.2d 704 (La. 1983), 634 F.Supp. 426 (E.D.La. 1985).

Alabama Civil Liberties Union v. Wallace, 371 F.Supp. 966 (M.D. Ala. 1971).

Allen v. Henkel, 424 F.2d 944 (1970).

Ambach v. Norwick, 441 U.S. 68, 99 S.Ct. 2806, 60 L.Ed. 49 (1979).

American Civil Liberties Union v. Albert Gallatin Area School District, 307 F.Supp. 637 (W.D.Pa. 1969).

Amidei v. Spring Branch Independent School District, No, H-84-4673 (S.D. Tex. May 9, 1985).

Anable v. Ford, 653 F.Supp. 22 (W.D.Ark. 1985).

Aronow v. United States, 432 F.2d 242 (9th Cir. 1970).

Avard v. Dupuis, 376 F.Supp 479 (D.N.H. 1974).

Bacona v. Bradley Bourbonnais High School District No. 307, 707 F.Supp. 1005 (C.D.Ill. 1989).

Baer v. Kolmorgan, 14 Misc.2d 1015, 181 N.Y.S.2d 230 (Sup.Ct.Westerchester County 1958).

Banks v. Board of Public Instruction of Dade County, 314 F.Supp. 285 (1970).

Beck v. McElrath, 548 F.Supp. 1161 (M.D.Tenn. 1982).

Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391 (10th Cir. 1985).

Bender v. Williamsport Area School District, 563 F.Supp. 697 (M.D. Penn. 1983), 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534, 105 S.Ct. 1167 (1985), *reh'g denied*, 476 U.S. 1132 (1986).

Bennett v. Livermore Unified School District, 193 Cal.App.3d 1012, 238 Cal. Rptr. 819 (Cal.Ct.App. 1987).

Berger v. Rensselaer Central School Corporation, 982 F.2d 1160 (7th Cir. 1993).

Bicknell v. Vergennes Union High School Board of Directors, 475 F.Supp. 615 (D.Vt. 1979), *aff'd*, 638 F.2d 438 (2nd Cir. 1980).

Blair v. Pitchess, 5 Cal.3d 258, 96 Cal.Rptr. 42, 486 P.2d 1242 (1971).

Bleich v. Board of Public Education, 190 So. 815 (Fla 1939).

Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968).

Board of Education, Island Trees Union Free School District No. 26 v Pico, 474 F.Supp. 387 (E.D.N.Y. 1979), *rev'd and remanded*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).

Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed2d 1060 (1968).

Board of Education of Mountain Lakes v. Maas, 152 A.2d 394 (N.J.Super, 1959), aff'd, 158 A.2d 330 (N.J.), *cert. denied*, 363 U.S. 843 (1960).

Board of Education of the Westside Community Schools, District 66, et. al. v. Bridget C. Mergens, By and Through Her Next Friend, Daniel N. Mergens, et al., 496 U.S. 224, 110 S.Ct. 2356, 110 L.Ed.2d 191(1990).

Board of School Commissioners v. Jaffree, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 181 (1984).

Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979).

Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), *cert denied*, 454 U.S. 1123, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981).

Braunfeld v. Brown, 366 U.S. 599 (1961).

Breen v. Runkel, 614 F.Supp. 355 (W.D.Mich.S.D. 1985).

Brown v. Louisiana, 383 U.S. 131 (1966).

Brown v. Stone, 378 So.2d 218 (Miss. 1979).

Brown v. Orange County Board of Public Instruction, 128 So.2d 181 (Fla. App. 1960).

Burch v. Barker, 651 F.Supp 1157 (1987).

Campus Crusade for Christ v. Centennial School District, 1990 U.S. App. LEXIS 10048, P. 43 (3d Cir. 1990).

Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

Cary v. Board of Education of the Adams-Arapahoe School District, 427 F. Supp. 945 (D.Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979).

Chamberlin v. Dade County Board of Public Instruction, 17 Fla.Supp.183 (Cir.Ct. 1961) ,*aff'd* ,143 So.2d 21 (Fla. 1962), *vacated and remanded*, 374 U.S. 487 *judgment reinstated*, 160 So.2d (Fla.), *rev'd*, 377 U.S. 402 (1964).

Chess v. Widmar, 480 F.Supp. 907 (1979).

Church of God v. Amarillo Independent School District, 511 F.Supp. 613 (N.D.Tex. (1981), *aff'd*, 670 F.2d 46 (5th Cir. 1982).

Citizens for Parental Rights v San Mateo County Board of Education, 51 Cal.App.3rd 1, 124 Cal.Rptr. 68 (1975), *appealed dismissed*, 425 U.S. 908, *reh'g denied*, 425 U.S. 1000 (1976).

Clark v. Dallas Independent School District, 671 F.Supp. 1119 (N.D. Tex. 1987), *modified*, 701 F.Supp. 594 (N.D.Tex. 1988), *appeal dismissed*, 880 F.2d 411 (5th Cir. 1989).

Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 1157 (1930).

Collins v. Chandler Unified School District, 470 F.Supp. 959 (D. Ariz. 1979), 644 F.2d 759 (9th Cir. 1981), *cert, denied*, 454 U.S. 863 (1981).

Committee Against Religious Encroachment in Schools v. Board of Education, Civil No. 1841-72 (D.N.J. November 20, 1972).

Committe for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed. 948 (1973).

Commonwealth v. Herr, 229 Pa. 132 (1910).

Conway v. District Board of Joint School District, 162 Wis. 482, 156 N.W. 477 (1916).

Cornwell v. State Board of Education, 314 F. Supp 340 (D.Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir.) (*per curiam*), *cert. denied*, 400 U.S. 942 (1970).

Country Hills Christian Church v. Unified School District No. 512, 560 F.Supp. 1207 (D.Kan. 1983).

County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 109 S.Ct. 3086 (1989).

Crockett v. Sorenson, 568 F.Supp 1422 (W.D.Va. 1983).

Cude v. State, 237 Arkansas 927, 377 S.W.2d 816 (1964).

Dale v. Board of Education, Lemon Independent School District, 316 N.W.2d 108 (S.D. 1982).

Dalli v. Board of Education, 358 Mass. 753, 267 N.E.2d 219 (1971).

Daniel v. Waters, 399 F.Supp. 510 (M.D.Tenn 1975), 515 F.2d 485 (6th Cir. 1975).

Davis v. Page, 385 F.Supp. 395 (D.N.H. 1974).

Decker v. O'Donnell, 661 F.2d 598 (1980).

DeSpain v. Dekalb Community School District, 384 F.2d 836 (U.S.C.A. 7th Cir. 1967), *cert denied*, 390 U.S. 906, 88 S. Ct. 815 (1968).

Dilger v. School District 24 CJ, 222 Or. 108 352 P2d 564 (1960).

Doe v. Aldine Independent School District, 563 F.Supp. 883 (S.D.Tex. 1982).

Doe v. Duncanville Independent School District, 994 F.2d 160 (5th Cir. 1993).

Doe v. Shenandoah County School Board, 737 F.Supp. 913 (W.D.Va. 1990).

Doremus v. Board of Education of the Borough of Hawthorne, 5 N.J. 435, 75 A.2d 880 (1950), 342 U.S. 429, 72 S.Ct. 815, 96 L.Ed. 472 (1952).

Duffy v. Las Cruces Public Schools, 557 F.Supp. 1013 (D.N.Mex. 1983).

Duro v. District Attorney, Second Judicial District of North Carolina, 712 F.2d 96 (1983).

Edwards v. Aguillard, 765 F.2d 1251 (5th Cir. 1985), reh'g denied, 779 F.2d 225 (5th Cir. 1985), 482 U.S. 578, 107 S.Ct. 2573 (1987).

Engel v. Vitale, 191 N.Y.S.2d 453 (1959), 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

Everson v. Board of Education, 330 U.S.1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

Farrington v. Tokushige, 273 U.S. 284 (1927).

Fink v. Board of Education of the Warren County School District, 442 A.2d 837 (Pa. Commonwealth, 1982).

