1985

Moments of silence in public schools: a breach in the "Wall"

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MOMENTS OF SILENCE IN PUBLIC SCHOOLS: A BREACH IN THE "WALL"

A Thesis

Presented to

The Faculty of the Department of Political Science

Marshall University

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

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by

Edward D. Talkington

1985

THIS THESIS
WAS ACCEPTED ON

1 / 14 / 80
Month Day Year

as meeting the research requirement for the master's degree.

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in loving memory of my grandmother,

Emma Julia George Still

(1918-1985)

"If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away."

--Henry David Thoreau

"Render, therefore, unto Caesar the things which are Caesar's; and unto God, the things which are God's."

--Matthew 22:21

"The principle of separation of church and state was not put into our Constitution because of any hostility to religion. It is there because of a deep conviction that religious beliefs like other ideas, can best flourish under a system in which government does not interfere either by supporting or discouraging any particular belief."

--Justice William O. Douglas

ACKNOWLEDGMENTS

If it were possible to list all those who had made the completion of this thesis possible, I would gladly do so. However, such a list would require more space than the entire thesis itself. I would like to express my greatest appreciation to all who have in whatever way--be it large or small--contributed to this effort. I am truly grateful.

There are a few individuals who must be publicly acknowledged for their contributions. I extend my greatest thanks to my family for creating an atmosphere in which I could work, for putting up with my bad moods, and for giving me unbridled support throughout this ordeal. Additionally, my dearest friends for their constant encouragement and in some instances, for the vast amounts of help and information they were able to supply. To name but a few, Leslie Skinner, Terry Grieco, Kent Keyser, Mark Hunt, Bob Wilkinson, Kathy Meadows, and David Austin.

Finally, but certainly not least, I am grateful to the members of the political science department of Marshall University who agreed to serve as members of my committee--Drs. Simon Perry, Troy Stewart, and Thomas Shevory. From the

beginning of my academic career Dr. Perry challenged me to strive beyond whatever level of work I had attained. He also challenged me to think for myself and to defend those thoughts. He never told me what to think, merely how to think. For this I am grateful. Dr. Troy Stewart first introduced me to the West Virginia Legislature in January of 1984 when he allowed me to participate as a graduate intern with the House Committee on Judiciary. That experience provided a wealth of information in writing this thesis. For my tenure with the legislature I am indebted to Dr. Stewart. I am grateful to Dr. Thomas Shevory for agreeing to serve as my thesis advisor. His guidance and suggestions have been most useful in raising the calibur of the quality of this effort. I am indebted to him for this.

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INTRODUCTION

On March 10, 1984, the West Virginia Legislature adopted a proposed state constitutional amendment, designated as Committee Substitute for Senate Joint Resolution 1 (SJR 1), which required 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 the 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.

On November 6, 1984 the voters of the state ratified the amendment. In December of that year, the election results having been certified by the Secretary of State, the proposal was adopted as Section 15-A of the state constitution.

The First Amendment requires that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." The Supreme Court has determined that the religious restrictions of the First Amendment must be adhered to by the states[1] due to the requirement in the Fourteenth that no ". . . State (shall) deprive any person of life, liberty, or property, without due process of law . . . ." It is the contention of this

thesis that West Virginia's "Voluntary Comtemplation, Meditation or Prayer in School Amendment" and other moment of silence statutes of a similar nature are a breach in the "wall of separation between church and state."

The first chapter will present the major decisions of the United States Supreme Court in defining "religion" in the public school classroom. In McCollum v. Board of Education[2] the Court invalidated a "released time" program in Illinois in which religious instructors entered the public schools to conduct religious training. In Engel v. Vitale[3] the high court banned state-composed prayer from the public classroom. School District of Abington Township v. Schempp and Murray v. Curlett[4] invalidated state requirements that Bible reading and recitation of the Lord's Prayer be included as a part of the opening exercises in each classroom. From these decisions a standard has been gleaned by the Court for the adjudication of establishment clause inquiries. This standard is generally referred to as the Lemon Test. It consists of three requirements. "[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive government entanglement with religion."[5] The purpose of Chapter One is to present the extensive background information necessary for an understanding of the establishment clause issue as it relates to religious excercises in public schools.

In the second chapter I will note various criticisms of the Court's actions in the aforementioned adjudication by political officers, the public, the press, religious leaders, and legal scholars. The vast majority of the criticism was opposed to the decisions, however the Court found support from the legal community. The response of Congress to these criticisms and the Court's rulings came in two forms--attempts to overturn or disregard the decisions by constitutional amendment and limitation on judicial review. The constitutional appropriateness of these attempts will also be discussed. The states have responded to the criticisms of the Court and its rulings by various attempts to conduct religious exercises in their public schools other than those specifically terminated by the courts. All of these attempts, save one,[6] have been invalidated by litigation. Moment of silence statutes have been adopted by many states as a compromise between those who favor religious exercises in the classroom and the constitutional prohibition against it. Generally speaking, such statutes require public schools to set aside a brief time during morning exercises in which a student may silently "contemplate," "meditate," "reflect," "introspect," or "pray."

In the third chapter I will discuss the constitutional validity of such silent moments. In doing so the relevant adjudicataion of the issue will be presented. From this adjudication several criteria under each prong of the Lemon

Test may be gleaned in order to formulate a definition of that test. Next, I will examine and present a definition of the Lemon Test by which one may determine if an act--in particular, moment of silence statutes,--fall under its prohibitions. Specifically, I will evaluate West Virginia's moment of silence amendment according to the three prongs of the Lemon Test. My conclusion is that the West Virginia amendment is an unconstitutional breach of the Establishment Clause of the First Amendment.

NOTES

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

[2]333 U.S. 203 (1948).

[3]370 U.S. 421 (1962).

[4]374 U.S. 203 (1963).

[5]Committee For Public Education v. Nyquist, 413 U.S. 756 (1973).

[6]See Gaines v. Anderson, 421 F. Supp. 337 (1976), in which a Massachusetts moment of silence statute was upheld.

CHAPTER ONE

Introduction

Prior to the ratification of the Fourteenth Amendment it had been established by judicial decree that the Bill of Rights did not apply to the states. This first occurred in Barron v. Baltimore[1] (1833) and was later applied to religious freedom in Permoli v. First Municipality No. 1[2] (1845), in which Justice Catron noted:

> The Constitution makes no provision for protecting the citizen of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibitions imposed by the Constitution of the United States in this respect on the states.[3]

After the ratification of the Fourteenth Amendment the Supreme Court began to apply selected areas of the Bill of Rights to the states. There have been some who have argued that those who enacted the Fourteenth Amendment did not intend for it to incorporate the Bill of Rights to the states,[4] but the Supreme Court has rejected such arguments.

The first important judicial move in applying the Bill of Rights to the states came in Allgeyer v. Louisiana[5] (1897), in which the Court noted that "liberty is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties." This was the first move towards defining and expanding the term "liberty" to include economic rights in the Fourteenth Amendment.[6]

The Court further broadened this phrase in Meyer v. Nebraska[7] (1923), when the court recognized that liberty included:

> Not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men . . . . (emphasis added)[8]

Later decisions incorporated First Amendment liberties to the states via the Fourteenth Amendment. For example, Gitlow v. New York[9] (1925) recognized that freedom of press and speech are binding on the states by virtue of the Fourteenth Amendment's "due process" clause.[10] Palko v. Connecticut[11] (1937) inferred that the religious guarantees of the First Amendment could be binding on the states through the Fourteenth Amendment. The Court noted that while the "due process" clause did not incorporate all of the Bill of Rights, it did incorporate all those rights necessary for "ordered liberty."[12] In Cantwell v. Connecticut[13] (1940) the Court specifically stated such when Justice Roberts speaking for the majority said: "The First Amendment declares that Congress shall make no law 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."[14]

In 1947, the case of Everson v. Board of Education[15] focused attention upon the establishment clause. The Court found in favor of the state's power to reimburse the parents of parochial school children for bus transportation; yet it recognized that the establishment clause was binding on the states. This recognition laid the foundation for further adjudication revolving around the establishment clause. It would be but a year before the Court would have to determine the constitutionality of religious teaching within the public school classroom. Fifteen years later the Court would have to determine the constitutionality of holding state-composed prayer within the classroom, and a year later the constitutionality of Bible-reading and the recitation of the Lord's Prayer. In this chapter I will discuss the relevant adjudication to determine the Court's definition of "religion" in the public classroom setting.

McCollum v. Board of Education[16]

The Champaign Council on Religious Education was created in 1940 by members of the Catholic, Jewish, and certain Protestant faiths. They requested and secured permission of the Board of Education to offer religious teaching during public school time for children in the fourth through ninth grades. The council provided the religious instructors without public compensation, but said instructors were retained under the authority of the school superintendent. Pupils who did not wish to take part were

required to continue their secular studies. At the beginning of the year parents would fill out request cards if they wished for their children to attend the religious training. This training was conducted once each week for a thirty-minute period in the younger grades and forty-five minutes in the upper grades. Attendance records were kept in these classes and turned over to the pupils public school teachers.[17]

Vashti McCollum filed suit requesting a writ of mandamus[18] against the Champaign County, Illinois Board of Education to enjoin the board's policy by which the religious instructors were entering the public schools and conducting religious training during public school hours. Ms. McCollum alledged that the board's policy was a violation of the establishment clause of the First Amendment and applicable to the states via the Fourteenth Amendment.[19]

The majority opinion was issued by Justice Black. He argued that the holding of religious instruction on public school grounds was clearly a violation of the establishment clause. Public property, he argued, was being used for religious training. Moreover, the cooperation which existed between school officials and the Champaign Council on Religious Education clearly advanced religion.[20]

The ban on such activities was absolute. The Court stated the following:

> 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 or 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 disbelief, or church attendance or non-attendance. 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." Everson v. Board of Education, 330 U.S. 1, 15-16.[21]

The First Amendment, according to Black, demanded complete separation. It prohibited government support of religion generally; not merely the preference of one religion over another. Further, this separation was extended to the states and binding upon them by virtue of the Fourteenth Amendment. Black argued that the ruling does not show hostility towards religion. Such hostility would have violated our national tradition that each citizen be allowed to follow the dictates of his own conscience.[22]

Justice Frankfurter offered a concurring opinion which was joined by Justices Jackson, Rutledge, and Burton. While concurring fully in the majority decision Frankfurter felt that prior to deciding that the cause violated the "wall of separation" it was first necessary to cite relevant history of both education in America and in what manner "released time" fit into that history. He noted that education in the Old World was largely run by the Church. As people emigrated to the New World, he asserted, that they brought this church-education concept with them. He further noted

that as the population of the country grew and society advanced technologically, the need for a public school system became more apparent and the move towards popular education gained momentum. In the beginning the call for popular education meant state-support of religious schools according to Frankfurter, but with the growth of the common school the state-support of religious schools was practically nonexistant.

With regard to separation of Church and State, Frankfurter argued that the Fourteenth Amendment was not forced upon the states, but rather adopted as a principle of separation which had become commonplace throughout the nation. By 1875 the movement for separation of public support and religious education was so complete that President Grant called for a constitutional amendment specifically prohibiting public support for religious education.

Religious leaders attempted to hold religious education after school and on weekends, but these attempts failed because the children preferred to take the time to play, according to Frankfurter. Therefore, he believed that if the children were to receive religious training, it had been apparent to religious leaders that it would be necessary to conduct such training during secular school time.

The movement towards a "released time" program had been initiated by Dr. George U. Wenner in 1905. His proposal had been based on the program operated in France in which pupils

were released from public schools to attend religious classes to be held on church property. It had been 1914, Frankfurter noted, before the first "released time" program had been adopted in Gary, Indiana. By 1947 such programs were being conducted in nearly 2,200 municipalities. As each of these programs were conducted in different manners, the only question for the Court to decide, according to Frankfurter, was whether the program as operated in Champaign, Illinois, violated the establishment clause. In this case, he stated, "the momentum of the whole school atmosphere and school planning is . . . behind religious instruction . . . in order to secure for the religious instruction such momentum and planning. To speak of released time as being only one half or three quarters of an hour is to draw a thread from a fabric."

In Champaign the religious training was a strong component of the school system. Therefore, it provided strong influences upon pupils in favor of the special interests of certain religious groups. Such excessive entanglement between government and religion was clearly a violation of the establishment clause in his view. As Frankfurter remarked, "If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'"[23]

Justice Jackson also presented a concurring opinion in which he agreed to the opinion of Justice Frankfurter and the result of the majority opinion, but with a reservation. He questioned the jurisdiction of the Court to decide the

matter. According to his arguments " [a] Federal Court may interfere with local school authorities only when they invade either a personal liberty or a property right protected by the Federal Constitution." Generally this occurs under two circumstances. First when an individual is required to participate in a religious activity in opposition to his conscience and second when a taxpayer is forced to support through taxation a religious activity. Neither, according to Jackson, was a factor in this case.[24]

Justice Reed dissented from the majority on the grounds that the interpretation of the meaning of the First Amendment by the majority was in error. He argued that the confines of the establishment clause was not as broad as the Court had indicated. He noted that "aid" as in unconstitutional support for religion should be defined "as a purposeful assistance to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions." Reed believed that the aid provided by the school system in Champaign did not fall under this definition. Government, he asserted, was involved with religion in many ways such as providing a chaplain for each house of Congress and paying for veterans to attend theological seminaries. Therefore Reed argued that the use of school property for religious education of a voluntary nature was surely not the establishment of a religion.[25]

Four years later the Court delineated between "released time" programs in upholding such a program in the New York City schools. In a majority opinion penned by Justice Douglas the Court noted in Zorach v. Clauson[26] that the school system had made no attempt to coerce students to go to religious training nor was such training held on school property. Additionally, no public funds were expended for the training. For these reasons the program as operated in New York City did not violate the establishment clause.[27] In delineating between this decision and the McCollum case Douglas noted:

> We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.[28]

Justices Black and Jackson offered separate dissenting opinions in which they argued that the only real difference between the program in Champaign and the program in New York City was that in New York City the training had not been held on public school property. That in itself, they advanced, would not make the program constitutional. Thus, the decision should have been reversed in their judgment.[29] Justice Frankfurter offered an additional dissenting opinion in which he concurred with Justice Jackson and further argued that the appellants should have been afforded the opportunity to provide evidence of coercion. The lower courts had ruled such evidence irrelevant

to an establishment clause question. He believed that such evidence was legitimate and that if such evidence were offered it might have changed the mind of the majority.[30]

