ANALYSIS OF SCHOOL BOARD POLICIES

RELATING TO THE ESTABLISHMENT CLAUSE

by

Charlie Jeff Perry

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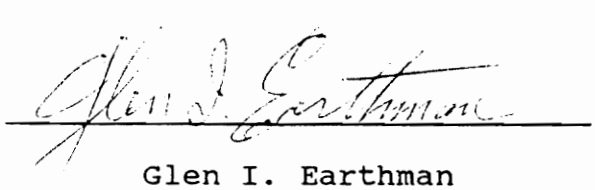

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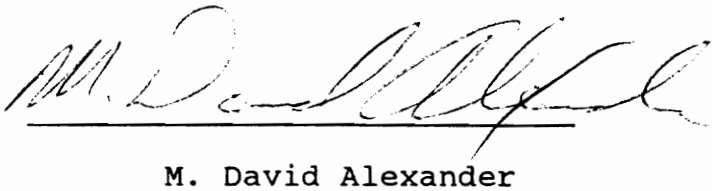

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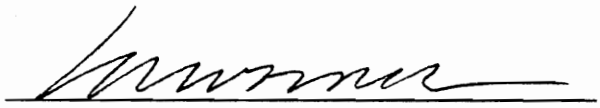

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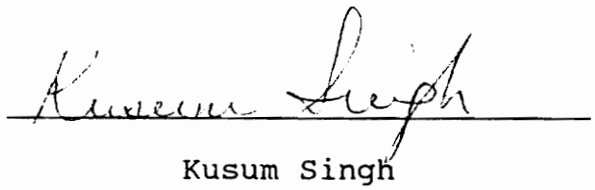

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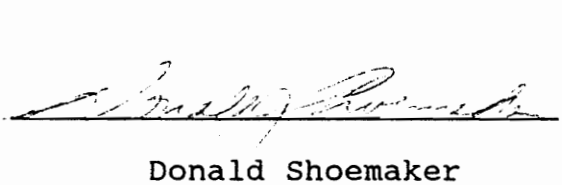

Donald Shoemaker

May, 1994

Blacksburg, Virginia

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(ABSTRACT)

The purpose of this study was to analyze the current school board policies within the Commonwealth of Virginia to determine if they were consistent with the federal judicial system's interpretation of the Establishment Clause. Twenty-four federal district, circuit and Supreme Court cases were analyzed to determine the court's interpretation of the Establishment Clause as it relates to the public schools. Twenty-one criteria were developed from this analysis and the criteria were used to evaluate the school board policies of Virginia school divisions. The criteria were separated into five categories to provide greater clarity and organization. The five categories include general, prayer, Bible reading, release time programs and equal access.

Approximately 91 percent of the schools in the Commonwealth responded to this study. Approximately 55 percent of the schools returned policies which governed at least one Establishment Clause issue. Approximately 36

percent of the schools responding to this study declared that they had no policies relating to any issues as defined by this study.

The data from this study demonstrated that the majority of school board policies throughout the Commonwealth are not consistent with the judicial system's interpretation of the Establishment Clause. The policies which were returned and evaluated satisfied only 35 percent of the criteria within the general category; 12.83 percent of the criteria within the prayer category; 24.34 percent within the Bible reading category; 16.58 percent within the release time category; and 21.05 percent within the equal access category.

Overall the policies which were analyzed satisfied only 22.74 percent of the entire set of criteria. The most successful school division satisfied only 52 percent of the criteria and over 61 percent of the policies failed to satisfy more than 27 percent of the criteria.

DEDICATION

I wish to dedicate this work to my mother who literally gave everything she had to ensure that her children were given the opportunity to succeed.

ACKNOWLEDGEMENTS

There have been several individuals, both in my personal and professional life, who are directly responsible for the completion of this dissertation and program. I feel it is just and necessary to express my appreciation to these individuals who have provided me with invaluable assistance. I must first express my love and gratitude to my wife, Donna, who has been extremely faithful and supportive throughout my entire graduate program. I would not have had the strength nor the will to complete this dissertation without her encouragement, faith, love and moral support.

I must also express my appreciation to each member of my committee for their assistant, hard work, advice and patience. To Dr. Kusum Singh for being such an excellent instructor and for possessing the ability and the desire to teach statistics to helpless individuals such as myself. To Dr. Wayne Worner who has taught me many practical and valuable lessons in the field of public school education. To Dr. Donald Shoemaker for his willingness to help and his professional insight.

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I would be very negligent if I failed to mention the work and support which was given to me by Robert K. Miller. He has spent many long hours proofreading this dissertation and teaching me the art of writing. He has been an superb mentor and I shall strive the remainder of my professional career to match his ability in providing instructional leadership for students and teachers in the public schools.

Finally I wish to express considerable appreciation to Dr. Glen Earthman who has served as my committee chair, advisor and mentor. He has provided excellent guidance and advice over the last few years and he has successfully navigated me through the graduate program at Tech. He has provided constant support, leadership and encouragement. I would have been unable to complete this program without his help. He has given me a considerable amount of his personal time and has provided much more than what was professionally required. This extra support has made the difference in my life and I shall never be able to repay or fully express my appreciation to him.

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CHAPTER ONE

INTRODUCTION

Public school officials within the Commonwealth of Virginia are constantly faced with the potential threat of litigation when their adopted policies fail to protect the individual rights of students, parents, employees and community members.[1] Litigation, especially at the federal level, forces the school divisions to consume enormous amounts of personal, financial and material resources.[2] Litigation can also have a detrimental effect on the relationship that exists between the schools and their community. Because of the enormous drain on division resources and damage to public relations it is critical that public school officials are knowledgeable about school law and that they develop and implement policies which are consistent with federal, state and local laws.[3]

It is estimated that approximately 1,200 to 3,000 law suits are filed against public school officials each year.[4] A public school may be forced to expend over $200,000 to resolve just one legal problem.[5] Litigation also removes key personnel from the instructional process for extended periods of time because one law suit may take years to resolve.

The potential damage that can result from litigation is substantial.[6] Public school officials should ensure their policies are developed and implemented in accordance with the current legal standards which govern public schools.[7] Administrators, board members and teachers should be thoroughly educated in the field of school law so that expensive litigation costs and other negative factors associated with violations of federal, state, or local laws may be prevented or reduced.[8]

Many school board members throughout the Commonwealth of Virginia delegate considerable power to the building level and central office administrators. School board members rely heavily upon the expertise of central office administrators in the development of board policy. Many school board members feel confident that the administrators within their division have adequate training in public school law and feel that both the central office and building level administrators possess a thorough understanding of the court's interpretation of the law.

Various studies have been conducted which analyze the knowledge of administrators and teachers concerning public school law.[9] Many of these studies have reported that both teachers and administrators lack an adequate knowledge of public school law and that this lack of knowledge places

school divisions in considerable jeopardy.[10]

In 1986 Chapman conducted a survey in New York State which was designed to analyze the knowledge and understanding of administrators concerning public school law.[11] He found that twenty-five percent of the administrators did not know the proper legal procedures which govern search and seizure of property belonging to public school children. He also found that over twenty percent of the administrators were unable to prescribe the appropriate legal procedures to actual disciplinary situations. He went on to state that fifty-two percent of the administrators reported that they were very uncertain about the constitutionality of a moment of silence within the schools.[12]

Other studies which have analyzed the knowledge of administrators concerning public school law tend to support Chapman's study. Shue, (1987) reported that thirty-one percent of the principals and superintendents in the Ohio Public Schools had insufficient knowledge of constitutional law relating to public schools.[13] Schmidt, (1988) reported that over thirty percent of the principals and superintendents in the Illinois Public Schools had difficulties or were unable to apply the appropriate legal procedures to specific problems.[14] Swikard, (1983) reported that only forty percent of a group of high school principals and teachers made the appropriate legal

decision in cases in which they were asked to respond to constitutional questions involving free speech.[15]

Lake, (1992) reported that over forty percent of high school principals in Illinois had a poor or inadequate knowledge of the law as it relates to use of facilities for religious activities.[16] Reglin, (1992) stated that over thirty-two percent of the principals in South Carolina responded incorrectly to public school law questions concerning religious issues.[17]

These studies help to demonstrate that school divisions throughout the nation employ administrators and teachers who are uncertain about issues which relate to public school law. School board members should be concerned about the general lack of knowledge among many administrators throughout the nation because of the obvious legal consequences associated with judicial noncompliance.[18]

The United States Supreme Court ruled in Wood v. Strickland that school board members could be held individually liable for damages under the Civil Rights Act of 1871.[19] Public school officials are currently being confronted with an increasing number of lawsuits which originate from a variety of sources.[20] Many of these lawsuits occur because public school officials fail to develop policies which are consistent with the decisions of the court. One aspect of

public school law that has gained much attention over the last decade is the Establishment Clause of the First Amendment.[21]

The First Amendment to the United States Constitution declares:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech or of the press: or the right of people peaceably to assemble, and to petition the government for redress of grievance.[22]

There are six distinct components of the First Amendment. The first component, referred to as the Establishment Clause, states that Congress may not enact any statute which would tend to establish or support a national religion.

The second component, referred to as the Free Exercise Clause, prohibits Congress from enacting any statute which would inhibit the free exercise or demonstration of an individuals' religious beliefs or convictions. The remaining four components are designed to ensure the freedom of speech, press, assemblage, and petition to all United States citizens. This study will focus on the Establishment Clause component of the First Amendment.

Although the Establishment Clause and the First Amendment would seem to be relatively simple to interpret it has been extremely difficult for governmental agencies to determine and maintain the appropriate legal distance between church and state.[23] School officials are faced with the complex and often

confusing dilemma of protecting the religious freedom of each child as guaranteed by the First Amendment and simultaneously ensuring that the Establishment Clause is not violated.[24] The efforts of administrators to comply with the Establishment Clause is also complicated by the fact, that on occasion, the courts have issued a decision which may conflict with the decision of an equal court.

Lower courts are force to adhere to a doctrine called "stare decisis" when ruling upon a case that has been decided by a higher court. Stare decisis is a Latin term which means "to let the decision stand".[25] This doctrine prevents a lower court from rendering a decision which is in opposition to a higher court decision or precedent.[26] This doctrine has been important throughout the development of case law because it helps to provide an uniform and consistent interpretation of the law.[27]

Although the doctrine of stare decisis is vertically binding, it is not horizontally binding. For example, if the First Circuit Court were to declare that student-initiated prayers were unconstitutional, the remaining twelve circuit courts would theoretically accept the precedent established by the First Circuit but they would not be legally bound to assume a similar position. Only a higher court decision would actually force a lower court to accept a decision.

The Federal Supreme Court could clarify many of these conflicting issues by rendering a decision which would be applicable to all courts.[28] The Federal Supreme Court is often reluctant, however, to hear a case until several of the Federal Circuit Courts have ruled on the same issue and it appears to be a national concern. Public school officials are placed in a precarious situation when their Circuit Court has not ruled on a controversy issue and the neighboring Circuit Courts have rendered conflicting decisions. In this scenario the administrator would be force to accept the decision of the Federal District Court in their own jurisdiction even though that particular decision may be reversed by their Circuit Court or the Federal Supreme Court. The doctrine of stare decisis normally prevents this situation from occurring but periodically there are conflicting decisions among equal courts.

When this inconsistency occurs it presents a serious dilemma to public school officials because they are unsure of the courts' position.[29] This uncertainty makes many public school officials reluctant to develop and implement board policies which govern Establishment Clause issues especially those which are politically controversial.[30] The decision not to develop policies creates even more confusion and problems for the building level administrator.[31] Principals are unsure

of the official position of the division and this uncertainty and lack of leadership may lead to serious legal problems.

Lack of clear policies provides opportunities for administrators to engage in practices which are often inappropriate and illegal. Many building level administrators experience considerable pressure from their community to participate in programs and activities which are either highly questionable or clearly unconstitutional.[32] Principals may succumb to this communal pressure and permit questionable activities if the division has not adopted policies which are consistent with the law. Although the adoption of some school board policies involving an Establishment Clause issue may have serious political consequences on public school officials the legal ramifications could be even more serious.[33]

STATEMENT OF THE PROBLEM

Potentially there may be many school divisions within the Commonwealth of Virginia which have not adopted any school board policies which relate to the Establishment Clause. It is also possible that other divisions throughout the Commonwealth have adopted policies but they are not consistent with the court's interpretation of the law. The lack of clear and concise school board policies which support the court's interpretation of the law places public school officials in

considerable jeopardy.

The first question that will be answered in this study is whether public school officials within the Commonwealth of Virginia have adopted division policies which govern Establishment Clause issues. The second question that will be answered is whether the current school board policies that have been adopted are consistent with the court's interpretation of the Establishment Clause.

PURPOSE OF THE STUDY

This study has five primary purposes. The first purpose of this study is to determine if the public school officials within the Commonwealth of Virginia have developed policies which are consistent with the federal court's interpretation of the Establishment Clause. The second purpose is to provide an analysis of the legal and historical development of public school law as it relates to the Establishment Clause. The third purpose is to provide a set of criteria which can be used to evaluate school board policies relating to the Establishment Clause. The fourth purpose is to analyze and evaluate the current school board policies that have been adopted throughout the Commonwealth which govern Establishment Clause issues. The final purpose is to develop sample policies which can be used as a reference in the formation of school board policies which are consistent with the current

judicial decisions.

SIGNIFICANCE OF THE STUDY

This study will create a sense of awareness within the Commonwealth of Virginia of the necessity for the development of division policies which are aligned with the mandates of the courts. This study will also add to the field of knowledge relating to public school law and provide necessary data to make informed decisions on issues which relate to policies concerning the Establishment Clause.

The analysis of the legal and historical development of public school law will provide a holistic view of case law as it relates to the Establishment Clause. This concentrated analysis will allow individuals to study case law as it relates to specific issues associated with the Establishment Clause. The sample policies and the criteria may serve as a reference in the development of effective school board policies governing issues involving the Establishment Clause.

LIMITATIONS OF THE STUDY

The Establishment Clause is an extremely complicated and complex issue which is beyond the scope of this study to discuss in its entirety. This study will focus on issues relating to the Establishment Clause which involve prayer, scripture reading, release time for religious activities and

distribution of religious materials and equal access. This study is designed to evaluate only the current school board policies which have been officially approved and adopted by the various school boards within the Commonwealth of Virginia as of September 7, 1993. The analysis of the legal and historical development of case law will concentrate on cases which have been decided at the federal court level.

Organization of the Study

This study is organized into five chapters. Chapter one contains an introduction to the study, a statement of the problem, a discussion of the significance and need for the study, limitations that govern the study and the organizational scheme of the remaining four chapters.

Chapter two contains a review of the literature which will focus primarily on an analysis of all federal court cases essential to a thorough understanding of public school law which involves the Establishment Clause.

Chapter three describes the methodology and criteria which is used to complete this study. This includes a discussion of the population, criteria, data collection system and method of analysis.

Chapter four reports the results of the study and provides an analysis of the data. This chapter reports how many school divisions within the Commonwealth have adopted

policies concerning Establishment Clause issues and if the adopted policies are consistent with the decision of the courts.

Chapter five summarizes the findings of the study, discusses implications that can be drawn from them, and presents conclusions. This chapter also provides a set of sample policies which can be used as a reference in the development of division policies.

NOTES

[1] Jean Arnold and Nancy Krent, The Supreme Court Says "No" to School-Sponsored Graduation Prayer (McGuire, Woods, Battle and Boothe: Legal Opinion, 1992).

[2] Gary L. Reglin, "Public School Educators' Knowledge of Selected Supreme Court Decisions Affecting Daily Public School Operations", Journal of Educational Administration, Vol. 30, n2 (1992), p. 26.

[3] Eugene C. Bjorklun, "School District Liability for Team Prayers", West's Educational Law Reporter, Vol. 59, n1 (1990), p. 13.

[4] Reglin, p. 6

[5] Mary Moran, "Up Against the Glass Ceiling", American-School-Board-Journal, Vol. 179, n2 (1992), p. 41.

[6] Reglin, p. 6

[7] Jean Arnold and Nancy Krent, The Supreme Court Says "No" to School-Sponsored Graduation Prayer (McGuire, Woods, Battle and Boothe: Legal Opinion, 1992).

[8] Reglin, p. 6

[9] David W. Chapman, Public School Administrators' Knowledge of Recent Supreme Court Decisions Affecting School Practices (New York: School Development Association, 1986).

[10] Ibid

[11] Ibid

[12] Ibid

[13] Donald O. Shue, "An Investigation of Religious Policies, Guidelines, and Activities in the Public Schools of Ohio: Awareness and Knowledge of Superintendents and Principals," (Ed.D dissertation Ohio University, 1988).

[14] Dianne Muehrer Schmidt, "Illinois School Administrators' Knowledge of Special Education Laws and Regulations," (Ed.D dissertation Northern Illinois University, 1987).

[15]Janet L. Swikard, "The Impact of Knowledge of Judicial Activity in the First Amendment Area Upon the Personnel Decision of High School Principals," (Ed.D dissertation University of Houston, 1983).

[16] Steven Alan Lake, "The Equal Access Act of 1984: Principals' Knowledge of Students' Rights to Use school Facilities for Religiously Oriented Meetings," (Ed.D dissertation, Northern Illinois University, 1991).

[17]Reglin, p. 27-31.

[18]Floyd G. Delon, Administrators and the Courts: Update 1977 (Virginia: Educational Research Service, Inc., 1977)

[19]Wood v Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975)

[20]John C. Hogan, The School, the Courts, and the Public Interest, 2nd Edition (Massachusetts: Lexington Books, 1985)

[21]Ralph D. Mawdsley and Charles J. Russo, "High School Prayers at Graduation: Will the Supreme Court Pronounce the Benediction?", West's Educational Law Reporter, Vol. 69, n2 (1991), p. 1.

[22]United States Constitution, First Amendment.

[23]Reglin, p. 26 & 27.

[24] Phillip H. Harris, "Invocation, Benedictions, and Freedom of Speech in Public Schools," West's Educational Law Reporter, Vol. 68, n4 (1991), pp. 951-955.

[25]John C. Walden, "Do Prayers at Graduations Exercises Violate the Establishment Clause?," West's Educational Law Reporter, Vol. 69,(1992), pp. 7 & 8.

[26]Kern Alexander and David Alexander, American Public School Law (St. Paul: West Publishing Company, 1985), p. 8

[27]Walden, p. 1.

[28]Eugene C. Bjorklun, "The Rites of Spring: Prayers at High School Graduation", West's Educational Law Reporter, Vol. 61, n1 (1990), p. 3.

[29]Ibid

[30]Eugene C. Bjorklun, "School District Liability for Team Prayers", West's Educational Law Reporter, Vol. 59, n1 (1990), p. 13.

[31]Ibid

[32]Eugene C. Bjorklun, "School District Liability for Team Prayers", West's Educational Law Reporter, Vol. 59, n1 (1990), p. 14.

[33]Ibid

CHAPTER TWO

REVIEW OF THE LITERATURE

INTRODUCTION

This chapter provides a review and analysis of all relevant literature which is essential to a thorough understanding of the development and evolution of public school law as it relates to the Establishment Clause. The review of literature concentrates primarily on an analysis of all the critical federal court cases which have involved issues relating to the Establishment Clause and the public schools. Secondary sources include a review and analysis of educational law journals, WestLaw, dissertations, professional educational journals and books.

This chapter has been divided into six segments to increase clarity and provide greater organization. These segments include the following: 1) Historical background on the development of the First Amendment and the Establishment Clause; 2) Analysis of the early court cases which have established the fundamental precedents and legal guidelines that govern virtually all church and state issues in the public schools; 3) Analysis of the court cases involving prayer, meditation and a moment-of-silence; 4) Analysis of the court cases involving scripture reading in the public schools; 5) Analysis of release time programs in the public

schools; and 6) Analysis of the court cases involving equal access and the distribution of religious materials in the public schools.

This chapter begins with a brief analysis of the historical development of the First Amendment with specific emphasis on the Establishment Clause. This discussion is followed by an analysis of all relevant federal court cases which have either affected or directly involved an Establishment Clause issues. The review and analysis of the secondary sources are used to help clarify the decisions of the courts and to more clearly define how these decisions have influenced public school law.

The analysis of the federal court cases follow a similar format. Each case is appropriately cited and is followed by a concise synopsis of the facts which precipitated the case. Selected parts of the actual text of the court's decision follow the factual account of each case. The decision of the court is then analyzed to determine its impact and influence on the development of public school law. Each segment will conclude with a summary of how the all court cases in that segment have collectively impacted public school law. Only the most recent cases are used in this study to ensure they have not been reversed or modified by a higher court.

SEGMENT I

ANALYSIS OF THE HISTORICAL BACKGROUND AND DEVELOPMENT OF THE ESTABLISHMENT CLAUSE

ANALYSIS OF THE HISTORICAL BACKGROUND AND DEVELOPMENT OF THE ESTABLISHMENT CLAUSE

On June 8, 1789, James Madison, a representative from Virginia, proposed before the House of Representatives that a series of amendments be added to the United States Constitution.[1] These proposed amendments were drafted primarily by Madison in an attempt to appeased the Anti-Federalists and other concerned Americans who felt that the power of the national government was too great and that an incorporation of a Bill of Rights into the Constitution was necessary to ensure and protect the civil liberties which were secured as a result of the American Revolutionary War.[2] After much debate and numerous revisions the First Congress submitted twelve of Madison's amendments to the individual states for ratification.[3] The first two amendments dealing with Congressional apportionment and pay were never ratified by the states but the remaining ten were added to the United States Constitution on December 15, 1791 when Virginia became the eleventh state to ratified the proposed amendments.[4] These ten amendments have become known as the Bill of Rights.

Although the Bill of Rights is a relatively short document its interpretation and application has been the source of numerous controversies and conflicts for over two

centuries.[5] Perhaps the most contested component of the Bill of Rights has been the First Amendment to the United States Constitution.[6]

The First Amendment to the United States Constitution declares:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech or of the press: or the right of people peaceably to assemble, and to petition the government for redress of grievance.[7]

There are six distinct components of the First Amendment. The first component, referred to as the Establishment Clause, states that Congress may not enact any statute which would tend to establish or support a national religion.