Fisher v. Clackamus City School District 12, 507 P.2d 839 (Ore.App. 1973).

Florey v. Sioux Falls School District, 464 F.Supp. 911 (D.S.D. 1979), *aff'd*, 619 F.2d. 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987, 101 S.Ct. 409 (1980).

Flory v. Smith, 145 Va. 164, 134 S.E. 360 (1926).

Ford v. Manuel, 629 F.Supp. 771 (N.D.Ohio 1886).

Frain v. Baron, E.D.N.Y. 1970, 307 F.Supp. 27 (1969).

Frasca v. Andrews, 463 F.Supp 1043 (E.D.N.Y. 1979).

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

Garnett v. Renton School District No. 403, 675 F.Supp. 1268, 865 F.2d 1121 (9th Cir. 1989), *appeal filed*, 110 S.Ct. 362 (1989).

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

Gordon v. Board of Education of City of Los Angles, 78 Cal.App2d 464, 178 P.2d 488 (1947).

Graham v. Central Community School District, 608 F.Supp. 531 (S.D.Iowa 1985).

Grand Rapids School District of City of Grand Rapids v. Phyllis Ball, 718 F.2d 1389 (1983), 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985).

Gregoire v. Centinnial School District, 674 F.Supp. 172 (E.D.Pa. 1987), *aff'd*, F.2d 918 (1988).

Grossberg v. Deusebio, 380 F.Supp. 285 (E.D.Va. 1974

Grove v. Mead School District No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826, 106 S. Ct. 85, 88 L.Ed.2d 70 (1985).

Hackett v. Brooksville Graded School District, 120 Ky. 608, 87 S.W. 792 (1905).

Hall v. Bradshaw, 630 F.2d 1018 (1980).

Hall v. Board of School Commisioners, 656 F.2d 999 (5th Cir. 1981).

Hanzel v. Arter, 625 F.Supp. 1259 (S.D.Ohio 1985).

Hardwick v. Board of School Trustees, 54 Cal.App. 696, 205 P. 49 (1921).

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562 (1988).

Hemry by Hemry v. School Board of Colorado Springs, 760 F.Supp. 856 (D. Colo. 1991).

Herdahl v. Pontotoc County School District, 887 F.Supp. 902 (N.D.Miss. 1995).

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

Hobolth v. Grenway, 52 Mich. App. 682, 218 N.W. 2d 98 (Mich. 1974).

Holden v. Board of Education of Elizabeth, 46 N.J. 279, 216 A. 2d 387 (1966)

Hopkins v. Hamden Board of Education, 29 Conn.Supp 397, 289 A.2d 914 (1971), *aff'd*, 165 Conn. 793, 305 A.2d 536 (1973).

Hunt v. Board of Education of County of Kanawha, 321 F.Supp. 1263 (S.D.W.Va. 1971).

Hysong v. School District, 164 Pa. 629 (1894).

Itz v. Penick, 393 S.W.2d 506 (Tex. 1973).

Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905).

Jaffree v. Board of School Commissioners, 554 F.Supp. 1104 (S. D. Ala. 1983), *aff'd in part, rev'd in part sub nom.*

Jaffree v. James, 544 F.Supp 727 (1982), 554 F.Supp, 1130 (S.D.Ala.1983), *aff'd in part, rev'd in part sub nom.*

Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), 466 U.S. 924, 104 S.Ct. 1704, 80 L.Ed.2d 178 (1984), *aff'd*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985).

Jager v. Douglas County School District, 862 F.2d 824 (11th Cir. 1989), *cert. denied* 109 S.Ct. 2431 (1989).

Jeffery v. O'Donnell, 702 F.Supp. 516 (M.D.Pa. 1988).

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

Johnson v. Huntington Beach Union High School, 68 Cal.App.3d 1, 137 Cal.Rptr. 43, *cert. denied*, 434 U.S. 877 (1978).

Jones v. Clear Creek Independent School District, 930 F.2d 416 (5th Cir. 1991).

Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992).

Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913, 107 S.Ct. 1267 (1982).

Kay v. David Douglas School District No. 40, 79 Or.App. 384, 719 P.2d 875 (1986), *rev'd on other grounds*, 303 Or. 574, 738 P.2d 1389 (1987), *cert. denied*, 484 U.S. 1032 (1988).

Keefe v. Geanakos, 305 F. Supp. 1091 (D. Mass.), 418 F.2d 359 (1st Cir. 1969).

Kent v. Commissioners of Education, 402 N.E.2d 1340 (Mass.App. 1980).

Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).

Kidder v. Chellis, 59 N.H. 473 (1879).

Kleid v. Board of Education, 406 F.Supp. 902 (W.D.Ky. 1976).

Kracher v. May, 484 U.S. 72, 108 S. Ct. 388 (1987).

Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993).

Lanner v. Wimmer, 463 F.Supp 867 (D.Utah 1978), *aff'd in part and rev'd in part*, 662 F.2d 1349 (10th Cir. 1981).

LaRocca v. Board of Education of Rye City School District, 406 N.Y.S.2d 348 (App.Div. 1978), *appeal dismissed*, 386 N.E.2d 266 (N.Y. 1978).

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

Lee v. Weisman, 728 F.Supp. 68 (D.R.I. 1990), 908 F.2d 1090 (1st Cir. 1990), 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

Lemke v. Black, 376 F.Supp. 87 (1974).

Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), *reh'g denied*, 404 U.S. 876 (1971).

Leoles v. Landers, 302 U.S. 656, 58, S.Ct. 364, 29 L.Ed. 745 (1971).

Lewis v. Spaulding, 193 Misc. 66, 85 N.Y.S.2d 682 (1948).

Lincolin v. Page, 241 A.2d 799 (N.H. 1968).

Lubbock Civil Liberities Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982), *reh. denied*, 680 F.2d 424 (5th Cir. 1982) *cert. denied*, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983).

Lundberg v. West Monona Community School District, 731 F.Supp. 331 (N.D.Iowa 1989).

Lynch v. Donnelly, 465 U.S. 668 (1984).

Malnak v. Yogi, 592 F.2d 197 (3rd Cir. 1979).

Mangold v. Albert Gallatin School District, 438 F.2d 1194 (3d Cir. 1971).

Marsh v. Chambers, 675 F.2d 228 (8th Cir. 1982), *review allowed*, 463 U.S. 783 (1983).

Martin v. Struthers, 319 U.S. 141 (1943).

May v. Cooperman, 572 F.Supp 1561 (D.N.J. 1983), 780 F.2d 240 (3rd Cir. 1985).

May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1986).

McCartney v. Austin, 293 N.Y.S2d 188 (Sup.Ct., Broome County, Special Term 1968), aff'd, 298 N.Y.2d 26 (N.Y.App.Div. 1969)

McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed.2d 649 (1948).

McDaniel v. Paty, 435 U.S. 618 (1978).

McGowan v. Maryland, 336 U.S. 420 (1961).

McLean v. Arkansas Board of Education, 529 F.Supp. 1255 (E. D. Ark. 1982).

Medeiros v. Kiyosaki, 52 Haw. 436, 478 P.2d 314 (1970).

Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975).

Meltzer v. Board of Public Instruction of Orange County, 548 F.2d 559 (1977), 577 F.2d 311 (5th Cir. 1978) (*en banc*) (*per curiam*) *cert. denied*, 439 U.S. 1089 (1979).

Meyer v Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed 1042 (1923).

Minarcini v. Strongsville City School District, 384 F. Supp. 698 (N. D. Ohio 1974) *aff'd in part, rev'd in part*, 541 F.2d 577 (6th Cir. 1976).

Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. (1973).

Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952).

Minersville School District v Gobitis, 310 U.S. 585 (1940).

Mitchell v. McCall, 273 Ala. 604, 143 So.2d 629 (1962).

Moody v. Cronin, 484 F.Supp. 270 (C.D. Ill. 1979).

Morrow v. Wood, 35 Wis. 59 (1874).

Mosier v. Barren County Board of Health, 215 S.W.2d 967 (Ky.App. 1948).