Engel v. Vitale[31]

The Board of Regents of New York in 1951 suggested that each school instructional day should begin with the recitation of a reverent non-denominational prayer. Specifically:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.[32]

The Regent's proposal created great controversy. The Christian Century suggested that the proposal would make prayer perfunctory. Peekskill, New York, Lutheran leaders called the prayer "an abomination and a blasphemy" as it did not acknowledge Christ. Other groups also voiced opposition such as the American Civil Liberties Union, the United Parents Association, the Synagogue Council of America, the New York Teachers Guild, the Citizens Union, the New York Board of Rabbis, and the American Jewish Congress. On the other hand, John F. Brosnan, a Regent, said that "the only criticism came from those who do not believe in God."[33]

The school districts were not required to adopt the proposal and, in fact, the New York City Board of Education refused. No actual count of how many school districts adopted the proposal was made. However, at most the number may have been ten percent. Among those adopting the prayer were the New Hyde Park schools. Several parents objected

and brought suit. The state courts on all levels ruled against the parents.[34] The State Supreme Court utilized four rationales for upholding the Regent's Prayer. They contended that the purpose of the First Amendment was to prevent state preference of one religion to another. Thus as the prayer was non-denominational it was within those requirements. The prayer was not compulsory, thus their rights were not violated. While the Fourteenth Amendment's "due process" clause does extend application of the First Amendment to the states, the act of prayer in schools has been long standing. Therefore, according to the court, the fact that the practice had successfully been held without objection for a long period was enough to withstand due process objections. Finally, to outlaw the practice would, in the court's view, have been an act hostile upon religion and not in keeping with the intent of the Framers.[35]

In the years prior to and during the adjudication of this issue there had been a number of incidents where religious practices in the public schools were questioned. For example, Jewish children raised objections to the recitation en masse of the Lord's Prayer in New York City. This recitation was discontinued without protest, although no ruling was given prohibiting it.[36] A taxpayers suit was brought in New Jersey which questioned the constitutional validity of Old Testament readings and recitation of the Lord's Prayer in that state's public schools.[37] The plaintiffs argued

that the state statute clearly violated the First Amendment as applied to the state through the Fourteenth Amendment. The charges were unpersuasive to the state supreme court.[38] Moreover, the New Jersey Supreme Court without dissent halted the distribution of Gideon Bibles by the Rutherford Board of Education.[39] Although the distribution was done after school hours without fanfare and with parental approval, the court found it discriminatory to the Catholic and Jewish faiths. The Supreme Court of New Jersey argued that, "the state, or any instrumentality thereof cannot, under any circumstances, show a preference for one religion over another."[40] Despite this unanimous ruling, and the refusal of the Supreme Court of the United States to reconsider the case, the Gideons were not deterred and continued the distribution in other areas.[41]

With such events occurring on a widespread basis it is hardly surprising that eventually the Supreme Court of the United States would have to make a decision on religious exercises in the public schools. The Court agreed to hear the case which had been raised in the New Hyde Park district of New York.

The majority opinion was offered by Justice Black in which he argued that the state-composed prayer utilized as a part of a public school program violated the First Amendment despite the fact that the prayer was "denominationally neutral" or that participation was voluntary. Prayer, according to Black, is the quentissential religious activity.

He believed that the purpose of the First Amendment was at the very least to prevent the state from determining what prayers one should offer. He asserted that it is simply "no part of the business of government to compose official prayers for any group of the American people to recite . . . ." Additionally, he remarked, the government should in no way use its vast power to "control, support, or influence" the types of prayer one might choose. Such a ban on this type of government activity did apply to the states by virtue of the Fourteenth Amendment.[42]

Black recognized that the religion clauses in the First Amendment do seem to overlap at times.[43] However, he found a means to distinguish them. The establishment clause does not require the presence of compulsion, whereas the free exercise clause does require such compulsion. He further opined, "[t]his is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. 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."[44]

The very foundation of the separation of Church and State was, according to Black, the belief that a union of religion and state would disgrace religion and ruin government. Where established religion existed, persecution tended to follow. Justice Black supported his position by

noting the tremendous problems in England after the Book of Common Prayer had been adopted. Shortly after the book's adoption the Act of Uniformity was enacted. This statute forced all citizens of England to take part in the prescribed service. It became a criminal act not to do so. Furthermore, it was illegal to take part in any other form of religious activity. Our founders were well aware of this, Black asserted, when forming our Constitution.[45]

While it had been true that the Regent's Prayer did not establish one religion as dominant over another, it was nevertheless a First Amendment violation in Black's judgment. Finally, while many argued that a general prayer was an insignificant encroachment, even the smallest encroachment was still a violation because the First Amendment is absolute, according to Black. In the words of James Madison:

> It is proper to take alarm at the first experiment on our liberties . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?[46]

A concurring opinion was offered by Justice Douglas. The issue according to him was "whether the Government can constitutionally finance a religious exercise."[47] If a public employee utilizes public time to lead a religious activity prescribed by government in a public facility, such

an act was surely a violation of the establishment clause.[48] Douglas aligned himself with a dissent by Justice Rutledge in the Everson case:

> The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or it's agencies in the state's domain or dependency on its largesse. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state.[49]

Justice Stewart offered a strong dissent in which he argued that the prayer did not violate the establishment clause. He stated that "to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation."[50] He noted that there were professions of faith by our Presidents of belief in a divine being. Further, two branches of government convene with prayers, both the Congress and the Supreme Court.[51] These activities did not establish a religion, nor did the Regent's Prayer in his judgment. He remarked, "What each has done has been 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."[52]

School District of Abington Township v. Schempp and Murray v. Curlett[53]

It is hardly surprising that the Court soon declared the practice of Bible reading and the recitation of the Lord's Prayer to be violation of the establishment clause. The Schempp and Murray cases were heard together on February 27-28, 1963. The decision of the Court was announced on June 27, 1963.[54]

The question before the Court in the Schempp case was whether a Pennsylvania state statute requiring Bible reading in the public schools was constitutional. It read, "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."[55]

The Murray case was similar to Schempp in certain important ways. A rule of the Board of School Commissioners of Baltimore City read that the public schools "shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer . . . . Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon written request of his parent or guardian." As in the first case, the question before the bar was whether this rule violated the establishment clause of the First Amendment by virtue of the Fourteenth Amendment.[56]

The majority opinion was delivered by Justice Clark. He argued that the practices in the public school systems under question violated the establishment clause of the First Amendment and were applicable to the states via the Fourteenth Amendment.[57] The guarantee of "liberty" in the Fourteenth Amendment certainly embodied religious liberty, according to Clark. He believed that "liberty" under the Fourteenth Amendment incorporated all of the rights explicitly granted by the First Amendment.[58]

The Court had, according to Clark, rejected all arguments to the effect that the First Amendment only required the government not give preference to one religion over another. The establishment clause forbade government support of religion; the free exercise clause allowed each to worship freely according to his own personal beliefs. Clark admitted that at times the two clauses could overlap.[59] While such overlap may occur, according to Clark, they represent two separate guarantees against encroachments upon freedom of religion. In order for the free exercise clause to be violated coercion must exist, however such coercion is not necessary to violate the establishment clause.[60]

Clark observed that the Court had dealt with establishment clause questions on eight separate occasions in the twenty years preceeding the case under discussion. With only one Justice taking exception the Court had held that the clause removes "all legislative power respecting

religious belief or the expression thereof." He asserted that for a legislative act to withstand establishment clause questioning, its legislative intent would have to be secular in nature, and the principle effect could neither inhibit nor advance religion.[61] While the morning programs operated in the public school systems in question may have held some secular purposes, such as the inculcation of proper morals, the very nature of the Bible and the Lord's Prayer were religious in Clark's view. Therefore, he reasoned that allowing pupils to remove themselves from the classroom did not prevent raising questions of constitutionality under the establishment clause. Further, he asserted, arguments that this was only a minor encroachment should be rejected; for even the most insignificant encroachment was still a violation.[62]

Clark argued that the ruling did not mandate a "religion of secularism" as some had advanced, but merely maintained the "wall of separation." Further, the Court noted the following:

> . . . it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. 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.[63]

Finally, he argued, the government was required to remain neutral towards all religions. Such neutrality did

not, in his view, allow a state to hold a religious activity, even if that activity was supported by the majority. He believed this to be true even if the act, in his words, "collides with the majority's right to free exercise of religion."[64]

A brief concurring opinion was offered by Justice Douglas. He argued that the act was violative of the First Amendment for two distinct reasons. First, the practice was a religious act sponsored by the state which prima facie was a violation. Second, by utilizing state funds and facilities, the state was in effect financing religion. He asserted that the state was forbidden from providing financial support for a religious exercise regardless of how insignificant such support might be. Douglas argued that ". . . the First Amendment does not say that some forms of establishment are allowed, ... What may be done directly may not be done indirectly lest the Establishment Clause become a mockery."[65]

In a lengthy concurring opinion Justice Brennan expounded upon his views. He noted that " [t] he Constitution enjoins those involvements of religious with secular institutions which (a) serve the essentially 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."[66]

While it was probable that the chief concern for the founding fathers was to prevent the federal government from creating an official church, there was nothing to indicate that this was the only intended meaning in Brennan's view. He argued that if the Framers had intended only to prevent the establishment of an official church, they would surely have stated that in explicit terms. The historical analysis that the Court had previously performed had indicated that the establishment clause "was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief."[67] Furthermore, he asserted that an analysis based purely upon original intent of the founders had serious flaws. He noted four such drawbacks. First, it was unlikely that the founders ever gave any thought to the constitutional propriety of religious exercises in public facilities. Second, as the form of our educational system moved from private to public hands in the last two centuries, the founders could have had little thought of such an issue. Third, with the introduction of more diverse religious beliefs by various emmigrant groups, religious preferences multiplied exponentially. This the founders could not have foreseen. Finally, the modern school system was financed entirely from public funds. This had not been true in the 18th century. The founders could not have foreseen the entirely public character of the school system.[68]

Justice Brennan then noted that the defense given in upholding such exercises was threefold: First, regardless of the religious nature of the act in question, its use in the public school was to serve a secular purpose thereby ". . . fostering harmony and tolerance among the pupils, en- hancing the authority of the teacher, and inspiring better discipline." He believed that while these exercises may have in fact fulfilled these aims, "the use of religious means to achieve secular ends" was a violation. There were other means by which these aims could be attained, such as "readings from speeches and messages of great Americans, for example or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class . . . ." Second, he noted the exercises did not give preference to one religious group over another. However, he asserted that the exercise did give preference to believers at the expense of non-believers. Finally, he argued that the argument that by excusing students the act becomes constitutional was absurd; if the act is of a religious nature it violates the establishment clause.[69]

In Brennan's view the decision of the Court merely upheld the purpose of the First Amendment. As noted by him, "No less applicable today than they were when first pronounced a century ago . . . are the words of a distinguisned Chief Justice of the Commonwealth of Pennsylvania, Jeremiah S. Black:

> The manifest object of the men who framed the institution of this country, was to have a <u>State</u>

> without religion and a Church without politics--that is to say, they meant that one should never be used as an engine for any purpose of the other, and that no man's rights in one should be tested by his opinions about the other. As the Church takes no note of men's political differences, so the State looks with equal eye on all the modes of religious faith . . . . Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate."[70]

An additional concurring opinion was penned by Justice Goldberg and joined by Justice Harlan. Goldberg merely wished to add a word of caution in extolling the virtues of the neutrality concept. He noted that ". . . untutored devotion to the concept . . . can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."[71]

Justice Stewart dissented from the majority. He did not believe that the exercises violated the establishment clause for those reasons which he had previously stated in Engel.[72] However, he did believe there was a legitimate question as to whether the exercises might have violated the free exercise clause due to the element of coercion, but he felt that the record of the case proceedings were inadequate to make an informed judgment. Therefore, he would have remanded the cases for the taking of additional evidence.[73]

A Definition of Religion in Public Schools

Having presented, in a detailed manner, the major decisions involving religious exercises in public schools, it is now appropriate to reflect upon their meaning. The question boils down to the following: What is the meaning of the "establishment of religion" in the public school setting? Let me briefly summarize what the Court has ruled. The government, according to the Court, be it national, state, or local, is prohibited from entangling itself with religion or sanctioning any type of religious practice including religious teaching in the classroom; the fact that such an encroachment may be very minor is of no consequence; banishing such religious practices from the public schools does not show hostility towards religion or violate the free exercise clause; the "ostensible voluntariness" of student participation does not allay questions about peer pressure and coercion; the mere claim of a secular purpose does not prevent constitutional questions from arising; and the principle effect of the act must not inhibit nor advance religion.

In order to determine if an act violated the establishment clause it seemed efficacious to formulate criteria by which to determine if materials, practices, or actions violate the establishment clause within the public school setting. Such a method has been developed by the Court over the years by relevant adjudication relating to the establishment clause. This method is generally referred to

as the Lemon Test.[74] The Court has indicated that "to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive government entanglement with religion."[75] The Court further stated in Stone v. Graham[76] that "If a statute violates any of these three principles, it must be struck down under the Establishment Clause."[77]

In the third chapter this thesis will present various components which should be considered as indicators of breaching the three criteria which make up the Lemon Test. The next chapter will view the reactions to the decisions of the Supreme Court in ruling on the establishment clause in the public school classroom, part of which lead to various attempts to overturn these decisions.

NOTES

[1]32 U.S. 243 (1833), John Barron had brought suit against the city of Baltimore after that city had redirected several streams causing his wharf to be inaccessible. He alledged that the Fifth Amendment prohibited the state from taking his property without fair compensation. The opinion issued by Chief Justice Marshall dismissed the case stating that the Court lacked jurisdiction because the Bill of Rights did not apply to the states.

[2]44 U.S. 589 (1845).

[3]Arthur E. Sutherland, Jr., "Establishment According to Engel," 76 Harvard Law Review 25, 28-29 (1962).

[4]See Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stanford Law Review 5 (1949); Raoul Berger, Government By Judiciary and "Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat," 42 Ohio State Law Journal 435 (1981). But see William W. Crosskey, "Charles Fairman, 'Legislative History,' and the Constitutional Limitations on State Authority," 22 University of Chicago Law Review 1 (1954) and Michael Kent Curtis, "Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights," 43 Ohio State Law Journal 89 (1982).