The second component, referred to as the Free Exercise Clause, prohibits Congress from enacting any statute which would inhibit the free exercise or demonstration of an individuals' religious beliefs or convictions. The remaining four components are designed to ensure the freedom of speech, press, assemblage, and petition to all United States citizens. This study will focus on the Establishment Clause component of the First Amendment.

The Establishment Clause of the First Amendment was added to the United States Constitution in an attempt to limit the power of the national government and to prevent it from encroaching upon the religious liberties of the American

people.[8] The desire and necessity for the Establishment Clause originated from the negative experiences that many of our founding fathers had with Great Britain and the early colonial governments.[9] At various times virtually all of the European countries, including Great Britain, had developed and maintained an active role in the affairs of the church.[10] Carrying this European tradition to the New World several of the colonial governments attempted to establish a theocracy in America or heavily influence the religious convictions of its people.[11] At least six of the original thirteen colonies had actually established state religions and three more had denominations which were clearly favored.[12]

Several of our early political leaders expressed the opinion that any attempt to combine politics with religion had detrimental and often fatal effects on the nation, the religious organization and the citizenry.[13] Many of these leaders held the firm belief that the civil liberties of individuals were often violated when governmental agencies attempted to extend their control and influence over religious organizations.[14] They also felt that hatred and fierce opposition to governmental agencies were created when the state became involved in religious matters.[15]

Two of the most vocal and influential individuals who were responsible for the development of the separation of

church and state philosophy in America were James Madison and Thomas Jefferson.[16] Madison possessed the firm and sincere belief that no level of government should ever attempt to sanction, endorse, support or establish any particular religion.[17] He argued on numerous occasions that religion was a personal matter and that any attempt by the government to interfere with mans' relationship with God would eventually have detrimental effects on the individual, government and religion.[18] Madison contended that history was full of examples of governments which had inappropriately used their power to influence religious events and that spiritual tyranny and governmental collapse was often the end result of such action.[19]

In 1784 Madison clearly demonstrated and articulated his views on the separation of church and state when he wrote his Memorial and Remonstrance Against Religious Assessments. Madison wrote this essay in response to Patrick Henry's Bill Establishing a Provision for Teachers of the Christian Religion.[20] Henry's proposed statute would require that every person in Virginia register his name with the County and the specific society that a portion of his tax money would support. Taxes would be dispersed among the various religious groups in Virginia if an individual chose not to select a specific society.[21]

In this essay, Madison clearly expressed his belief that the state should not financially support any religion to any degree. Madison wrote:

> ....Because we hold it for a fundamental and undeniable truth, "that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right....
>
> What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instances have they have been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberties, may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate it, needs them not.[22]

Madison's views and arguments in support of the separation of church and state have had considerable impact on the development of our nation's history and the distance that has been maintained between government and religious organizations.[23] Madison's views on the separation of church and state were greatly influenced by Thomas Jefferson. Jefferson also possessed the firm conviction that no level of government should ever become involved in religious affairs.[24] Jefferson argued that each person had the individual right to choose and follow his or her own religious convictions without being influenced to any degree by the government.[25]

In 1779 Jefferson proposed An Act For Establishing Religious Freedom before the General Assembly of Virginia which expressed much of his philosophy on the separation of church and state.[26] This act had a tremendous impact on the state of Virginia and its philosophy on the separation of church and state.[27] Jefferson wrote:

> Well aware that Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitation, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercion on either, as was in his Almighty power to do.
>
> That the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world .... [28]

In this act Jefferson argued that no level of government should have the authority nor the power to interfere with religious matters. He argued that God had created man to be free and that man possessed the natural right and freedom to choose the religious sect, if any, that he would support. Any attempt by the government to alter or influence this freedom of choice would be detrimental to the overall welfare of the individual, state and eventually even the church which benefitted from the initial support.[29]

Among the many other writings of Jefferson perhaps his

letter to the Baptist Association of Danbury has had more of an impact on the development of public school law than any other document he wrote. In this letter Jefferson wrote:

> I contemplate with sovereign reverence that act on the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof' thus building a wall of separation between church and state... [30]

The "wall of separation" concept expressed by Jefferson has greatly influenced the courts and several of the early decisions involving church and state issues were decided on the premise that a high and impregnable wall had to be maintained to ensure constitutionality.[31] This wall of separation has become less formidable over the years however, and it does not stand as high nor as strong as the earlier courts had interpreted it to be.[32] It is important to note at this point that the Bill of Rights was originally drafted to limit the power of the national government and the first ten amendments were not applicable to the states.[33] In 1868 Congress ratified the Fourteenth Amendment which offered considerable protection against state abuse of civil liberties. The 14th Amendment states:

> ... No state shall make or enforce any law which shall abridge the privileges of 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.[34]

In 1940 the Supreme Court ruled in Cantwell, (1940) that the Due Process Clause of the Fourteenth Amendment places certain restrictions on the power of the states and prevents them from violating any of the civil liberties which are guaranteed by the Bill of Rights.[35] In 1947 the Supreme Court incorporated the Establishment Clause into the protection of the Fourteenth Amendment in Everson v. Board of Education.[36]

It would seem at a superficial reading of the early founding fathers' writings that the proper distance between church and state should be clear to discern, but it is not. The courts have debated furiously over the last half century as to how high and impregnable the wall between church and state should actually be. The following analysis of relevant federal court decisions will provide the legal and historical development of the courts' attempt to define the Establishment Clause and the appropriate constitutional relationship between church and state.

SEGMENT II

ANALYSIS OF THE FUNDAMENTAL FEDERAL COURT CASES INVOLVING THE SEPARATION OF CHURCH AND STATE

COCHRAN v LOUISIANA STATE BOARD OF EDUCATION

281 U.S. 370

FACTS OF THE CASE

In 1928 the State of Louisiana enacted Public Laws 100 and 103 which authorized state officials to use public funds for the purchase of textbooks for all school aged children in the state. Under authority of these laws the Louisiana State Board of Education was directed to provide free textbooks to all children throughout the state including those students who were enrolled in non-public and parochial schools. Emma Cochran and others, as taxpayers and citizens of the State of Louisiana, filed suit against the State Board of Education requesting that the court enjoin the state from expending any public funds on non-public schools.

Cochran argued Public Laws 100 and 103 violated the Louisiana State Constitution, the Fourteenth Amendment and Section 4 Article 4 of the United States Constitution. It is important to note that Cochran brought suit against the school using the Fourteenth Amendment and not the Establishment Clause. It was not until 1947 that the Supreme Court first ruled in Everson that the Establishment Clause was applicable to the states.[37] Cochran was thus forced to use the Fourteenth Amendment to bring suit in federal court.

The Louisiana State Supreme Court rejected Cochran's

argument and ruled that the statutes were constitutional. Cochran appealed the decision to the United States Supreme Court which affirmed the lower court's decision and stated that public funds could be constitutionally used to provide textbooks to students enrolled in parochial schools.

EXCERPT FROM THE DECISION OF THE COURT

One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children.

ANALYSIS OF THE COURT DECISION

Cochran v Louisiana was an important court case in the fundamental development of public school law because it introduced the Child Benefit Theory.[38] The Court stated that the State of Louisiana could provide specific forms of financial support to students attending parochial schools

without violating the provisions of the Constitution because the private schools were not the direct beneficiaries of the money. The Court developed the legal rationale that a distinction could be made as to who actually benefitted from the public support of textbooks to all children.[39] The court ruled that in this case the children were the main beneficiaries under this program and that eventually the entire society would realize the rewards of providing textbooks to all school age children regardless of the status of their enrollment in public or private schools.

WEST VIRGINIA STATE BOARD OF EDUCATION v BARNETTE

319 U.S. 624

FACTS OF THE CASE

On January 9, 1942 the West Virginia Board of Education adopted a resolution which required all children in the West Virginia public schools to participate in a daily salute and Pledge of Allegiance to the United States Flag. The resolution stated that any student refusing to participate in the flag salute would be committing an act of insubordination and the student, as well as his/her parent, would be held liable for prosecution. Opposition to the law grew quickly and members of a religious sect, the Jehovah's Witnesses, filed suit against the West Virginia Board of Education

requesting an injunction against the resolution.

The Jehovah's Witnesses argued that the flag was considered to be an image and their religious beliefs prohibited them from pledging allegiance to or saluting any image. The Jehovah's Witnesses argued that the flag salute requirement violated both the First and Fourteenth Amendments to the Constitution. The District Court agreed with the Jehovah's Witnesses and declared the West Virginia resolution to be unconstitutional. The Board of Education appealed the decision to the Supreme Court which affirmed the lower court's decision and stated that the public schools could not constitutionally require students to participate in a flag salute or pledge of allegiance.

EXCERPT FROM THE DECISION OF THE COURT

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag of banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or a bared head, a bended knee.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the

sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

ANALYSIS OF THE COURT DECISION

The requirement to have all students participate in a salute to the United States Flag was first addressed by the Supreme Court in 1940.[40] In Minersville v Gobitis the Supreme Court ruled that a school's requirement that all students salute the flag did not violate any provision of the United States Constitution.[41] In 1940 the Supreme Court held the belief that national cohesion was extremely important to the country and thus the Court gave the states considerable freedom to enact legislation which would create national unity.[42]

The Minersville decision generated much scholarly debate and criticism which helped to persuade three of the Justices who were in the majority to change their view on required flag salutes.[43] These three Justices (Black, Douglas and Murphy), two new appointments (Jackson and Rutledge) who had replaced Hughes and McReynolds after 1940 and the only dissenter in Minersville (Stone) used Barnette to reverse the Gobitis' decision. The court ruled that states could not constitutionally require students to participate in a daily flag salute and recitation of the pledge of allegiance.[44] The court ruled that the Bill of Rights prohibits public officials

from forcing individuals to recite statements or phrases that they do want to repeat nor believe to be true.

Many cases since Barnette have been argued before the courts which have involved some type of requirement that children participate in a flag salute. The courts have consistently ruled that schools may engage in a daily flag salute practice as long as students who elect not to participate are not punished in any fashion, are not required to leave the room, and are not required to stand during the practice.[45]

EVERSON v BOARD OF EDUCATION OF EWING TOWNSHIP

330 U.S. 1

FACTS OF THE CASE

In 1941 the state of New Jersey enacted a statute which allowed local school districts to develop regulations and to establish contracts for the transportation of children to and from school. The Board of Education of Ewing concluded that the statute authorized them to provide transportation to public school children and also gave them the authority to financially reimburse parents for the costs associated with the transportation of their children to private and parochial schools. Arch R. Everson, as a taxpayer, filed suit against

the Board of Education arguing that the reimbursement of public funds to parents of children enrolled in private schools, specifically parochial schools, violated the Establishment Clause.

Everson argued that the state was providing direct financial aid to the Catholic Church by financing part of the parochial schools' pupil transportation cost. The New Jersey Supreme Court agreed with Everson and declared the reimbursements to be unconstitutional. The Board appealed the decision to the Court of Errors and Appeals of New Jersey which reversed the decision. The case was granted certiorari by the United States Supreme Court which affirmed the Court of Errors and Appeals' decision. The Supreme Court held by a five-to-four majority that the practice of reimbursing parents for transportation to parochial schools did not violate the constitution.

EXCERPT FROM THE DECISION OF THE COURT

....Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation for of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public and

highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them...

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We must not approve the slightest breach. New Jersey had not breached it here.

ANALYSIS OF THE COURT DECISION

The Supreme Court ruled that the State of New Jersey had not violated any provision of the Constitution by providing public funds for the transportation costs of both public and private school children throughout the state. The court ruled that a considerable amount of public money was consumed daily for services which provided direct support to all members of society and that virtually all of these services provide either direct or indirect support to parochial schools and churches. The court stated that the general public would never question the legitimacy of providing services such as fire, police, or public works to parochial schools and that pupil transportation was similar to these kinds of public services.[46] The court ruled that the state would not be forced to adopt an adversarial relationship with religion to be in accordance with the Establishment Clause. Instead the Court

ruled that the state simply had to be neutral in its relationship with religious and non-religious groups. The Court also maintained that the children were the direct beneficiaries of the transportation and not the schools.

This case was very important in the development of public school law because it was the first time that the Federal Supreme Court was required to define the Establishment Clause in an educational setting. In this case the Supreme Court reinforced the precedent established in Cantwell (1940) that the Fourteenth Amendment made the first ten amendments applicable to the states. The Court ruled in Everson that the First Amendment was clearly applicable to both the national and state governments. This meant that any state statute or constitutional provision could be declared unconstitutional if it violated the Establishment Clause or the First Amendment.

LEMON v. KURTZMAN

91 S.Ct 2105

FACTS OF THE CASE

Lemon involved the constitutionality of two statutes enacted by the states of Rhode Island and Pennsylvania. The facts of the Rhode Island case will be given first. In 1969 the state of Rhode Island enacted the Salary Supplement Act which authorized state officials to supplement the salaries of certain teachers who taught in non-public schools.

The act allowed state officials to supplement the salaries of non-public teachers if specific criteria were met. Citizens and taxpayers of the state of Rhode Island brought suit against the state asking the court to enjoin operation of the Salary Supplement Act. The taxpayers argued that the law was unconstitutional because it violated the First Amendment. The District Court agreed and declared the Salary Supplement Act to be unconstitutional. The state appealed the decision to the United States Supreme Court which affirmed the lower court's decision.

In 1969 the state of Pennsylvania enacted the Pennsylvania Non-Public Elementary and Secondary Education Act which authorized the Superintendent of Public Instruction to "purchase" services from non-public schools. The act gave state officials the power to directly reimburse non-public schools for specific expenditures associated with the education of children. The Pennsylvania statute also contained many specific stipulations that had to be met before payment could be received. Lemon, as a taxpayer, citizen and parent, brought suit against the state arguing that the act violated the First Amendment. The District Court ruled that the law violated neither the Establishment Clause nor the Free Exercise Clause and was therefore constitutional. Lemon appealed the decision to the United States Supreme Court which reversed the decision and declared the statute to be

unconstitutional.

EXCERPT FROM THE DECISION OF THE COURT

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion... finally, the statute must not foster "an excessive government entanglement with religion...

The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teaches under religious discipline can avoid conflicts. The state must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion-indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefor carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools an use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitable be required to ensure that these restriction are obeyed and the First Amendment otherwise respected...

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church related schools... The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state...

ANALYSIS OF THE COURT DECISION

In 1968 the Supreme Court ruled in Allen that the loan of

textbooks to parochial schools did not violate the Establishment Clause and was therefore constitutional.[47] Justice Burger, writing for the majority, stated that parochial schools were performing the secular task of providing an education to children within the state. This led many legislators to believe that public funds could constitutionality be used for the support of certain services which were provided within the parochial schools.[48]

Two states, Rhode Island and Pennsylvania, attempted to take advantage of the Allen decision and use public funds to supplement the salaries of teachers who taught secular courses in parochial schools. The Supreme Court stated, however, that both plans were unconstitutional because they involved excessive entanglement between the church and state. The Court stated that the salary supplement acts forced the states to maintain a constant and discriminating surveillance of religious matters and that this degree of monitoring violated the Establishment Clause.

The Supreme Court, relying and gleaning precedents from previous cases, developed a three prong test which has been used for the last two decades as a standard to determine the constitutionally of school practices, policies, and statutes. The three prong test possesses the following criteria which must be met if a statute is to pass constitutional scrutiny:

1) The statute must have a secular legislative purpose; 2) Its principal or primary effect must be one that neither advances nor inhibits religion; and 3) The statute must not foster an excessive government entanglement with religion.

The Supreme Court has stated that each challenged practice that is argued before the court must satisfy each one of these three prongs before it is deemed constitutional. For a practice to be constitutional it must first have a legitimate secular purpose. The courts have made it clear that they will not accept a stated secular purpose which is simply a facade for a sectarian one. The practice must also be one that will not encourage, advance or lend support to any particular religious sect. Conversely the practice may not hinder or inhibit any religion. To pass the final prong of the Lemon Test a statute must ensure that the role of government does not become too deeply involved in the affairs of the church. A constant monitoring of religious matters or a requirement which forces the state to make discriminating decision affecting religious concerns would violate the Establishment Clause.

Lemon v Kurtzman is one of the most important and influential court cases in the development of public school law. The Lemon Test has had considerable influence over the courts for the last twenty years. Between 1971 and 1992 the Supreme Court has heard thirty cases which have involved

Establishment Clause issues. The Court has used the tripartite test twenty-nine times as a basis for their decision.[49] The lone exception in this group was Marsh v Chambers in which the Court developed the "Unique History" test. In this case the Federal Supreme Court ruled that a practice of opening the Nebraska legislature with a prayer was constitutional. The Court ruled that since this practice was in existence and was allowed to occur at the constitutional convention that the framers apparently had no objections to prayers at legislative sessions. The Court ruled that the Nebraska practice of prayer had a unique history and was therefore constitutional.

Although some of the current Supreme Court Justices have expressed discontent with the Lemon Test they have used it as a standard to analyze questionable practices since 1971. Justice Blackmun still expresses his support for the continuing use of the Lemon Test whereas other Justices such as Scalia has argued that the Lemon Test should be abolished.[50] The court had an ideal opportunity to abolish the Lemon Test in the Weisman case but the Justices did not take advantage of the situation to entirely eliminate the tripartite test.[51] It is important to note, however, that the Supreme Court did not use the Lemon Test to decide the constitutionality of Weisman. Modifications to the Lemon Test and the "Coercion Test" will

be discuss later in the analysis of the Weisman case.

STONE v GRAHAM

101 S.Ct. 192

FACTS OF THE CASE

In 1978 the Kentucky Legislature enacted a statute which required all public school officials within the Commonwealth of Kentucky to post a copy of the Ten Commandments on the wall of each public school classroom in the state. Sydell Stone, as a taxpayer and citizen of the Commonwealth of Kentucky, filed suit against the Commonwealth requesting that the court issue both a temporary and permanent injunction against enforcement of the act. The Kentucky Court of Appeals transferred the case to the Kentucky Supreme Court which declared that the act had a secular purpose, it did not advance religion, and it did not create excessive entanglement and was therefor constitutional. The United States Supreme Court granted certiorari, reversed the lower court's decision and declared the posting of the Ten Commandments to be unconstitutional.

EXCERPT FROM THE DECISION OF THE COURT

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments

do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness.... Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day...

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all , it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

ANALYSIS OF THE COURT DECISION

The Supreme Court ruled that the posting of the Ten Commandments in the public schools failed to pass the first prong of the Lemon Test and was therefore unconstitutional. The court rejected the state's argument that the posting of the Ten Commandments served the secular purpose of demonstrating to the children how the text was fundamental in the adoption of the basic legal codes of Western Civilization. The court stated that the Ten Commandments were undeniably a part of the sacred text of the Jewish and Christian faiths and that the primary purpose of posting the commandments was a sectarian one. The court made it clear however, that the Ten Commandments could be constitutionally incorporated into the curriculum if it was taught as part of history or comparative religion.

MUELLER v ALLEN

103 S.Ct. 3062

FACTS OF THE CASE

In 1955 the state of Minnesota enacted a law, which was revised in 1976 and again in 1978, which allowed state taxpayers to claim deductions from their gross income for specific expenses incurred from the "tuition, textbooks and transportation" of their children to elementary and secondary schools. The statute provided the tax breaks to parents of children in public schools as well as private schools. A group of Minnesota taxpayers filed suit against the state arguing that the statute violated the Establishment Clause because it used public funds to provide financial assistance to sectarian institutions.

The District Court ruled that the statute did not violate the Establishment Clause and was therefore constitutional. The taxpayers appealed to the Eight Circuit Court of Appeals which affirmed the lower court's decision. On writ of certiorari, the Supreme Court held that the stature did not violate the Establishment Clause and was therefore constitutional.

EXCERPT FROM THE DECISION OF THE COURT

A State's decision to defray the cost of educational expenses incurred by parents - regardless of the type of schools their children attend - evidences a purpose that if

both secular and understandable. An educated populace is essential to the political and economic health on any community and State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. Similarly, Minnesota, like other States, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian...

Other characteristics of 290.09 subd. 22, argue equally strongly for the provision's constitutionality. Most importantly the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools. Just as in Widmar v. Vincent, where we concluded that the State's provision of a forum neutrally "available to a broad class of nonreligious as well as religious speakers" does not "confer any imprimatur of state approval,"...

ANALYSIS OF THE COURT DECISION

The Supreme Court used the Lemon Test to determine the constitutionality of the Minnesota statute. The court ruled that the statute had the secular purpose of defraying the cost of educational expenses incurred by all parents who had children in school. It also had the secular purpose of ensuring that all children throughout the state were well educated regardless of their enrollment in private or public schools.

The court also ruled that the statute did not have the primary effect of advancing the sectarian aims of the parochial schools. The Court based this decision on the fact that the school deductions were only a small part of the entire statute, that the deductions were provided to all

parents and that the assistance was challenged through the individual parents without any governmental involvement. The Court concluded their analysis of the tax plan by stating the statute did not excessively entangle the state in religious matters.

WOLMAN v WALTER

97 S.Ct. 2593

FACTS OF THE CASE

In 1974 the state of Ohio enacted a statute which authorized the expenditure of public funds to provide financial assistance to non-public elementary and secondary schools. The statute allowed non-public schools to receive public funds for specific educational services such as the purchase of secular textbooks, standardized testing, cost of diagnostic and therapeutic services, cost of instructional materials and equipment and transportation for field trips.

Taxpayers and citizens of Ohio filed suit against the state arguing that the statute violated the Establishment Clause and was therefore unconstitutional. The District Court rejected the taxpayers' argument and ruled that the statute was constitutional. The taxpayers appealed to the Supreme Court which affirmed the lower court's decision in part and reversed in part. The Supreme Court ruled that the purchase of textbooks, standardized testing and diagnostic and

therapeutic services could be subsidized with public funds. The Supreme Court, however, ruled that instructional materials, equipment and transportation for field trips could not constitutionality be purchased with public funds.