Morton v. Board of Education of City of Chicago, 69 Ill.App.2d 38, 216 N.E.2d 305 (1966).

Mozert v. Hawkins County Public Schools, 647 F.Supp 1194 (E. D.Tenn. 1986), 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3569 (U.S. February 22, 1988).

Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed. 2d 721 (1983).

Muka v. Sturgis, 53 A.D.2d 716, 383 N.Y.S.2d 933 (1976).

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

Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir. 1984).

Nelson v. Moline School District 40, 725 F.Supp. 965 (C.D.Ill. 1989).

Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951).

Opinion of the Justices, 228 A.2d 161 (1967).

Opinion of the Justices, 307 A.2d 558 (1973).

Palmer v. Board of Education of City of Chicago, 603 F.2d 1271 (1979), *cert. denied*, 444 U.S. 1026 (1980).

Parducci v. Rutland, 316 F. Supp. 352 (M. D. Ala. 1970).

Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979).

People ex rel. Lewis v. Graves, 245 N.Y. 195, 156 N.E. 663 (1927).

People ex rel. Latimer v. Board of Education of City of Chicago, 394 Ill. 228, 68 N.E.2d 305 (1946).

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 103 S.Ct. 948, L.Ed.2d 794 (1983).

Perry v. School District No. 81, Spokane, 54 Wn.2d 886, 344 P.2d 1036 (1959).

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 510, 69 L.Ed. 1070 (1925).

Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct., 88 L.Ed. 645 (1944).

Pratt v. Independent School District No. 831, Forest Lake, Minnesota, 670 F.2d 771 (8th Cir. 1982).

President Council, District 25 v. Community School Board No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

Quick Bear v Leupp, 210 U.S. 50 (1908).

Quimette v. Babbie, 405 F.Supp. 525 (D.Vt. 1975).

Rawlings v. Butler, 290 S.W.2d 801 (Ky. 1956).

Reed v. Van Hoven, 237 F.Supp. 48 (W.D.Mich. 1965).

Reiman v. Fremont County County Joint School District, Boise District Court (Idaho 1980).

Renton School District No. 403 v. Garnett, 987 F.2d 641 (9th Cir. 1993).

Resnick v. East Brunswick Township Board of Education, 77 N. J. 88, 389 A.2d 944 (1978).

Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea, 454 F. Supp. 703 (D.Mass. 1978).

R.J.J. v. Shineman, 658 S.W.2d 910 (Mo.App. 1983).

Ring v. Grand Forks Public School District Number 1, 483 F.Supp. 272 (1980).

Rivera v. East Otero School District, 721 F.Supp. 1189 (D.Colo. 1989).

Roberts v. Madigan, 702 F.Supp. 1505 (D.Colo. 1989).

Rosenberg v. Board of Education of New York, 196 Misc. 542, 92 N.Y.S.2d 344 (1944).

Rulison v. Post, 79 Ill. 567 (1877).

Salinas v. School District of Kansas City, Missouri, 751 F.2d 288 (8th Cir. 1984).

Salvail v. Nashua Board of Education, 469 F. Supp. 1269 (D.N.H. 1979).

Sands v. Morongo Unified School District, 262 Cal.Rptr. 452 (Cal. App. 1989), *pet. for review granted*, 264 Cal.Rptr. 683, 782 P.2d 1139 (1989).

School District No. 18, Garvin County v. Thompson, 24 Okla. 1, 103 P. 578 (1909).

Schwartz v. Dobson, 468 F.Supp. 133 (1979).

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

Segraves v. State of California, No. 278978 (Cal.Super.Ct. 1981).

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

Shelton v. Tucker, 364 U.S. 479 (1960).

Sherbert v. Verner, 374 U.S. 398 (1963).

Sherman v. Community Consolidated School District 21 of Wheeling Township, 714 F.Supp. 932 (N.D.Ill. 1989).

Sloan v. Lemon, 413 U.S. 472 (1973).

Smith v. Board of School Commissioners of Mobile County, 655 F.Supp. 939 (S.D.Ala. 1987), 827 F.2d 684 (11th Cir. 1987).

Smith v. North Babylon Union Free School District, 844 F.2d 90 (2d Cir. 1988).

Smith v. Ricci, 89 N.J. 514, 446 A.2d 501 (1982).

Smith v. Smith, 391 F.Supp. 443 (1975), 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

Smith v. State, 242 So.2d 692 (Miss. 1970).

Special District for the Education and Training of Handicapped Children of St. Louis County v. Wheeler, 408 S.W.2d 60 (Mo. 1966).

State v. Bailey, 61 N.E. 730 (Ill. 1901).

State Board of Education v. Board of Education of Netcong New Jersey, 262 A.2d 21 (1970).

State v. Davis, 120 P 2d 808 (Ariz. 1942).

State *ex rel.* Holt v. Thompson, 66 Wis.2d 659, 225 N.W 2d 678 (1975).

State *ex rel.* Kelly v. Ferguson, 95 Neb. 63, 144 N.W. 1039 (1914).

State *ex rel.* Sheibley v. School District No. 1, 31 Neb. 252, 48 N.W. 393 (1891).

State *ex rel.* Weiss v. District Board, 76 Wis. 177, 44 N.W. 967, 7 LRA, 330 (S.Ct. 1978).

State of West Virginia v. Bobbie E. Riddle and State of West Virginia v. Esther Riddle, 285 S.E.2d 359 (W.Va. 1981).

Steele v Van Buren Public Schools, 845 F.2d 1492 (8th Cir. 1988).

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

Stein v. Oskinsky, 224 F.Supp. 757 (E.D.N.Y. 1963), *rev'd*, 348 F.2d 999 (2d Cir. 1965), *cert. denied*, 382 U.S. 957 (1965).

Stein v. Plainwell Community Schools, 610 F.Supp. 43 (W.D.Mich. 1985), *rev'd*, 822 F.2d 1406 (6th Cir. 1987).

Stone v. Graham, 599 S.W.2d 157 (1980), 499 U.S. 39 (1980), *reh'g denied*, 449 U.S. 1104 (1981).

Stuart v. Kalamazoo, 30 Michigan 69 (Mich. 1874).

Student Coalition for Peace v. Lower Merion School District, 633 F.Supp 1040 (E.D. Pa. 1986).

Student Members of the Playcrafters v. Board of Education, 177 N.J. Super. 66, 424 A.2d 1192, *aff'd*, 88 N.J. 74, 438 A.2d 543 (1981).

Thomas v. Review Board, 450 U.S. 707 (1981).

Thompson v. Waynesboro Area School District, 673 F.Supp 1379 (M.D.Pa. 1987), *aff'd by an equally divided court*, (3rd Cir. 1989).

Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091 (1971).

Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

Torcaso v. Watkins, 367 U.S. 488 (1961).

Trietly v. Board of Education of City of Buffalo, 409 N.Y.S.2d 912 (Sup.Ct.N.Y. 1978).

Trustees of Schools v. People ex rel. Martin Van Allen, 87 Ill. 303 (1877).

Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857, 45 ALR 2d 729 (1953), *cert denied*, 348 U.S. 816, 75 S.Ct. 25, 99 L.Ed. 644 (1954).

United States v. Bennett, 16 Blatch 338, Federal Case 14, 571 (1879).

United States v. Lee, 455 U.S. 252 (1982).

United States v. Seeger, 85 S.Ct. 850 (1964), 380 U.S. 163 (1965).

Vail v. Board of Education, 354 F.Supp. 592 (D.N.H. 1973).

Valent v. New Jersey State Board of Education, 114 N.J.Super. 416, 288 A. 2d 52 (1971).

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 102 S.Ct. 752 (1982).

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

Wallace v. Jaffree, 705 F.2d 1526 (5th Cir. 1983), *aff'd* 472 U.S. 38 (1985).

Wallace v. Jaffree, 103 S.Ct. 842 (1984).

Wallace v. Jaffree, 466 U.S. 924, 104 S.Ct. 1704, 80 L.Ed.2d 178 (1984).

Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479 (1985).

Walter v. West Virginia Board of Education, 610 F.Supp. 1169 (D.C.W.Va. 1985).

Walz v. Tax Commission of the City of New York, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). (1970).

Ware v. Valley Stream High School District, 551 N.Y.S.2d 167, 550 N.E.2d 420 (Ct.App. 1989).

Weist v. Mt. Lebanon School District, 320 A.2d 362 (Pa. 1974), *cert. denied,* 419 U.S. 967 (1974).

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

Widmar v. Vincent, 635 F.2d 1310 (8th Cir. 1980), *aff'd,*454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 44 (1981).

Wiley v. Franklin, 486 F.Supp. 133 (E. D. Tenn. 1979) ("Wiley I"); 474 F.Supp. 525 (1980) ("Wiley II"); 497 F.Supp. 390 (1980) ("Wiley III").

Williams v. Board of Education of the County of Kanawha, 388 F.Supp. 93 (S.D.W.Va. 1975).

Wisconsin v. Yoder, 406 U.S. 205 (1972).

Wood v. Mt. Lebanon School District, 342 F.Supp 1293 (W.D.Pa. 1972).

Wright v. Houston Independent School District, 366 F.Supp. 1208 (S.D.Tex. 1972), 486 F.2d 137 (1973).

Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951).

Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462 (1993).

Zorach v. Clausen, 343 U.S. 306 (1952).

Zykan v. Warsaw Community School Corporation, 631 F.2d 1300 (7th Cir. 1980).

BIBLIOGRAPHY

A. Books

Alexander, Kern. School Law. St. Paul, Minn.: West Publishing Company, 1980.

Alexander, Kern and M. David Alexander. American Public School Law. 3d ed. St. Paul, Minn.: West Publishing Company, 1992.

Alexander, Kern, Ray Corns, and Walter McCann, Public School Law: Cases and Materials. St Paul, Minn.: West Publishing Company, 1969.

Alley, Robert S., ed. The Supreme Court on Church and State. New York: Oxford University Press, 1988.

Amundson, Kristen J. Religion in the Public Schools. Arlington, Virginia: American Association of School Administrators, 1986.

Armstrong, Karen. A History of God: The 4000-Year Quest of Judaism, Christianity, and Islam. New York: Alfred A. Knopf, 1993.

_____. Holy War: The Crusades and Their Impact on Today's World. 1st ed. Doubleday, 1991.

Barnet, J. The American Christmas: A Study in National Culture. New York: Macmillan, 1954.

Barton, David. The Myth of Separation, 7th ed. Aledo, Texas: WallBuilder Press, 1992.

Beane, James A., Conrad F. Toepfer, Jr., and Samuel J Alessi, Jr. Curriculum Planning and Development. Boston: Allyn and Bacon, Inc., 1986.

Beard, Charles, and Mary Beard. The Rise of American Civilization. Vol. 1. New York: Macmillan, 1927.

Beggs, David W., III., and Bruce R. McQuigg, eds. America's Schools and Churches. Bloomington, Indiana: University Press, 1965.

Berkin, Carol and Leonard Wood. Land of Promise: A History of the United States. 2d ed. Glenview, Illinois: Scott, Foresman, and Company, 1987.

Bilger, Jean. "Religion in the Public Schools-The Twilight Zones." In Contemporary Legal Issues in Education, ed M. A. McGeyhey, 166-178. Topeka, Kansas: National Organization on Legal Problems of Education, 1979.

Blake, Nelson, ed. The United States: From Wilderness to World Power, 3d ed. New York: Henry Holt and Company, 1957.

Blumenfeld, Samuel L. NEA: Trojan Horse in American Education. Boise, Idaho: Paradigm, 1984.

Boles, Donald E. The Bible, Religion, and the Public Schools. Ames: Iowa: Iowa State University Press, 1965.

Bosmajian, Haig A. Censorship, Libraries, and the Law. New York: Neal-Schuman Publishers, 1983.

Boone, Richard G. Education in the United States. Freeport, New York: Books for Libraries Press, 1980.

Braunthal, Alfred. Salvation and the Perfect Society: The Eternal Quest. Amherst: University of Massachusetts Press, 1979.

Brown, Windsor. The Secularization of American Education. New York: Russell and Russell, 1912, 1967.

Brubaker, Dale L. Curriculum Planning: The Dynamics of Theory and Practice. Glenview, Illinois: Scott, Foresman and Company, 1982.

Bryson, Joseph E. and Elizabeth W. Detty. Censorship of Public School Library and Instructional Materials. Charlottesville, Virginia: The Michie Company, 1982.

Bryson, Joseph E. and Samuel H. Houston, Jr. The Supreme Court and Public Funds for Religious Elementary and Secondary Schools: The Burger Years, 1969-1986. Jefferson, North Carolina: McFarland and Company, Inc., Publishers, 1990.

Censorship: Libraries and the Law, comp. Haig A.Bosmajian, New York: Neal-Schuman Publishers, 1983.

Church, Robert L. and Michael W. Sedlak. Education in the United States: An Interpretive History. New York: The Free Press, 1976.

Connors, Eugene T. Religion and the Schools: Significant Court Decisions in the 1980s. Bloomington, Ind.: Phi Delta Kappa Educational Foundation, 1988.

Cord, Robert. Separation of Church and State: Historical Fact and Current Fiction. New York: Lamberth Press, 1982.

Cremin, Lawrence A. The American Common School. New York: Columbia University Press, 1951.

_____. American Education: The Colonial Experience, 1607-1783. New York: Harper & Row, 1970.

_____. Traditions of American Education. New York: Basic Books, 1977.

_____. The Transformation of The School: Progressivism in American Education, 1876-1957. New York: Alfred A. Knopf, 1969.

Cubberley, Ellwood P. Changing Conceptions of Education. Boston: Houghton Mifflin Company, 1909.

_____. Public Education in the United States. Chicago: Houghton Mifflin Company, 1934.

_____. Readings in the History of Education. Boston: Houghton Mifflin Company, 1920.

Current, Richard N., T. Harry Williams, Frank Freidel, and Alan Brinkley. American History. Vol. 1, A Survey To 1877. New York: Alfred A. Knopf, 1987.

Dewey, John. Democracy and Education. New York: Macmillan Company, 1922.

Davis James E., ed Dealing with Censorship. Urbana, Illinois: National Council of Teachers of English, 1979.

_____. The School and Society. Chicago: University of Chicago Press, 1915.

Fellman, David, ed. The Supreme Court and Education. New York: Teachers College Press, 1965.

Fenwick, Linda B. Should The Children Pray? Waco, Texas: Markham Press Fund of Baylor University Press, 1990.

Ferguson, Wallace K.and Geoffrey Brun. A Survery of European Civilization. 2d ed. William L. Langer. Boston: Houghton Mifflin Company, 1947.

French, William M. America's Educational Tradition. Boston: D. C. Heath and Company, 1964.

Garber, Lee O., ed. Current Legal Concepts in Education. Philadelphia: University of Pennsylvania Press, 1966.

Good, H. G. A History of American Education. New York: Macmillan Company, 1956.

Graebner, Norman A., Gilbert C Fite, and Philip W. White. A History of the United States. Vol 1. New York:McGraw-Hill, 1970.

Gray, Peggy B. "Public School Curriculum: Legislative and Judicial Mandates." Ed. D. dissertation, University of North Carolina at Greensboro, 1986.

Greeley, Andrew M. and Peter H. Rossi. The Education of Catholic Americans. Chicago: Aldine Publishing Company, 1966.

Hall,. Wayne Thompson. "Legal Aspects of the Practice of Religious Activities in Selected Public Schools in North Carolina." Ed.D. dissertation, University of North Carolina at Greensboro, 1993.

Handbook of Denominations in the United States. New York: Abington, 1975.

Hudgins, H. C. The Warren Court and the Public Schools: An Analysis of Landmark Supreme Court Decisions. Danville, Ill: Interstate Printers and Publishers, 1970.