[5]165 U.S. 578 (1897), Allgeyer had been fined $1,000.00 when he utilized a marine insurance policy he held with a New York insurance company. He did so in violation of a Louisiana statute which prohibited such activities with companies not fully in compliance with state laws. The company was not licensed to do business in the state. Justice Peckham's opinion held that the state had no authority to infringe upon Allgeyer's liberty to make contracts outside the state.

[6]Joseph W. Harrison, "The Bible, The Constitution and Public Education," 29 Tennessee Law Review, 325, 367 (1962).

[7]292 U.S. 390 (1923), In an opinion by Justice McReynolds the Court overturned the conviction of an educator for teaching German in violation of a state law prohibiting the teaching of foreign languages to young people.

[8]Harrison, p. 368.

[9]268 U.S. 652 (1925), The majority opinion of Justice Sanford upheld the conviction of Benjamin Gitlow under New York's anarchy law for publishing and distribution of materials calling for the overthrow of the government by violent means.

[10]Harrison, pp. 368-69.

[11]302 U.S. 319 (1937), The Court by way of Justice Cardozo's opinion upheld the conviction and death sentence of Frank Palko for first degree murder. He had been tried previously for the same crime, but convicted of second degree murder and sentenced to life in prison. Palko had argued that the state law allowing the state to appeal placed him in double jeopardy.

[12]Harrison, p. 369.

[13]310 U.S. 296 (1940), The Court under Justice Roberts overturned the conviction of Jesse Cantwell, a Jehovah's Witness, who had been proselytizing on the streets of New Haven for incitement to breach the peace.

[14]Comments, "Public School Prayer and the First Amendment: Reconciling Constitutional Claims," 22 Duquesne Law Review 465, 466-67 (1984).

[15]330 U.S. 1 (1947).

[16]333 U.S. 203 (1948).

[17]Ibid., pp. 207-09.

[18]A writ of mandamus is a judicial order to require a public official to perform a duty of his office.

[19]McCollum v. Board of Education, 333 U.S. 203, 205 (1948).

[20]Ibid., pp. 209-10.

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

[22]Ibid., pp. 211-12.

[23]Ibid., pp. 212-32.

[24]Ibid., pp. 232-35.

[25]Ibid., pp. 238-56.

[26]343 U.S. 306 (1952).

[27]Ibid., pp. 308-15.

[28]Ibid., p. 315.

[29]Ibid., pp. 315-20; 323-25.

[30]Ibid., pp. 320-23.

[31]370 U.S. 421 (1962).

[32]Leo Pfeffer, "Court, Constitution and Prayer," 16 Rutgers Law Review 735, 736 (1962).

[33]Ibid., pp. 736-37.

[34]Anson Phelps Stokes and Leo Pfeffer, Church and State in the United States, (New York: Harper and Row, Publishers, 1964), p. 378.

[35]Pfeffer, "Court, Constitution and Prayer," p. 738.

[36]American Civil Liberties Union, "In Times of Challenge: U.S. Liberties, 1946-47," ACLU Annual Reports, no. 25, August 1947, vol. 4, (New York: Arno Press and the New York Times, 1970), p. 50.

[37]Doremus v. Board of Education, 5 NJ 435 (1950).

[38]American Civil Liberties Union, "Security and Freedom: The Great Challenge," ACLU Annual Reports, no. 28, June 1951, vol. 4, (New York: Arno Press and the New York Times, 1970), p. 45.

[39]Tudor v. Board of Education, 14 NJ 31 (1953).

[40]American Civil Liberties Union, "America's Need: A New Birth of Freedom," ACLU Annual Reports, no. 30, July 1, 1953--June 30, 1954, vol. 5, (New York: Arno Press and The New York Times, 1970), p. 51.

[41]American Civil Liberties Union, "Liberty Is Always Unfinished Business," ACLU Annual Reports, no. 32, July 1, 1955--June 30, 1956, vol. 5, (New York: Arno Press and The New York Times, 1970), p. 46.

[42]Engel v. Vitale, 370 U.S. 421, 424-30 (1962).

[43]For a discussion of the problems which may arise from the overlap of the religion clauses, see Sherbert v. Verner, 374 U.S. 398, 413-18, Justice Stewart concurring.

[44]Engel, pp. 430-31.

[45]Ibid., pp. 431-33.

[46]Ibid., p. 436.

[47]Ibid., p. 437.

[48]Ibid., pp. 441-42.

[49]Ibid., p. 443.

[50]Ibid., p. 445.

[51]Ibid., p. 446-48.

[52]Ibid., p. 450.

[53]374 U.S. 203 (1963).

[54]School District of Abington Township v. Schempp and Murray v. Curlett, 10 L. ed. 2d 844 (1963).

[55]Ibid., p. 846.

[56]Ibid., p. 852.

[57]School District of Abington Township v. Schempp and Murray v. Curlett, 374 U.S. 203, 205, 215 (1963).

[58]Ibid., pp. 215-16.

[59]Ibid., pp 216-17.

[60]Ibid., p. 221.

[61]Ibid., p. 222.

[62]Ibid., pp. 223-25.

[63]Ibid., p. 225.

[64]Ibid., pp. 225-26.

[65]Ibid., pp. 229-30.

[66]Ibid., p. 231.

[67]Ibid., pp. 233-34.

[68]Ibid., pp. 237-42.

[69]Ibid., pp. 278-88.

[70]Ibid., p. 304.

[71]Ibid., pp. 305-06.

[72]Supra, p. 20.

[73]School District of Abington Township v. Schempp and Murray v. Curlett, 374 U.S. 203, 308-20 (1963).

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

[75]Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

[76]449 U.S. 39 (1980).

[77]Ibid., pp. 40-41.

CHAPTER TWO

Introduction

The decisions of the Court in defining religion in the public schools was met with great criticism in many circles. Criticism, in a constructive manner, can be quite useful. Chief Justice Harlan Stone once admitted, "When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."[1] The vast majority of criticism was negative. It was emotional and in some instances, quite vicious.

Congress and states responded to the criticism by instituting various attempts to limit or overturn the decisions. Such attempts have generally taken three forms--constitutional amendment, Congressional limitation on judicial review, and state actions. Many states, for example, have attempted to institute moments of silence as a means of compromise between allowing vocal prayer and the Constitutional prohibition against it. The propriety of such action will be considered later. Many would argue that such criticism would cause the Court to limit the scope of its decisions in future adjudication as the Court had done in the late 1930's with New Deal economics. Exactly the opposite

has been the case. The Court has in fact, expanded its definition of what constitutes religious activities in the public schools in such a way as to exclude more activities.

The actions of the legislative and judicial branches of government in responding to the criticism should to some degree be seen as a function of their roles in government. The function of the legislative branch is to represent its constituents. As an elected body, the legislative branch tends to represent the majority. The Court is not a majoritarian body, however. Its sole responsibility is to interpret the laws of the country under the Constitution. In doing so, the Court's function is often to represent various minorities. Such a function is necessary. "In a democracy, the majority rules. To a point. The point where a line must be drawn on majority rule is when certain basic, constitutional or legal rights of minorities are denied by the majority. At that point, majority rule becomes tyranny, and the injury must be redressed, usually by the courts."[2]

Criticism of the Decisions

The reaction of public officials was generally very critical. Many politicians took advantage of it. It seemed politically advantageous to come out "in favor of God." Congressman Rooney of New York called the ruling "asinine" and labeled it as a Communist threat.[3] Congressman George W. Andrews of Alabama noted: "They put the Negroes in the schools and now they've driven God out."[4] Congressman L.

Mendel Rivers said, "The Court has now officially stated its disbelief in God Almighty."[5] Senator Robert C. Byrd decried the course the Court was taking by inquiring, "Can it be that we, too, are ready to embrace the foul concept of atheism? . . . . Somebody is tampering with America's soul. I leave it to you who that somebody is." Senator Sam Ervin of North Carolina claimed the "Supreme Court had made God unconstitutional," however later he was to recant this line of thinking and supported the course of the Court.[6]

The National Governors' Conference was meeting at the time of the Engel decision, and that body, with one exception, called for a constitutional amendment to overturn the decision. Governor Nelson Rockefeller of New York noted: "Until the whole question can be considered in terms of the fundamental percept of freedom of religion, which was the basis for the constitutional provision upon which the Supreme Court based its opinion, I shall abstain from the endorsement of any hasty action by the Governors relating to amendment of the Constitution of the United States."[7] Several former Presidents were upset by the course the Court was taking. President Hoover called Engel "a disintegration of a sacred American heritage" and further called for a constitutional amendment to establish "the right to religious devotion in all governmental agencies--national, state or local."[8] Dwight Eisenhower asserted, "I always thought that this nation was essentially a religious one. I realize, of course, that the Declaration of Independence antedates the

Constitution, but the fact remains that the Declaration was our certificate of national birth. It specifically asserts that we as individuals possess certain rights as an endowment from our Creator--a religious concept."[9] President Kennedy's response which came during a news conference is notable for its moderation:

> The Supreme Court has made its judgment, and a good many people will disagree with it. But I think it is important for us if we are going to maintain our constitutional principle that we support the Supreme Court decisions even when we may not agree with them . . . . I would hope that (the people) will support the Constitution and the responsibility of the Supreme Court in interpreting it, which is theirs, and given to them by the Constitution.[10]

And the U.S. Commissioner of Education, Sterling M. McMurrin said, "I believe it no loss to religion but may be a gain in clarifying matters . . . . Prayer that is essentially a ceremonial classroom function has not much religious value."[11]

The public's reaction was generally a hostile one. Shortly after the Engel decision, a poll by Gallop of a nation-wide sample of parents of public school children indicated an eighty percent approval rating for holding religious exercises in public schools.[12] And shortly after the Schempp decision another Gallop poll showed public disapproval of that decision by seventy percent to twenty-four percent. In 1967 a Good Housekeeping poll reported eighty-two percent in favor of Bible-reading.[13] In a poll taken by the San Francisco Chronicle recently after Engel resulted in a two-to-one approval of the decision. Of those

responding almost thirty-three percent indicated that they held "no religion" and of that subsample the approval rating was nearly seven-to-one. Of the whole sample a majority of Protestants were in favor of the decision; virtually all Jews supported it; and Catholics by a five-to-one margin were opposed to the court's ruling.[14]

Empirical studies show, however, that mass public reaction varied from state to state as did the performance of officials in instituting the ruling in Engel. A survey conducted in Kentucky revealed that sixty-one public school districts conformed their policies to that required by the Court's decision. However, 116 had yet to stop prayers in their districts. On the other hand, a similar survey in Iowa disclosed wide conformity to the Court's ruling.[15] In a study by Dolbeare and Hammond they noted:

> Levels of approval and disapproval of the Court's decision varied sharply between states. For example 55 percent of a sample of a Minnesota adult population approved and only 31 percent disapproved of Engel, while in Texas two years later approval of Schempp was expressed by only 28 percent and disapproval by 60 percent.[16]

While a majority of the public may disagree with the decisions made in these cases concerning school prayer and Bible reading, the respect for the authority of the Supreme Court to make such decisions remained high and had an effect on the respondent's attitude on the issue. In a poll conducted by the Roper Public Opinion Research Center a sample was asked if they favored the use of prayer in their public schools. Seventy-four percent held a favorable attitude, yet

after that body was informed of the decisions opposing such activity, forty-four percent of those of a favorable attitude expressed a liking for the decision.[17]

In a sample of one-hundred and twenty newspapers nationwide and the one-hundred and seventy-one editorials on the Engel decision by that sample offered twenty-nine percent unqualified support, seventeen percent gave qualified support, and fifty-four percent voiced disapproval.[18]

The reaction of the different religious denominations varied greatly in response. The Protestant response to the "wall" created by the Court was quite diverse. The president and general secretary of the National Council of Churches, J. Irwin Miller and Dr. Roy G. Ross respectively, declared:

> The Supreme Court bears the responsibility for interpreting the laws of our country. However, this does not relieve the churches, the schools, and individual citizens from the imperative for finding, within the letter and spirit of the laws of the land, ways to recognize the importance of religion to a healthful culture and to emphasize the strong religious convictions which have been the foundation of our nation. The principle of separation of Church and State must be observed and these Rights need not and must be observed and these Rights need not and must not prevent forms of public school recognition of the role of religion as viewed by the vast majority of parents and other American citizens.[19]

But later, the Council as a whole in a letter written to Senate members stated:

> The National Council of Churches, representing 32 major Protestants and Orthodox communions in this country believes that the religious experience of children is not the business of government or the public schools . . . rather a responsibility and a sacred trust of the family and the church.[20]

Episcopalian bishops were particularly critical. Bishop James Pike screamed "the Supreme Court has just deconsecrated the nation." The Episcopalen bishop in Pittsburgh decried the "powerful, aggressive spirit of secularism."[21] On the other hand, the Presiding Bishop of the Episcopal Church, the Right Reverend Arthur Lichlenberger called the Schempp decision in line with "the Court's sensative responsibility to assure freedom and equality to all groups of believers and non-believers as expressed in the First Amendment of the Constitution."[22]

The Methodist point of view was split. Three Bishops from Decator, Georgia, Philadelphia, and Dallas were opposed to this course as to do other wise was to violate "the basic religious commitment of this nation" and was not consistent with the Declaration of Independence. Additionally, a publication of the Methodist Board of Missions, World Outlook criticized the Court for its secularistic position. On the other hand, the Christian Advocate came out in favor of the Court as did the Interboard Council of the Methodist Central Illinois Conference and the Reverend Dean Kelly, the director for the religious liberty wing of the National Council of Churches.[23]

The Lutheran reaction was generally very critical. Several leaders labeled the Court as "godless" and others urged a return to religious education. However, the public relations director of the Missouri Synod came out in favor of the Court as did Robert van Deusen in an article in The Lutheran.