EXCERPT FROM THE DECISION OF THE COURT

Appellees seek to avoid Meek by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the materials and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in Meek. Before Meek was decided by this Court, Ohio authorized the loan of material and equipment directly to the nonpublic schools. Then, in light of Meek, the state legislature decided to channel the goods through the parents and pupils. Despite the technical change in legal bailee, the program in substance is the same as before. The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools...

The Ohio situation is in sharp contrast. First the nonpublic school controls the timing of the trips and, within a certain range, their frequency and destinations. Thus, the schools, rather than the children, truly are the recipients of the service and, as this court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid...

Moreover, the public school authorities will be unable adequately to insure secular use of the field trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement.

ANALYSIS OF THE COURT DECISION

The Supreme Court used the Lemon Test to determine the constitutionality of the Ohio statute and found that three

parts (purchase of secular textbooks, standardized testing and diagnostic and therapeutic services) were constitutional. The Court found the remaining two (instructional materials and equipment and transportation for field trips) were unconstitutional.

The court stated that the first three parts of the statute were clearly constitutional because they had the secular purpose of protecting and ensuring the health of the children and in maintaining a strong educational system throughout the state. The court also stated that the first three provisions did not have the primary effect of advancing religion nor did they excessively entangle the state with religion.

The court ruled, however, that the purchase of instructional materials and equipment would inevitably result in the state's support of the religious mission of the sectarian schools which would be unconstitutional. The Court ruled that the expenditure of public funds for field trips, instructional materials and equipment would be under the direct control of the sectarian school officials and this would result in direct aid to the school instead of the child. This form of aid would be unconstitutional.

EPPERSON V. ARKANSAS

393 U.S. 97

FACTS OF THE CASE

In 1928 the State of Arkansas enacted a statute which prohibited any public school or university in the state from teaching of any theory that man evolved from any other species of life. In 1965, Susan Epperson, a Biology teacher in the Little Rock School District, became concerned that one section of the state's newly adopted biology textbook contained a chapter about evolution.

Epperson was aware of the state law which prohibited the teaching of evolution but she felt that the curriculum compelled her to teach all of the material in the new biology textbook. She brought the matter before the Chancery Court of Arkansas seeking a declaration and injunction against the statute. The Chancery Court ruled that the statute violated both the Fourteenth and First Amendments. The Supreme Court of Arkansas reversed the lower court's decision and Epperson appealed to the Supreme Court. The United States Supreme Court reversed the decision and ruled that the statute violated both the First and Fourteenth Amendments.

EXCERPT FROM THE DECISION OF THE COURT

[1,2] Government in our democracy, state and nation, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the

advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion...

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

ANALYSIS OF THE COURT DECISION

The United States Supreme Court ruled that an Arkansas statute forbidding the teaching of any evolutionary theory in its public schools and university violated both the First and Fourteenth Amendments to the Constitution. The Court ruled that the Constitution requires government to be neutral toward religion and that it may not be hostile to any particular religious sect nor may it foster or promote any sectarian interest. The Court stated that the State of Arkansas had violated the Establishment Clause by adopting a statute which clearly demonstrated the state's approval and endorsement of the Biblical version of the Creation of Man. The Court stated that the Arkansas statute could not be seen as an act of religious neutrality and was therefore unconstitutional.

ZOBREST v CATALINA FOOTHILLS SCHOOL DISTRICT

113 S.Ct. 2462

FACTS OF THE CASE

James Zobrest, a deaf child, attended grades one through five in a school for the hearing impaired and enrolled in grades six through eight in a public school. During his enrollment in the public school the school district provided him with a sign language interpreter. For religious reasons Zobrest's parents placed him in a Catholic school at the start of his ninth grade year. Although Zobrest was no longer enrolled in the public school his parents requested that the public school still provide the sign-language interpreter. The school argued that they could not provide such a service because it would violate the Establish Clause.

The Zobrests filed suit in District Court arguing that the Individuals with Disabilities Education Act (IDEA) and the Free Exercise Clause required the school system to provide Zobrest with an interpreter. The District Court rejected Zobrest's argument and ruled that the public support of an interpreter would violate the Establishment Clause. Zobrest appealed to the Ninth Circuit Court which affirmed the District Court's decision. The Supreme Court granted certiorari and reversed the decision. The Supreme Court ruled that public funds could be constitutionality used to provide an interpreter for a child who was enrolled in a parochial

school and who was identified as needing such services under the IDEA.

EXCERPT FROM THE DECISION OF THE COURT

The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualified as "handicapped" under the IDEA, without regard to the sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends.... When the government offers a neutral services on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," it follows under our prior decision that provision of that services does not offend the Establishment Clause... Indeed, this is an even easier case than Mueller and Witters in the sense that, under the IDEA, no funds traceable to the government ever find their way into sectarian schools' coffers.

The IDEA creates a neutral government program dispensing aid not the schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district form furnishing him with a sign-language interpreter there in order to facilitate his education.

ANALYSIS OF THE CASE

The Supreme Court ruled that the Establishment Clause did not prevent governmental agencies from providing neutral services to sectarian schools. The Court ruled that religious institutions were not excluded, by virtue of the Establishment Clause, from receiving benefits of publicly sponsored social programs.

The Supreme Court ruled that the public support of a sign language interpreter for a deaf child enrolled in a sectarian school did not violate the Establishment Clause because this

service was religiously neutral and in no way did it support the religious institution. The provision of an interpreter would not provide any incentives for a parent to select a sectarian school over a public school and thus the Court declared the service to be neutral. The Court also stated that the IDEA provides a governmental program to children and not institutions; therefore it would not matter whether the school was sectarian or secular because it was the child receiving the benefits from the program and not the school.

SUMMARY OF FOUNDATION CASES

The foundation cases can be summarized to a considerable degree by a discussion of the Lemon Test and the Child Benefit Theory. The Courts have consistently used these two doctrines as standards by which they have determined the constitutionality of questionable statutes and practices. The Child Benefit Theory was first expressed in Cochran and the Lemon Test was articulated in Lemon.

The Lemon Test is a three prong test that the Court has developed to help them determine the constitutionality of statutes and regulations. The first prong of the Lemon Test is concerned with the motive or intention behind the development of the policy or practice. The policy must have a clear secular purpose to be considered constitutional by the Courts. The Courts have also made it clear that school

districts cannot proclaim a secular purpose which is a facade for a sectarian one.

The courts have scrutinized the stated purposes of school policies and state statutes to ensure they have legitimate secular purposes similar to the Minnesota statute in Mueller.[52] This statute had the stated purpose of attempting to defray the educational expenses incurred by all parents throughout the state regardless of their children's enrollment in private or public schools. The statute also claimed that it was developed to maintain the health and strength of all educational institutions throughout the state. The court accepted these claims as being legitimate secular purposes. The court, however, declared that the posting of the Ten Commandments was unconstitutional in Stone because the avowed secular purpose (to demonstrate the secular application of the Ten Commandments in the development of the legal codes of Western Civilizations) was only a facade for the real sectarian purpose of inducing children to read, meditate and obey the document.[53]

If a policy or practice successfully meets the criteria of the first prong of the Lemon Test the Court will analyze the second prong which will determine if the practice has the primary effect of advancing or inhibiting religion. The Courts have consistently declared that policies and practices

must be neutral toward religion and that they demonstrate no bias (either negative or positive) to any particular faith or religion.

In Epperson the Court declared an Arkansas statute, which prohibited the teaching of evolution in any public school, to be unconstitutional because it was not religiously neutral.[54] The court argued the statute was clearly an attempt to eliminate a theory of the origin of man from the public schools because it challenged the Biblical version of the Creation of Man. The Court declared in Mueller that a Minnesota tax deduction plan did not advance religion (even though it allowed parochial school parents to deduct their expenses from their gross income) because the statute allowed all parents to deduct such expenses.[55] The broad class of religious and nonreligious people who benefitted from the Minnesota program was seen as an attempt to help all parents thought the state and not just parochial parents.

The third prong of the Lemon Test is concerned with the degree of involvement that the governmental agency has in sectarian affairs. The Courts have stated that governmental agencies cannot excessively entangle themselves with religious matters. For a statute to pass the third prong of the test it must not require the state to maintain a comprehensive, discriminating, or continuing state surveillance of religious

matters. The Supreme Court stated in Lemon that the Pennsylvania and Rhode Island statutes failed the third prong of the Lemon Test because the state had become too deeply involved in religious affairs.[56] The Supreme Court ruled in Wolman that a provision of an Ohio statute (which allowed parochial schools to receive public funds for transportation costs of field trips) was unconstitutional because the state would be excessively entangled in religious affairs.[57] This entanglement occurred because public officials were constantly forced to determine if field trips were secular or sectarian in nature.

The other primary doctrine that has influenced the courts on Establishment Clause cases is the Child Benefit Theory. The Court has recognized that statutes which provide some form of public support has the primary effect of either benefiting the child or the religious institution. This distinction often determines the constitutionality of the statute. The courts have declared statutes to be unconstitutional if they have the primary effect of directly benefiting the institution instead of benefiting the child.

In Cochran, the Supreme Court ruled that public funds could be used to help provide textbooks to parochial school students because the children benefitted from the books and not the religious institution.[58] Similarly in Everson, the

Supreme Court ruled that the State of New Jersey could provide public funding to bus children to parochial schools because this service benefitted the child and not religion.[59]

In Zobrest, again the Supreme Court declared that public funds could be used to provide a sign language interpreter to a deaf child enrolled in a parochial school because the support was going to the child and not the institution.[60] The Child Benefit Theory can also be seen in Mueller where the Court allowed the state of Minnesota to provide public funding for the purchase of textbooks, standardized testing, and diagnostic and therapeutic services because these services were directed to the students and not to the school.[61] The means through which public support is delivered to the sectarian schools is of great material consideration to the courts. The court made it clear in Mueller that any type of public support of a parochial school would stand a much better chance of constitutional scrutiny if the support flowed through the children rather than the school itself.[62]

SEGMENT III

ANALYSIS OF THE FEDERAL COURT CASES INVOLVING PRAYER, MEDITATION AND A MOMENT OF SILENCE

ENGEL v. VITAL

82 S.CT. 1261

FACTS OF THE CASE

In 1961, acting under the authority of New York State law, the Board of Education of Union Free School District No. 9 directed its principals to ensure that the following prayer be repeated each day by every class under the direct supervision of a teacher: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." This required prayer generated a great deal of opposition and eventually ten parents filed suit in a New York Court arguing that the prayer was contrary to their religious beliefs and that the official prayer violated both the First and Fourteenth Amendments of the United States Constitution.

The New York Court of Appeals declared that the practice could be constitutional if the state did not compel students to recite the prayer against their objections. The United States Supreme Court granted certiorari, reversed the lower court's decision and remanded it back to the Court of Appeals of New York for further proceedings which were not inconsistent with the Supreme Court's opinion.

EXCERPT FROM THE DECISION OF THE COURT

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer is "nondenominational" and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause of the First Amendment, both of which are operative against the States by virtue of the Fourteen the Amendment. The history of governmental established religion, both in England and in this country. showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people has lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversions'...

ANALYSIS OF THE COURT DECISION

From 1884 through 1962 the lower courts had generally upheld the constitutionality of prayer in the public schools and it was not until the 1950's that the federal court system began to hear cases involving Bible reading and prayer.[63] The Supreme Court became involved in the debate when the Board of Regents of New York State recommended that a prayer, written by state officials, be recited each day at the opening of school.[64] In this case the Supreme Court ruled that no state

had the authority nor the power to have any involvement in a governmental-sponsored prayer.[65]

Justice Black began his argument by discussing the historical background and development of the First Amendment. He argued that Europeans and early colonists had suffered many injustices as a result of a state sponsored religion. Justice Black argued that the prayer, as prescribed by the State of New York, was exactly the reason why the First Amendment was added to the Constitution.

The court declared that no prayer, developed by the state, could be recited in the classroom. The court further stated that the voluntary nature of student participation was no justification for any school sponsored prayer. The court did not address, however, the question of whether a prayer which was not written by the state could be constitutionally recited in the public schools. This question would be addressed later in Schempp.[66]

SCHOOL DISTRICT OF ABINGTON v. SCHEMPP

MURRAY v. CURLETT

374 U.S. 203

FACTS OF THE CASE

This Supreme Court case involves two companion cases which center around daily Bible readings and prayer in the

public schools. One case originated in Pennsylvania and the other in Maryland. The facts of the Pennsylvania case will be given first. In 1959 the Commonwealth of Pennsylvania enacted Public Law 1928 which required public school officials to ensure: "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 written request of his parent or guardian."[67]

School officials at Abington High School, in accordance with the law, began each school day with a selected group of children reciting ten Bible verses over the public address system. The Bible readings were concluded with the students reciting the Lord's Prayer. Students were requested to stand during the Bible reading and were expected to repeat the prayer as it was delivered. The Schempp family filed suit against the School District of Abington and requested that the court enjoin enforcement of Public Law 1928.

The Schempps argued that the daily Bible readings and prayer violated both the Fourteenth and First Amendments of the United States Constitution. The District Court of Pennsylvania ruled that the statute was unconstitutional. The school district appealed the case to the Supreme Court which affirmed the decision.

In 1905 the School Board of Commissioners of Baltimore City adopted a resolution pursuant to Article 77 section 202 of the Code of Maryland. The resolution stated that each teacher within the division would begin each day by reading, without comment, a chapter from the Bible and/or would direct students to repeat the Lord's Prayer. Mrs. Madalyn Murray, an atheist, expressed her concern to the principal that the practice of daily Bible reading and prayer was against her personal beliefs and requested that the practice stop. The principal refused to terminate the practice and Murray filed suit against the school board arguing that the act violated the First and Fourteenth Amendments of the Constitution. The Maryland Court of Appeals declared the act to be constitutional. The United States Supreme Court granted certiorari, reversed the lower court's decision and declared the act to be unconstitutional.

EXCERPT FROM THE DECISION OF THE COURT

The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison,"it is proper to take alarm at the first experiment on our liberties." Memorial and Remonstrance

Against Religious Assessments, quoted in Everson ...

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality. Through the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment.

ANALYSIS OF THE COURT DECISION

The Supreme Court ruled in Engel that a prayer, which was written by the state and recited each day in the public schools, was unconstitutional but it did not address the constitutionality of all prayers in the public schools, especially those not written nor endorsed by the state.[68] In Schempp[69],the court stated that the practice of reciting Bible verses and the Lord's Prayer was a religious ceremony and that both states had openly admitted them to being so.[70] Because the practices were religious ceremonies they had a religious intent and were therefore unconstitutional.

The court rejected the state's argument that the practice was only a minor encroachment on the First Amendment, if it was at all. The court maintained that a small trickle or even minor encroachment on the First Amendment would soon turn into a mighty river and quickly erode the civil liberties of all individuals. The court made it clear in this case, however,

that the Bible and other religious matters could be integrated into the curriculum if that were taught in a secular or historical manner.

WALLACE v JAFFREE

105 S.Ct. 2479

FACTS OF THE CASE

In 1978 the State of Alabama enacted a statute which authorized public schools to observe a period of silence each morning for the purpose of meditation. The act was amended in 1981 to include meditation and/or voluntary prayer. The act was amended again in 1982 allowing teachers to lead students in a prescribed prayer to the Almighty God who was the Creator and Supreme Judge of the world. Ishmael Jaffree, as a taxpayer and resident of Mobile County, filed suit against the Mobile County School Board, various school officials, and teachers, requesting that the court issue a declaratory judgment and an injunction restraining the defendants from enforcing the statute.

Jaffree argued that school officials and teachers had subjected his children to religious indoctrination and eventually caused his children to be ostracized from their peers because of their reluctance to participate in the daily prayers. The District Court declared the 1978 statute to be constitutional but that the 1981 and 1982 statutes would be

unconstitutional under the Federal Constitution. Surprisingly, the District Court went on to state that the statutes were in fact constitutional because Alabama had the authority to establish a state religion if they had the desire to do so. The Alabama Court of Appeals reversed the District Court's decision and ruled that the 1981 and 1982 statutes were unconstitutional. The United States Supreme Court noted probable jurisdiction, affirmed the Court of Appeal's decision and declared the 1981 and 1982 statutes to be unconstitutional.

EXCERPT FROM THE DECISION OF THE COURT

(6,7) In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion." In this case, the answer to that question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of 16-1-20.1 was not motivated by any clearly secular purpose - indeed, the statute had no secular purpose.

The sponsor of the bill that became 16-1-20.1, Senator Donald Homles, inserted into the legislative record- apparently without dissent- a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools. Later Senator Holmes confirmed this purpose before the district court. In response to the question whether he had any purpose for the legislation other that returning voluntary prayer to public schools, he stated, "No, I did not have no other purpose in mind." The state did not present evidence of any secular purpose...

ANALYSIS OF THE COURT DECISION

The Supreme Court ruled in Wallace that an Alabama statute, which allowed the public schools to designate a brief

period of time in the mornings for silent meditation or prayer, was unconstitutional.[71] The Supreme Court ruled that the act had no secular purpose and thus failed the first prong of the Lemon Test. The court went on to argue that not only did the statute not have a secular purpose but that it had a clear sectarian purpose of attempting to return prayer back into the public schools. Senator Holmes, the sponsor of the bill, stated in the record that this statute was an effort to return voluntary prayer back into the public schools and that he had no other purpose in mind when he drafted the bill.[72]

The Supreme Court made it clear in this case that no amount of time, regardless of how brief the period, could be designated by school officials or legislators for the purpose of prayer in the public schools. The court stated that the State of Alabama had attempted to "... characterize prayer as a favored practice" when they amended the 1978 statute in 1981 and 1982 to include the term 'prayer' and references to the 'Almighty God'.[73] The Supreme Court ruled that the First Amendment clearly prohibited this type of governmental endorsement of a religious practice.

JAGER v DOUGLAS

862 F.2d 824

FACTS OF THE CASE

Beginning in the late 1940's, a local minister began to deliver pregame invocations at the Douglas County football games. Initially the student government had invited the invocational speaker but in the early 1970's an assistant football coach was given the responsibility of securing speakers. Protestant clergyman delivered each pregame invocation from 1974 to 1986. The invocations were usually initiated with the words of "Let us pray" and often concluded with a reference to Jesus Christ.

In 1985 Doug Jager, a member of the Douglas County High School marching band, lodged a complaint with his principal objecting to the practice of pregame invocations. The Jagers, who are Native Americans, argued that the pregame invocations conflicted with their religious beliefs. After much discussion the school division developed an equal access plan which allowed the student government to randomly select an invocational speaker. This equal access plan did not satisfy the Jagers who proposed that a wholly secular message be given at the football games. The Jagers filed suit in the United States District Court for the Northern District of Georgia asking for a temporary restraining order prohibiting the school district from giving pregame invocations.

The District Court found the invocations to be unconstitutional but entered an additional order which stated that the equal access plan was facially constitutional. The case was appealed to the Eleventh Circuit Court which affirmed and reversed parts of the lower court's decisions. The Eleventh Circuit ruled that both the pregame invocations and the equal access plan were unconstitutional.

EXCERPT FROM THE DECISION OF THE COURT

Clearly, the equal access plan in the case at bar was adopted with the actual purpose of endorsing and perpetuation religion. 19. The School District could serve all of its cited secular purposes by requiring wholly secular inspirational speeches about sportsmanship, fair play , safety, and the values of teamwork and competition." Indeed, the Jagers offered to accept the pregame invocation consisting of a secular inspirational speech...

In short the equal access plan is unconstitutional because it has a religious purpose and a primary effect of advancing religion. By using a primary effect of advancing religion. By using a purely secular invocation , the School district could avoid any problems of entanglement, fulfill its secular purposes, and not advance religion, thereby complying with the requirements of Lemon and its progeny, Because the School District rejected the alternative of a purely secular pregame speech, and instead adopted a plan which fails to satisfy the Lemon test, we hold that the equal access plan is unconstitutional on its face.

ANALYSIS OF THE COURT DECISION

The Eleventh Circuit Court ruled that the pregame invocations were unconstitutional because they had the actual purpose of endorsing religion and it had the primary effect of

promoting the Protestant faith. The court maintained that the school's rejection of the inspirational and secular message, as proposed by the Jagers, and subsequent adoption of a prayer before the game was a clear indication that the school was more concern with promoting religious themes than it was with the communal benefits of a secular message.

In Jager the Court rejected the school's argument that the Unique History test of the Marsh decision should be used as a precedent in this case instead of the Lemon Test.[74] In Marsh, the court deviated from the Lemon Test rationale and ruled that a Nebraska practice of commencing the legislative session with a prayer was constitutional because similar practices existed at the time of the development of the First Amendment and was obviously acceptable to the framers of the Constitution.[75] This test is much less stringent than the Lemon Test and a questionable policy would stand a much better chance of survival under the Marsh test. The court rejected the school's argument to use the liberal policy of Marsh to analyze their equal access plan and instead chose to use the more stringent tripartite test of Lemon. The pregame invocations could not pass the scrutiny of the Lemon test and was ruled to be constitutional.

LEE v WEISMAN

112 S.Ct. 2649

FACTS OF THE CASE

For many years the Providence School District had allowed its principals to invite clergyman to deliver invocations and benedictions at graduation ceremonies. In 1989 Daniel Weisman, the father of Deborah Weisman, a graduate from Bishop Middle School, spoke to Deborah's principal about the traditional ceremonies and argued that all forms of prayer should be prohibited at the graduation ceremony. Robert Lee, the principal, refused to grant Weisman's request and instead invited a local rabbi to deliver the invocation and benediction. The principal gave the Rabbi a pamphlet entitled Guidelines for Civic Occasions which was used by the district to establish guidelines for the content of prayers delivered at school functions.