Hudgins, H. C., Jr., and Richard S. Vacca. Law and Education: Contemporary Issues and Court Decisions. 3d ed. Charlottesville, Virginia: The Michie Company, 1991.

Ivers, Gregg. Refining the First Freedom: The Supreme Court and the Consolidation of State Power. New Brunswick, U.S.A.: Transaction Publishers, 1993.

_____. To Build a Wall: American Jews and the Separation of Church and State. Charlottesville: University Press of Virginia, 1995.

Johnson, F. Ernest, ed. American Education and Religion: The Problem of Religion in the Schools. New York: The Institute for Religious and Social Studies/Harper and Brothers, 1952.

Kaestle, Carl F. The Evolution of An Urban School System: New York City, 1750-1850. Cambridge: Harvard University Press, 1973.

Kauper, Paul G. Religion and the Constitution. Baton Rouge, Louisiana: Louisiana State University Press, 1964.

Kliebard, Herbert M. "Three Currents of American Curriculum Thought." In Current Thought on Curriculum: 1985 ASCD Yearbook. Alexandria, Virginia: Association for Supervision and Curriculum Development, 1985.

Knight, Edgar W. Education in the South. Chapel Hill: University of North Carolina Press, 1924.

_____. Education in the United States. Boston: Ginn and Company, 1929.

_____. Education in the United States. 3d rev. ed. Boston: Ginn and Company, 1951.

_____. Public Education in the South. Boston: Ginn and Company, 1922.

_____. Twenty Centuries of Education. Boston: Ginn and Company, 1940.

Kurtz, Paul. "Is Everyone a Humanist." In The Human Alternative: Some Definitions of Humanism. ed. Paul Kurtz. Buffalo: Prometheus Books, 1973.

Lannie, Vincent P. Public Money and Parochial Education. Cleveland: The Press of Case Western Reserve University, 1968.

Lee, Francis Graham. Wall of Controversy: Church-State Conflict in America. Malabar, Florida: Robert E. Krieger Company, 1986.

Levy, Leonard W. The Establishment Clause. New York: Macmillan Company, 1986.

Machen, Elizabeth M. Christian Education/Public Schools: A Teacher's Interpretation. Hicksville, New York: Exposition Press, 1978.

Markowitz, Ruth Jacknow. My Daughter, the Teacher: Jewish Teachers in the New York City Schools, New Brunswick: Rutgers University Press, 1993.

Marnell, William H. The First Amendment: The History of Religious Freedom in America. Garden City, New York: Doubleday and Company, 1964.

McCarthy, Martha M. A Delicate Balance : Church, State, and the Schools. Bloomington, Indiana : Phi Delta Kappa Educational Foundation, 1983.

McCarthy, Martha M. "Emerging and Reemerging Issues in Church-State Relations." In School Law in Changing Times. ed M. A. McGhehey. Topeka: National Organization on Legal Problems of Education, 1982.

McCarthy, Martha M., and Nelda H. Cambron. Public School Law: Teachers' and Students' Rights. Boston: Allyn and Bacon, 1981.

McCluskey, Neil G. Catholic Education in America: A Documentary History. New York: Columbia University Press, 1964.

_____. Public Schools and Moral Education. New York: Columbia University Press, 1958.

McMillan, Richard C., ed. Education, Religion and the Supreme Court. Danville, Virginia: The Association of Baptist Professors of Religion, 1979.

Meany, Margaret Bloom. "Religious Challenges to the Public School Curriculum: Analysis of the Application of the Lemon Tripartite Test in Selected Cases, 1982-1987." Ed. D. dissertation, University of Carolina at Greensboro, 1988.

Menendez, A. The December Dilemma: Christmas in American Public Life. Silver Spring, Maryland.: Americans United for Separation of Church and State, 1988.

Miers, Earl Schenck, ed. The American Story: The Age of Exploration to the Age of the Atom. Kingsport, Tennessee: Kingsport Press, Inc., 1956.

Miles, Jack. God: A Biography. 1st ed. New York: Alfred A. Knopf, 1995.

Mize, Richard Leon. "The Legal Aspects of Religious Instruction in Public Schools." Ed. D. dissertation, University of North Carolina at Greensboro, 1980.

Mobley, Phillip Anthony, "The Legal Impact of Conservative New Right Influence on Public School Curriculum." Ed. D. dissertation, University of North Carolina at Greensboro, 1987.

Monroe, Paul. Founding of the American Public School System: A History of Education in the United States. New York: Macmillan Company, 1940.

Morison, Samuel Eliot. The Oxford History of the American People. New York: Oxford University Press, 1965.

Morris, Arval A. The Constitution and American Education. 2nd ed. St. Paul, Minn.: West Publishing Company, 1980.

Nasaw, David. Schooled to Order: A Social History of Public Schooling in the United States. New York: Oxford University Press, 1979.

Nielsen, Niels Christian. God in Education: A New Opportunity for American Schools. New York: Sheed and Ward, 1966.

Noble, Stuart. A History of American Education. rev. ed. New York: Rhinehart and Company, Inc., 1954.

Nord, Warren A. Religion and American Education: Rethinking a National Dilemma. Chapel Hill: University of North Carolina Press, 1995.

Nuger , Kenneth P. "Accommodating Religious Objections to State Reading Programs: Mozert v. Hawkins County Public Schools." West's Education Law Reporter. Vol. 36. St. Paul: West Publishing Company, 1987.

_____. "The Religion of Secular Humanism in Public Schools" Smith v. Board of School Commissioners.' West's Education Law Reporter, Vol. 38. St. Paul: West Publishing Company, 1987.

Oboler, Eli M. ed. Censorship and Education. The Reference Shelf Vol. 53, No.6. New York: H. W. Wilson, 1981.

O'Hair, Madalyn. An Atheist Epic. Austin, Texas: American Atheist Press, 1989.

Pagels, Elaine. The Origins of Satan. New York: Randon House, 1995.

Panoch, James V. and David L. Barr. Religion Goes to School: A Practical Handbook for Teachers. New York: Harper and Row, Publishers, 1968.

Parsons, Elsie W. Clews. Educational Legislation and Administration of the Colonial Governments. New York: Arno Press and The New York Times, 1971.

Pfeffer, Leo. Church State and Freedom. Rev. ed. Boston: Beacon Press, 1967.

_____. God, Caesar, and the Constitution. Boston: Beacon Press, 1975.

_____. Religion, State and the Burger Court. Buffalo, New York: Prometheus Books, 1984.

Provenzo, Eugene F., Jr. Religious Fundamentalism and American Education: The Battle for the Public Schools. Albany: State University of New York Press, 1990.

Rapp, James A., ed. Education Law. New York: Matthew Bender and Company, Inc., 1984.

Ravitch, Diane. The Great School Wars: New York City, 1805-1973; A History of the Public Schools as Battlefield of Social Change. New York: Basic Books,Inc., 1974.

Reichley, A. James. Religion in American Public Life. Washington, D. C.: The Brookings Institution, 1985.

Religion in the Public Schools. Arlington, Virginia. American Association of School Administrators, 1964.

Reutter, E. Edmund, Jr. The Law of Public Education. 3rd ed. Mineola, New York: The Foundation Press, 1985.

_____. The Supreme Court's Impact on Public Education. Bloomington, Indiana: Phi Delta Kappa and National Organization on Legal Problems in Education, 1982.

_____. Schools and the Law. 5th ed. Dobbs Ferry, New York: Oceana Publications, 1981.

Rhodes, Robert T. "Is Secular Humanism the Religion of the Public Schools?" In Dealing with Censorship, ed James E. Davis (Urbana, Illinois: National Council of Teachers of English, 1979).

Seybolt, Robert Francis. The Public Schools of Colonial Boston 1635-1775. New York: Arno Press and The New York Times, 1969.

Shakespeare, William. Hamlet. With an introduction by Sylvan Barnet. New York: New American Library, 1982.

Shuster, George N. Catholic Education in a Changing World. New York: Holt, Rinehart and Winston, 1967.