In direct response to the Engel decision, the response of Baptist leadership was generally favorable. The president of the Southern Baptist Convention, Dr. Herschel H. Hobbs, noted that the court had, "struck one of the most powerful blows in our lifetime, maybe since the Constitution was adopted, for the freedom of religion . . . ." However, he also stated that he would not favor declaring Bible-reading unconstitutional. The executive secretary of the Baptist Joint Committee on Public Affairs, Dr. C. Emanuel Carson, came out in favor of the Court's decision as did the Baptist Standard.[24] Recently, the American Baptist Churches by a vote of 1149-51 announced, "We affirm the United States Supreme Court stand that prayer and Bible reading as prescribed acts have no place in a secular, pluralistic public school." Further, up until 1982 the Southern Baptist Convention held the same position.[25]

The National Association of Evangelicals supported the Engel decision. However, in regard to Bible-reading it was noted that they would lend their "support to remedial legislation which will preserve the rights of the majority to maintain our great and vital school traditions."[26] Billy Granam called Engel "another step toward the secularization of the United States." He further stated, "the framers of our Constitution meant we were to have freedom of religion, not freedom from religion."[27]

The Catholic response was nearly universal in its condemnation. Cardinal Spellman noted in response to Engel, "I

am shocked and frightened that the Supreme Court has declared unconstitutional a simple and voluntary declaration of belief in God by public school children. The decision strikes at the very heart of the Godly tradition in which America's children have for so long been raised." The Brooklyn Tablet called the prayer decision "preposterous." The Catholic News considered the "implications appalling." Isservatire Romano announced its "regrets" at the decision of the Justices "whatever (their) motivation." Additionally, La Civilita Catholica noted, "The possible implications are such as to give rise to certain preoccupations."[28] In response to Schempp Cardinal McIntyre said that it "can only mean that our American heritage of philosophy, of religion and of freedom are being abondoned in imitation of Soviet philosophy, of Soviet materialism and of Soviet regimented liberty."[29]

The Jewish reaction was rather favorable to the Engel position. It was supported by the Commissioner of Social Action of Reformed Judaism, the New York Board of Rabbis, and the Rabbinical Assembly of America. There were dissenters, however, such as Brooklyn's Rabbi Kelman who said, "It is regrettable from the point of view of Judaism that this prayer was banned."[30] The American Jewish Committee, perhaps in anticipation of Schempp stated, "We are confident that when other more sectarian religious practices are brought to the Court's attention, they likewise will be declared unconstitutional."[31] The Committee's opposition to Bible

reading had been announced publically, at least as early as 1955, when it recognized that:

> Most people look upon the Bible as the source of religious inspiration. Children are taught to revere it as sacred. Therefore, the reading of any version in the public schools, except when explicitly undertaken as a part of a literature course, must be regarded as a religious act, inappropriate for classroom or assembly.[32]

The reaction of legal and constitutional scholars was nearly universal in its support for the outcome of the decisions, but not necessarily in the manner in at which it was arrived. Leo Pfeffer[33] came out fully in favor of the decision in Engel noting that it was, "consistent not only with its own prior decisions, but with the intent of the founders of our republic and with the cause of religious liberty."[34] Jesse H. Choper[35] and Paul G. Kauper[36] criticized the decision on the basis that it could have been decided on narrower grounds such as religious freedom. They believed that the coercive effects of religious exercises in the classroom was sufficient for the Court to invalidate the act under the free exercise clause.[37] As Choper notes, ". . . you send your child to the schoolmaster . . . 'tis the schoolboys who educate him . . . . Compulsion which comes from circumstances can be real as compulsion which comes from command."[38] Philip B. Kurland further bemoaned the failure of the Court to adequately develop the coercion angle noting "that the Court's judgements can serve their function of stare decisis only when the grounds for the judgement are adequately revealed.[39] Quite simply the lower courts cannot

follow precedent, if the lower court cannot determine the justifications for the precedent.

However, not all agreed with the decisions. For example, Erwin N. Griswold[40] believed that the Court should have upheld the Engel decision as the prayer was not compulsory. While the citizenry needs to be tolerant of various religious views we need not abandon the Christian tradition of the country. He argued, in essence, that to deny the majority the time for this simple prayer was to deny their free exercise rights. And further to allow the majority this prayer would teach toleration to religious minorities and sects.[41]

Congressional Response

Considering the massive negative criticism by many of the Court's decisions, particularly those from Capitol Hill, it should not be surprising that there would be various attempts by Congress to overturn or disregard the Court's rulings. Congressional response come in the form of constitutional amendments and limitation of judicial review. The states have made a variety of attempts which will be discussed hither, but the most popular form of state response has been to enact moment of silence statutes.[42]

Proposed amendments to the U.S. Constitution have rarely been successful. Hundreds have been proposed, but only twenty-six have been ratified. It is not unusual for Congress to utilize amendments to overturn decisions of the

Supreme Court which it considered to be usurpations of legislative or state power. On six occasions Congress has successfully done just that. This first occurred in 1798 with the passage of the Eleventh Amendment[43] in response to Chisolm v. Georgia[44] in which the Court ruled that a citizen of one state may sue another state without the agreement of the state being sued. More than half a century later the Court ruled that blacks were not citizens of the United States or any state. Therefore, Congress did not have the authority to prevent slavery in the territories. This decision invalidated the Missouri Compromise.[45] Congress responded with the Thirteenth,[46] Fourteenth[47] and Fifteenth[48] Amendments. The Sixteenth Amendment[49] came in response to Pollock v. Farmer's Loan and Trust Company[50] in which the Court invalidated a Congressional act allowing for a uniform tax on various types of real estate and personal property. The last instance occurred in 1971 with the ratification of the Twenty-sixth Amendment[51] which set the voting age at eighteen for all elections on all levels of government. In 1970 the Court had invalidated a Congressional act prescribing such.[52] From these examples it is clear that it is not unheard of for Congress to attempt to overturn the Court's decisions with which it vehemently disagrees. Considering the vocal response of Congress to the Court's decisions defining religion in the public schools, it should come as no surprise that Congress would attempt to limit these decisions by constitutional amendment.

Within a short period of time after the decisions, about 150 bills were introduced to overturn the decisions. Coming out against the decisions was politically advantageous. By introducing measures to overturn the decisions Congressmen could tell their constituents that they were serious about the issue, even if they were not. However, Congressman Frank Becker was quite serious. He influenced those who had suggested similar measures to organize behind one bill. In September 1963, less than 90 days after the Schempp decision, this bill was introduced. It stated that:

> Section 1. Nothing in this Constitution shall be deemed to prohibit the offering, reading from or listening to prayers or Biblical Scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.
>
> Section 2. Nothing in this Constitution shall be deemed to prohibit making a reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being, in any governmental or public document, coinage, currency, or obligation of the United States.
>
> Section 3. Nothing in this Article shall constitute an establishment of religion.[53]

The measure was referred to the House Committee on Judiciary where its Chairman, Emanuel Celler, had decided to let the bill die because of his personal opposition to school prayer. But Becker was not to be deterred and began work on a discharge petition.[54] Such a petition would have required 218 signatories. After Becker had gained about 160, Cellar agreed to hold public hearings on the issue. To the chagrin of Becker, the public hearing revealed that religious leaders were not willing to give unbridled

support. Opposition to the bill came from both Jewish and Protestant leaders. The Catholic Church had, in light of the Schempp decision, adopted a neutral position.[55] The remarks of the Reverend Edward Miller were representative of most church leaders. He stated that "the threat is not the secularization of our schools, but the secularization of our religion . . . [Y] ou cannot kill God by a Supreme Court decision." He further pointed out that Christianity and Judaism have "been weakest in just those societies where the state has undertaken to sponsor and promote religious activities in public institutions."[56] To no ones surprise by the end of the hearings, Becker's proposal failed.

Senator Everett Dirksen of Illinois in 1966 took up the gauntlet again and proposed an amendment not quite as radical as Becker's had been. It read:

> Nothing in this Constitution shall prohibit the authority administering any school, school system, educational institution or other public building supported in which or in part through the expenditure of public funds from providing or permitting the voluntary participation by students or others in prayer. Nothing in this article shall authorize any such authority to prescribe the form or content of any prayer.[57]

The Senate Committee on Judiciary held public hearings, the results of which were similar to those conducted in the House. Dirksen, however, was undaunted and through parliamentary procedural actions he was able to bring the measure to a vote by the full Senate in September 1966. A two-thirds majority vote would be required for adoption. The roll call vote revealed forty-nine yeas, thirty-seven nays,

and fourteen not voting. One may question whether many of the forty-nine who voted for it were strongly in favor of it. As it was apparent that the proposal had no chance whatever of obtaining the required two-thirds majority, many could afford to vote in its favor purely for hometown consumption.[58]

Many similar proposals have been made in the years since those first attempts including an amendment proposed by Senator Strom Thurmond during the last session at the urging of President Ronald Reagan which failed to obtain the required two-thirds majority. As recently as February 6, 1985 the President called on Congress for passage of such an amendment.[59] All attempts to overturn the Court's rulings by this method have thus far failed.

Another means of Congressional response to the Court's rulings has been limitation of judicial review. The best known of these measures was sponsored by Jesse Helms, an ultra-conservative Senator from North Carolina. It has proposed to deny appellate jurisdiction to both the Supreme Court and the federal courts in all cases involving religious exercises in public schools.[60] Carl Anderson, an aid to Senator Helms, says that in the passage of such a measure, "I can't, for the life of me, see a threat to anybody's liberty." He admits that if such a procedure were upheld it could be inferred that other areas of concern such as busing and abortion might be next, but says that it is imperative that the "judicial usurpation" of state and legislative authority be checked.[61]

The authority of Congress to limit judicial review is based on Article III of the U.S. Constitution, the salient portions of which are enumerated below:

Section 1 states:

> The judicial power of the United States, shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish . . . .

Section 2 (1) reads:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . . .

Section 2 (2) states:

> [T] he Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.[62]

Article III certainly grants Congress expansive power over the courts. This view has been supported by the Supreme Court.[63] However, Congress has never attempted to manipulate the federal courts on a widespread basis although it has limited federal court jurisdiction in certain types of cases by setting up administrative panels for decision making. Additionally, Congress has never attempted to remove federal court jurisdiction in order to determine the outcome of cases. Such a move would deny a reasonable opportunity for persons to raise issues of constitutionality in a neutral arena and therefore violate the due process clause of the Fifth Amendment. The Second Circuit suggested that such a move would be unconstitutional when it recognized, "that the exercise by Congress of its control over jurisdiction is

subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law . . . ."[64] Additionally, if Congress were to remove such jurisdiction in an area of guaranteed constitutional rights the equal protection clause might be violated. Such an act restricts only one particular constitutional guarantee while not similarly limiting others. The result would likely be the weakening of a particular constitutional right. Such a limitation would require an overwhelming governmental interest.[65]

Of course the Helms bill removes the Supreme Court's appellate power also. This would allow state courts to be the final arena for raising constitutional questions relating to religious exercises in public schools. Thus, the First Amendment guarantees which the Supreme Court has established would be upheld in some courts and not in others. Under our judicial system lower courts are obliged to follow the precedents of higher courts. It is a fact of judicial life, however, that lower courts do not always do so. Merely consider the decision of Judge Hand in the first Alabama moment of silence case.[66] In his decision he ruled that the Fourteenth Amendment was not meant to apply the Bill of Rights to the States. Therefore, there was no constitutional bar prohibiting the State of Alabama from establishing religion.[67] If

some state courts did not follow precedent, then the citizens of those states would be denied vital First Amendment freedoms. The citizens of those states in which its courts followed precedent would be guaranteed their First Amendment rights. Such a situation could only be described as chaotic.

Those who support limitation of judicial review cite the "exceptions" clause in Section 2 (2) of Article III as the constitutional basis for the proposal. Additionally, they cite the Supreme Court's decision in Ex parte McCardle[68] as evidence of the support of the Court for Congress holding such power.[69]

In the McCardle case, the Court was asked to determine if it had jurisdiction in habeas corpus cases filed pursuant to the Habeas Corpus Act of 1867. McCardle, a civilian, had been jailed by the military pursuant to the Reconstruction Acts. During the process of appeal Congress repealed the act for fear the Supreme Court would invalidate the Reconstruction Acts. Chief Justice Chase, writing for a unanimous Court, stated:

> The provision of the act of 1867, affirming the appellate jurisdiction of this Court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of a positive exception.
>
> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.[70]

The decision applied only to habeas corpus suits filed under the invalidated act. It did not apply to such suits

filed under the Judiciary Act of 1789.[71] A mere year later the Court accepted such an appeal in recognition of this.[72] Thus, the ruling was really quite narrow.

The "exceptions" clause of Article III and the decision in McCardle do give a basis for Congressional authority to limit judicial review. Whether Congress has the authority to limit such review on as broad a basis as the Helms measure is subject to question. Certainly the measure would cause havoc as state courts were left free to be the final authority in this area. Citizens would not be guaranteed equal protection of this First Amendment right from state to state. The purpose of the Bill of Rights is to set forth certain "inalienable rights" to be guaranteed to all citizens regardless of the state in which he or she chooses to live. Thus, the measure defeats the entire purpose of having and enforcing a Bill of Rights. Also, the Constitution is meant to be the supreme law of the land. To allow a state court to be the final interpretor of a national standard is absurd. Only a judicial body which represents the nation as a whole can be the final arbitor of such laws and set such standards. Otherwise, these laws and standards could not be maintained on a nationwide basis. Certainly all of the state courts will not follow the precedents in this area as established by the Supreme Court. It would only require one state court to violate these precedents to prevent such a First Amendment right from being applied on a uniform basis nationwide. If this were to occur the effect of the measure would be to

prevent citizens from being assured of their constitutional rights in this area. Therefore, the measure would be unconstitutional. On an ironic note, if all of the state courts were to follow the precedents set by the Court the purpose of the measure would be defeated; religious exercises would not be returned to the public schools.

State Response

The states responded to the decisions by holding various sorts of religious exercises in the public schools other than those practices which were allowed. Virtually all have been declared unconstitutional. The Seventh Circuit struck down an Illinois teachers practice of leading her kindergarden class in a pre-meal verse of "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.[73] A similar prayer initiated by students had been held unconstitutional by the Second Circuit two years earlier. This prayer said: "Thank you for the world so sweet; Thank you for the food we eat; Thank you for the birds that sing; Thank you God for everything."[74] In 1970 a period for the "free-exercise" of religion sponsored by a local school board was invalidated. During this period prayers from the Congressional Record were read aloud.[75] The Fifth Circuit invalidated an Alabama statute in 1972 which prescribed a daily period of Bible reading in that state's public schools.[76] In 1980 the Supreme Court of Massachusetts denied the constitutional

validity of a prayer time to be led by a student volunteer.[77] And in 1981 the Ninth Circuit declared that student councils could not mandate a period of prayer prior to school assemblies.[78]

One type of state action has been upheld in one instance. So called "moments of silence" statutes have been initiated in about twenty states as a compromise between those desiring to return organized audible prayer to the classroom and the constitutional prohibition against it. Those who defend the constitutionality of such statutes cite the concurring opinion of Justice Brennan in Schempp in which he noted that a reverent moment of silence might adequately serve the purposes previously given for the use of Bible-reading and the Lord's Prayer. Of course, it must be remembered that at the time of his remark no moment of silence statute had ever been enacted. Therefore, Justice Brennan could not have given full consideration to the possible religious implications of such a moment.