Weisman filed suit in District Court requesting an injunction prohibiting the school district from having prayers at future graduation ceremonies. The District Court declared the invocations and benedictions to be unconstitutional. The school appealed to the First Circuit Court which affirmed the decision of the lower court. The United States Supreme Court granted certiorari and affirmed the lower courts' decision declaring the practice to be unconstitutional.

EXCERPT FROM THE DECISION OF THE COURT

The State's role did not end with the decision to include a prayer and with the choice of the clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be non- sectarian. Through these means the principal directed and controlled the content of the prayer...

The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real....

ANALYSIS OF THE COURT DECISION

The Supreme Court ruled that invocations and benedictions at graduation ceremonies were unconstitutional in Lee because school officials were too deeply involved in the development and endorsement of the prayer that was delivered.[76] The court stated that the school demonstrated an excessively high degree of involvement when it directed the Rabbi to use a pamphlet which provided guidelines and regulations for the content of his prayer.[77]

It is important to note that the Court did not rely on the Lemon Test to decide this case and that several Justices have voiced considerable criticism of the Lemon Test.

Although Scalia dissented in the Weisman case and seriously criticized the decision of the majority, he praised his fellow Justices for not using the Lemon Test as a basis for their decision. Scalia argued that the Lemon Test is irrelevant in determining the constitutionality of questionable practices involving the Establishment Clause and that the refusal to use the Lemon Test in this case was the only happy byproduct of the entire case. Four of the other Justices (Kennedy, O'Connor, Renhquist and White) have written opinions which have also criticized the Lemon Test.

Instead of the Lemon Test, the majority in this case (Kennedy, Blackmun, O'Connor, Souter and Stevens) relied on the "Coercion Test". The Court ruled that the school, by allowing a prayer at graduation, had coerced or forced the students to participate in a religious exercise. The court rejected the school's primary argument that participation in the graduation ceremony was voluntary. The court maintained that participation in graduation ceremonies was not actually voluntary because society has placed such a high degree of emphasis on the ceremony and that it expects students to attend this culminating activity. The Court also rejected the school's argument that the prayer was not unconstitutional because any student having objection to the prayers could remain at home without any sort of penalty. Although the Coercion Test is not fully endorsed by all of the Justices it

would seem that the Court may use some form of this test or the "Endorsement Test" to determine the Constitutionality of a questionable practice within the school. Justices O'Connor, Stevens and Souter seem to support the Endorsement Test which would deem a practice to be unconstitutional if it had the purpose or effect of endorsing religion by supporting or demonstrating bias for a specific religion. The Courts may rely on the Coercion Test, the Endorsement Test or perhaps some combination of the two. Regardless of the new standards by which Establishment Clause issues will be judged, it appears that the Lemon Test will continue to fade.

Although the Court made it clear in this case that no school officials may be involved in the development of any form of prayer at graduation ceremonies it did not address the question of whether students may initiate prayers in graduation ceremonies without the consent, direction or approval of school officials. This question is more difficult to answer than the first one and will be addressed in the next case.

DOE v DUNCANVILLE INDEPENDENT SCHOOL DISTRICT

986 F.2d 953

FACTS OF THE CASE

It had been an established tradition in the Duncanville Independent School District that coaches would lead their

teams in a prayer before and after each game. Players were expected to gather in a group, bow their heads and recite a prayer. The prayer would usually be terminated by the coach's signal or verbal request. Jane Doe, a 12 year old student, was very reluctant to participate in the prayer but did so because she felt her team mates would ostracize and ridicule her if she refused to participate.

Doe's father contacted the assistant superintendent of schools requesting that the school terminate the pre and post game prayers. The assistant superintendent informed Doe that he could not prohibit prayers at athletic contests. Doe filed suit against the school district seeking declaratory and injunctive relief. Doe argued that the prayers violated the First Amendment and was therefore unconstitutional. The United States District Court ruled that the prayers were unconstitutional and issued injunctive relief. The school district appealed the decision to the Fifth Circuit Court which affirmed the lower court's decision.

EXCERPT FROM THE DECISION OF THE COURT

The DISD understandably points to Mergens to support its contention that by allowing students and teachers to engage in spontaneous prayer, it merely is accommodating religion in a constitutionally permissible manner. For number of reasons, however, Mergens is not implicated by the facts before us. First, Mergens involved non curriculum-related activities; the crucial activity here, playing on a school-sponsored basketball team, is extra curricular. Second, even if participation on the school basketball team were non-

curricular, the prayer here hardly could be considered student-initiated. Coach Smith chose the prayer and where and when it was to be said and led the team in reciting it. This is not the minimal, "custodial" oversight allowed by Mergens.

Nor are DISD's attempts to distinguish the graduation setting at issue in Lee at all persuasive. Coach Smith, a DISD employee, just as surely chose and "composed" the prayer here as did the school official in Lee. Given the "subtle coercive pressures" deemed dispositive by the Court there, Coach Smith's involvement, too, no doubt "will be perceived by the students as inducing a participation they might otherwise reject."...

ANALYSIS OF THE COURT DECISION

The District Court utilized the Lemon Test to determine the constitutionality of the pre and post game prayers and ruled that the practice violated all three prongs of the tripartite test. On appeal the Circuit Court agreed with the court's analysis and affirmed the decision. The Circuit Court also stated that the Equal Access Act did not protect the school in this situation because the Act requires school personnel to act only in a custodial manner and that the coaches were too highly involved in the prayers. The Circuit Court further stated that the coach had more control over the team's prayer than the school administrator did in the Lee decision. The Court ruled that if the administrator's action in Lee was unconstitutional than surely the coaches' actions in this case was unconstitutional.

GEARON v LOUDOUN COUNTY SCHOOL BOARD

---F.Supp.---

1993 WL 595198

FACTS OF THE CASE

In the spring of 1993 several students in the Loudoun County Public Schools delivered invocations and benedictions at the schools' graduation ceremonies. Concerned citizens of Loudoun County filed suit prior to the ceremonies requesting that the District Court issue an injunction against the students being allow to deliver such prayers. The District Court issued an injunction but it was later lifted by the Fourth Circuit Court. The case was brought back to the District Court for arguments on the merits of the case.

The school district argued that the Jones decision (a Fifth Circuit case which allowed student initiated prayers at graduation) gave them the authority to permit student initiated prayers as long as school officials did not become excessively involved in the process.[78] The plaintiffs argued that the Jones decision was not consistent with the Federal Supreme Court's decision in the Weisman case which prohibited prayers at graduation ceremonies. The District Court ruled in favor of the Plaintiffs and stated that the prayers were unconstitutional. The Court issued an injunction prohibiting the school district from allowing prayers at their high school

graduation ceremonies.

EXCERPT FROM THE DECISION OF THE COURT

State sponsorship, i.e., involvement in a graduation ceremony is inherent. A high school graduation, and certainly one's right and desire to attend, is an important ingredient of school if--as much so as attending class. To involuntarily subject a student at such an event to a display of religion that is offensive or not agreeable to his or her own religion or lack of religion is to constructively exclude that student from graduation, given the options the student has. The Establishment Clause does not permit this to occur.

Nor can the state simply delegate the decision as to a prayer component of that ceremony to the graduating class without offending the establishment Clause. The notion that a person's constitutional rights may be subject to a majority vote is itself anathema. The graduating classes in Loudoun County certainly could not have voted to exclude from the ceremonies persons of a certain race. To be constructively excluded from graduation ceremonies because of one's religion or lack of religion is not a great deal different.

ANALYSIS OF THE COURT DECISION

The District Court ruled that student initiated prayers at graduation ceremonies were unconstitutional because they violated the Establishment Clause. The Court stated that the prayers were unconstitutional because school officials were excessively entangled in the development and delivery of the invocations. The record demonstrated that school officials had encouraged students to develop prayers by initiating a senior class meeting to discuss the issue; by reviewing the remarks before the students delivered the prayers; and by actually encouraging the students to follow the example set by

the Jones decision. The court also stated that the primary purpose of the prayers was not secular or an attempt to solemnize the ceremony. The court stated that the remarks in the prayers were clearly sectarian in nature and promoted the Christian faith while inhibiting non-Christian faiths.

SUMMARY OF PRAYER CASES

In Engel the Supreme Court ruled that a resolution of the Board of Regents of New York State which prescribed that a prayer be recited each day at the beginning of class was unconstitutional.[79] In a narrow decision the Supreme Court declared that no governmental agency could develop a prayer and then encourage, persuade or force individuals to recite such a prayer. The Supreme Court, however, did not rule on all forms of prayer in the public schools and a variety of ingenious attempts have been made to bring prayer back into the schools.

The Supreme Court ruled in Abington v. Schempp that an ordinance requiring the daily reading of a chapter from the Bible and a recitation of the Lord's Prayer was unconstitutional.[80] In determining whether the two statutes were constitutional or not the Supreme Court analyzed the purpose of the statutes and the primary effects that the practice would have if they were allowed to continue. The

Supreme Court concluded that the statutes were religious in nature and would have the primary effect of advancing religion. The Court stated that government must remain neutral in terms of religion and that no support or hostility could be shown to any religious sect. The Supreme Court made it clear in this case that public schools could not sponsor, endorsed or encourage daily Bible readings or the recitation of prayers during the normal school day.

Many schools, operating either under ignorance of the law or in open defiance, still attempted to incorporate a daily recitation of a prayer into the school day. The Courts have ruled on numerous attempts by public school officials, local governmental officials and legislators to incorporate some form of prayer, other than an open one, into the public schools. In 1985 the Supreme Court ruled in Wallace v. Jaffree that an Alabama statute which authorized a daily period of silence for meditation or voluntary prayer in the public schools was unconstitutional.[81] The Supreme Court ruled that this practice was not religiously neutral and was clearly in opposition to the Establishment Clause.

The Third Circuit Court of Appeals ruled in Karcher v May that a New Jersey statute which directed public school officials to observe a moment of silence each morning before the start of school was unconstitutional because the statute

had no secular purpose.[82] The deciding factor in Karcher was the purpose of the minute of silence. The school could not successfully argue that the moment of silence had a secular purpose. If a moment of silence policy was challenged the state would have the burden of proof to demonstrate that their statute had some legitimate secular purpose and that it was not a facade for a state approved time for prayer. If the governmental agency could prove it had a secular purpose the Courts would be more likely to approve the statute but the level of scrutiny would be extremely high. Because of the lack of clear judicial case law involving moment of silence statutes it would be prudent, from a legal standpoint, for school district not to adopt any moment of silence statutes until the courts give more direction on this aspect of prayer in the school.

Presently the Commonwealth of Virginia has a minute of silence statute which allows time for children to pray. The Code of Virginia S 22.1-203 states:

> In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the state either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division is authorized to establish the daily observance of one minute of silence in each classroom of the division.
>
> Where such one-minute period of silence is instituted the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each

> pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.[83]

This statute has yet to be challenged but many public school law scholars feel this statute is undistinguishable from the statute found to be unconstitutional in Wallace.[84] From a legal stand point it would be imprudent for any public school officials within the Commonwealth of Virginia to implement a moment of silence practice until further direction is given by the courts.

The Supreme Court ruled in Lee that invocations and prayers at graduation ceremonies were unconstitutional because the school had not maintained a state of neutrality. The Court ruled that school officials had given the rabbi, who delivered the prayer, a handbook which contained guidelines that regulated the content and structure of the prayer. This degree of involvement was excessive and therefore unconstitutional.

Although the Supreme Court declared that school endorsed or sponsored prayers were unconstitutional at graduation ceremonies it did not clearly address whether student initiated prayers were constitutional. The Fifth Circuit Court of Appeals ruled in Jones that invocations and benedictions which were developed and delivered solely by

students without any school involvement was constitutional. The Fifth Circuit Court declared that the schools' allowance of student initiated prayers had a secular purpose, it did not have the primary effect of advancing or endorsing religion, it did not excessively entangle government with religion and it did not coerce the participation of any objectors. The Jones decision has been seriously criticized, however, and many law scholars feel that the Fifth Circuit has misinterpreted Weisman.

In Loudoun County v Gearon, the United States District Court of Eastern Division of Virginia ruled that student initiated prayers at graduation ceremonies were unconstitutional because they violated the Establishment Clause. The Court rejected the school's argument that the Jones decision allowed student initiated prayers as long as the students were able to vote on whether they wanted a prayer or not. The Court maintained that no individual or organization had the authority to subject an individual's rights to a vote. The Court stated that the graduating class could not exclude people from the graduation ceremonies because of their race and therefore could not elect to have a prayer which would violate any individual's First Amendment rights.

Despite the Federal Court's decision in Loudoun, the Virginia Legislature enacted a statute in March of 1994 which

authorized public school officials within the Commonwealth to permit student initiated prayers in the public schools.[85] The legislature also enacted a companion statute directing the Virginia Board of Education to develop guidelines which would regulate voluntary student prayer in the public schools.[86] A few influential state senators such as Elliot Schewel, (D-Lynchburg) opposed the bills stating that both pieces of legislation were unconstitutional and that the Loudoun decision clearly prohibited such legislation and practices.[87] Several school superintendents such as Arthur W. Gosling, superintendent of Arlington Public Schools, agree with Schewel stating that both statutes were unconstitutional and that they would not recommend board policies which allowed student initiated prayers in their school divisions.[88]

Many groups such as the American Civil Liberties Union are scrutinizing the action of local school divisions relating to prayer in the public schools. Kent Willis, director of the Virginia Chapter of the American Civil Liberties Union, argued that the statutes were unconstitutional and has vowed to sue any school division which allows student initiated prayers. Relying on the Loudoun case as precedent it would seem that both of these statutes are clearly unconstitutional.[89] School divisions would almost certainly be forced to legally defend any policy allowing student initiated prayers at school and

despite the current state legislation allowing such prayers it would be extremely imprudent at this time for any school division to adopt board policies which allow student initiated prayers at school.

Although this aspect of school law is complex the court has provided some clear guidelines in the development of policies which regulate prayer in the public school. School officials or legislators may not constitutionally develop, endorse, sponsor or support any attempt to incorporate a structured prayer into the public schools. The courts are very clear on this issue. The courts are less clear on a moment of silence but would likely declare such a practice to be unconstitutional if the schools could not prove they had a legitimate secular purpose. The burden of proof would be extremely high, however, and from a legal sense it would be prudent for public schools not to have a moment of silence.

The courts have also made it clear that schools may not constitutionally develop, endorse, sponsor or support any attempt to incorporate a prayer into any extra-curricular activity such as a graduation ceremony or athletic contest. From a legal standpoint, public school officials must refrain from any direct involvement or support of prayer in the public school. A laissez faire doctrine is necessary for the school district to avoid violations of the Establishment Clause.

SEGMENT IV

ANALYSIS OF THE FEDERAL COURT CASES INVOLVING THE READING OF SCRIPTURES IN THE PUBLIC SCHOOLS

ABINGTON V. SCHEMPP

MURRAY V. CURLETT

374 U.S. 203

INTRODUCTION

Although Schempp and Murray have been discussed earlier in this chapter it is important to review these classes in this particular section because they involved prayer and Bible reading in the public schools. The Court ruled in this case that any daily or sporadic recitation of Bible verses by any public school official would be unconstitutional. The Court agreed that the Bible may be used as a literary and historical book but that it could not be used in a religious manner. The schools had openly admitted that their practice of daily prayers and Bible readings were religious ceremony and that they had a religious intent. The Court ruled that all schools must maintain a state of neutrality with religion and that public school officials may not constitutionally demonstrate support or hostility toward any particular religious belief. Please refer to the prayer section for a more detailed discussion of this case.

ROBERTS V. MADIGAN

921 F.2d 1047

FACTS OF THE CASE

In 1986 Kathleen Madigan, principal at Berkeley Gardens Elementary School, directed one of her teachers, Kenneth Roberts, to remove religiously oriented books from his classroom, to keep his Bible out of sight from the children and to refrain from reading the Bible during classroom hours. Madigan argued that this action was necessary because she wanted the school to avoid the appearance of teaching or endorsing religious doctrines to young impressionable students. Roberts filed suit against the school arguing that Madigan's directive was a violation of both the Establishment Clause and the Freedom of Speech Clause. The United States District Court of Colorado ruled in favor of the school district and supported the constitutionality of all of the school's actions except for the removal of the Bible from the library. Roberts appealed the decision and the Tenth Circuit Court of Appeals ruled that the school's action did not violate the free speech rights of the teacher or the Establishment Clause.

EXCERPT FROM THE DECISION OF THE COURT

Because the school district allegedly treated the

Christian materials differently than any other materials, Mr. Roberts concludes that the primary effect of the district's action must have been a disparagement of Christianity. Mr. Roberts infers that "{t}he school's actions do not convey a message of obeying the Establishment Clause, because then the school district would have removed all religious books, and prohibited teachers from silently reading any religious books....

....The removal of materials from the classroom is acceptable when it is determined that the materials are being used in a manner that violates Establishment Clause guarantees. Thus, the Establishment Clause focuses on the manner of use to which materials are put; it does not focus on the content of the materials per se. For example, the books about American Indian religion could be used in violation of the Establishment Clause of they were taught in a proselytizing manner. Because they were not so used, however, those books do not violate the Establishment Clause by the very existence of their content.

ANALYSIS OF THE COURT DECISION

The Tenth Circuit Court of Appeals ruled that a school district's decision to prohibit a fifth grade teacher from reading the Bible during a silent reading period and from keeping Christian books on his desk did not violate the free speech rights of the teachers or the Establishment Clause. The Court stated that the school's action did not have the primary effect of inhibiting religion and was therefore constitutional under the Establishment Clause. The Court ruled that the teacher's reading and presentation of Christian books could be seen as an attempt to proselytize the Christian Faith and would therefore be unconstitutional.

The Court rejected the teacher's argument that the school district was conveying a message of disapproval of the

Christian faith by preventing him from reading his Bible during silent reading periods and from having Christian books on his desk. The Court accepted the school's argument that the teacher was in effect attempting to proselytize the Christian faith. Fifth graders may see the teacher's action as being approved by the school and may feel coerced to read similar books. The Court also stated that fifth graders were very impressionable and the religious nature and action of the teacher could be seen as a crucial symbolic link between government and religion.[90]

The Court also accepted the school's argument that the teacher's action, if allowed, would violate the Establishment Clause. Using the Lemon Test the Court stated that the teacher did not have a secular purpose motivating his action of reading the Bible and that it actually had the primary effect of advancing religion.

SUMMARY OF BIBLE READING CASES

The Supreme Court ruled in Abington v Schempp that a state requirement of daily Bible reading in the public schools was unconstitutional.[91] The court stated that the Bible reading requirement in Schemmpp had the primary effect of endorsing and advancing religion and that it did not have a secular purpose. In Doe v Human the District Court of

Arkansas ruled that Bible classes conducted within the public schools were also unconstitutional.[92]

In Roberts a District Court ruled that a school district could force a teacher to remove his Bible from his desk during school hours and also prevent him from reading the Bible silently during a student reading period.[93] The Court ruled that elementary students were very impressionable and that they may see the Bible reading as part of the regular school curriculum. This may force some children to feel that they had to read the Bible to be in good standing with the school and the teacher.

The Courts have made it clear that public school officials can not develop, endorse, sponsor or conduct practices which include the daily or even sporadic reading of scripture during the normal school day. The Courts have also made it clear that schools may incorporate the Bible into the curriculum from a historical or a literary sense but it can not be used to advance religion. Any attempt by a public school to allow or condone structured Bible readings would be in open violation of the Establishment Clause of the First Amendment.

SEGMENT V

ANALYSIS OF THE FEDERAL COURT CASES INVOLVING RELEASE TIME PROGRAMS AND THE PUBLIC SCHOOLS

McCOLLUM v BOARD OF EDUCATION

68 S.Ct. 461

FACTS OF THE CASE

In 1940 a multi-denominational group called the Champaign Council on Religious Education was given permission by the Champaign Board of Education to provide religious instruction to school aged children during normal operating school hours. These meetings were held each week for thirty to forty-five minutes. Students were not required to attend any of these meeting but any child electing not to participate had to report to a different area of the building and was forced to complete some form of secular school work.

Vashti McCollum, as a taxpayer and a parent, filed suit against the school district arguing that the religious instruction created a school sponsorship of religion and that this sponsorship violated both the First and Fourteenth Amendments of the United States Constitution. The Supreme Court of the State of Illinois ruled that the religious instruction was constitutional and refused to enjoin the district from continuing the practice. McCollum appealed the decision to the United States Supreme Court which reversed the lower court's decision and remanded the case back to the Supreme Court of Illinois with directions.

EXCERPT FROM THE DECISION OF THE COURT

The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in Everson...

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths of sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere....

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

ANALYSIS OF THE COURT DECISION

Justice Black, writing for the majority, argued that public schools could not provide or allow for religious instruction to be given to students during normal operating hours on school premises because this practice was not a separation of church and state.[94] He argued that states which

possessed compulsory attendance laws would provide religious groups with a captive audience which could be subjected to religious indoctrination if sectarian groups were allowed admission into the schools.

Justice Black argued that this case was different from Everson or Cochran because the state's action in this case would constitute excessive involvement by the state in the affairs of the church. The Court stated that this extreme depth of relationship would violate the First Amendment. The court concluded that schools could not constitutionally permit religious organizations to provide religious instruction to children on public school premises during the normal operating hours of the school. It is important to note that the court narrowed its decision to religious instruction on school premises and during normal school hours.

ZORACH v. CLAUSON

72 S.Ct. 679

FACTS OF THE CASE

In the early 1950's the City of New York authorized its public schools to release students from school during normal school hours to attend religious institutions which would provide sectarian instruction and devotions. Under this program students would be allowed to leave the school campus and attend a local center where religious instruction would be

provided. Students who did not want to participate in the religious program were required to remain in the classroom. Tessiam Zorach, a taxpayer and a resident of New York City, filed suit against the New York City School Board arguing that the release time program was unconstitutional. Three lower courts ruled that the release time, as described in this case, was constitutional. Zorach appealed the decision to the United States Supreme Court which affirmed the lower courts' decision and ruled that the New York release time program was constitutional.