Sizer, Theodore R., ed. Religion and Public Education. Boston: Houghton Mifflin Company, 1967.

Smith, Rodney K. Public Prayer and the Constitution. Wilmington, Delaware: Scholarly Resources, Inc., 1987.

Sneller, Angela K. Censorship in PublicSchools. Columbia, Missouri: ERIC Document Reproduction Service ED 207 118, 1981.

Spurlock, Clark. Education and the Supreme Court. Urbana: University of Illinois Press, 1955.

Stokes, Anson Phelps, and Leo Pfeffer. Church and State in the United States. rev. ed. New York: Harper and Row, 1964.

Thayer, V. T. The Attack Upon the American Secular School. Boston: Beacon Press, 1951.

_____. Religion in Public Education. New York: The Viking Press, 1947.

_____. The Attack Upon the American Secular School. Boston: Beacon Press, 1951.

Thomas, Hugh. A History of the World. New York: Harper and Row, 1979.

Thomas, Stephen B., Nelda H. Cambron-McCabe, and Martha M. McCarthy, eds. Education and the Law: Current Trends and Issues. Elmont: Institute for School Law and Finance, 1983.

Verduin, John R., Jr., Cooperative Curriculum Improvement. Englewood Cliffs, New Jersey: Prentice-Hall, 1967.

Vinovskis, Maris A. The Origins of Public High Schools. Madison: The University of Wisconsin Press, 1985.

Vitz, Paul C. Censorship: Evidence of Bias in Our Children's Textbooks. Ann Arbor, Michigan: Servant Books, 1986.

_____. Religion and Traditional Values in Public School Textbooks: An Empirical Study. Washington, D. C.: National Institute of Education, 1985.

Webster's New World Dictionary of the American Language. 2nd College Edition. New York: New World Dictionaires/Simon and Schuster, 1984.

Webster's Third New International Dictionary of the English Language Unabridged. Springfield, Massachusetts: Merriam-Webster Inc., 1984.

Whitehead, John W. The Rights of Religious Persons in Public Education. Wheaton, Illinois: Crossway Books, 1991.

Williams, T. Harry, Richard N. Current, and Frank Friedel. A History of United States (To 1877), 2d ed., rev. New York: Alfred A. Knopf, 1964.

Wilson, John F., and Donald L. Drakeman, eds. Church and State in American History. 2d ed. Boston: Beacon Press, 1987.

Woody, Thomas. Quaker Education in the Colony and State of New Jersey. Philadelphia: University of Pennsylvania, 1923.

B. Legal Aids

American Jurisprudence 2d. Vol 68. Rochester, N. Y.: Lawyers Cooperative Publishing Company, 1973.

American Law Reports 3d. Annotated. Rochester, N. Y.: Lawyers Cooperative Publishing Company.

Black's Law Dictionary. 5th ed. St. Paul, Minnesota: West Publishing Company, 1979.

Black's Law Dictionary, 6th ed. St. Paul, Minnesota.: West Publishing Company, 1991.

Corpus Juris Secundum. Vols. 78, 79. New York American Law Book Company.

Current Law Index. Foster City, California: Information Access Company.

Index to Legal Periodicals. New York: H. W. Wilson Company.

National Reporter System. St. Paul, Minnesota: West Publishing Company, 1879 to date, with weekly advance sheets. The system includes:

The Atlantic Reporter: Reports every decision of the courts of last resort of Connecticut, Delaware, Maine, Maryland, New Hampshire New Jersey, Pennsylvania, Rhode Island, and Vermont from 1883 to date.

The California Reporter: Reports every decision of the California Supreme Court and lower courts of record in California from 1959 to date.

The Federal Reporter: Reports every decision of the United States circuit courts and other federal courts from 1880 to date.

The Federal Supplement: Reports the decisions of the United States district courts since 1932, Court of Claims from 1932 to 1960, and the United States Customs Court since 1949.

The New York Supplement: Reports all cases of the New York Court of Appeals and lower courts of record in New York from 1888 to date.

The North Eastern Reporter: Reports every decision of the courts of last resort of Illinois, Indiana, Massachusetts, New York, and Ohio from 1885 to date.

The North Western Reporter: Reports every decision of the courts of last resort of Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, and Wiscon from 1879 to date.

The Pacific Reporter: Reports every decision of the courts of last resort of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, and Wyoming from 1883 to date.

The South Eastern Reporter: Reports every decision of the courts of last resort in Georgia, North Carolina, South Carolina, Virginia, and West Virginia from 1887 to date.

The Southern Reporter: Reports every decision of the courts of last resort in Alabama, Florida, Louisiana, and Mississippi from 1887 to date.

The South Western Reporter: Reports every decision of the courts of last resort in Arkansas, Kentucky, Missouri, Tennessee, and Texas from 1886 to date.

The Supreme Court Reporter Reports every decision of the Supreme Court of the United States from 1882 to date.

NOLPE (National Organization on Legal Problems of Education), School Law Update. Topeka, Kansas: 1977.

Shepard's Citations. Colorado Springs, Colorado: Shepard's Citations.

West's Education Law Digest. St. Paul, Minnesota: West Publishing Company.

West Education Law Reporter. St. Paul, Minnesota: West Publishing Company.

C. Journals and Periodicals

Bennett, Rev. Bill. "Secular Humanism: America's Most Dangerous Religion." Humanist 42 (March-April 1982): 42-45, 53.

Bird, Wendell R. "A Response to Gerald Skoog 'Creationism and Evolution'." Educational Leadership 38, no 2 (November 1980): 157.

Boys, D. " Christian Education." USA Today (*Periodical*) 123 (September 1994) : 71-73.

Brookhiser, R. "Let Us Pray." Time 144 (December 19, 1994): 84.

Buckley, W. F. "By Bread Alone." National Review 46 (December 31, 1994): 70-71.

Burkholder, John David. "Religious Rights of Teachers in Public Education." Journal of Law and Education 18,no. 3 (Summer 1989): 335-374.

Butts, R. Freeman. "A History and Civic Lesson for All of Us." Educational Leadership, (May 1987): 21-25.

Carter, S. L. "Let Us Pray." The New Yorker 70 (December 5, 1994): 60-62+.

Collie, William E. "Schempp Reconsidered: The Relationship Between Religion and Public Education." Phi Delta Kappan 65 , no. 1 (September 1983): 57-59.

"Court Rulings on Religion." Christian Century 110, no. 19 (June 16-23, 1993): 24-25.

"Creationism in the Schools: The Arkansas Decision." The American Biology Teacher 44, no. 3 (March 1982): 172-179.

Dellinger, Walter. "Suffer the Little Children?" Church and State 44, no. 11 (December 1991): 4-6.

Dotinga, R. "Wronging the Right." Columbia Journalism Review 33 (March/April 1995): 17-18.

Duncan, Homer. "Secular Humanism and the Schools: The Issue Whose Time Has Come." The Missionary Crusader, 1979.

Editorials, Literary Digest 27, no 9 (August 29, 1903): 261.

Eldredge, Niles. "Are "Scientific Creationists" Right About Darwin Being Wrong?" Educational Leadership 39 (December 1981): 216.

Frankel, M. E. "School Without A Prayer." The New Leader 77 (December 19, 1994- January 16, 1995): 3-7.

Fuller, Lawrence B. "Students' Rights of Expression: The Decade Since Tinker." English Journal 68 (December 1979): 11-15.

Gibbs, Nancy. "America's Holy War." Time 138, no. 23 (December 9, 1991): 60-68.

Gluckman, Ivan B. "Separating Myth from Reality." NASSP Bulletin 69, no. 485 (December 1985): 60-66.

Goldberg, Kirsten. "Textbook Decision Fuels Debate on Role of Religion in Schools, Rights of Parents." Education Week 6, no. 9 (November 5, 1986): 1, 18-19.

Impoco, J. "Separating Church and School." U. S. News & World Report 118 (April 24, 1995): 30.

"Judical Involvement." Congressional Digest 74 (January 1995): 8-13.

Kadlecek, J. "Public School Students Get Religion Legally." Christianity Today 38 (November 14, 1994): 74.