The first case in which such a "moment of silence" was adjudicated occurred in Massachusetts when in 1976 twelve students challenged a state statute which required:

> At the commencement of the first class 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, and during any such period, silence shall be maintained and no activities engaged in.[79]

This statute was upheld by the United States District Court. It argued through District Judge Frank J. Murray that

the statute merely required students to be silent which is a legitimate demand of the educational system. Furthermore, the word "meditation" may contemplate religious, nonreligious, or irreligious thought. Students were not required to engage in any religious activity, thus the state remained neutral and the students maintained their rights under the free-exercise clause.[80]

Since the adjudication of this case, however, statutes in New Mexico,[81] Tennessee,[82] and New Jersey[83] have been declared unconstitutional by federal court judges. Also, the United States Supreme Court recently declared an Alabama moment of silence statute unconstitutional. These decisions will be considered in detail in the next chapter. Additionally, that chapter will present various components under each prong of the Lemon Test which are useful as indicators that moments of silence are a breach in the wall of separation under the First Amendment. In particular, West Virginia's moment of silence amendment will be evaluated under the criteria and in relation to precedent to show that it is unconstitutional.

As is evidenced above, the judiciary has not, with the possible exception of the Massachusetts moment of silence case, acquiesced to the vast criticism of the judiciary in light of its decisions invalidating religious exercises in public schools. While other decisions by the judiciary concerning religious exercises in public schools will be discussed further in the next chapter, it is appropriate to

make a few observations at this time. The role of the judiciary in the American form of government is to interpret the laws of this country pursuant to the guidelines of the U.S. Constitution. Because that document is sometimes vague, a great deal of leaway is left to the judiciary in its interpretation. Those who have disagreed vehemently with the Court's interpretation of the Constitution have attempted to force a change in that interpretation. As evidenced in this chapter, the Court was met with vast negative criticism of its interpretation of the Constitution in outlawing religious exercises in the public schools. The Congress and state legislatures, as majoritarian bodies, responded to the will of the majority by their attempts to overturn or disregard the decisions. The courts, as antimajoritarian bodies, generally responded to criticism by continuing to uphold its role of protecting the fundamental guarantees of the Bill of Rights. The liberties guaranteed by the Bill of Rights are the foundation of representative self-government. Thus, if the legislative branch of government attempts to impinge upon these liberties by legislation. It is the function of the judiciary to remain vigilant in its role by striking down measures that would repress the liberties expressly granted by the Bill of Rights and thereby undermine the very foundation of our government. By striking down all attempts to hold religious exercises in public schools, the judiciary has fulfilled its role of protecting the foundation of American government.

NOTES

[1]Charles E. Rice, The Supreme Court and Public Prayer, (New York: Fordham University Press, 1964), p. 4.

[2]Herald/Register (Beckley, WV), March 2, 1985. For a similar view see John Hart Ely, Democracy and Distrust, (Cambridge, Mass: Harvard University Press, 1980).

[3]Philip B. Kurland, "The Regents' Prayer Case: 'Full of Sound and Fury, Signifying . . .'," The Supreme Court Review, (Chicago: The University of Chicago Press, 1962), p. 3.

[4]Pfeffer, "Court, Constitution and Prayer," p. 735.

[5]Stokes and Pfeffer, p. 378.

[6]Leo Pfeffer, God, Caeser, and the Constitution, (Boston: Beacon Press, 1974), p. 201.

[7]Kurland, p. 3.

[8]Paul Blanshard, Religion and the Schools: The Great Controversy, (Boston: Beacon Press, 1963), p. 50.

[9]Ibid.

[10]Kurland, p. 3.

[11]"Reactions to Supreme Court Prayer Rule is Widespread; Ranges From Sharp Condemnation to Vigorous Laud," Nations Schools, vol. 70, no. 2, August 1962, p. 80.

[12]The Freedom Reader, Edwin S. Newman, ed., (Dobbs Ferry, New York: Oceana Publications, Inc., 1963), p. 148.

[13]James E. Wood, Jr., "Religion and Public Education in Historical Perspective," Journal of Church and State, vol. 14, no. 3, Autumn 1972, p. 406.

[14]The Freedom Reader, p. 149.

[15]American Civil Liberties Union, "defending the bill of rights: the stakes grow higher," ACLU Annual Reports, no. 40, July 1, 1963--June 30, 1964, vol. 7, (New York: Arno Press and The New York Times, 1970), p. 36.

[16]Kenneth M. Dolbeare and Phillip E. Hammond, The School Prayer Decisions, (Chicago: The University of Chicago Press, 1971), pp. 14-15.

[17]Ibid., p. 16.

[18]The Freedom Reader, p. 150.

[19]Ibid., p. 152.

[20]James E. Wood, Jr., "Religion and Education in American Church-State Relations," Journal of Church and State, vol. 26, no. 1, Winter 1984, p. 40.

[21]The Freedom Reader, p. 153.

[22]P. Raymond Bartholomew, "Religion and the Public Schools," 20 Vanderbilt Law Review 1078, 1087-88 (1967).

[23]The Freedom Reader, p. 154.

[24]Ibid., p. 155.

[25]Wood, Jr., "Religion and Education in American Church-State Relations," p. 40.

[26]The Freedom Reader, p. 155.

[27]Bartholomew, p. 1085.

[28]Kurland, p. 2.

[29]Bartholomew, p. 1087.

[30]Kurland, p. 2.

[31]The Freedom Reader, p. 148.

[32]American Jewish Committee, "Religion in Public Education," Religious Education, vol. 50, no. 4, July-August, 1955, p. 236.

[33]General Counsel, American Jewish Congress.

[34]Pfeffer, "Court, Constitution, and Prayer," p. 752.

[35]Associate Professor, University of Minnesota Law School.

[36]Professor of Law, University of Michigan.

[37]Jesse H. Choper, "Religion in the Public Schools: A Proposed Constitutional Standard," 47 Minnesota Law Review 329 (1963); Paul G. Kauper, "Prayer, Public Schools, and the Supreme Court," 61 Michigan Law Review 1031 (1963).

[38]Choper, p. 416.

[39]Kurland, p. 30.

[40]Dean and Langdell Professor of Law, Harvard University.

[41]Erwin N. Griswold, "Absolute is in the Dark--A Discussion of the Approach of the Supreme Court to Constitutional Questions," 8 Utah Law Review 167, 176-77 (1963).

[42]Twenty-five states have enacted such laws. See Sec. 16-1-20.1, Alabama Code (Supp. 1984); Sec. 15-522, Arizona Revised Statutes Annotated (1984); Sec. 80-1607.1, Arkansas Statutes Annotated (1980); Sec. 10-16a, Connecticut General Statutes (1983); Title 14, Sec. 1401, Delaware Code Annotated (1981); Sec. 233.062, Florida Statutes (1983); Sec. 20-2-1050, Georgia Code Annotated (1982); Ch. 122, Sec. 771, Illinois Revised Statutes (1983); Sec. 20-10.1-7-11, Indiana Code Annotated (1982); Sec. 72.5308a, Kansas Statutes Annotated (1980); Sec. 17:2115, Louisiana Revised Statutes Annotated (West 1982); Title 20-A, Sec. 4805, Maine Revised Statutes Annotated (1983); Sec. 7-104, Maryland Education Code Annotated (1985); Ch. 71, Sec. 1A, Massachusetts General Laws Annotated (1982); Sec. 380.1565, Michigan Compiled Laws Annotated (Supp. 1984-85); Sec. 18A:36-4, New Jersey Statutes Annotated (West Supp. 1984-85); Sec. 22-5-4.1, New Mexico Statutes Annotated (1981); Sec. 3029-a, New York Education Law (McKinney 1981); Sec. 15-47-30.1, North Dakota Central Code (1981); Sec. 3313.60.1, Ohio Revised Code Annotated (1980); Title 24, Sec. 15.1516.1, Pennsylvania Statutes Annotated, (Purdon Supp. 1984-85); Sec. 16-12-3.1, Rhode Island General Laws (1981); Sec. 49-6-1004, Tennessee Code Annotated (1983); Sec. 22.1-203, Virginia Code (1980); Article III, Sec. 15-a, West Virginia Constitution.

[43]The Eleventh Amendment states:
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[44]2 U.S. 419 (1793).

[45]The Missouri Compromise was an agreement between the House and Senate to allow Missouri to join the Union as a slave state and Maine to be admitted as a free state. It further provided that territory north of 39^{o} 30' would be free and south of that divide would be slave.

[46]The Thirteenth Amendment states:
Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

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

[48]The Fifteenth Amendment states:
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

[49]The Sixteenth Amendment states:
The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

[50]158 U.S. 601 (1895).

[51]The Twenty-sixth Amendment states:
The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

[52]William J. Keefe and Morris S. Ogul, The American Legislative Process, 5th ed., (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1981), pp. 428-29.

[53]Pfeffer, God, Caesar, and the Constitution, pp. 215-16.

[54]A discharge petition is a means of forcing a floor vote on removing a bill from the committee to which it was referred. If a majority of members sign the petition it is possible to force such a vote.

[55]Pfeffer, God, Caesar, and the Constitution, pp. 214-15.

[56]American Civil Liberties Union, "defending the bill of rights: the stakes grow higher," pp. 36-37.

[57]Bartholomew, p. 1116.

[58]Pfeffer, God, Caesar, and the Constitution, pp. 215-16.

[59]Ronald Reagan, President of the United States, "State of the Union Message," February 6, 1985.

[60]Wood, Jr., "Religion and Education in American Church-State Relations," p. 39.

[61]Scott Slonim, "Say Dormant Prayer Bill Has Broad Implications," American Bar Association Journal, vol. 66, April 1980, p. 437.

[62]U.S. Constitution, Art. III.

[63]See Lockerty v. Phillips, 319 U.S. 182 (1943); Sheldon v. Sill, 49 U.S. 441 (1850).

[64]See Battaglia v General Motors Corporation, 169 F. 2d. 254, 257 (1948).

[65]Joel David Farren, "Restoring School Prayer by Eliminating Judicial Review: An examination of Congressional Power to Limit Federal Court Jurisdiction," 60 North Carolina Law Review 831, 835-37 (1982).

[66]The Supreme Court's decision in that case will be discussed in detail in Chapter Three.

[67]Jaffree v. Board of School Commissioners of Mobile County, 554 F. Supp. 1104 (1983).

[68]74 U.S. 506 (1868).

[69]Farren, pp. 827-38.

[70]Ibid., p. 838.

[71]The Judiciary Act of 1789 established the makeup of the Supreme Court, created inferior courts, and allowed appellate jurisdiction in various types of cases including habeas corpus.

[72]See Ex parte Yerger, 75 U.S. 85 (1868).

[73]DeSpain v. DeKalb County School District, 384 F. 2d. 836 (1967), cert. den. 390 U.S. 906.

[74]Stein v. Oshinsky, 348 F. 2d. 999 (1965), cert. den. 382 U.S. 957.

[75]State Board of Education v. Board of Education of Netcong, New Jersey, 270 A. 2d. 412 (1970), cert. den. 401 U.S. 1013.

[76]Alabama Civil Liberties Union v. Wallace, 456 F. 2d. 1069 (1972).

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

[78]Collins v. Chandler Unified School District, 644 F. 2d. 759 (1981), cert. den. 454 U.S. 863.

[79]Ch. 71, Sec. 1A, Massachusetts General Laws Annotated. (1982).

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

[81]Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (1983).

[82]Beck v. McElrath, 548 F. Supp. 1161 (1983), vacated 718 F. 2d. 1098.

[83] May v. Cooperman, 572 F. Supp. 1561 (1983).

CHAPTER THREE

Introduction

The standard by which establishment clause cases are adjudicated was first enunciated by the Court in Lemon v. Kurtzman.[1] In this case the Court invalidated state statues in Rhode Island and Pennsylvania that allowed for state financial support for parochial elementary and secondary schools and the instructors therein of secular subjects. The Court found these statutes to be a violation of the First Amendment by using a three-pronged standard which has come to be referred to as the Lemon Test. It requires that "to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and third, must avoid excessive government entanglement with religion."[2] The first part of this chapter will present several cases in which moments of silence have been adjudicated. The purpose therein is twofold: (1) These decisions have posed several criteria under each prong of the Lemon Test which is useful in formulating a definition of that test; and (2) to note that the judiciary has further expanded its definition of religious exercises by including legislated moments of silence under that definition. Next, this chapter will

examine in detail each prong of the Lemon Test, to show how one should determine if an act falls under its prohibitions. Specifically, I will examine whether moments of silence are constitutional. Finally. I will evaluate West Virginia's moment of silence amendment according to the three prongs of the Lemon Test. My conclusion is that West Virginia's amendment is a violation of the establishment clause and is therefore unconstitutional.