EXCERPT FROM THE DECISION OF THE COURT

This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike McCollum....

The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of church and state. Rather, it studiously defines the manner, the specific ways, on which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other - hostile, suspicious, and even unfriendly....

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

ANALYSIS OF THE COURT DECISION

Justice Douglas, writing for the majority, argued that the City of New York's release time program was constitutional because the religious instruction was not given on the school campus and it did not involve the expenditure of any public funds. The court stated that this case was different from the McCollum case because the religious instruction did not take place on the school campus. The court also ruled that the Constitution does not required the state to be hostile to religion but that only an appropriate distance be maintained to prevent the state from becoming excessively entangled with religious affairs.[95] The court concluded that public schools could constitutionally modify their schedules to accommodate religious instruction if the programs were delivered off campus and if the programs involved no financial assistance from public funds.

SMITH v SMITH

523 F.2d 121

FACTS OF THE CASE

Since 1923 the Rockingham Council of Weekday Religious Education (WRE), a nonprofit organization supported by the Virginia Council of Churches, had provided religious instruction to school age children during the school day in

Harrisonburg, Virginia. In 1963 the religious classes were removed from the classrooms and held in trailers near the school or in surrounding churches. WRE officials obtained the schools' enrollment lists and contacted parents to determine if they wanted their children to participate in the religious program.

Students wishing to participate in the program were removed from the classroom for approximately one hour per week. Students who elected not to be involved in the religious program were required to remain in the classroom even though the instructional process was terminated during the WRE classes. Students were neither encouraged nor discouraged by school officials from attending the WRE classes.

Parents who objected to the release time program filed suit against the school district arguing that the WRE program violated the First Amendment of the Constitution. The District Court ruled that the WRE program was unconstitutional and enjoined enforcement of the practice. The school district appealed the decision to the Fourth Circuit Court which reversed the decision of the District Court and declared that the WRE program was constitutional.

EXCERPT FROM THE DECISION OF THE COURT

In the instant case, the accommodations of the school program to religious training were generous and thorough going, but the public school classrooms, where the students

were compelled by state law to be, were not turned over to religious instruction, Therefore, the case is indistinguishable from and controlled by Zorach. Under it, the Harrisonburg release-time program must be constitutional...

We take this language to mean that the primary effect the public schools's release-time program in Zorach must be seen as simply the innocuous diminishing of the number of children in school at a certain time of day. According to this view, public school cooperation with the religious authorities in Zorach and the instant case is a largely passive and administratively wise response to a plenitude of parental assertions of the right to "direct the upbringing and education of children under their control..." With these premises, our conclusions must be that Harrisonburg public school's cooperation with the WRE program by itself does not necessarily advance or inhibit religion. Therefore, the Harrisonburg release-time program is not unconstitutional, under the modern test, as understood in the light of Zorach's apparent continuing validity.

ANALYSIS OF THE COURT DECISION

The Fourth Circuit Court of Appeals ruled that the Harrisonburg release time program was constitutional because it satisfied all three prongs of the Lemon Test and fell within the standards established by Zorach. The Court ruled that the McCollum and Zorach cases had established the standards by which the courts had consistently analyzed the constitutionality of release time programs. The Court stated, using Zorach as a basis, that a release time program would be constitutional if religious instruction was conducted off of the school campus and if no public funds were used for the sectarian endeavor. The Court ruled that these two criteria were met by the Harrisonburg program and was therefore

Constitutional.

The Court also elected to analyze the program by applying the Lemon Test. The Court ruled that the release time program had a secular purpose (to accommodate the wishes of the students and parents who wanted values and morals instilled in their children), that it did not create an excessive entanglement between the school administration and the religious authorities and that the primary effect of the program did not advance religion because the school's role was largely passive in the entire process.

DOE v SHENANDOAH COUNTY SCHOOL

737 F.Supp 913

FACTS OF THE CASE

Prior to 1982 the Weekday Religious Education organization (WRE) had provided religious instruction to students inside the Shenandoah County Public Schools. The WRE was required to provide this instruction off of the school campus after the school board became aware of the constitutional problems associated with allowing the organization access into the buildings. Since this time the school system has developed a release time program which enables the WRE to provide religious instruction to the children in old school buses which are parked in front of the school.

Parents and other concerned citizens of Shenandoah County filed suit against the school system arguing that the release time program violates the Establishment Clause and requested that the court issue an injunction against further implementation of the program. The school argued that its program was constitutionally permissible under the standards established by Zorach. The parents argued that the WRE was actually providing religious instruction on the campus and that the children were subjected to considered pressure to participate. The Court agreed with the parents and ruled that the release time program was unconstitutional and issued an injunction prohibiting the schools from continuing the program.

EXCERPTS FROM THE DECISION OF THE COURT

The primary distinction between this case and both Smith and Zorach is that the religious education is taking place on what appears to be school property. Photographs tendered by the plaintiffs indicate that the WRE school bus, which in most respects is indistinguishable form the defendants' school buses, parks directly in front of the entrance to plaintiff's school and only a matter of inches form the school's sidewalk. At other times the bus has parked in the school parking lot.... Even if it is true that the street directly in front of the school, or the parking lot, are not legally titled to the school, factor of overarching importance is the symbolic impact created by the appearance of official involvement.

The second important distinction is the fact that WRE personnel have entered the defendants' classrooms to recruit students, and that the employees of the defendants have taken an active part in the recruitment effort both by physical participation in the enrollment process and by verbal encouragement of the students. The defendants' actions have gone beyond a mere accommodation of the desires of parents that their children have sectarian instruction available to

them.

ANALYSIS OF THE COURT DECISION

The District Court ruled that the release time program was unconstitutional because it violated the Establishment Clause of the First Amendment. The Court stated that school officials had violated the Establishment Clause by allowing the WRE to enter the building to recruit students; by verbally and physically encouraging students to participate; by allowing the WRE to park a bus close to or actually on the school campus; by allowing the WRE to place unreasonable pressure on the students to participate by the offering or withdrawing of incentives such as candy; and by allowing students to participate in the program without parental permission.

The Court used Zorach and McCollum as a basis for its decision and concluded that this program did not possess the necessary constitutional standards as mandated by Zorach. The Court was also concerned about the symbolic link which may be created in the minds of young children between the WRE and the school. The court was concerned that children may be unable to clearly distinguish the efforts of the WRE from those of the school because the WRE was using a bus which closely resembled a regular school bus and which was parked in front of the building like a regular bus. The symbolic link must be

eliminated before a program would be considered constitutional.

SUMMARY OF RELEASE TIME CASES

In McCollum the Supreme Court ruled that an Illinois Public school's release time program, which allowed multidenominational instruction to be given on campus during the normal school hours, was unconstitutional.[96] The court stated that the school was advancing religion and was creating the appearance of state sponsorship of religion by allowing the program to continue on campus. Four years later the Supreme Court ruled in Zorach that a New York City release time program, which allowed students to receive religious instruction off campus, was constitutional.[97] The Supreme Court and the lower federal courts have used these two cases as the standards by which they have determined the constitutionality of release time programs.

In Virginia, the United States District Court, Western Division, ruled in Doe v Shenandoah that a Shenandoah County release time program was unconstitutional because it more closely resembled McCollum than Zorach. The Court maintained that this release time program did not sufficiently separate the school from the religious activities of the Weekday

Religious Education (WRE) organization. The court stated that the program gave the appearance that the school was actually endorsing and promoting the religious beliefs held by the WRE.

In Crockett v. Sorenson, the United States District Court, Western Division Virginia, ruled that a Bible class program was unconstitutional because it violated the Establishment Clause. The Court stated that the Establishment Clause allows the study of the Bible in the public schools only when it is taught in a factual and objective manner. The Court ruled that the Bible classes were developed in 1941 with the expressed purpose of teaching Christian values and morals. The Court went on to state that the program still had such a purpose and that it was clearly a religious exercise as opposed to being a objective, secular program.

Although the courts have relied heavily upon Zorach and McCollum for legal precedent some have incorporated the Lemon Test into their analysis. In Smith the Fourth Circuit Court of Appeals use the philosophy of Zorach and McCollum, as well as the Lemon Test, to determine the constitutionality of a release time program in Virginia.[98] The Court ruled that the Harrisonburg program was conducted off campus, participation was voluntary, no public funds were used to finance the program and the school officials were neutral in regards to the program. The Court ruled that this program was

constitutional because it was similar to Zorach and it passed all three prongs of the Lemon Test.

In summary the courts have generally ruled release time programs to be constitutional if the following criteria are meet: 1) The release time program must be held off campus. 2) Participation in the program must be voluntary in nature. Students can not be penalized or punished in any way because of their participation or lack of participation. 3) The cost of the release time program must not involve the expenditure of any public funds. 4) The school must maintain a complete state of neutrality toward the program. School officials may not force, persuade or discourage participation in the release time. 5) The release time program must not excessively entangle the school with the religious organization. 6) The primary effect of the program must not advance any specific religious cause.

SEGMENT VI

ANALYSIS OF THE FEDERAL COURT CASES INVOLVING THE DISTRIBUTION OF RELIGIOUS MATERIALS AND EQUAL ACCESS

INTRODUCTION

Segment VI of this chapter combines the distribution of religious material cases and equal access cases together into one segment. The decision to combine these topics was made because the Courts have traditionally analyzed the public forum status test in both the distribution cases and the equal access cases to determine the constitutionality of questionable practices within the schools. While it is true that the vast majority of the equal access cases actually involve the Free Speech Clause, as opposed to the Establishment Clause, both clauses have been closely related and it is difficult the separate the two.

For example, many public school officials have refused to allow equal access to the building for religious groups because they are concerned that such practices will violate the Establishment Clause. In contrast most individuals and groups who have been denied access have argued that their Free Speech rights have been violated. It would be difficult to completely separate these two clauses or these two issues especially when the Courts used a similar process and rationale to arrive at a decision.

The Courts have traditionally analyzed the public forum status of the schools to determine the constitutionality of either an equal access or distribution case. As will be discussed in greater depth later in this segment the amount of

control that public school officials have over the distribution of religious materials and equal access will be based to a considerable degree on the public forum status that has been developed for their school and for the specific issue in question. Because these two issues are so closely related in terms how they have been decided and because the schools have traditionally used the Establishment Clause as a rationale to limit Free Speech rights it is appropriate that the two issues be placed together.

LAMB'S CHAPEL V. MORICHES

113 S.Ct. 2141

FACTS OF THE CASE

Section 414 of the New York Education Law authorized local school boards to develop regulations which would govern the use of school facilities when the plant was not in used for educational purposes. Under the authority of this law the Center Moriches Union Free School District adopted 10 regulations which would govern communal use of their school. Rule Number 7 of these regulations prohibited the use of the school facilities for any religious activity.

In 1992 members of the Lamb's Chapel Evangelical Church requested the use of the school facilities to show a six-part film series which contained lectures by Doctor James Dobson. In these films, Doctor Dobson argued that negative influences

of the media on children could be eliminated if positive Christian values were taught and instilled in children at an early age.

The school district denied the request and cited rule number 7 as the rationale. Members of the church filed suit in District Court arguing that the school's denial violated the Freedom of Speech and Assembly Clause, the Free Exercise Clause and the Establishment Clause of the First Amendment. The church also argued that the refusal to allow use of the facilities violated the Equal Protection Clause of the Fourteenth Amendment. The District Court ruled in favor of the school district and rejected all of the church's claims.

The church appealed the decision to the Second Circuit Court of Appeals which affirmed the lower court's decision. The Court of Appeals petitioned the Supreme Court which granted certiorari. The Supreme Court reversed the Circuit Court's decision and ruled that the school district violated the Free Speech Clause of the First Amendment by denying church access to school premises for the purpose of showing films. The Supreme Court also ruled that the district could allow use of the facilities in this case without violating the Establish Clause.

EXCERPT FROM THE DECISION OF THE COURT

There is no suggestion from the courts below or from the

District or the State that a lecture or film about child-rearing and family values would not be a use for social or civic purposes otherwise permitted by Rule 10. That subject matter is not one that the District has placed off limits to any and all speakers. Nor is the any indication in the record before us that the application to exhibit the particular film involved here was or would have been denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in Cornelius,... that "... the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." The film involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the film dealt with the subject from a religious standpoint.

ANALYSIS OF THE COURT DECISION

The Supreme Court ruled that the Center Moriches Union Free School District had violated the Free Speech Clause of the First Amendment by denying access of their school facilities to a church group solely because the church wanted to show a film on family issues which involved religious tones. The court also ruled that the school would not have violated the Establishment Clause if they would have allowed the church to use the school facilities.

The Court began its argument by recognizing the authority of the public schools to develop reasonable regulations which would govern community use of the school's facilities. The Court ruled, however, that once a school opens its doors to the public it begins to create a public forum and thus abrogates some of its control to prevent organizations from

using the facilities. The Court ruled that the school had unconstitutionally denied access to the school facilities because the school had inappropriately applied Rule Number 7 (a school regulation which denied access to the school facilities by all religious group) to the case in question.

The Court ruled that the church was attempting to show films which dealt with issues concerning family issues and child-rearing and that this content was permissible under Rule Number 10. The Court ruled that the school's action to deny access was not viewpoint neutral and therefore could not constitutionally deny access. The Court concluded that even though the church had attempted to use a religious viewpoint to deliver their program, it was still permissible because the overall content was acceptable under Rule Number 10.

The Court further stated that the school would not have endorse religion if they would have granted access to the church for the presentation of the films because there was no realistic danger that the community would perceive access to the school as being a state sponsored event. The Court also stated that the use of the facilities by the Church would pass all three prongs of the Lemon Test.

BERGER v RENSSELAER CENTRAL SCHOOL CORPORATION

982 F.2d 1160

FACTS OF THE CASE

For many years the Rensselaer Central School Corporation had allowed the Gideons to distribute Bibles in the public schools. In 1990 two children, Moriah and Joshua Berger, moved into the Rensselaer District and their parents objected to the school district's policy of allowing the distribution of Bibles. The parents discussed the situation with the school officials but they informed the Bergers that the policy would not be terminated. The Bergers filed suit in District Court arguing that the policy violated the First Amendment and was therefore unconstitutional. The District Court ruled in favor of the school and the Bergers appealed to the Seventh Circuit Court of Appeals which reversed the lower court's decision. The Circuit Court ruled that the classroom distribution of Gideon Bibles violated the Establishment Clause and was therefore unconstitutional.

EXCERPT FROM THE DECISION OF THE COURT

The only reason the Gideons find schools a more amenable point of solicitation than, say, a church or local mall, is ease of distribution, since all children are compelled by law to attend school and the vast majority attend public schools...

In Lee, the Supreme Court held that public school principals may not invite clergy to offer invocation and benediction prayers at formal graduation ceremonies for high schools and middle schools without offending the First

Amendment. The Corporation's practice of assisting Gideons in distribution Bibles for non-pedagogical purposes is a far more glaring offense to First Amendment principles than a nonsectarian graduation prayer.

The invocation and benediction in Lee was nonsectarian; the Gideon Bible is unabashedly Christian. In permitting distribution of "The New Testament of Our Lord and Savior Jesus Christ" along with limited excerpts from the Old Testament, the schools affront not only non-religious people but all those whose faiths, or lack of faith, does not encompass the New Testament...

Attendance at the graduation ceremony in Lee was voluntary; attendance at Rensselaer schools during the Gideon distribution was mandatory...

The prayer in Lee occurred during an after-school extracurricular event; the Gideons distributed Bibles during instructional time...

ANALYSIS OF THE COURT DECISION

The Court rejected the Gideons' claim that they had a First Amendment Free Speech Right to distribute the Bibles. The Court ruled that the school and the Gideons had unconstitutionally advanced and promoted religion by providing a captive audience of fifth graders to which the Gideons had full access to distribute their religious materials and philosophy. The Court was also concerned that some of the students probably felt coerced to accept and read the Bibles because of the school's policy. The Court used the Lee decision to help determine the constitutionality of the case and concluded that the distribution of Bibles in this case was much more offensive than the prayer in Lee.

The Court ruled that the prayer in Lee was nonsectarian while the distribution of Bibles was clearly religious in

nature. Attendance to graduation ceremonies in Lee was voluntary to some degree whereas attendance was mandatory in Berger. The Court also ruled that the prayer in Lee was after school hours whereas the Bibles were distributed during normal school hours. The Lee case involved a multitude of religious sects giving prayers whereas the Gideons offered only one viewpoint. The Court concluded their argument by stating that the distribution of Bibles was much more coercive in nature than the prayer in Lee.

BOARD OF EDUCATION V. MERGENS

110 S.CT. 2356

FACTS OF THE CASE

In 1985 a group of students at Westside High School in Nebraska requested permission to form an organization that would meet at school for the purpose of discussing the Bible, having prayer and enjoying Christian fellowship. The students argued that they were entitled to develop such an organization under the authority of the Equal Access Act. The school officials denied the request and argued that the Equal Access Act was unconstitutional because it would force them to violate the Establishment Clause by permitting religious groups to meet at a public school. The school also argued that the Equal Access Act did not even apply to this case because all student organizations and clubs within the school

were curriculum related and were extensions of the educational goals of the school. A Federal District Court ruled in favor of the school district and agreed that all student organizations were curriculum related and that the school was not a limited open forum. The students appealed to the Eighth Circuit Court which reversed the decision and ruled that several of the organizations were not curriculum related and therefore the school could not deny access to religious clubs. The case was presented to the Supreme Court which affirmed the Circuit Court's ruling and stated that the school had unconstitutionally prohibited the students from organizing a club.

EXCERPT FROM THE DECISION OF THE COURT

Westside's existing student clubs include one or more noncurriculum related student groups[s]" under the foregoing standard. For example, Subsurfers, a club for students interested in scuba diving is such a group, since its subject matter is not taught in any regularly offered course; it does not directly relate to the curriculum as a whole in the same way that a student government or similar group might; and participation in it is not required by any course and does not result in extra academic credit. Thus, the school has maintained a "limited open forum" under the Act and is prohibited from discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time..

Westside's denial of respondents' request to form a religious group constitutes a denial of "equal access" to the school's limited open forum..... Since denial of such recognition is based on the religious content of the meetings respondents wish to conduct within the school's limited open forum, it violates the Act.

ANALYSIS OF THE CASE

The Mergens case was an important case in the development of public school law because the Federal Supreme Court ruled that the Equal Access Act was constitutional and that schools would be forced to allow religious groups to have the same type of access to school facilities as any other non-curriculum organization had. The Federal Supreme Court used the Lemon Test to determine the constitutionality of the Equal Access Act. The Court concluded that the Act had a secular purpose (to prevent the discrimination against various types of speech in the secondary schools); that the primary effect did not advance religion; and that the Act did not create an excessive entanglement between church and state.

Justice O'Connor, writing for the majority, stated that the Equal Access Act would be applicable in any public secondary school which allowed even one non-curriculum related club to meet at school. The Court stated that the requirements of the Equal Access Act could be avoided by the refusal of the schools to accept federal money but once the school officials elected to accept the money they would be forced to adhere to the law. The Court also stated that the Equal Access Act allows school officials to maintain an orderly environment within the school and that substantial disruptions for any organization could result in its prohibition to meet.

Because of the Mergen decision public school officials must now determine what type of public forum exists within their school and adjust their policies accordingly. Secondary public school officials must allow all non-curriculum related organizations an equal opportunity to use the school if school officials have adopted a limited open forum within their school. A limited open forum would seem to exist if any non-curriculum club is allowed to meet within the school. Secondary school officials may develop a closed public forum and thus free them to prohibit any non-curriculum clubs to meet within the schools.

SUMMARY OF THE DISTRIBUTION OF RELIGIOUS MATERIALS AND EQUAL ACCESS CASES

Bjorklun argued that the distribution of religious materials and Equal Access to school facilities may become the leading legal issue of the 1990's.[99] Most of the early court cases which involved the distribution of religious materials involved the dissemination of Bibles in the public school.[100] The majority of the courts ruled that the distribution of Bibles in public schools was an endorsement of religion and declared the practice to be unconstitutional.[101]

Traditionally the courts ruled that students had the constitutional right of free speech but that a potential violation of the Establishment Clause was a compelling state interest. This allowed schools to prohibit the distribution of religious materials within the schools. This tradition may no longer be valid because of the Mergens decision and the subsequent federal circuit and district court cases that followed.[102] Many of the courts now declare that schools may no longer argue that a violation of the Establishment Clause is a sufficient compelling state interest to prohibit the distribution of religious materials.

In Widmar v Vincent the Federal Supreme Court ruled that any infringement on a student group's access to a public forum which was created for student expression on college campuses had to be justified by a compelling state interest. The Court stated that compliance to the Establishment Clause was a compelling state interest in this case. The Court went on to state, however, that the Establishment Clause does not prohibit colleges from allowing access to all religious groups on campus. The Court ruled that religious groups would be able to use the forum, with no violation of the Establishment Clause, if all other student groups were given the same opportunity. This case applied only to post-secondary schools and did not affect precollegiate institutions.

In the Mergens decision the Federal Supreme Court extended the Widmar rationale into the secondary schools. The Supreme Court ruled in this case that the Equal Access Act did not violate the Establishment Clause.[103] The Equal Access Act has a direct impact on the schools because it provides considerable freedom to all students if a limited public forum exists. An analysis of the public forum status of public schools is necessary to understand how this act affects the schools.

The courts have recognized three types of forums; non-public forums or closed forum, limited public forums and traditional public forum. The non-public forum is one that is not, either by tradition or designation, a forum for public communication. A limited public forum is property which the state has opened for use by the public as a place for expressive activity, but only for limited groups of individuals such as students. A traditional public forum is a place which by long tradition or governmental fiat has been devoted to assembly and debate.