Kaplan, G. R. "Shotgun Wedding: Notes on Public Education's Encounter with the New Christian Right." Phi Delta Kappan 75 (May 1994): K1-K12.

Kaus, M. "Separation Anxiety [School Prayer]." The New Republic 211 (December 12, 1994): 6.

Kelly, Eugene W., Jr. "How Prayer and Public Schooling Can Coexist?" Education Week 6, no. 10 (November 12, 1986): 24.

Kemerer, Frank R. and Stephanie A. Hirsh. "School Library Censorship Comes Before the Supreme Court." Phi Delta Kappan 63 (March 1982): 444-447.

Kraus, Larry L. "Censorship: What Island Trees v. Pico Means to Schools." The Clearing House 57 (1984): 343-347.

Lawton, Kim A. "Do Students Have A Prayer?" Christianity Today 37, no. 7 (June 21, 1993): 45.

Leo, J. "The Counterculture: Part Deux." U. S. News & World Report 117 (December 12, 1994): 35.

_____. "Praying for Sanity in Schools [Amendment to the Constitution]." U. S. News & World Report 117 (November 28, 1994): 38.

Lewin, Roger. "Creationism Goes on Trail in Arkansas." Science 214, no.4 (December 1981): 1101-1102, 1104.

Loconte, J. "Lead Us Not Into Tempation: A Christian Case Against School Prayer." Policy Review no. 71 (Winter 1995): 24-31.

Marty, M. E. "Competing for God's Ear." The Christian Century 112 (April 19, 1995): 439.

Massie, Dorothy C. "Censorship in the Schools: Something Old and Something New." Today's Education 69 (November, December, 1980): 30-34.

McCarthy, Martha M. Read. "This Review of Case Law Before Religious Controversy Hits Your Schools." American School Board Journal 169 January 1982): 33-34.

_____. "Religion and Public Schools: Emerging Legal Standards and Unresolved Issues." Harvard Educational Review 55, no.3 (August 1985): 278-317.

McFarland, S. T. "The School Prayer Temptation." Christianity Today 39 (January 9, 1995): 18-19.

Menendez, A. J. "Christmas in the Schools: Can Conflicts Be Avoided?" Phi Delta Kappan 76 (November 1994): 239-242.

Mesibov, Laurie. "Tennessee Students Who Have Religious Objections to the Reading Textbooks May Be Taught Reading at Home." School Law Bulletin 18, no. 2 (Spring 1987): 37-38.

_____. "U. S. Supreme Court Rules on Moment of Silence Statute." School Law Bulletin 16, no.3 (Summer 1985): 20-21.

Miller, R. T. and R. B. Flowers. "Religion and Public Education." Congressional Digest 74 (January 1995): 7, 32.

Mirga, Tom. "Creationism Law in Louisiana is Rejected by Supreme Court." Education Week 6, no. 39 (June 24, 1987): 1.

_____. "Prayer Group Allowed to Meet Again." Education Week 5, no. 38 (June 11, 1986): 12.

_____. "Supreme Court Skirts Ruling on Religious Club's Suit." Education Week 5, no. 28 (April 2, 1986): 12.

Murphy, Janine McPeters. "Access to Public School Facilities and Students by Outsiders." School Law Bulletin 16, no. 1 (Winter 1985): 9-20.

"Now, It's Our Fight." The Nation 259 (December 5, 1994): 673+.

Overton, William R. "The Decision in Mclean v. Arkansas Board of Education." Society 20, no.2 (January/February 1983): 3-12.

Peek, William W. "Religion in the Schools." School Management Advisor 4 (1986): 1-4.

Pfeffer, Leo. "Religion, Education and the Constitution," Lawyers Guild Review, 8 (1948): 387.

Pollitt, K. "Subject to Debate." The Nation 259 (December 26, 1994): 788.

"Prayer in Public Schools." Congressional Digest 74 (January 1995): 3-32.

Primack, Robert and David Aspy. "The Roots of Humanism." Educational Leadership 38 (December 1980): 224-226.

Punger, Douglas S. "Religious Practices in the Public Schools." School Law Bulletin 10, no. 4 (October 1979): 1-7.

"Purposes of Amendment." America 172 (January 14-21, 1995): 3-4.

Putnam, Kim. "States and Publishers Deny Ill Effects From Alabama's Textbook Decision, But Changes May Be In the Future." Your School and the Law 16 no. 8 (May 1987): 1-4.

Rabkin, J. A. "TheCurious Case of Kiryas Joel ." Commentary 98 (November 1994): 58-61.

_____. "Let Us Pray." The American Spectator 28 (February 1995): 46-47.

Reese, William J. "The Public Schools and the Great Gates of Hell." Educational Theory 32, no. 1 (Winter 1982): 9-15.

Roberts, S. V. "Finding a Voice in the Sounds of Silence." U. S. News & World Report 117 (December 5, 1994): 8-9.

Saladin, Kenneth S. "Sixty Years of Creationism in Georgia." Society 20, no. 2 (January/February 1983): 17-25.

"School Prayer." Scholastic Update (*Teachers' Edition*) 127 (January 13, 1995): 11.

"School Prayer on GOP Docket." The Christian Century 117 (December 7, 1994): 1152-1153.

Sendor, Benjamin B. "The Role of Religion in the Public School Curriculum." School Law Bulletin 15, no. 3 (July 1984): 1-9.

_____. "The Wall Between Preaching and Teaching in the Public Schools." School Law Bulletin 14, no. 3 (July 1983): 1-8.

_____. "Religion and the Public Schools." A Chapter in Education Law in North Carolina (Chapter 16, 1987): 1-37.

Sorenson, Gail Paulus. "Removal of Books From School Libraries 1972-1982: Board of Education v. Pico and its Antecedents." Journal of Law and Education 12, no. 3 (July 1983): 417-441.

Spiro, Daniel A. "Public Schools and the Road to Religious Neutrality." Phi Delta Kappan 70, no. 10 (June, 1989): 759-763.

Strike, Kenneth A. "Creationism: Equal Respect not Equal Time." Principal 60-61 (January 1982): 26-29.

"Students Across Country Gather to Pray." Christianity Today 35, no 12 (October 28, 1991): 54.

Tax, Meredith. " My Censorship and Ours." The Nation 260 (March 20, 1995): 374-378.

"The Separation of the Church from the Tax-Supported School." Education Review 26 (October 1903): 38.

Triplett, Frank. "The Growing Battle of the Books." Time 117 (January 1981): 86-88.

"What Really Happened in Metropolis?" Christianity Today 36, no. 1 (January 13, 1992):__.

Williams, L. R. "Innocence, Ignorance, and Backlash." The Humanist 55 March/April 1995): 33-34.

Woodard Kenneth L., Donna Foots, and Jane Tanner. "The Sound of Empty Barrels: In the School Wars, the Bullets are Mostly Blanks." Newsweek 121, no. 20 (May 17, 1993): 62.

Yaffe, E. "Not Just Cupcake Anymore: A Study of Community Involvement." Phi Delta Kappan 75 (May 1994): 697-704.

Yob, Iris M. "Reflection on an Experimental Course: Religion and the Public Schools." Phi Delta Kappan 76 (November 1994): 234-238.

Zakariya, Sally Banks and Marilee C. Rist. "Biology and the Bible: A Conservation with Wayne A. Moyer." Principal 61 (January 1982): 22-25.

Zippers, J. "School-Prayer Amendment Draws Mixed Support." Christianity Today 39 (January 9, 1995): 44, 46.

Zirkel, Perry A. and Ivan B. Gluckman. "Invocations and Benedictions at School Events." NASSP Bulletin 75, no. 531 (January 1991): 105-109.

Zirkel, P.A. "A Doomed Prayer for Relief." Phi Delta Kappan 76 (February 1995): 496-497.

D. Newspapers

Biskupic, Joan "Religious Access To Schools Upheld." The Charlotte Observer, 8 June 1993, sec. A, p. 1.