Moment of Silence Adjudication

Since the Gaines decision several similar statutes have failed to pass the constitutional test imposed by the Supreme Court. The first case I will discuss is Beck v. McElrath.[3] In this case Beck challenged the constitutionality of a Tennessee law which 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 of duration shall be observed for meditation or prayer or personal beliefs and during any such period, silence shall be maintained.[4]

Clearly, the basic question before the Court was if the statute violated the Establishment Clause when analyzed by the Lemon criteria. The opinion of the district court was issued by Chief Judge Morton. He determined that the statute violated the first prong of the Lemon Test as the statute had no secular purpose. He found the presence of alternatives to prayer such as "meditation" or "personal beliefs" to be ambiguous at best. The intent of the

legislators was clearly to establish prayer as a part of the school day, he asserted. They did so, according to Morton, "because a majority of their constituents support such a practice."[5] In the Barnette case,[6] he noted, Justice Jackson stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[7]

If this is incorrect, he argued, "we have no need for a Constitution at all, and we might determine our most basic rights by consulting the latest Gallup Poll."[8]

Chief Judge Morton also found the statute to be violative of the second prong of the Lemon Test. The schools were not in session; therefore, there was no direct evidence of the primary effect of the statute. He determined, however, that the probable effect of the statute was to establish religion. The legislature had issued no guidelines for teachers to follow; thus a great deal of variety in its imposition would have occurred from classroom to classroom.[9] Even if the teacher merely recited the statute "students will understand" he asserted, "that they are being encouraged not only to be silent, but also to engage in religious exercises."[10]

In light of the obvious violation of the Establishment Clause via these first two considerations a lengthy discourse on the entanglement issue seemed perfunctory in

Morton's view. He did note, however, that school officials were required to interpret the law as well as administer it. He considered this to be sufficient grounds for violation of the entanglement prong.[11]

Another moment of silence was brought under question in New Mexico in Duffy v. Las Cruces Public Schools.[12] Duffy questioned the constitutional validity of a New Mexico act and the right of the legislature to pass such an act. The statute stated:

> 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.[13]

The opinion of the court was delivered by District Judge Burciaga. He noted that the statute was nearly identical to the Massachusetts act which had formerly been upheld. Nevertheless, he found the statute to be a violation of the Establishment Clause under the Lemon Test. He determined that the purpose of the act had been to establish prayer as a part of the school day. The argument that words such as "contemplation" and "meditation" provided an intent of "neutrality" on the part of the legislature was not credible in his view. In fact, the bill's author stated that his purpose was to draft "a bill which would authorize some form of prayer in our public schools."[14] Futhermore, on the occassions that the school board discussed the matter, he noted that, only the religious aspects were debated. It was clear in his view that the legislature, the

school board, and the public considered the enactment to return prayer to daily classroom activities. He further asserted:

> It does not matter whether the moment of silence would be regarded as a proper devotional exercise by a cleric or another person knowledgeable in such affairs. The ill lies in the public's perception of the moment of silence as a devotional exercise. If the public perceives the state to have approved a daily devotional exercise in public school classrooms, the effect of the State's action is the advancement of religion.
>
> Furthermore,
>
> There is a clear and present danger that the children will perceive the moment of silence as government approval of religion.[15]

For these reasons Burciaga found the sole purpose of the statute had been to establish religion. Therefore, the primary effect of the statute was to encourage religious training in the schools.[16]

Finally, he determined that excessive entanglement existed by the mere fact that such state-sponsored prayer existed in a public school during the school day. He also argued that the act caused a great deal of political divisiveness among the school board, the educators, and the public. Such divisiveness was evidence of excessive entanglement. Therefore, Burciaga, ruled that the statute violated the third prong of the Lemon Test.

Another moment of silence was challenged in New Jersey in May v. Cooperman.[17] It is particularly notable as "prayer" was not mentioned as an alternative activity in the

statute. It read:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 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.[18]

District Judge Debevoise stated that the statute was a violation of the Establishment Clause when analyzed by the Lemon criteria. He determined that the purpose of the enactment was to return prayer to the public school classroom. He found this to be the case as the New Jersey legislature had repeatedly attempted to pass bills that would allow time for prayer in public schools. He asserted that this had been in response to public outcries for the return of such prayer. Additionally, he noted that those who had encouraged its passage were those who had expressed an interest in providing a mandated time for prayer in public schools.[19]

Debevoise also found the primary effect of the statute was to both advance and inhibit religion. It advanced religion by setting aside a prescribed time in which "all students and teachers must assume the traditional posture of prayer of some religious groups and during which those who pray in that manner can do so."[20] It inhibited religion by making prayer perfunctory. It also inhibited religion in that not all religious persuasions would be able to participate. Those who by the tenets of their religion were required to engage in vocal prayer could not participate.

Therefore the practice of their religion was prohibited by a silent moment. For these reasons Debevoise ruled that the statute violated the second prong of the Lemon Test.[21]

The court also found the statute to create an excessive entanglement between the state and religion. It ruled thusly because of the divisive nature of the bill. The enactment pitted believers against nonbelievers and some religions against others; therefore, it brought child against child and parent against parent. Thus, the enactment was a violation of the third prong of the Lemon Test.[22]

The final case I will note in moment of silence adjudication is the recent decision of the Supreme Court of the United States in Wallace v. Jaffree.[23] The case had arisen in Alabama when Jaffree questioned the constitutionality of a legislated moment of silence in that state. It 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 each 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.[24]

The majority opinion was penned by Justice Stevens. The court found the statute to be a violation of the Establishment Clause because the purpose of the enactment was to establish religion. The opinion did not deal with the other prongs of the Lemon Test as it was not necessary once it was determined that the purpose of the statute was not secular. The basis for the Court's ruling was twofold.

First, it found the intent of the legislature to be religious. In fact, the state did not attempt to show that the purpose had been secular. Moreover, the sponsor of the bill said that his sole reason for sponsoring the statute was to return prayer to the public schools. Second, the inclusion of "prayer" as an alternative evidenced state endorsement of prayer--an ultimate act of religious faith--as an activity for children while attending public schools. For these reasons the Court ruled the act to violate the Establishment Clause of the First Amendment.[25]

A concurring opinion was offered by Justice Powell. First, he wished to endorse the Lemon Test as a means of determing Establishment Clause violations. He noted that it is the only "coherent test" a majority of the Justices have ever been able to agree upon. He noted this in response to criticism of the Lemon Test which will be discussed later. It was of vital concern to him that no secular purpose had been purported for the enactment. Powell would have upheld the statute despite its religious nature if there had also been a clear secular purpose. He further noted that he considered it unlikely that a moment of silence would violate the last two prongs of the Lemon Test, but did not expand upon his assertion.[26]

An additional concurring opinion was presented by Justice O'Conner. She stated "that the standards announced in Lemon should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment."[27] She suggested that what should be

considered was whether the state by its action endorsed religion. If a state attempts by statute to convey that belief in a particular religion or even religion generally is a preferred position, then the state infringes upon religious liberty as guaranteed by the Establishment Clause. Therefore, the purpose of the statute would have been religious and the effect of such a statute could only advance religion. The inquiry into the secular purpose prong with regard to moments of silence "should be deferential and limited" in her view. The courts should defer to the legislature if it presents a reasonable secular purpose in the bill or its legislative history.[28] She determined that "courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer."[29] With regard to the second prong of the Lemon Test, she argues, that the effect can only be determined by supposition. If an objective observer views the statute as the endorsement of prayer by the state then the effect is to advance religion. However, if a statute allows for prayer, but does not endorse it as preferential behavior, a statute should withstand constitutional scrutiny. The intent of the Alabama legislature, however, was so blatantly religious; their endorsement of prayer so obvious; that the only possible determination was that the statute violated the Establishment Clause.[30]

Chief Justice Burger dissented from the majority. His arguments were fourfold: (1) He did not believe that Alabama was endorsing prayer by including it as an alternative during a moment of silence. He saw no difference between the state allowing prayer as an alternative and the state paying for legislative chaplins. Neither was an endorsement of prayer in his view; (2) The reliance of the court upon the statements of the primary sponsor of the legislation was too great. While it may well have been his intent to return prayer to the public schools, that in itself did not indicate that the intent of the legislature as a whole was religious; (3) He asserted that the court had applied the Lemon Test too strictly. He believed that the prongs were meant to be "signposts," not an inflexible wall; and (4) He argued that the statute merely provided a time for prayer, but did not mandate it as an activity. Such did not establish religion in his view. In his words "[t] he notion that the Alabama statute is a step toward creating an established church borders on, if it does not tresspass into, the ridiculous."[31]

An additional dissenting opinion was offered by Justice White. He merely wished to note that he could not fatham how a moment of silence could be a violation of the First Amendment regardless of whether prayer was an alternative. He asserted that even if the statute had only mentioned "meditation" a student could still use the period for prayer. If a student had asked if such was permissable, the

teacher, he argued, could only respond affirmatively. For these reasons he saw no difference between a moment of silence for prayer and a moment of silence for meditation. He believed that either was a permissable state activity, but did not expound upon this view.[32]

Justice Rehnquist dissented most vehemently. He asserted that the framers' of the Constitution had never meant for a wall to be erected between church and state. He believed the sole purpose for the religion clauses had been to prevent an official national religion from being established and possibly discrimination between religions; nothing more.[33] He cites the passage of the Northwest Ordinance which noted that "[r] eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[34] Rehnquist also finds fault with the Lemon Test. He would abandon it completely because the test is based upon the faulty historical analysis that the Court had adopted some forty years before.[35]

A Definition of the Lemon Test

There are four components of the secular purpose requirement which need to be addressed to determine whether a legislated moment of silence violates the establishment clause. These are (1) the context under which the acts were adopted, (2) similarities in form to the unlawful exercises, (3) legislative intent, and (4) codification.

Usually moments of silence are adopted due to a movement to bring religious exercises back to the public schools. For example, after a state statute in Massachusetts which allowed for both Bible reading and prayer was invalidated,[36] the legislature passed a moment of silence statute which withstood constitutional scrutiny.[37] Next the legislature rewrote the statute which had been upheld to read:

> 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 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.[38]

The Massachusetts Supreme Court ruled the enactment a violation of the establishment clause, noting that the statute was religious on its face.[39] Then the legislature reinstated its original moment of silence statute.[40] The cycle of events in Massachusetts is representative of repeated attempts by the states to find a means of returning religious exercises to the public schools.

A second notable item to be considered under the secular purpose prong is the similarity in practice between moments of silence and those religious exercises which have been invalidated. Moments of silence are held in the morning and are of minimal duration.[41] For example, moment of silence statutes in Alabama,[42] Arizona,[43] Massachusetts,[44] New Mexico,[45] and Tennessee[46] provide that the duration of their silent moments not exceed a sixty second

period. Additionally, moments of silence usually take place on a voluntary basis.[47] This is true of Arkansas,[48] Connecticut,[49] Georgia,[50] Louisiana,[51] and Michigan.[52] However, some states do require participation such as Illinois,[53] Kansas,[54] and Pennsylvania.[55] The fact that many legislatures recognize that moments of silence should be voluntary indicate that, like those exercises previously outlawed, moments of silence are considered to be religious in nature. Such a recognition also indicates a concern involving the free-exercise clause. If a legislature required participation, there might well be free-exercise objections by those who felt they were being required to participate in a religious exercise. Thus, the very "voluntariness" of moment of silence statutes make them constitutionally suspect.

Historically speaking, moments of silence certainly do not have the religious connotations of Bible reading or prayer, but it is significant that the justifications given for moments of silence are the same used to justify the practices previously invalidated. Rationales given for moments of silence are usually that they allow for the instillation of moral values, enhance discipline and serve as a time to calm students at the beginning of the day.[56] For example, in testimony before the New Jersey Senate Education Committee on June 21, 1982, Assemblyman Zangari argued that the adoption of a moment of silence law in that state "would serve a useful psychological purpose" for the

students.[57] Additionally, school board members in Las Cruces, New Mexico asserted that the adoption of a moment of silence in that school district "was to enhance discipline and instill in the students the 'intellectual composure' necessary for effective learning."[58] While such results are a legitimate goal of education, if the means used are religious in nature, the act is a violation. Additionally, there are other means by which such goals can be reached. Such was noted by Justice Brennan in his concurring opinion in Schempp when he suggested that patriotic readings would meet such a need.[59]

The third element of the secular purpose prong is whether the intent of the legislature was religious or secular. Many point to the language of the statutes themselves to show a secular purpose. In particular, some argue that if a statute has language stating that the moment of silence is for "meditation or prayer" as opposed to "meditation and prayer" it gives an aura of neutrality by the government thus somehow making it secular.[60] Such an argument has little, if any, merit. The use of such a disjunctive only serves to emphasize the voluntary nature of the act. It does not however, squelch establishment clause questions. This is particularly true with the inclusion of the word prayer. Prayer has long been considered an ultimate act of religious faith.[61] In fact, the inclusion of the term "prayer" should make such a statute unconstitutional unconstitutional prima facie.

The fact that legislators have a tendency to express a concern over the violation of First Amendment rights when instituting moments of silence would indicate that they recognize the religious nature of such activities. For example, Representative O'Donnell of the New Mexico House requested the General Counsel of the State Education Department, Mr. William McEuen, to draft a bill in such a manner to permit prayer in schools and survive First Amendment attacks.[62] Even if we were to accept that a statute contained solely secular language the intent of the legislature still might be questionable.[63] Such was evidenced by the May case previously discussed.

Another indicator of a religious intent on the part of the legislature may well be the statements of the legislators adopting the amendment. For example, New Jersey Assemblyman Zangari, in response to a question of why a moment of silence was needed when students could already pray when they desired, replied "They (students) publicly won't do it (pray) unless they are directed."[64] The sponsor of Alabama's moment of silence testified in court that his sole reason for introducing his bill was to return prayer to the public schools.[65] While this method is useful in determining legislative intent, it is also problematic. A statement by one legislator does not necessarily mean that the entire legislature had the same intent. Additionally, many legislatures do not record their proceeding; therefore, many times it is impossible to determine intent in this manner.

Attempts have been made by some legislatures to con- "constitutionalize" their statutes by denying that they have a religious purpose in the bill itself. For example, Arkansas's statute asserts that its moment of silence "is not intended to be, and shall not be conducted as, a religious service or exercise . . . ."[66] Statutes in Illinois,[67] Indiana,[68] Kansas,[69] and Pennsylvania,[70] use similar language in their denials. Certainly the validity of a statute is questionable if legislatures feel it necessary to deny that the purpose of the statute is religious. Such a denial is not sufficient to answer the Constitutional objections to religious exercises in public schools raised by the Court. Further, such a denial is of no consequence if the true purpose of the bill is to bring religious exercises back to the public schools or if the effect of its implementation is to do so. Along those lines, it is interesting to note that the Arkansas legislature in Section 3 of Acts 1975 (Extended Sess., 1976), No. 1084, found "that the right of a young individual to choose whether he or she should engage in silent meditation or prayer is seriously abridged by a general prohibition against prayer in schools" and further "that it is in the best interests of the citizens of this State that this Act (the moment of silence statute) be effective immediately upon its passage in order to encourage and promote freedom of religion or philosophical belief." If

the state enacts a prescribed time to be used as an opportunity for a student to exercise freedom of religion, it is incomprehensible that such a period is not meant to be used for religious exercises. Therefore, such a denial may indicate that the true purpose of the legislation is to return religious exercises to the public schools.

Finally, the codification of moment of silence statutes may indicate a religious purpose. The moment of silence laws of Arkansas,[71] Illinois,[72] Indiana,[73] and Maryland[74] are codified in sections dealing with religion.[75] This does not necessarily mean that the effect of such a statute would be religious, but the placement of such a statute in a section of a state code dealing with religion gives strong evidence that the bill was religious in nature.