The courts have identified these three types of forums and will permit varying degrees of state control over expressive activity. The public forum enjoys the most expressive freedom and the state must be able to prove that it has a compelling state interest to prohibit any form of

expressive activity. The courts have also demanded that any restrictions on expressive activity be narrowly drawn to achieve the compelling state interest. The court will scrutinize any attempt by the state to prevent expressive activity in a traditional public forum. The burden of proof will fall on the governmental agency to prove that it does have a compelling state interest.

The non-public forum enjoys the least amount of expressive freedom. The courts will accept governmental prohibition of expressive activity as long as the time, place, and manner restrictions are reasonable. The courts also insist that although the state may reserve its forum for its intended purpose, public officials can not suppress expression merely because they oppose the content or views of the speaker.

The limited public forum enjoys less expressive freedom than the traditional forum and more than the non-public forum. The state can limit its forum to specific forms of expressive activities but it must have well defined standards which regulate the forms of expressive activities that are permissible. The standards must also be tied to the nature and function of the forum. A limited forum has the same degree of constitutional scrutinize as the traditional forum on all unspecified uses.

The type of forum that a school develops is a major

factor in determining whether the school can prevent the distribution of religious materials and deny access of the use of their facilities. The courts have traditionally accepted that public schools are not originally traditional public forums. The schools are not forced to open their doors to any member of the community or allow any group to distribute literature within the schools. The courts have also stated that schools may surrender their non-public status (and thus lose considerable control over the type of expressive activity that occurs within the school) when they allow non-curriculum or non-school related organizations or clubs to use the facilities. Justice O'Connor stated that the Equal Access Act would become activated even if one non-curriculum club were allowed to meet during non-instructional time.[104] This would mean that school would be force to allow the distribution of all forms of literature and open its doors to all organizations (within reason) if school officials allowed any one non-curriculum club to meet or to distribute materials.

Public schools have demonstrated that they can be closed forums but high schools seem to have a much more difficult time persuading the courts that they have a non-public forum. Most elementary schools do not have a wide range of extra-curricular clubs and thus have less difficulty declaring their non-public status. Generally, high schools have a wide range

of extra-curricular clubs and many are not directly related to the curriculum. Many organizations and community groups have been granted permission to use the high school facilities which helps to erode the non-public status of the high school.

Although the rationale of the court is somewhat clear in terms of the degree of scrutiny it will use in determining the constitutionality of equal access and distribution practices, it is often difficult to determine what is a non-curriculum club and at what point does the school lose its non-public status. Some clubs are clearly curriculum related such a science club or Spanish club but is a club such as the chess club curriculum related or not? This debate is one of the questions that must be addressed before one can understand how the courts will decide on an equal access or distribution case.

Morris argued that a club is directly related to the curriculum when it possesses any of the following criteria: 1) Student participation in the club receives academic credit 2) The subject matter of the club concerns the body of courses as a whole 3) The subject matter of the group is actually taught, or soon will be taught, in a regularly offered course; 4) Participation in the group is required for a particular course.[105] If a school allows access to a club or organization which fails to meet any one of the above criteria, the court

will likely declare the school to be a limited public forum. This will force school officials to allow the distribution of religious materials within the school and prevent them from denying access to religious organizations.

An example of a public forum would be the Grace Bible case in which the First Circuit Court of Appeals ruled that a school district could not deny access of their facilities to a religious organization because the school had created a public forum by allowing various organizations in the community to use the facilities.[106] The court stated that the school had allowed non-curriculum groups such as the American Association of Retired People, Up With People, Pen Ray Hospital and United Parcel Service to use the facilities. This action created a public forum and the school could not constitutionally prohibit a non-profit religious organizations from using the facilities unless they could demonstrate a compelling state interest.

Another example of the public forum could be found in Bacon where the United States District Court of Illinois ruled that a school district could not prohibit an individual from distributing Gideon Bibles on a sidewalk in front of the school.[107] The court stated that the sidewalk and been designated as an open forum and therefore the school could not constitutionally prohibit individuals from distributing

literature.

The courts have also recognized non-public forums. The District Court of Colorado in Hemry ruled that a school's prohibition of the distribution of a religious newspaper was constitutional because the school had created a non-public forum.[108] The court ruled that the school had not designated the hallway for indiscriminate use by the general public and thereby had created a non-public forum. In Perumal, the Fourth District Court of Appeals declared that a California high school ban on the distribution of religious flyers was constitutional because the school had allowed only school sponsored activities to take place on the campus.[109] This restriction on all non-school related clubs had created a non-public forum which allowed the school to prohibit students from distributing religious flyers.

A Court of Appeals ruled in Reed that neither the public nor the school had designated a sidewalk on the school campus as a place for expressive activity and had thereby created a non-public forum.[110] The school could therefore prohibit the dissemination of anti-abortion books on the campus sidewalk. In Duran, the United States District Court of Pennsylvania held that an elementary school's refusal to allow a child to distribute religious surveys was constitutional because the school had clearly established a non-public forum by denying

access to all outside groups and from prohibiting the dissemination of all non-school related material.[111]

Although the public forum analysis is the primary standard by which the court determines the constitutionality of questionable practices involving equal access, some of the courts have either relied exclusively on the Lemon Test or have incorporate it into their analysis. The Fifth Circuit Court of Appeals used the Lemon Test in Lubbock to analyze a school district's practice which allowed the distribution of Bibles to fifth and sixth graders, silent prayers in the school and daily Bible readings.[112] The Court ruled that the policy did not have a secular purpose, had the primary effect of promoting religion and excessively entangled government with religion.

In Quappe, the United States District Court of Ohio incorporated the Lemon Test into their analysis and declared that a school could change the meeting time of a religious club from 3:30 to 7:30.[113] The court ruled that the school had a secular purpose in changing the meeting time, that its primary effect did not prohibit religion and that it did not excessively entangle religion with the church. In Berger, the Seventh Circuit Court of Appeals held that the classroom distribution of Gideon Bibles was unconstitutional because the school had advanced the cause of religion by providing the

Gideons with a captive audience.[114] The court ruled that the school had not maintained a state of neutrality and therefore the school's action was unconstitutional.

To summarize, school officials should determine the type of public forum status that would best serve their interests and reflect to a considerable degree the past patterns and practices of the school. School officials will lose considerable control over the type of literature that may be distributed within the school and the organizations that can use the facilities if they adopt an limited public forum. School officials must, however, adopt a limited public forum status if the school allows access to even one non-curriculum club or organization.

School officials will be better able to control who uses their facilities and what material is distributed within the school if a closed public forum is adopted. This will force the schools, however, to limit access to all non-school related clubs and organizations. Secondary schools may find it extremely difficult and to their disadvantage to establish a closed public forum status. Many secondary schools allow various non-curriculum clubs and organizations to exist within the schools. Often these clubs are service oriented and provide considerable assistance to the school and to the community.

Each forum has their own merits and disadvantages. Schools must analyze their own needs and community to determine which forum should be adopted. This decision should be a conscious decision, however, so that school officials may develop policies and regulations which are consistent with the court's interpretation of the law.

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CHAPTER THREE

METHODOLOGY

Introduction

There were four separate phases to this study. The first phase provides an analysis of the legal and historical development of public school law as it related to the Establishment Clause. The second phase collects all relevant division policies which were officially adopted by school boards within the Commonwealth of Virginia as of September 7, 1993. Phase three provides an analysis and evaluation of the school board policies that were collected. An analysis was conducted to determine if these policies were consistent with the court's interpretation of the Establishment Clause. The final phase presents a set of sample policies which are based on the most current research available and which are applicable to Virginia. These sample policies can be used as a reference in the development of school board policies which relate to issues involving the Establishment Clause.

The Population

All superintendents from the one hundred thirty-six school divisions within the Commonwealth of Virginia served as the population for this study. The 1993 Virginia Educational Directory was used to identify and obtain the addresses of the

superintendents.

Instruments

First Phase

Analysis of Case Law

The first phase of this study was designed to provide an analysis of the development of public school law as it relates to the Establishment Clause. A comprehensive review and analysis of public school law was necessary for the selection of the appropriate cases which were relevant to the scope of this study. All federal district, circuit and Supreme Court cases involving references to the Establishment Clause were obtained by utilizing WestLaw, ERIC, reference books and textbooks. The court cases obtained from these searches were combined with an additional list of church and state cases prepared by Dr. David Alexander at the Virginia Polytechnic Institute and State University.

A three member panel, possessing considerable knowledge about public school law, was selected and approved by the dissertation committee. This panel consisted of Dr. Joe Bryson, University of North Carolina, Dr. Richard Vacca, Virginia Commonwealth University and Dr. David Alexander, Virginia Polytechnic Institute and State University. Each member of the panel was asked to review the comprehensive list and select the cases they felt were important to a thorough

understanding of the development of public school law concerning the Establishment Clause.

The analysis of each case adheres to the same format. All cases are appropriately cited and followed by a brief synopsis of the facts which precipitated the case. Selected parts of the court's decision follow the summary of the facts. The analysis concludes with an explanation of how the courts' decisions have affected the public schools.

Second Phase

Collection of School Board Policies

A letter was sent to all public school superintendents in the Commonwealth of Virginia. The names and addresses for these administrators were obtained from the 1993 Virginia Educational Directory. Superintendents were requested to return any policy involving an Establishment Clause issue that had been approved by their school board. If such policies did not exist the superintendents were requested to return a form which declared that their school division had not adopted any policies.

Each letter was coded with a series of numbers so that the researcher was able to identify the superintendents that had not responded. A second mailing was sent to the school divisions that had not responded within three weeks of the original mailing. This letter reinforced the importance of

the study and encouraged superintendents to respond. Complete confidentiality was assured in the letter in an attempt to increase both the response rate and the accuracy of the replies.

Third Phase

Evaluation of Board Policies

The third phase of this study was designed to evaluate the school division policies that were returned by the superintendents. A set of twenty-one criteria was developed to evaluate the school board policies which were returned. The criteria reflect a synopsis of the information and data obtained from a meticulous review of the literature, sample policies and criteria supported by both the National and Virginia School Board Associations and public school attorneys. The criteria were divided into five categories to provide greater organization and to increase clarity. The categories include general criteria, prayer criteria, Bible reading criteria, release time criteria and equal access criteria. After the criteria were developed, they were sent to the members of the school law panel for review and recommendations for improvement. The necessary modifications were made to the criteria and the following 21 criteria represent the final copy.

GENERAL CRITERIA

1. The policy should contain a philosophy statement which proclaims and demands that the schools maintain a state of neutrality with religion. The philosophy statement should make it clear that school officials may express neither support nor hostility toward religion.
2. The policy should declare that religion can be incorporated into the curriculum only when it is presented in a manner that is religiously neutral. Schools can establish religious neutrality by presenting content of a religious nature in a historical, literary, objective or factual manner.
3. The policy should declare that each school sponsored observance, program, instructional or any other activity involving some form of religious content must have a secular purpose.
4. The policy should declare that each school sponsored observance, program, instructional or any other activity involving some form of religious content must not have the primary effect of either advancing or inhibiting religion.
5. The policy should declare that each school sponsored observance, program, instructional or any other activity involving some form of religious content must not create an excessive entanglement between the school and

religion.

6. The policy should define critical terms that are used within the policy such as religious organizations, school hours, excessive entanglement, secular purpose, sponsorship and primary effect.

PRAYER

7. The policy should declare that there will be no school sponsorship or involvement in the daily or sporadic recitation of any form of prayer in the classroom during normal school hours.

8. The policy should declare that there will be no school sponsorship or involvement in any invocation, benediction or any other form of prayer at graduation ceremonies.

9. The policy should declare that there will be no school sponsorship or involvement in any invocation, benediction or any other form of prayer at athletic events or any other extra-curricular activity sponsored by the school.

10. The policy should not contain a minute of silence provision which has any reference to the time being used as an opportunity for students to pray or engage in any other non-secular activity.

BIBLE READING

11. The policy should declare that there will be no school sponsorship, endorsement or encouragement of daily or sporadic scripture reading.
12. The policy should declare that scripture reading may be incorporated into the curriculum only when it is presented in a factual, historical or literary manner.

RELEASE TIME

13. The policy should declare if the schools within the division have the opportunity and authorization to participate in release time programs.
14. The policy should declare that all release time programs are to be conducted off the school campus.
15. The policy should declare that no public funds nor any school funds can be use to support a release time program.
16. The policy should declare that participation in any release time program must be voluntary in nature and must include parental consent. No students can be penalized or punished for either electing to participate or choosing not to participate in any release time program.
17. The policy should declare that the school and all school officials must maintain a state of neutrality toward the release time program. No school official can directly

participate in the release time program nor may they encourage or discourage students from participating.

EQUAL ACCESS

DISTRIBUTION OF RELIGIOUS MATERIALS

18. The policy should declare the public forum status of each school in the division and ensure that the decision is based to a considerable extent on the past patterns and practices of the schools.
19. The policy should define key terms that are used in the policy such as limited public forum, closed public forum, equal access, curriculum related clubs and normal school hours.
20. The policy should declare reasonable time, manner and place restrictions on the distribution of religious materials and access to the school facilities. Religious organizations should conform to the same standards and regulations as any other non-school organization.
21. The policy should make it clear that religious organizations are only allowed access to the schools on an equal basis with any other non-school organization. The policy should make it clear that the school does not necessarily endorse nor sponsor any non-school activity because it allows an organization to use the facilities or to distribute literature.

Each policy was evaluated by the preceding criteria. A matrix, which is located in Appendix C, was developed to analyze the data in which the criteria were listed horizontally across the top. The coding numbers representing the school divisions were listed vertically on the left. Each policy was individually analyzed to determine if they met each one of the criteria listed on the evaluation form. The criteria were marked in the affirmative fashion if the policy met the specific condition. The criteria were marked in the negative if they failed to meet the specifics. Affirmative marks were coded with a "1" and negatives were coded with a "0". Appendix D represents the summation of this analysis.

To ensure consistency and internal validity the school law panel analyzed a random sample of ten percent of the policies that had been evaluated for this study to determine if they would have responded in the same fashion. At least ninety percent of the responses of the recorder and panel members corresponded and this rate was considered reliable.

The data collected from this study were analyzed in five primary sections. First the data were analyzed to determine the percentage of school divisions within the Commonwealth of Virginia which had adopted school board policies governing Establishment Clause issues.

The second stage was designed to rank the schools into four separate quartiles according to the percentage of

affirmative marks received in all five categories. The most successful policy satisfied only 52 percent of the criteria and therefore the range was from 0 percent to 52 percent instead of 0 percent to 100 percent. The quartiles were divided into four relatively equal parts. The first quartile included the school divisions satisfying 42 percent to 52 percent of the criteria. The second quartile included the school divisions satisfying 28 percent to 41 percent. The third quartile included the school divisions satisfying 14 to 27 percent. The fourth quartile included the school divisions satisfying 0 percent to 13 percent of the criteria.

For clarification purposes the first part of the second analysis was performed without using the 49 school divisions which responded to this study but declared that they had no policies. These two analyses were performed separately so that the strengths and weaknesses of the policies which are currently in place throughout the Commonwealth could be determined without being skewed or distorted by the number of schools which did not have policies. Part two of the second analysis was necessary to determine the status of the Commonwealth as a whole in regards to school board policies governing Establishment Clause issues. It is important to note that column 4 of Tables 3 through 16 represent the percent of total school divisions which satisfied the criteria. All 125 school division which responded to this

study (regardless if they returned policies or not) are included in this analysis. Column 3 demonstrates the strengths and weakness only of the schools which have adopted policies but column 4 demonstrates the weaknesses of all the schools in the Commonwealth which responded to this study. The percent of schools satisfying criteria in column 4 will always be less than column 3 because the schools which have no policies are added in column 4. The remaining three analyses follows this same format of separating the schools which returned policies and then all schools responding to this study.

The third stage was designed to rank the schools into four separate quartiles according to the percentage of affirmative marks received in each one of the five categories. The first quartile includes the policies satisfying 75 percent to 100 percent of the criteria within a specific category. The second middle quartile includes the policies satisfying 50 percent to 74 percent of the criteria within a specific category. The third quartile includes the policies satisfying 25 percent to 49 percent of the criteria within a specific category. The fourth quartile includes the policies satisfying 0 percent to 24 percent of the criteria within a specific category. This analysis provides a brief scenario of the success rate of the school divisions in developing adequate policies to deal with Establishment Clause issues.

For example: There were 6 criteria in the general

category. A school division would receive six affirmative marks if it met all the criteria within the general category. This meant that if a policy satisfied at least 5 of the 6 criteria it would be ranked in the first quartile and would be a relatively strong policy. This ranking was established by dividing the total number of affirmative marks of a specific school division within a category by the number of possible criteria. If a policy satisfied 6 criteria (6 divided by 6 equals 100 percent) or if the policy satisfied 5 criteria (6 divided by 5 equals 83 percent) it would be ranked in the first quartile; 4 criteria (66 percent) or 3 criteria (50 percent) would be placed in the second quartile; 2 criteria (23 percent) would be place in the third quartile; 1 criterion (16 percent) or 0 criteria (0 percent) would be placed in the fourth quartile.

The percentage of schools falling into the first quartile was determined by dividing the total number of schools which ranked in the first quartile by the total number of schools returning policies. For example: There were 17 schools which satisfied 5 or 6 of the criteria within the general category. The percentage of schools ranking in the first quartile (22 percent) of the general category was obtained by dividing the total number of schools which satisfied 5 or more criteria (17) by the total number of schools returning policies (76). The same process was used to determine the quartile ranking of

the remaining three quartiles.

The same analysis was conducted again using the total number of schools responding to the study instead of using only those schools which returned policies. The same data and numbers were used with the exception of the number of schools changed to 125 (the total number of schools responding to the study) instead of 76 which represented the total number of schools responding to the study that had policies.

The fourth stage was designed to determine the percentage of criteria within each category which were satisfied by the school divisions returning policies. For clarification and organizational purposes the analysis was conducted within each one of the five categories. The percentages were obtained by dividing the total number of affirmative marks within each one of the categories by the total number of possible affirmative marks.

For example: There were 76 schools which returned policies. There were 6 criteria within the first category or the general category. The total number of possible criteria or affirmative marks (456) in the general category was obtained by multiplying the total number of school divisions returning policies (76) by the total number of criteria within the general category (6). The total number of affirmative marks within the general category was 160. This number was obtained by counting the total affirmative marks of the first

six criteria. This data can be located in Appendix C. The total affirmative marks (160) were divided by the total number of possible affirmative marks (456) in the general category to obtain the percentage (35.08 percent) of criteria which were satisfied by the school divisions which returned policies. This same analysis was conducted for each one of the remaining four categories.

For clarification purposes the above analysis was conducted without including the school divisions which responded to the study but had no policies. A second analysis was conducted using the same process but the number of schools increased from 76 (the number of schools with policies) to 125 which represents the total number of schools responding to the study.

The fifth stage was designed to determine the percentage of school board policies which satisfied each one of the 21 criteria within the five major categories. These percentages were obtained by dividing the total number of affirmative marks associated with one specific criterion by the total number of policies.

For example: There was a total of 35 affirmative marks for the first criterion which dealt with a philosophy statement. This meant that only 35 school divisions had adopted policies which contained a philosophy statement. These data were obtained by counting the total affirmative

marks associated with the first criterion in Appendix D. The percentage of schools returning policies that successfully satisfied the first criterion (46 percent) was obtained by dividing the total number of affirmative marks (35) by the total number of schools which returned policies (76). The same analysis was conducted for each individual criterion.

Again another analysis was conducted to determine the status of all schools which responded to this study and not just the ones which had returned policies. The process for determining this set of percentages would be the same except that the number of all schools responding to this study (125) would be used in the calculation instead of the number of schools which returned policies (76).

Fourth Phase

Development of Sample Policies

The final phase of this study provides sample policies that school divisions can use as a reference in the development of their own division policies which are consistent with the courts' interpretation of the Establishment Clause. The development of these sample policies were governed by the information obtained from a thorough review of the literature, sample policies and guidelines developed by the National and Virginia School Boards Association and the expertise of the law panel.

CHAPTER FOUR

ANALYSIS OF DATA

INTRODUCTION

The analysis of data was divided into five separate sections to provide improved organization and clarity. The first section was designed to analyze the response rate and the percentage of schools returning policies. The second section was designed to rank the school divisions into 4 quartiles according to the degree of success they had in satisfying all 21 criteria. The third section was designed to rank the school divisions into 4 quartiles according to the degree of success they had in satisfying the criteria in each one of the five categories. The fourth section was designed to analyze the percentage of affirmative marks in each one of the five major categories. The fifth section was designed to analyze the percentage of total affirmative marks of each individual criterion.

SECTION ONE

ANALYSIS OF THE RESPONSE RATE

In December, 1993 a letter was sent to all public school superintendents in the Commonwealth of Virginia. A sample of the letter can be located in Appendix A. The letter requested

that each superintendent return any policy that their division had adopted which related to an Establishment Clause issue. Approximately 66 percent (90 school divisions) responded to the first mailing. A second letter (Appendix B) was sent three weeks later which requested that the non-responding superintendents reply to the study. Approximately 25 percent (35 school divisions) replied to the second mailing. The second mailing increased the response rate to 91 percent (125 school divisions). Table 7 represents an analysis of the respond rate. The first column provides the necessary descriptive information; the second column represents the number of school divisions responding to the study; the third column represents the corresponding percentages.

TABLE 1
ANALYSIS OF RESPONSE RATE

	NUMBER	PERCENT
Responding to first mailing	90	66.18
Responding to second mailing	35	25.74
TOTAL	125	91.91

Table 2 represents an analysis of the school divisions returning policies. Column 1 provides the necessary descriptive information; column 2 represents the number of school divisions; column 3 represents the corresponding percentages. Data from Table 2 demonstrates that

approximately 55 percent of the school divisions which responded to this study returned policies relating to at least one Establishment Clause issue as defined by this study. Approximately 36 percent of the schools which responded declared that they had no policies relating to any Establishment Clause issue as defined by this study. Approximately 8 percent of the school divisions did not respond to this study.