Carelli, Richard. "Bush Lawyers Ask Supreme Court To Allow Prayers At Graduations." The Charlotte Observer, 7 November 1991, sec. A, p. 1.

"Court Upholds Ban On Bible Distribution." Statesville Record & Landmark, 18 May 1993, sec. A, p. 4.

"Court Will Hear Case On Graduation Prayer." Statesville Record & Landmark, 18 March 1991, sec. A, p. 1.

"Court Wrestles Religion Cases." Winston-Salem Journal, 8 June 1993, sec A, p. 1.

Dellinger, Walter. "Say Amen, Or Else." The Charlotte Observer, 17 November 1991, sec. B, p. 1.

"Diplomas and Bibles Mix No More." The Charlotte Observer, 8 June 1992, sec. C, p. 1.

Henry, Tamara. "Schools Get Religion-Club Guidelines." The Charlotte Observer, 31 January 1991, sec. A, p. 2.

McClain, Kathleen. "Without A Prayer." The Charlotte Observer, 6 March 1992, sec. E, p. 1.

McMillian, Ralph, "School Prayer: Opponents Distorting Amendment." The Charlotte Observer, 15 September 1984, sec. A, p. 23.

Montgomery, Audrey. "Bible Course Will Be Offered In Schools." Statesville Record & Landmark, 15 March 1994, sec. A, p. 1.

"Opinion Received." Statesville Record & Landmark, 11 August 1992, sec. A, p. 1.

"Religion in Brief." The Statesville Record & Landmark, 26 September 1991, sec. A, p. 4.

"Secular Humanism: Fundamentalist Lighting Rod." Greensboro New and Record, 5 January 1986, sec. E, p. 1.

"Senate Agrees to Deny Money To Agencies That Forbid Prayer." Winston-Salem Journal, 4 February 1994, Metro Edition, sec. A. p. 9.

E. Encyclopedias

The World Book Encyclopedia. Chicago: World Book, Inc., 1991. S. v. "Constitution of the United States," by J. W. Peltason.

The World Book Encyclopedia. Chicago: World Book, Inc., 1991. S v. "Mayflower Compact," by Joan R. Gundersen.

F. Government Documents

U.S. Congress. Senate. Helms Proposes Constitutional Amendment To Allow Voluntary School Prayer. 103 rd Cong., lst sess., S.J. R. 3. Congressional Record, Vol. 139, no. 5. Daily ed (21 January 1993), S140-143.

U.S. Constitution. Amendment I

U.S. Constitution. Amendment X

U.S. Constitution. Amendment XIV

APPENDIX A

IREDELL-STATESVILLE SCHOOLS

SCHOOL PRAYER POLICY

IREDELL-STATEVILLE SCHOOLS

SCHOOL PRAYER POLICY

PURPOSE

The Iredell-Statesville Schools hereby adopts a policy regarding religious activities at school and at school-sponsored events. The policy has several purposes. One purpose is to reflect the desires of the citizens in the communities which the school system serves. A second purpose is to allow constitutionally permissible, student-initiated prayer or religious activity at school and school-sponsored events. A further purpose of the policy is to guarantee students, faculty members and others attending school-sponsored events the opportunity to exercise in a constitutionally permissible manner their right to freedom of speech and free exercise of religion. Finally, it is a purpose of the policy to safeguard against any action by school personnel which would constitute an "establishment of religion" as that term has been interpreted by the federal and state appellate courts.

The desires of citizens in the communities which the school system serves regarding religious activities at school and at school sponsored events may change from time to time. Likewise, it is anticipated that the definition of a constitutionally permissible religious activity at school and at school sponsored events may change due to subsequent federal and state appellate court decisions. It is expected that this policy may be modified in the future.

POLICY

It is the general policy of the Iredell-Statesville Schools to permit and encourage among its students religious education and expression which are lawful and constitutionally permissible. By way of example, and not of limitation, the following conduct shall be permitted at school and at school sponsored events:

1. Prayer before and after school hours on school premises.

2. During school hours, individual prayer which is not disruptive to the normal operation of the school and not monitored or influenced by school personnel.

3. A moment of silence at the beginning of the school day or at school with sponsored events on or off campus; the moment of silence to comply with North Carolina General Statute 115C-47 (29).

4. Prayer by athletic team members, if student initiated and not controlled or influenced by school personnel.

5. Prayer by individual spectators or groups of spectators at school -sponsored events, if initiated by spectators and not controlled or influenced by school personnel.

6. Prayer at parent-teacher organization meetings, if member initiated not influenced by school personnel.

7. Prayer at open meetings of the Iredell-Statesville Board of Education.

8. Wearing of T-shirts displaying a religious theme.

9. Distribution of religious literature by students before and after normal school hours in a manner that will not create an unsafe condition for fellow students, school personnel, and others properly on school premises.

10. Use of school facilities for religious purposes consistent with facility use guideline of the Iredell-Statesville Schools.

11. Student-initiated prayer or religious activity at school or at school sponsored events which is not controlled or influenced by schoolpersonnel and which does not disrupt or hinder the normal operation of school and which does not disrupt or hinder school sponsored events is permissible.

By way of example, and not of limitation, the following conduct shall not be permitted on school premises and at school sponsored events.

1. Prayer during school hours which is initiated, controlled or influenced by school personnel.

2. At school sponsored events held either on or off school premises, prayer which is controlled or influenced in any way be school personnel. This would include all high school athletic events. However, a moment of silence complying with North Carolina General Statute 115C-47 (2) shall be permissible.

3. At baccalaureate services, prayer which is controlled or influenced in any way by school personnel. However, a moment of silence complying with North Carolina Statute 115C-47 (29) shall be permissible.

The permissibility of conduct not specifically listed in this policy shall be determined on a case-by-case basis. Determination shall be made by the Iredell-Statesville Board of Education after recommendation by the Superintendent. The superintendent's recommendation shall (a) attempt to promote religious education and expression among students while (b) complying with applicable federal and state appellate court decisions.

Source: Iredell-Statesville Board of Education Policy Manual, Iredell-Statesville Board of Education, P. O. Box 911, Statesville, North Carolina 28677

APPENDIX B

TEXTBOOKS BANNED IN ALABAMA

I. Social Studies:

Publisher	Date Published	Titles and Grade Levels
Houghton Mifflin	1980	At Home, At School (1); In Our Community (2); Ourselves and Others (3); Our Home, the Earth (4); America, Past and Present (5); Around Our World (6)
Laidlaw	1981	Understanding People (1); Understanding Families (2); Understanding Communities (3); Understanding Regions of the Earth (4): Understanding Our Country (5); Understanding the World (6)
Rand McNally	1980	You and Me (1); Here We Are (2); Our Land (3); Where On Earth (4); Across America (5); World Views (6)
Scott Foresman	1979	Social Studies (1-6)
Steck	1981	Our Family (1); Our Neighborhoods (2); Our Communities (3); Our Country Today (4); Our Country's History (5); Our World Today (6)

II. History:

Publisher	Date Published	Titles and Grade Levels
Globe	1979	Exploring Our Nation's History (11)
Harcourt, Brace, Jovanovich	1977	Rise of the American Nation (11)
Holt Rinehart & Winston	1978	People and Our Country (11)
Houghton Mifflin	1981	These United States (11)

Laidlaw	1981	A History of Our American Republic (11)
Macmillan	1981	History of a Free People (11)
Merrill	1978	America Is (11)
Scott, Foresman	1980	The American Dream (11)
Silver Burdett	1979	Our American Heritage (9-12)

III. Home Economics:

Publisher	Date Published	Titles and Grade Levels
Bennett	1981	Today's Teen (8-12)
Ginn	1983	Caring, Deciding and Growing (9-12)
Goodheart-Wilcox	1979	Contemporary Living (8-12)
	1981	Homemaking: Skills for Everyday Living (9-12)
McGraw-Hill	1985	Teen Guide (8-12)

Source: Smith v. Board of School Commissioners of Mobile County, 655 F.Supp. 939, 988-989 (S.D.Ala 1987).