There are three aspects of the primary effect prong of the Lemon Test that need to be considered in determining the constitutionality of an encroachment. These include the teacher-student relationship in the classroom, the possibilities of coercion, and public perception.

An autocratic community exists in the classroom consisting of the students and the teacher. The teacher acts not only as an instructor, but additionally as the "law-giver" and "law-enforcer." Teachers serve as role models for students to follow. Students are taught to obey the "law" that the teachers deem to create. If a teacher believes that students should pray in school he or she may influence them to do so in at least two ways. First the

teacher may give off physical signs of prayer thus indicating to the students that prayer is the correct posture to assume. Additionally, if a statute contains the word prayer, the teacher may influence the students to pray by giving special emphasis to prayer as an alternative.[76]

Other students may also influence classmates to pray by giving off physical signs to other students that prayerful worship is the appropriate mode of behavior for a moment of silence. It has been empirically established that coercive peer pressure exists.[77] Sociologists and psychologists have long recognized that coercive effects do take place in the classroom, particularly among the students peer group. A child will conform to the majority, even if he or she strongly believes that the majority is wrong for fear of being an outcast.[78] This is illustrated by the experience of several litigants in the McCollum and Schempp cases. Prior to the McCollum decision, Terry McCollum had originally refused to participate in such activities during the fall semester of his fourth grade year, but did so in the Spring semester. In the fifth grade he was one of two students who refused to participate, but by the end of the first semester the other student was participating in the program. In his school students representing thirty-one different denominations or religions took part in the program. Prior to the Schempp lawsuit, Donna Schempp never told school authorities that the practice of Bible reading was in violation of her religious tenets and, in fact, she

had read the Bible aloud to the class "voluntarily."[79] It is evident that a coercive effect does exist in the "community" of the classroom which may establish prayer as the norm during a moment of silence. Such a coercive effect would cause the advancement of some religions and the inhibition of others; therefore, the second prong of the Lemon Test is violated by such a coercive effect.

Another indicater of the principal or primary effect of the implementation of a moment of silence statute is the public perception thereof. This is an element which is being given creedence by the judiciary. Consider the reliance upon it noted by District Judge Burciaga in the Duffy case previously discussed.[80] Additionally, note the assertion of Justice O'Conner in her concurrence in Wallace in discussing the perception of an objective observer in finding the Alabama statute in violation of the establishment clause. Media sources have indicated that the public perceives a moment of silence as a means of restoring prayer to the public schools. Such statutes are described by the media "as but another manifestation of the ongoing controversy regarding the role of religion in public schools." One editorial actually suggested, "It would have been much better for all concerned if (silent moment laws) honestly required prayer, spoken out loud as we used to, for that's the only way you can really be sure kids are praying."[81]

An additional indication that the public perceives moments of silence as a religious exercise are the letters

received by school officials and legislators. For example, each letter received by the legislative sponsor of New Mexico's now defunct moment of silence law mentioned the religious intent of the proposal. School district officials in New Mexico received letters asking for the adoption of the proposed moment of silence locally as a means of returning prayer to its schools. After its adoption these officials continued to receive letters indicating that the public considered the effect of the moment of silence's implementation to be to restore religious exercises to the public schools.[82] The Superintendent of Schools in Princeton, New Jersey, Dr. Paul Houston, noted that after the moment of silence statute was adopted in that state he received many phone calls from concerned parents who did not want their children subjected to religious exercises in the public school.[83] While these reactions on the part of the public do not allow for scientific analysis, they certainly give a sense of the perception of the community, that the effect of the proposal was religious.

The last prong of the Lemon Test concerns the problem of excessive entanglement. Such entanglement can only exist if an enactment is determined to be religious, with regard to moment of silence cases. Excessive entanglement consists of two criteria. These are administrative entanglement and political divisiveness. Administrative entanglement may be

defined as a situation in which public employees are directly involved on a continuing basis with religious institutions or practices during public time. Political divisiveness may be defined as conflict among religious groups and between persons of different religious persuasions on a continuing basis.

Excessive administrative entanglement does exist with moments of silence in public schools. The teacher, a public employee, is directly involved with a religious act. Such direct involvement occurs when the teacher provides a daily atmosphere of silence for the religious act to occur. Several courts have determined such as sufficient evidence to find a statute in violation of the first criteria.[84]

Moments of silence also violate the second criteria. Such statutes create divisions among religious groups and between persons of different religious persuasions. These divisions occur because the state cannot possibly create a period of silence that may be utilized by all religions. Faiths which are non-theistic do not include prayer as a part of their beliefs. Children who follow such religious tenets would be subject to harsh criticism by others who did believe in prayer. The effect of such criticism leads to division among the students and even has the potential for religious hatred. Some religions which do believe in prayer would not be benefitted either. Moslems, for example, would not be able to perform a prayerful act of religious worship. Their prayers are not suited to a period of short duration.

Further, the tenets of Islam require their prayers to be vocalized. Such prayers could not take place during a mandated silent period. In short, moments of silence tend to cause dissention between persons over religious doctrines and practices. Rather than promoting harmony among religions as school prayer proponents assert, moments of silence only tend to cause havoc. Therefore, moments of silence violate the second criteria and thus the excessive entanglement prong.

The Passage, Ratification, and Implementation of West Virginia's Amendment

Prior to evaluating West Virginia's Amendment it may be beneficial to the untutored reader to have some knowledge about the passage, ratification, and implementation of the amendment. On January 11, 1984, Senate Joint Resolution 1 was introduced by Senator Ted Stacy (D-Raleigh) and referred to the Senate Committee on the Judiciary. The original resolution required that:

> Public schools shall provide a designated time for any student wishing to exercise his right to religious worship or prayer. No student of a public school may be denied the right to daily worship or prayer.[85]

On March 2, 1984, the Senate Committee on the Judiciary considered the resolution and amended it to read as follows:

> Public schools shall provide a designated time for any student wishing to exercise his or her right to personal and private contemplation and meditation. No student of a public school may be denied the right to personal and private contemplation and meditation nor shall any student be required or

> encouraged to enter into any given contemplation or meditation unrelated to the curriculum.[86]

The reasoning behind the change in language was to attempt to avoid the constitutional problem of separation of church and state. It was believed that the resolution in its original form was blatantly unconstitutional.[87] The resolution was sent to the floor of the Senate as a committee substitute and after having been read on three consecutive days was passed by the required two-thirds majority and communicated to the House of Delegates.

On January 11, 1984, Delegates Charles Shaffer (R-Upshur) and Joe Miller (D-Barbour) introduced House Joint Resolution 1 (HJR 1) which contained verbatim the language of SJR 1. The resolution was referred to the House Committee on Constitutional Revision and considered March 2, 1984. The resolution was amended and sent to the floor as a committee substitute with the recommendation that it do pass.[88] The resolution stated that:

> Public schools shall provide a two minute period of silence at the beginning of each school day to be used for silent prayer or medication [sic] as each pupil may desire.[89]

On second reading on March 7, 1984, the resolution was amended on the House floor by striking the two minute requirement and inserting "a brief daily period."[90] Delegate Thais Blatnik (D-Ohio) attempted but failed to amend the resolution by adding:

> The respective county boards of education shall provide all public, private, paraochial and denominational schools, located within this state a copy of the Roman Catholic Cathecism [sic] , a

> picture of the Pope, a copy of the Torah, a picture of Golda Meier [sic] , a picture of Billy Graham, a picture of Jerry Falwell, a picture of Madelyn O'Hara [sic] , a statute [sic] of Budda, the teachings of Mahatma Ghandi, the teachings of Mohammed, a picture of Malcolm X, the doctrines of Martin Luther King, a picture of Martin Luther, the teachings of Jehovah Witnessess, the concepts of the Seventh Day Adventists, a version of the P.T.L. Club, a recording of Elvis Presley singing "How Great Thou Art", the teachings of Diettrich, Bohnnoffer and Bultmann, a recording of "Flip" Wilson as minister of the "Church of What's Happening Now Baby", and a tape of the Mormon Tabernacle Choir singing "Glory, Hallelujah."[91]

The purpose of the somewhat humorous amendment was to show the great variety of religious thoughts within West Virginia and within the legislative body itself. There are approximately thirty denominations represented in the legislature as well as a myriad of religious thought.[92]

On that same day, Committee Substitute for Senate Joint Resolution 1 was amended by striking all language after the enacting clause and inserting in lieu thereof the terms of Committee Substitute for House Joint Resolution 1.[93]

On March 8, 1984, the amended version of Committee Substitute for Senate Joint Resolution 1 was considered for passage by the House. The resolution was voted on and adopted, receiving the required two-thirds majority.

Committee Substitute for House Joint Resolution 1 was tabled on the motion of Majority Leader Marion Shiflet (D-Monroe) on March 8 immediately after the adoption of the House amended version of Committee Substitute for Senate Joint Resolution 1.[94]

The result of the vote on Committee Substitute for Senate Joint Resolution 1 was communicated to the Senate and a request was made for the Senate to concur in the House amendment. The Senate refused to concur and asked for the House to recede, which it refused to do. Conferees were appointed by both bodies to work out the differences between the two versions. The Speaker of the House appointed Delegates Marc Harman (R-Grant), Joseph Cipriani (D-Brooke), and John Hatcher (D-Fayette). The President of the Senate appointed Senators Sam White (R-Pleasants), Bobby Rogers (D-Boone), and Ted Stacy (D-Raleigh). On March 10, 1984, the Conference Committee reported back a revised version containing the major provisions of both sides. The Conference Committee Report and the revised resolution were adopted by both bodies. The final version stated:

> 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 the right to personal and private concontemplation, 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.[95]

The amendment was ratified by the voters in the November 6, 1984 election and after the results were certified by the Secretary of State, the State Superintendent of Schools, Roy Truby, issued guidelines for its implementation. These guidelines determined a brief period to be between twenty and sixty seconds. Further, in recognition of the religious nature of the amendment, the

memorandum noted that "students should be allowed to sit, stand, kneel, or engage in other acts symbolic of their faith." It further directed that all public school personnel should restrict their involvement with the amendment's implementation to announcing, "A moment of silence will now be observed for contemplation, meditation, or prayer." If questions were to arise from students it was suggested that personnel restrict their response to remarking, "We are doing this in compliance with the State Constitution."[96] The implementation of the amendment varied from county to county and school to school. Mercer County Schools implemented the amendment immediately after its ratification.[97] On the other hand, Superintendent George Edwards announced that Fayette County Schools would not institute the amendment until its constitutionality was decided in court.[98] Additionally, prayer was deleted as an alternative in some schools. For example, in the Wright Denny Intermediate School in Jefferson County the principal announced over the public address system each morning the observance of a brief period of "silent meditation." No mention was made of "contemplation" or "prayer."[99] In one Ohio County school the announcement of the moment of silence was left for the teacher to hold during the home room period. Teachers were instructed not to mention prayer as an alternative.[100] Of course many school systems wholly followed the state's guidelines. This was generally true of schools in Cabell,[101] Marion,[102] and Brooke[103] counties.

The West Virginia Amendment Under The Lemon Test

West Virginia's "Voluntary Contemplation, Meditation or Prayer in School Amendment" is unconstitutional via the First Amendment of the U. S. Constitution.[104] Such is clearly evident when evaluated by the three prongs of the Lemon Test and their components.

The West Virginia Amendment has no secular purpose. It was passed as a means of returning prayer to the public schools of West Virginia. The context under which it was adopted indicate so. It was only one of many bills which had been introduced in the last decade on school prayer.[105] It was, however, the first successful measure. Unlike many other statutes this amendment did not deny a religious purpose in the measure itself.[106] The Senate Judiciary Committee did attempt to "constitutionalize" the measure by removing the religious connotations of the original proposal and inserting secular language.[107] The Chairman of the Senate Judiciary Committee, Senator Si Boettner (D-Kanawha) noted that the original proposal was unconstitutional prima facie.[108]

The West Virginia Amendment is conducted in a similar manner to those religious exercises outlawed by the Supreme Court some twenty years ago. The moment of silence is held in the morning as a part of opening exercises. It is also of minimal duration. Finally, it takes place on a voluntary basis. Additionally the justification for holding a moment

of silence in West Virginia Schools are generally the same given for holding these religious exercises struck down by the U. S. Supreme Court.[109]

The intent of the legislature in adopting the constitutional amendment was religious in nature. It was done in order to return prayer to the public schools. Like many moments of silence statutes the amendment allows a choice of "meditation or prayer," but nevertheless contains the word "prayer." The inclusion of this term clearly indicates a religious intent on the part of the legislature. Additionally, the statements of many legislators show such an intent. The Senate sponsor of the amendment, Senator Ted Stacy (D-Raleigh), publicly noted that his sponsorship of the amendment was due to his belief that "children need to be allowed to worship God in school."[110] Senator Mario Palumbo (D-Kanawha) asserted that the amendment was religious. He believed that the legislature was attempting to "do by indirection what it cannot directly do."[111] In the House there was vehement debate on the merits of the resolution. Delegate Joseph P. Albright (D-Wood), Chairman of the House Committee on the Judiciary, suggested that in order to keep the oath a Delegate takes upon assuming office, requiring him or her to uphold the Constitution of the United States, it would be necessary to vote "Nay," as the resolution violated the doctrine of separation of church and state. Delegate Sammy Dalton (D-Lincoln), Vice-chairman of the House Committee on Constitutional Revision, stated that

anyone who would vote against school prayer could not possibly believe in God. Delegate Martha Wehrle, Chairman of the Committee on Constitutional Revision, refused to defend the resolution reported out of her committee. She argued that the resolution was an unconstitutional attempt to return prayer to public schools. She further asserted that any court would strike it down as such.[112]

The fact that the West Virginia Amendment was adopted under a context of returning prayer to the public schools; that an attempt was made to "constitutionalize" the statute by inserting secular language; that similarities in practice and justification exist between the amendment and the outlawed religious exercises; and that the intent of the legislature was blatantly religious can only lead to the conclusion that the primary purpose of the amendment was not secular. Therefore the amendment violates the first prong of the Lemon Test.