TABLE 2
ANALYSIS OF RESPONSE RATE ACCORDING TO POLICIES

DESCRIPTION	NUMBER	PERCENT
Schools returning religious policies	76	55.88
Schools declaring no religious policies	49	36.03
Schools not responding to the study	11	8.09
TOTAL	136	100

SECTION 2
ANALYSIS OF THE QUARTILE RANKING OF POLICIES ACCORDING TO THE DEGREE OF SUCCESS IN SATISFYING ALL 21 CRITERIA

Section 2 of the analysis was designed to rank the school divisions into one of four quartiles which correspond to the percentage of criteria that were satisfied by the policies. This analysis is beneficial because it provides a clear illustration of the overall strengths and weaknesses of school board policies as they relate to issue involving the Establishment Clause.

The first quartile includes the policies which satisfy 42 percent to 52 percent of the criteria (9 to 11 criteria). The first quartile terminates at 52 percent instead of 100 percent because the most successful policy only met 11 of the criteria or 52 percent. The second quartile includes the policies which range between 28 percent and 47 percent (6 to 8) affirmative criteria. The third quartile includes the policies which satisfy between 14 percent and 27 percent (3 to 5) of the criteria. The fourth quartile consists of the policies ranging between 0 percent and 13 percent (0 to 2) affirmative criteria.

Column 1 of Table 3 provides the quartile assignments. Column 2 provides the number of criteria which were successfully met. Column 3 provides the number of schools which fall within the corresponding quartiles. Column 4

provides the corresponding percentages of schools returning policies. Column 5 provides the corresponding percentages of all schools responding to this study.

TABLE 3
ANALYSIS OF QUARTILE RANKING
OF POLICIES AMONG ALL 21 CRITERIA

QUARTILE ASSIGNMENT	NUMBER OF CRITERIA MET	NO. OF SCHOOLS	PERCENT POLICIES	PERCENT SCHOOLS
1ST QUARTILE	9 to 11	11	14.47	8.80
2ND QUARTILE	6 to 8	18	23.68	14.40
3RD QUARTILE	3 to 5	24	31.58	19.20
4TH QUARTILE	0 to 2	23	30.26	57.60

The data in Table 3 demonstrate that even the most successful policy responded in an affirmative manner to only 52 percent of the criteria or 11 criteria. A little more than 14 percent of the policies were ranked in the first quartile. Approximately 23 percent of the policies were ranked in the second quartile. The majority of the policies or approximately 61 percent were ranked in the third and fourth quartiles. Approximately 31 percent of the policies were in the third quartile and 30 percent were in the fourth quartile.

Column 5 of Table 3 includes the data involving all school divisions which responded. With these additions the deficiencies of the divisions are seen more clearly and become more serious. Over 57 percent of the school divisions ranked in the fourth quartile and satisfied no more than 13 percent

of the criteria. Over 19 percent were ranked in the third quartile and over 14 percent were ranked in the second quartile. Approximately 8 percent of the school divisions were ranked in the first quartile.

SECTION 3
ANALYSIS OF THE QUARTILE RANKING OF POLICIES ACCORDING TO THE DEGREE OF SUCCESS IN SATISFYING THE CRITERIA IN EACH CATEGORY

Section 3 of the analysis was designed to rank the school divisions into four quartiles which correspond to the degree of success that the schools had in satisfying the criteria within each major category. The first quartile includes the school divisions satisfying 75 percent or more of the total criteria within a specific category. The second quartile includes the schools satisfying 50 percent to 74 percent of the criteria. The third quartile includes the divisions satisfying 25 percent to 49 percent of the criteria. The fourth quartile includes the schools satisfying 0 percent to 24 percent of the criteria.

Tables 4 through 10 display the corresponding data in the third section of the analysis. Tables 4, 5, 7, 8 and 10 are designed to demonstrate the quartile placement of school divisions according to each one of the five categories. Table 6 provides a brief analysis of how division policies have addressed the issue of a moment of silence and Table 9 provides an illustration of how division policies have addressed release time programs.

The first column in Table 4 describes the assigned quartiles. Column 2 provides the number of criteria which were successfully satisfied by the policies. Column 3 provides the

number of schools which fall within the corresponding quartiles. Column 4 provides the corresponding percentages of schools returning policies. Column 5 provides the corresponding percentages of all schools responding to this study. It is important to note that the fourth column represents only those schools which returned policies. The fifth column represents all schools which responded to the study. The first category to be analyzed is the general category which will be followed by the prayer, Bible, release time and equal access category.

TABLE 4
ANALYSIS OF QUARTILE RANKING
WITHIN THE GENERAL CATEGORY
(n = 6)

QUARTILE ASSIGNMENTS	NUMBER OF CRITERIA MET	NO. OF SCHOOLS	PERCENT POLICY	PERCENT SCHOOLS
1ST Quartile	5 to 6	17	22.37	13.60
2ND Quartile	3 to 4	10	13.16	8.00
3RD Quartile	2	8	10.53	6.40
4TH Quartile	0 to 1	41	53.95	72.00

Data from Table 4 demonstrates that nearly 54 percent of the policies fell in the fourth quartile and failed to satisfy at least 76 percent of the criteria within the general category. Less than a quarter (22 percent) of the policies were able to satisfy at least 75 percent of the criteria. Approximately 13 percent of the policies were ranked in the

second quartile and a little more than 10 percent were ranked in the third quartile.

More serious deficiencies become apparent when the remaining 49 schools (those schools which responded to the study but had no policies) were added to the analysis. Almost three-quarters of the school divisions (72 percent) were ranked in the fourth quartile. Only a little more than 13 percent of all school divisions were ranked in the top quartile. Approximately 6 percent were in the third quartile and 8 percent were in the top middle quartile.

TABLE 5
ANALYSIS OF QUARTILE RANKING
WITHIN THE PRAYER CATEGORY
(n = 4)

QUARTILE ASSIGNMENTS	PERCENT BRACKETS	NO. OF SCHOOLS	PERCENT POLICIES	PERCENT SCHOOLS
1ST Quartile	4	2	2.63	1.60
2ND Quartile	3	2	2.63	1.60
3RD Quartile	2	28	36.84	22.40
4TH Quartile	0 to 1	44	57.89	74.40

Data from Table 5 demonstrates that less than 3 percent of the policies ranked in the top quartile of the prayer category. Less than 3 percent of the policies ranked in the second quartile. Approximately 36 percent of the policies ranked in the third quartile. The majority of the policies (57 percent) ranked in the fourth quartile. The vast majority

or approximately 94 percent of the policies failed to satisfy at least 50 percent of the criteria within the prayer category.

Again the deficiencies become more obvious when the remaining schools are added into the equation. Over 74 percent of all school divisions responding to this study ranked in the fourth quartile. Over 22 percent were ranked in the third quartile. Less than 4 percent of the school divisions were ranked in the first and second quartiles.

It is important to analyze the percentage of school divisions which addressed the issue of a moment of silence. Table 6 demonstrates how the school divisions addressed the moment of silence provision. Column 1 provide the necessary descriptive information. Column 2 represents the corresponding number of school divisions. Column 3 represents the corresponding percentages of divisions returning policies. Column 4 represents the corresponding percentages of all schools which responded to this study.

TABLE 6
ANALYSIS OF A MOMENT OF SILENCE

DESCRIPTION ON THE STATUS OF A MOMENT OF SILENCE	NUMBER SCHOOLS	PERCENT POLICY	PERCENT SCHOOLS
Allowing moment of silence	17	22.37	13.60
Prohibiting moment of silence	1	1.32	.80
Not addressing a moment of silence	58	76.32	85.60

The data in Table 6 demonstrates that less than one quarter (23.69 percent) of the policies which were returned even addressed a moment of silence. Approximately 76 percent of the policies had not declared an official position on the subject. As discussed earlier in Chapter two, a moment of silence provision which is designated as an opportunity for students to pray or meditate is not consistent with the courts' interpretation of the Establishment Clause. These data demonstrate that over 22 percent of the divisions within the Commonwealth of Virginia have adopted a policy which is not consistent with the court's interpretation. The data also demonstrates that over 76 percent of the school divisions did not address a moment of silence.

TABLE 7
ANALYSIS OF QUARTILE RANKING
WITHIN THE BIBLE READING CATEGORY
(n = 2)

QUARTILE ASSIGNMENT	PERCENT BRACKETS	NO. OF SCHOOLS	PERCENT POLICIES	PERCENT SCHOOLS
1ST Quartile	2	2	2.63	1.60
2ND Quartile	1	31	40.79	24.80
3RD Quartile	N/A	N/A	N/A	N/A
4TH Quartile	0	42	55.26	72.80

For interpretation purposes it is important to note that there are only 2 criteria in the Bible reading category. For this reason there are no school divisions which may be placed

in the third quartile and thus it has been labeled "N/A" or not applicable. The data in Table 7 demonstrates that less than 3 percent of the policies ranked in the first quartile of the Bible reading category. Over 40 percent of the policies ranked in the second quartile. Again the majority of the policies (55 percent) ranked in the fourth quartile.

The deficiencies in this category become more serious when the additional schools which had not adopted any policies are included. Column 4 of Table 8 shows the percent of all school in the survey. Over 72 percent of the school divisions which responded to this study were ranked in the fourth quartile. Over 24 percent was ranked in the second quartile. Less than 2 percent of the school divisions were ranked in the first quartile.

TABLE 8
ANALYSIS OF QUARTILE RANKING
WITHIN THE RELEASE TIME CATEGORY
(n = 5)

QUARTILE ASSIGNMENT	NUMBER OF CRITERIA MET	NO. OF SCHOOLS	PERCENT POLICY	PERCENT SCHOOLS
1ST Quartile	4 to 5	12	15.79	9.60
2ND Quartile	3	2	2.63	1.60
3RD Quartile	1 to 2	0	0	0
4TH Quartile	0	62	81.16	88.80

The data in able 8 demonstrates that over 81 percent of the policies ranked in the fourth quartile of the release time

category. Over 15 percent of the policies ranked in the first quartile and a little more than 2 percent ranked in the second quartile.

It is important once again to analyze the totals using all 125 school divisions. With this analysis over 88 percent of the school divisions ranked in the fourth quartile. Approximately 9 percent of the school divisions ranked in the first quartile and a little more than 1 percent ranked in the second quartile.

Table 9 provides data associated with the official position of school divisions on the possibility of release time programs. Column 1 provides the necessary descriptive information. Column 2 provides the corresponding number of schools. Column 3 provides the corresponding percentage of schools returning policies. Column 4 provides the corresponding percentage of all schools responding to this study.

TABLE 9
ANALYSIS OF RELEASE TIME PROGRAMS

DESCRIPTION OF THE STATUS OF RELEASE TIME PROGRAMS	NO. OF SCHOOLS	PERCENT POLICY	PERCENT SCHOOLS
Allowing release time	7	9.21	5.60
Prohibiting release time	5	6.58	4.00
Not addressing release time	64	84.21	90.40

Data in Table 9 demonstrates that less than 16 percent of

the school divisions within the Commonwealth have adopted policies which addressed the issue of release time programs. The vast majority or approximately 84 percent of the policies have not established an official position on release time programs.

TABLE 10
ANALYSIS OF QUARTILE RANKING
WITHIN THE EQUAL ACCESS CATEGORY
(n = 4)

QUARTILE ASSIGNMENT	NUMBER OF CRITERIA MET	NO. OF SCHOOLS	PERCENT POLICIES	PERCENT SCHOOLS
1ST Quartile	4	8	10.53	6.40
2ND Quartile	3	9	11.84	7.20
3RD Quartile	2	15	19.74	12.00
4TH Quartile	0 to 1	44	57.89	74.40

The data in Table 10 demonstrates that approximately 10 percent of the policies ranked in the first quartile. Approximately 11 percent of the policies ranked in the second quartile and 19 percent in the third quartile. Again the majority or approximately 57 percent of the policies were in the fourth quartile.

As in each of the other four categories the problem becomes more obvious when the schools which declared no policies are added to the equation. Nearly three-quarters (74 percent) of the school divisions which responded to this study were ranked in the fourth quartile. A little more than 6

percent of the divisions were ranked in the top quartile. Approximately 7 percent were in the second quartile and 12 percent were in the third quartile.

SECTION 4
ANALYSIS OF ALL AFFIRMATIVE CRITERIA

Section 4 of the analysis was designed to analyze the percentage of the total categorical criteria that were satisfied by the policies. This analysis provides another method to identify the overall strengths and weaknesses of the policies within Virginia. Column 1 of Table 11 contains the name of the specific category. Column 2 contains the number of affirmative criteria within the corresponding criteria. Column 3 contains the percentage of affirmative criteria of schools which returned policies. Column 4 contains the percentage of affirmative criteria of all schools responding to this study.

TABLE 11
ANALYSIS OF ALL AFFIRMATIVE CRITERIA

NAME OF CATEGORY	NUMBER AFFIRM CRITERIA	PERCENT POLICIES	PERCENT SCHOOLS
General	161	35.30	21.46
Prayer	39	12.83	7.80
Bible reading	37	24.34	12.17
Release time	63	16.58	10.08
Equal access	64	21.05	12.80
TOTAL	**364**	**22.80**	**13.86**

Data from Table 11 demonstrates that a little more than 35 percent of all criteria within the general category were met by policies. Less than 13 percent of all criteria within the prayer category were satisfied by policies. Less than a quarter or 24 percent of all criteria within the Bible reading category were met by the policies. Approximately 16 percent of all criteria within the release time category were satisfied by policies. A little more than 21 percent of all criteria within the equal access category were met. Approximately 22 percent of all 21 criteria were satisfied by the policies.

The deficiencies in the policies become more obvious when the remaining school divisions are added to the analysis. A little more than 21 percent of the criteria were satisfied in the general category. Approximately 7 percent of the criteria were met in the prayer category and a little less than 13 percent were satisfied in the Bible reading category. Approximately 10 percent of the criteria were met in the release time category and only 12 percent of the criteria were met in the Equal Access category. The total percentage of criteria that were satisfied in all categories were 13.86 percent.

SECTION FIVE
ANALYSIS OF THE INDIVIDUAL CRITERIA WITHIN EACH CATEGORY

Section five of the analysis was designed to determine the percentage of individual criteria that were satisfied by the policies. Tables 12 through 16 follow the same organizational format but contain data from the 5 different categories. The first column represents the criterion being analyzed. The second column represents the total number of policies which met the specific criteria. The third column represents the percentage of policies that met the specific criteria. The fourth column represents the percentage of all 125 schools which met the specific criteria.

This analysis will demonstrate the individual deficiencies and strengths of the school board policies within Virginia as they relate to the Establishment Clause. For organizational and clarification purposes the analysis was divided into the five different categories. The general category will be analyzed first and will be followed by prayer, Bible reading, release time and equal access.

TABLE 12
ANALYSIS OF INDIVIDUAL CRITERIA
WITHIN THE GENERAL CATEGORY

CRITERIA NUMBER	NUMBER OF AFFIRMATIVE MARKS	PERCENT POLICIES	PERCENT SCHOOLS
1	35	46.05	28.00
2	40	52.63	32.00
3	22	16.18	17.60
4	29	21.32	23.20
5	18	13.24	14.40
6	17	22.37	13.60
TOTAL	**161**	**35.30**	**21.46**

The data in Table 12 demonstrates that the strongest area within the general category was the second criterion concerning the appropriateness of incorporating religious materials into the curriculum. Approximately 52 percent of the policies had a statement which described the appropriate manner in which subject matter of a religious nature could be incorporated into the curriculum. Over 46 percent of the policies had a clear philosophy statement concerning religion and the public schools. Approximately 21 percent of the policies stated that the schools could not endorse, sponsor, support or encourage any activity which had the primary effect of promoting or inhibiting religion.

A little more than 22 percent of the policies defined key terms that were used in the policy such as primary effect, religion, excessive entanglement and secular. Approximately 16

percent of the policies stated that the schools could not endorse, sponsor, support or encourage any activity which did not have a secular purpose. Approximately 13 percent had a statement which prohibited excessive entanglement between the schools and religion. It is important to note that the criterion which was satisfied the most was met only 51 percent of the time. This helps to demonstrate that there are serious deficiencies in the policies which were returned.

The fifth column represents the percentage of all schools which responded to this study that met the specific criterion. Only 28 percent of all school divisions were able to meet the philosophy criterion. Approximately 32 percent met the curriculum criterion. Approximately 17 percent satisfied the secular purpose criterion; 23 percent met the primary effect criterion; 14 percent met the excessive entanglement standard. A little more than 21 percent satisfied the definition of terms criterion.

TABLE 14
ANALYSIS OF INDIVIDUAL CRITERIA
WITHIN THE BIBLE READING CATEGORY

CRITERIA NUMBER	TOTAL NUMBER OF AFFIRMATIVE MARKS	PERCENT POLICIES	PERCENT SCHOOLS
11	4	5.26	3.20
12	33	43.42	26.40
TOTAL	**37**	**48.68**	**14.80**

Data from Table 14 demonstrates that approximately 43 percent of the policies met the twelfth criterion. A little more than 5 percent of the policies prohibited the daily reading of scriptures which was criteria number 11.

Column 4 of Table 14 demonstrates that school divisions were unsuccessful in satisfying the eleventh criterion. A little more than 3 percent met the prohibition of daily or sporadic scripture readings. Approximately 26 percent of divisions successfully met the incorporation criteria.

TABLE 15
ANALYSIS OF INDIVIDUAL CRITERION
WITHIN THE RELEASE TIME CATEGORY

CRITERIA NUMBER	TOTAL NUMBER OF AFFIRMATIVE MARKS	PERCENT POLICIES	PERCENT SCHOOLS
13	15	19.73	12.00
14	12	15.79	9.60
15	8	10.53	6.40
16	14	18.42	11.20
17	14	18.42	11.20
TOTAL	**63**	**16.58**	**10.08**

Data from Table 15 demonstrates that approximately 19 percent of the policies actually addressed the issue of whether individual schools may develop a release time program. Over 15 percent of the policies declared that all release time programs had to be conducted off school grounds. A little more than 10 percent of the policies stated that no public funds could be used to help support a release time program. Nearly 19 percent of the policies prohibited staff participation in release time programs and almost 19 percent of the policies stated that the programs had to be voluntary and include parental permission.

Upon reviewing all of the schools which responded to the study, only 12 percent declared the division's position on release time programs. Approximately 9 percent of the divisions demanded that release time programs must be held off campus. Approximately 6 percent of the divisions declared that no public funds be used to help finance any release time program. Approximately 11 percent of the divisions had developed policies which contained statements that declared student participation in release time programs had to be voluntary. Approximately 11 percent of the divisions prohibited staff participation.

TABLE 16
ANALYSIS OF INDIVIDUAL CRITERIA
WITHIN THE EQUAL ACCESS CATEGORY

CRITERIA NUMBER	TOTAL NUMBER OF AFFIRMATIVE MARKS	PERCENT POLICIES	PERCENT SCHOOLS
18	7	9.21	5.60
19	10	13.16	8.00
20	15	19.74	12.00
21	32	42.11	25.60
TOTAL	**64**	**21.05**	**12.80**

Data from Table 16 demonstrates that approximately 9 percent of the policies identified the public forum status of each school. Over 13 percent of the policies had defined key terms which were used in the policies. Approximately 19 percent of the policies contained reasonable time, place and manner restrictions. Over 42 percent of the policies allowed religious organizations equal access into the schools.

Upon analyzing all of the school which responded, approximately 5 percent had declared the public forum status of the schools. Only 8 percent had defined key terms which were used in the policies. Only 12 percent of the schools had developed reasonable time, place and manner restrictions on religious meetings and the distribution of sectarian literature. Approximately 25 percent of the schools had satisfied the equal access criteria.

CONCLUSION

This study was designed to answer two primary questions which are: 1) Have public school officials, within the Commonwealth of Virginia, adopted school board policies which govern issues that relate to the Establishment Clause?; 2) Are the policies, which are currently in place throughout the Commonwealth, consistent with the court's interpretation of the Establishment Clause?

This study demonstrated that approximately 55 percent of the schools which responded to this study had adopted policies which involved some aspect of the Establishment Clause. Approximately 36 percent of the schools which responded to this study declared that they had not adopted any policies involving an Establish Clause issue. The data from this study demonstrated that the majority of schools division (55.88 percent) have adopted polices involving some aspect of the Establishment Clause.

The first question does not addressed whether the policies are consistent with the court's interpretation of the Establishment Clause but is only concerned with the presence of a policy. The data from this study demonstrated that the majority of school board policies which have been adopted throughout the Commonwealth are not consistent with the judicial system's interpretation of the Establishment Clause.

The majority of the policies are not complete and therefore do not adequately address the issues related to the Establishment Clause. Many of the policies which do address Establishment Clause issues do not conform to the standards established by the federal courts.

The most successful school division was able to satisfy only 52 percent of the criteria used to evaluate division policies. Over 61 percent of the policies satisfied less than 28 percent of the criteria. A little less than 15 percent of the policies were able to satisfy more than 42 percent of the criteria. The best percentage of criteria satisfied by the policies within the 5 major categories was only 35.09 percent. The remaining four categories had less than 25 percent of their criteria satisfied by the policies which were returned.

Public school officials and legislators throughout the Commonwealth of Virginia should become concerned about the lack of policies governing Establishment Clause issues and the inadequacies of the policies that are currently in place. The preceding data demonstrates that the vast majority of school board policies within the Commonwealth are not consistent with the federal judicial system's interpretation of the Establishment Clause. Public school administrators, school board members and legislators need to become more educated and aware of public school law so they can ensure that their policies are consistent with the decision of the courts.

CHAPTER FIVE

DEVELOPMENT OF SAMPLE POLICIES

INTRODUCTION

The following policies have been developed by a meticulous review of the literature, policies returned by the various school divisions in the Commonwealth and sample policies submitted by the National and Virginia School Board Associations. These policies may be used as a reference in the development of division policies which govern Establishment Clause issues within the public schools. It is important to note, however, that while these policies are based on the most current research it is still critical that school divisions communicate with their own legal counsel before adopting any policy.