The amendment has a primary effect which both advances and inhibits religion. As a religious act it could have no other effect. It advances some religion, particularly Christianity, by allowing just enough time to say the Lord's Prayer. It also inhibits other religions, such as Islam. Silent prayer is forbidden for Moslems. It also may "make fun" of religion and thereby inhibit it. One student noted that several of her classmates teasingly chanted "Ohm" during the designated period.[113] The amendment also has a coercive effect which may advance religion. One teacher said that

after a couple of students stood up for the silent moment the rest of the class followed.[114] One student reported that he stood up in class because he was afraid his teacher would punish him if he did otherwise.[115] Certainly the public perception was that the amendment was a religious act. All of the speakers at the public hearing held by the Senate Committee on the Judiciary noted that the resolution was religious in nature.[116] For example, one speaker complained "this bill is an attack upon the religious and patriotic ideals I cherish most deeply."[117] He did not believe that religious exercises had any place in public schools. Another speaker, who was a public school teacher, begged the Committee to pass the resolution and thereby advance religion, saying, ". . . they (parents) are waiting for word back home . . . that their children will be guaranteed or reaffirmed their right to pray."[118] The words of then Secretary of State, A. James Machin, were probably reflective of the attitude of many. Regardless, his words could only have increased the perception of the public that the amendment was religious. After certifying the amendment's ratification Machin stated, "This is a great day. I supported this amendment, and I am delighted to share it with our brothers in Christ this day."[119] He also noted, "There's going to be some civilized libertarians raise hell. . . . Let them come now. We're ready for them."[120] He later contended that "As a nation, one that believes in God, we should respect . . . minorities, but not let them dictate to the majority what is to be done.

I prayed at Farmington High School and the roof didn't fall in . . . . If I had my way, they (students) would pray outloud. This is a Christian nation."[121]

The facts that the amendment tends to favor one mode of religion to another; that coercive pressures do exist in the classroom for the students to take part; and that the perception of the public is that the amendment is a religious act, lead to the conclusion that the amendment both advances and inhibits religion. Therefore, it violates the second prong of the Lemon Test.

The West Virginia Amendment also creates an excessive entanglement between the state and religion. It suffers from both administrative entanglement and political divisiveness. It fails the administrative entanglement criteria because it involves public employees with religion. It requires public school teachers to take time out each day to enforce what turns out to be nothing less than religious worship. This is sufficient evidence to create administrative entanglement.

The amendment also creates divisiveness between students and between religions. As one student feared, "If you don't pray, people will look at you and think you're a heathen. It's infringing on other peoples beliefs."[122] Illustrative of this is the experience of a young female student in Kanawha County. She read during the first moment of silence held in her class. She was later maligned by other students and told "that she would go to hell 'with all the other Jews.'"[123] Certainly it is evident that the amendment

creates divisiveness among students and among religions. As noted above, the amendment also creates an excessive administrative entanglement. For these reasons it is apparent that the amendment violates the final prong of the Lemon Test.

It nas been evidenced above that West Virginia's "Voluntary Contemplation, Meditation or Prayer in School Amendment" violates all three prongs of the Lemon Test. The only viable conclusion to be drawn therefore, is that the amendment is a breach in the wall of separation demanded by the First Amendment of the U. S. Constitution.

NOTES

[1]403 U.S. 602 (1971).

[2]Committee For Public Education v. Nyquist, 413 U.S. 756 (1973).

[3] 48 F. Supp. 1161 (1982), vacated 718 F. 2d. 1098.

[4] Sec. 49-6-1004 Tennessee Code Annotated (1983).

[5]Beck, p. 1163.

[6]West Virginia Board of Education v. Barnette, 319 U.S. 623 (1943).

[7]Ibid., p. 638.

[8]Beck, p. 1163.

[9]Ibid., pp. 1164-65.

[10]Ibid., p. 1165.

[11]Ibid.

[12]557 F. Supp. 1013 (1983).

[13] Sec. 22-5-4.1 New Mexico Statues Annotated (1981).

[14]Duffy, p. 1015.

[15]Ibid., p. 1016.

[16]Ibid., p. 1020.

[17]572 F. Supp. 1561 (1983).

[18] Sec. 18A:36-4 New Jersey Statutes Annotated (West Supp. 1984-85).

[19]May, pp. 1571-72.

[20]Ibid., p. 1574.

[21]Ibid., pp. 1574-75.

[22]Ibid., pp. 1575-76.

[23]No. 83-812,____ U.S.____(1985).

[24]Sec. 16-120.1 Alabama Code (Supp. 1984).

[25]Wallace, pp. 17-23.

[26]Ibid., pp. 1-6, Justice Powell concurring.

[27]Ibid., p. 3, Justice O'Conner concurring.

[28]Ibid., pp. 3-9, Justice O'Conner concurring.

[29]Ibid., p. 9, Justice O'Conner concurring.

[30]Ibid., pp. 10-13, Justice O'Conner concurring.

[31]Ibid., pp. 2-6, Chief Justice Berger dissenting.

[32]Ibid., p. 1, Justice White dissenting.

[33]Ibid., pp. 3-10, Justice Rennquist dissenting.

[34]Ibid., p. 10, Justice Rehnquist dissenting.

[35]Ibid., pp. 17-22, Justice Rehnquist dissenting.

[36]See Attorney General v. School Commissioner, 199 N.E. 2d. 553 (1964).

[37]Supra, p. 54.

[38]Kent v. Commissioner of Education, 402 N.E. 2d. 1340, 1341 (1980).

[39]Ibid.

[40]David Z. Seide, "Daily Moments of Silence in Public Schools: A Constitutional Analysis," 58 New York University Law Review 364, 394 (1983).

[41]Seide, pp. 400-01.

[42]Sec. 16-1-20.1, Alabama Code (Supp. 1984).

[43]Sec. 15-522, Arizona Revised Statutes Annotated (1984).

[44]Ch. 71, Sec. 1A, Massachusetts General Laws Annotated (1982).

[45]Sec. 22-5-4.1, New Mexico Statutes Annotated (1981).

[46]Sec. 49-6-1004, Tennessee Code Annotated (1983).

[47]Seide, pp. 400-01.

[48]Sec. 80-1607.1, Arkansas Statutes Annotated (1980).

[49]Sec. 10-16a, Connecticut General Statutes (1983).

[50]Sec. 20-2-1050, Georgia Code Annotated (1982).

[51]Sec. 17:2115, Louisiana Revised Statutes Annotated (West 1982).

[52]Sec. 380.1565, Michigan Compiled Laws Annotated (Supp. 1984-85).

[53]Ch. 122, Sec. 771, Illinois Revised Statutes (1983).

[54]Sec. 72.5308a, Kansas Statutes Annotated (1980).

[55]Title 24, 15.1516.1, Pennsylvania Statutes Annotated (Purdon Supp. 1984-85).

[56]Seide, pp. 397-98.

[57]May, p. 1564.

[58]Duffy, p. 1016.

[59]Supra, p. 25.

[60]See Gaines, p. 343.

[61]Notes, "The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools," 96 Harvard Law Review 1874, 1882, 1884 (1983).

[62]Duffy, p. 1015.

[63]Notes, 1882-83.

[64]May, p. 1564.

[65]John Sexton and others, Brief Amici Curiae on behalf of the American Civil Liberties Union and the American Jewish Congress. Wallace v. Jaffree, No. 83-812, U.S., p. 10.

[66]Sec. 80-1607.1, Arkansas Statutes Annotated (1980).

[67]Ch. 122, Sec. 771, Illinois Revised Statutes (1983).

[68]Sec. 20-10.1-7-11, Indiana Code Annotated (1982).

[69]Sec. 72.5308a, Kansas Statutes Annotated (1980).

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[71]Sec. 80-1607.1, Arkansas Statutes Annotated (1980).

[72]Ch. 122, Sec. 771, Illinois Revised Statutes (1983).

[73]Sec. 20-10.1-7-11, Indiana Code Annotated (1982).

[74]Sec. 7-104, Maryland Education Code Annotated (1985).

[75]Notes, p. 1880.

[76]Ibid., pp. 1889-91.

[77]See Solomon Asch, "Opinions and Social Pressure," Scientific American, vol. 193, no. 5. November, 1955, pp. 31-35.

[78]Choper, pp. 343-44.

[79]Ibid., pp. 345-46.

[80]Supra, p. 67.

[81]Seide, pp. 401-02.

[82]Ibid., pp. 402-03.

[83]May, pp. 1566-67.

[84]See Karen B. v. Treen, 653 F. 2d. 897, 903 (1981).

[85]West Virginina Legislature, 66th Legislature, 2nd Session, Senate Joint Resolution 1, pp. 1-2.

[86]West Virginia Legislature, 66th Legislature, 2nd Session, Committee Substitute for Senate Joint Resolution 1, pp. 1-2.

[87]Statements by Mark Hunt, Intern, Senate Committee on Judiciary; John J. Frail, Counsel, Senate Committee on Judiciary, personal interviews, Charleston, WV, May 1984.

[88]West Virginia Legislature, 66th Legislature, 2nd Session, Minutes of the House Committee on Constitutional Revision, March 2, 1984.

[89]West Virginia Legislature, 66th Legislature, 2nd Session, Committee Substitute for House Joint Resolution 1, p. 2.

[90]West Virginia Legislature, 66 Legislature, 2nd Sesesion, Journal of the House, March 7, 1984, p. 1159.

[91]Ibid., pp. 1159-60.

[92]Statement by Thais Blatnik, Member, House of Delegates, personal interview, Charleston, WV, April 1984.

[93]West Virginia Legislature, 66th Legislature, 2nd Session, Journal of the House, March 8, 1984, pp. 1160-61.

[94]Ibid., p. 1270.

[95]West Virginia Legislature, 66th Legislature, 2nd Session, Enrolled Committee Substitute for Senate Joint Resolution 1, pp. 1-2.

[96]Roy Truby, Memorandum to County Superintendents, December 17, 1984, pp. 1-2.

[97]"Judge Says School Prayer Measure Not Legal Yet," Charleston Daily Mail, December 8, 1984, p. 5B.

[98]"Fayette County School Prayer Start Delayed," Charleston Daily Mail, December 19, 1984, p. 7B.

[99]Statement by Kay T. Skinner, Teacher, Jefferson County School System, personal interview, Charles Town, WV, May 1985.

[100]Statement by Peggy Hand, Teacher, Ohio County School System, personal interview, Wheeling, WV, June 1985.

[101]Statement by Carol Kern, Teacher, Cabell County School System, personal interview, Huntington, WV, June 1985.

[102]Statement by Terry Grieco, Teacher, Marion County School System, personal interview, Fairmont, WV, May 1985.

[103]R.G. Lindsey, Superintendent of Brooke County Schools, Memorandum to Brooke County School Administrators. December 21, 1984.

[104]On March 14, 1985 the U.S. Dist. Court for the Southern District of West Virginia, Beckley, granted a permanent injunction against further implementation of the amendment citing constitutional questions. The decision is now in the process of appeal. See Walter v. Board, No. 84-5366, _____ F. Supp. _____.

[105]There have been a number of bills introduced to hold moments of silence in public schools including HB 712 (1979), HB 777 (1980), HB 748 (1981); SB 220 (1984). There have also been bills introduced in related areas such as permissive participation in prayer in public schools including HB 938 (1981) and HB 1282 (1981); allowing religious meetings in schools such as SB 319 (1982), HB 1282 (1983), and HB 1936

(1983); and creation science including HB 1664 (1981), SB 275 (1982), and SB 294 (1984).

[106] Supra, p. 77.

[107] Supra, p. 84.

[108] West Virginia Legislature, 66th Legislature, 2nd Session, Transcript of Senate Debate, March 6, 1984.

[109] Statement of Charles Shaffer, Member, House of Delegates, West Virginia Legislature, 66th Legislature, 2nd Session, Transcript of House Debate, March 8, 1984.

[110] E. O'Neil Robinson, "Senate Hears School Prayer Debate," Charleston Daily Mail, February 8, 1984, p. 96.

[111] West Virginia Legislature, 66th Legislature, 2nd Session, Transcript of Senate Debate, March 6, 1984.

[112] West Virginia Legislature, 66th Legislature, 2nd Session, Transcript of House Debate, March 8, 1984.

[113] Whitney Clay, "Law Introduces Silent Moments to Kids, Class," Charleston Daily Mail, December 20, 1984, p. 1.

[114] Statement by Kay T. Skinner.

[115] Joann P. Rhody, "Superintendent: Prayer amendment intended to lessen state involvement," The Register/ Herald (Beckley, WV) January 31, 1985, p. 1a.

[116] West Virginia Legislature, 66th Legislature, 2nd Session, Transcript of Public Hearing on Senate Joint Resolution 1, February 7, 1984.

[117] Testimony of Richard Withers, Ibid.

[118] Testimony of Yvonne Jarrell, Ibid.

[119] "School prayer guidelines issued as amendment goes into effect," The Dominion Post (Morgantown, WV) December 18, 1984.

[120] Deborah Baker, "School prayer guidelines are issued," The Charleston Gazette, December 18, 1984, p. 1a.

[121] Rhody, p. 12a.

[122] Whitney Clay, "Students See Good, Bad in Moment of Silence," Charleston Daily Mail, March 16, 1984, p. 4a.

[123] "Almost Immediate End to Moment of Silence Seen," Charleston Daily Mail, February 2, 1985, p. 12a.

CONCLUSION

It has been the contention of this thesis that West Virginia's Moment of Silence Amendment and other similar statutes are an unconstitutional breach in the "wall between Church and State." Chapter One presented the major decisions of the Supreme Court in defining "religion" in the public school classroom. These decisions formulated a standard by which to determine the constitutionality of establishment clause questions. This standard, known as the Lemon Test, requires that a statute have a clearly secular purpose, a primary effect which neither inhibits nor advances religion, and that an excessive entanglement between the state and religion is not created.

In Chapter Two criticisms of the course the Court was adopting in the establishment clause arena as it related to the classrom were noted. These criticisms, in part, led to Congressional and state attempts to overturn or disregard the decisions of the Court. The Congressional attempts to overturn the decisions by constitutional amendment and limitation on judicial review have thusfar all failed to be enacted. The state responses to the decisions in enacting other forms of religious worship for classroom use have been invalidated by the Courts. The only form of state response which had any success at all were moment of silence statutes.

Chapter Three discussed the relevant adjudication in moment of silence cases. Just as the Court's original decisions some twenty years ago which defined "religion" in the classroom by formulating the basis for the Lemon Test, these decisions help form a definition of that test. Next, the West Virginia Moment of Silence Amendment was considered in light of the Lemon criteria and the components which make up each of its prongs. My conclusion was that when evaluated by that standard the West Virginia amendment and other moment of silence statutes of a similar nature are unconstitutional.

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