Sample policies have been developed for each one of the five major categories which were analyzed in this study. The first sample policy serves as a general statement regarding the Establishment Clause and provides a framework for the remaining four policies. The second policy is devoted to the prayer category. The third policy is concerned with scripture readings in the public schools. The fourth policy deals with release time programs. The fifth policy is devoted to the distribution of religious materials in the school. The final

policy concerns equal access of religious groups to public schools and gives an example of a limited open public forum.

SAMPLE POLICY I

GENERAL AND PHILOSOPHICAL STATEMENTS

CONCERNING RELIGION AND THE PUBLIC SCHOOLS

PHILOSOPHY STATEMENT CONCERNING
RELIGION AND THE PUBLIC SCHOOLS

In considering the role or the absence of the role of religion in the Virginia Public Schools, it is important to remember that the First Amendment of the United States Constitution does not forbid all mention of religion in public schools. It is the advancement or inhibition of religion that is prohibited. Nor are the public schools required to delete from the curriculum all materials that may offend any religious sensitivity. For instance, studying music without sacred music, architecture minus cathedrals, or painting without scriptural themes would be incomplete from any point of view. There is nothing unconstitutional about the use of religious subjects as part of a religiously neutral program of education. Teaching against religion is as intolerable as teaching specific religious beliefs.

No religious belief or systems denying or objecting to belief should be promoted by the school division and none should be disparaged. It is essential that teaching about - and not of - religion be conducted in a factual, objective and respectful manner. Because knowledge of religious institutions and beliefs is critical to understanding human experience, past and present, an education excluding consideration of religion would be inadequate. Study about

religion should offer students the opportunity to become informed about the religions of our culture and of other cultures. Moreover, such study may include the impact and role of religions in the development of civilization.

It was both possible and desirable to educate students about the principle of religious liberty as one of the central elements of freedom and democracy in America and to acknowledge its unique responsibility for teaching and presenting sectarian or religious beliefs was the province of the home and religious institutions. A variety of religious beliefs, as well as systems denying or objecting to belief, enriches the fabric of American culture. Virginia Public Schools should use every opportunity to foster understanding and mutual respect among students and parents. A variety of religious beliefs, as well as systems denying or objecting to belief, enriches the fabric of American culture.

Virginia Public Schools should use every opportunity to foster understanding and mutual respect among students and parents, whether it involves race, culture, economic background, or religious beliefs. School personnel should avoid actions which operate to single out and isolate the "different" pupils and thereby serve to embarrass or harass children because of their personal views. Simply permitting a student to be excused from classroom activities involving religious content, ceremony, or celebration may not foster

such understanding and respect, but may subject students to a cruel dilemma. Some children may avoid their right not to participate because of an understandable reluctance to be stigmatized as non-conformists on the basis of their request.

In order to ensure that Virginia Public Schools uphold constitutional standards within the religiously neutral role as assigned the public schools, the following questions established by the United States Supreme Court should be asked of each school sponsored observance, program, instructional or other activity involving religious content, ceremony, or celebration:

1. What is the purpose of the activity? Is the purpose secular in nature?
2. What is the primary effect of the activity? Is it the celebration of religion? Does the activity either advance or inhibit religion?
3. Does the activity involve an excessive entanglement with a religion, religious group, or between the schools and a religious organization? Are funds of a religious origin being used for a school activity? Does either the school or religious activity require the consent or approval of the other?

If the purpose of the activity is not secular, if the effect of the activity is to advance or inhibit religion, or if the activity involves an excessive entanglement, then the activity is unconstitutional and will not be permitted in the Virginia Public Schools.

DEFINITIONS

1. Religious Organizations- Although it is difficult to give a conclusive definition of a religious organization, there are certain characteristic forms of human activity which are commonly recognized as religious. Therefore, any group subscribing to one or more of the following practices may be defined as religious:
    a. Has as its primary purpose belief in gods or a God
    b. Has a theological creed and form of worship
    c. Accepts supernatural revelation
    d. Seeks spiritual salvation
    e. Has a prescribed set of theological rituals
    f. Has been declared to be a religious organization by the Federal government or

the Commonwealth of Virginia for tax purposes or by the courts

g. Has a legally recognized organization or ordained ministers ministering to congregations

h. Has regular services, meetings, or assemblies at which a particular set of spiritual beliefs is advanced

i. Claims to be religious or spiritual

j. Has an established system denying or objecting to religious belief.

2. School hours - The time from one-half hour before school until one-half hour after school.

3. Sponsorship - The endorsement, support, encouragement and/or advancement of a specific activity.

4. Excessive Entanglement - Occurs when public school officials become involved in a religious activity to such a degree that it appears that he/she is supporting, endorsing, encouraging or demonstrating preference to one or more religious beliefs.

5. Secular Purpose - The intent or motivation behind a specific activity, program, practice or ceremony must not originate from any attempt to promote a

sectarian endeavor.

6. Primary Effect - The principle consequence of a specific act can not be one which advances, promotes or inhibits any particular religious belief or sect.

SCHOOL CEREMONIES AND OBSERVANCES

In order to provide guidance in the interpretation of the school division's policy on school ceremonies and observances, the following policy statements are adopted and apply to such school activities:

1. Religious heritages and their histories, arts, symbols, and tenets may properly be included within a program of religiously neutral education. Such studies must be objective in nature and directly related to the broader education purposes in the various field of study.
2. At no time shall any form of religious belief or system denying or objecting to belief be advanced or disparaged, nor shall any form of religious indoctrination or exercise, including prayers, be conducted by the school division or its employees. (The baccalaureate service is traditionally religious in nature and should be sponsored by agencies separate from the school division.)

3. The historical and contemporary significance and the symbols and origins of religious holidays may be studied within the guidelines of this policy.
4. Music, art, literature, and drama related to religious holidays may be studied and performed in programs if they are presented in a objective and neutral manner as a traditions of the cultural heritage of the particular holiday. Such programs should be part of a curricular unit and should be simply staged and costumed.
5. In response to class questions and assignments, students are free to initiate expressions of religious belief or nonbelief through compositions, art forms, music, speech, and debate.
6. Student groups sponsored by the school division shall not perform as part of a religious worship service.
7. In order to prevent misinterpretation of this policy, teachers who work with children to prepare school programs involving religious content, ceremony, or celebration (i.e., reference to deities, sacred writing, music and art) will meet with their building principal at the outset of the academic year. The purpose of this meeting is to place such school programs in appropriate

instructional context and to establish a mutual dialogue for selecting, planning and designing these programs. In the event that the teachers and principal are unable to reach agreement, either party may refer the matter to the area or division superintendent.

8. At the discretion of the administration, a statement of purpose may be distributed at school programs and performances which include material of religious origin. The form of such a statement should be substantially the following:

> This (program/performance) is presented for the purpose of helping student and the public become aware of, understand, and appreciate human culture, history, and religious diversity. By including these materials, the Virginia Public Schools do not endorse any form of religious belief or systems denying or objecting to the belief, nor does it intend to disparage any such beliefs.

SAMPLE POLICY II

POLICIES GOVERNING PRAYERS, MEDITATION AND A MOMENT OF SILENCE IN THE PUBLIC SCHOOLS

PRAYER AT SCHOOL CEREMONIES, OBSERVANCES AND EXTRA-CURRICULAR ACTIVITIES

Recent judicial decision at the federal district, circuit and Supreme Court level have defined the basic legal guidelines which govern prayers at school ceremonies, observances and ceremonies. To maintain the appropriate constitutional distance between church and state as defined by the Establishment Clause and recent judicial decisions the following guidelines shall govern all ceremonies, observances and extra-curricular activities in the Virginia School Division.

1. There shall be no official school sponsorship, endorsement, support or encouragement of any daily or sporadic recitation of prayers during normal school hours nor shall any public school official be engaged in such a promotion.
2. There shall be no official school sponsorship, endorsement, support or encouragement of any period of time established during the normal school day which is designed to provide students or school officials with the opportunity to pray or meditate. This prohibition includes, but is not limited to, all official moment of silence provisions which

allow students an opportunity to pray or meditate during the normal school day.

3. There shall be no official school sponsorship, endorsement, support or encouragement or any prayer, benediction or invocation at any graduation ceremony.

4. No public school official, guest speaker, citizen or member of the clergy may lead group prayers, invocations or benedictions at graduation ceremonies.

5. There shall be no official school sponsorship, endorsement, support or encouragement of a baccalaureate service. All baccalaureate services (if any) shall be conducted and sponsored by agencies separate from the school division.

6. There shall be no official school sponsorship, endorsement, support or encouragement of any individual or group prayer at the beginning or conclusion of any school sponsored extra-curricular or curricular activity, program, ceremony or contest. No school official, guest speaker, citizen or member of the clergy shall lead any student or group of students in any form of prayer at any school sponsored extra-curricular or curricular activity, program, ceremony or contest.

SAMPLE POLICY III

SAMPLE POLICY FOR REGULATING SCRIPTURE READING IN THE PUBLIC SCHOOLS

PHILOSOPHY STATEMENT

In considering the role or the absence of the role of religion in the Virginia County Schools, it is important to remember that the First Amendment of the United States Constitution does not forbid mention of religion in public schools. It is the advancement or inhibition of religion that is prohibited. Nor are the public schools required to delete from curriculum all materials that may offend any religious sensitivity. For instance, studying music without sacred music, architecture minus cathedrals, or painting without scriptural themes would be incomplete from any point of view. It is also constitutional for public school officials to use religious readings and scripture as part of a religiously neutral program of education.

The factual and objective teaching and use of sectarian readings may occur in the Virginia Public Schools but it must be presented in a balanced and informed manner. The role of the school division is one of education and not of inculcation or indoctrination of a particular set of sectarian values. The value and significance of the Bible and other sacred readings as instructional and educational tools are uncontested but because of recent judicial decisions and the pluralism of religious beliefs the following guidelines will govern the use of religious scriptures in the Virginia Public Schools:

1. There shall be no official school sponsorship, endorsement, support or encouragement of any daily or sporadic recitation of religious scriptures.
2. Public school officials may use the Bible and other sacred readings only when they are used as nonsectarian tools. They may not be used in a capacity which is devotional in nature.
3. The use of the Bible or other sacred readings cannot be used in an attempt to proselytize, convert or indoctrinate students to one particular faith.
4. The emphasis and use of religious writings should be only as extensive as necessary for a balanced and comprehensive study of the subject material in question. Such studies shall never foster any particular religious tenets or demean any religious beliefs.
5. The use of the Bible or other sacred readings should only be taught by teachers who have a legitimate need to incorporate the religious scriptures into the curriculum. An example of this would be a history teacher who is teaching a unit on comparative religions or a language arts teacher using scriptures as a literary document.
6. The use of the Bible or other sacred readings should be taught only by public school officials and

teachers who have expertise in the area and who have received professional training.

SAMPLE POLICY IV

POLICY REGULATING RELEASE TIME PROGRAMS IN THE PUBLIC SCHOOLS

RELEASE TIME FOR RELIGIOUS OBSERVANCE AND INSTRUCTION

The Virginia School Board authorizes students from the schools which elect to participate in the religious program to be released from classes during school hours to participate in religious activities. Students may be excused up to forty-five minutes per week for such activities. The released time policy of the school board, however, shall be designed and implemented in such a manner so as not to have a primary effect of advancing or inhibiting religion or impeding the normal education process of the school division.

This policy does not prohibit teaching courses or units in comparative religion or the history of religions. The following regulations shall apply to the program of release time for Virginia Public School students for religious activities:

1. No religious instruction of a sectarian nature shall take place on school property. This does not preclude the teaching or discussion of comparative religion or the history of religion by public school teachers and students.
2. A student who wishes to be released from class for the purpose of participating in religious programs must have written parental permission given to the school principal prior to the time that release is requested.

3. The permission request must contain a statement to the effect that parents are aware that the student is leaving the school grounds and that the parents accept responsibility for the student while he or she is attending the religious activity and while traveling to and from the place where it is held. Permission for released time activities will remain in effect for the duration of the program unless revoked by parents in writing.

4. No employee of the school system shall be involved in the registration of students in a program of religious instruction, and the registration process shall not be conducted on school property. While registration shall generally be handled by sponsors by mail or other home contacts, completed documents related to registration may be accepted by school employees and passed on the sponsors of the program. The principal, of course, will accept signed permission forms from parents. The principal also may release the names of students and their parents to officials of the organization providing religious instruction upon request.

5. No employee of the school board shall comment to the student on his of her registration or participation in a religious activity or program of instruction

nor shall any employee attempt to encourage or discourage students from participating in the program.

6. The school principal is authorized to set a common time when students may be released. The division superintendent shall be notified of the time of release and the number of students involved.

7. During the time that students are out of class on a released time basis the instructional program of the school will continue. The student is responsible for instructional activities which may be missed during his or her absence.

8. Program sponsored teachers shall accompany students form their classrooms to the location where the instruction takes place and back.

9. No public funds or any other material resources may be used to help support the release time program.

10. Student participation in any release time program must be strictly voluntary in nature and students may not be penalized or rewarded for their participation in the program or for their decision not to participate.

11. The Superintendent shall submit annually to the School Board a study of the impact of released time activities on the schools and the instructional

program.

SAMPLE POLICY V

POLICY REGULATING THE DISTRIBUTION OF RELIGIOUS MATERIALS IN THE PUBLIC SCHOOLS

DISTRIBUTION OF RELIGIOUS MATERIALS

A. INTRODUCTION

The secondary schools in the Virginia Public Schools have been declared to be limited open forums. The Virginia Public Schools wishes to reaffirm its practice of nondiscrimination with respect to the distribution of noncurriculum related literature. Pursuant to the Equal Access Act, sectarian literature may be distributed within the secondary schools if the specific conditions of this policy are satisfied. It is important to note, however, that the students and employees of the Virginia Public Schools are generally protected from intrusions by announcements, posters, bulletins and communications of any kind from individuals and organizations not directly connected with the schools.

Each principal shall review carefully each request to distribute materials, pamphlets, notices and other communications. If in doubt, the principal will seek permission from the superintendent or his designated agent. If doubt exists at this level as to whether distribution should be made, permission will be denied until disposition of the matter is made by the school board.

B. REGULATIONS GOVERNING CONTENT OF LITERATURE

1. Material cannot be libelous or defamatory according to current legal definitions.

2. Material cannot be obscene
3. Material cannot infringe on the health and safety of the students or encourage acts that could impair the health of students
4. Material cannot be inappropriate for the ages or maturity of students in the school
5. Material cannot cause a disruption or interfere with the normal operation of the school
6. Material cannot encourage students to violate laws or policies
7. Material cannot be inflammatory so that it may provoke physical retaliation
8. Material cannot contain derogatory attacks on racial, ethnic, gender or religious groups
9. Material cannot be descriptive of dangerous weapons
10. Material cannot conflict with any reasonable time, place or manner restrictions or regulations established by the Student Publication Committee of each school.

C. DISTRIBUTION OF SECTARIAN LITERATURE

Any student(s) wishing to distribute sectarian literature shall contact the building principal and advise him/her of their intention. The principal shall review the material and provide the student(s) with a reply within three days of the

request. The building principal shall create a Student Publication Committee which will develop reasonable time, place and manner restrictions on the distribution of all noncurriculum material including sectarian literature. The committee shall be composed of at least one administrator, one teacher, one member of the community and one student. The distribution of literature shall originate from the students. Announcements and or advertisements which publicly endorse or support groups or organizations involved in a commercial endeavor for profit are strictly prohibited.

D . APPEAL PROCESS

Any student desiring to appeal the decision of a building principal shall adhere to the following procedure:

1. A written appeal shall be filed with the building principal within 5 school days of the denial.
2. The principal shall take the appeal to the Student Publication Committee and allow the student an opportunity to argue his/her case. A decision will be made by majority vote. The committee will convey its written decision within 2 school days to the principal and the student.
3. The student has the right to appeal the committee decision to the division superintendent within 5 schools days.

4. The division superintendent will allow both parties to present their arguments and he/she shall render a written decision within 5 days.

5. The student has the right to appeal the superintendent's decision within 5 school days to the school board.

6. The school board will appoint a hearing committee which shall consist of at least 3 board members. The hearing committee will review the appeal and render a decision within 5 days. The decision of the school board shall be the final decision within the school division administrative process.

SAMPLE POLICY V

POLICY REGULATING ACCESS AND USE OF A PUBLIC SCHOOL IN A LIMITED OPEN FORUM

EQUAL ACCESS IN A LIMITED OPEN FORUM

A. PHILOSOPHY STATEMENT

The United States Congress has enacted The Equal Access Act which requires school boards to permit students to conduct noncurriculum-related meetings during noninstructional time on school premises if the school board permits student groups to so meet. The Virginia County School Board reaffirms its practice of nondiscrimination with respect to the treatment of noncurriculum related student groups, including student religious groups.

B. APPLICABILITY

This policy is applicable only to the following secondary school(s); A High School, B High School and C High School.

C. IMPLEMENTATION

The school board authorizes the superintendent to prepare administrative regulations to create a limited public forum in accordance with related board policy and existing employee contracts.

D. REGULATIONS GOVERNING ACCESS TO SCHOOL FACILITIES

Access to secondary school facilities for non-curriculum related students groups may be provided under the following

guidelines:

1. Noncurriculum related student groups are defined as those whose primary purpose is to foster student interest in political, religious, community service or other recreational activities.
2. Noncurriculum activities covered under this policy are those that are conducted before and after the student instructional day.
3. Noncurriculum related clubs must have a monitor who is a certificated employee, and who is a volunteer, approved by the building administrator. In the case of religious clubs, sponsors may not participate in the formation, content or activity of the club.
4. Nonschool personnel may not participate in such club activities unless approved in advance by the building principal.
5. Club activities governed by this policy must be student initiated, operated and promoted. School personnel may not participate except in the general supervision necessary to protect the safety and well-being of the students involved.
6. Any group which interferes with the orderly conduct of educational activities will be denied the opportunity to meet on school premises.

7. Nothing in this policy is intended to permit any meeting or activity which is otherwise unlawful. All religious organizations must adhere to the same rules as any other noncurriculum group.

8. The superintendent shall promulgate regulations providing for the following:

    a. How students can apply for space,

    b. Times and usage, and

    c. Maximum numbers permitted in a room for safety purposes.

9. Groups which are denied permission to use school facilities under this policy by the superintendent, may appeal the superintendent's decision to the school board.

Denial of Equal Access Prohibited

Section 802 of the Equal Access Act:

(a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such uniformly provides that

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any state or political subdivision thereof--

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meeting;

(4) To compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specific numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold federal financial assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on

school premises, to protect the wellbeing of students and faculty, and to assure that attendance of students at meetings is voluntary."

DEFINITIONS

Section 803 of the Equal Access Act: As used in this title--

(1) The term 'secondary school' means a public school which provides secondary education as determined by state law.

(2) The term 'sponsorship' includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term 'meeting' includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term 'noninstructional time' means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."

SEVERABILITY

"Sec. 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby."

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APPENDIX A

FIRST LETTER TO SUPERINTENDENTS

SAMPLE LETTER SENT TO SUPERINTENDENTS

FIRST LETTER

Dear Dr. Superintendent,

As a doctoral student at Virginia Tech I am conducting a study which is designed to provide public school officials within the Commonwealth of Virginia with an analysis of the legal and historical development of public school law as it relates to the Establishment Clause of the First Amendment. This study is also designed to review current school board policies that have been adopted within the Commonwealth.

I realize that you are extremely busy but I hope that you will take the time to respond to this study. **I am requesting that you return to me a copy of any school board policy that your school division has officially adopted which involves any Establishment Clause issue. For the purposes of this study an Establishment Clause issue will involve matters such as: (1) prayer, meditation or moments of silence; (2) the distribution of religious materials within the schools; (3) release time for religious activities; (4) scripture reading; and (5) equal access for religious groups.**

Please return any policy that you feel relates either directly or indirectly to any of these issues. Please do not hesitate to send any policy that you feel may have some connection to an Establishment Clause issue. Please sign and return the enclosed statement if your school division has not adopted policies which relate to Establishment Clause issues.

All responses and policies will be kept confidential. An identifying number has been placed on the enclosed form so that I will be able to determine which school divisions have responded. Neither your name nor that of your division will ever appear on any of the data. The study will conclude with the development of sample policies and criteria which can be used as a reference in the development of division policies. Please initial the appropriate space on the enclosed form if you desire the results of this study or the sample policies. Thank you in advance for your assistance.

Sincerely,

Jeff Perry

APPENDIX B

FOLLOW-UP LETTER TO SUPERINTENDENTS

SAMPLE LETTER SENT TO SUPERINTENDENTS

SECOND LETTER

Dear Dr. Superintendent,

Last month I sent a letter requesting a copy of any school board policy that your division has adopted which relates to any Establishment Clause issue. As an administrator myself, I do realize how busy you are and that you have very little time to respond to requests such as mine. Your reply to this request is extremely important to me because I must have a 100% response rate to complete my study. Please find the time to respond to this request. Your help in completing this study will be deeply appreciated.

I am requesting that you return to me a copy of any school board policy that your school division has officially adopted which involves any Establishment Clause issue. For the purposes of this study an Establishment Clause issue will involve matters such as: (1) prayer, meditation or moments of silence; (2) the distribution of religious materials within the schools; (3) release time for religious activities; (4) scripture reading; and (5) equal access for religious groups.

Please return any policy that you feel relates either directly or indirectly to any of these issues. Please do not hesitate to send any policy that you feel may have some connection to an Establishment Clause issue. **Simply sign and return the enclosed statement if your school division has not adopted policies which relate to Establishment Clause issues.**

All responses and policies will be kept confidential. An identifying number has been placed on the enclosed form so that I will be able to determine which school divisions have responded. Neither your name nor that of your division will ever appear on any of the data. The study will conclude with the development of sample policies and criteria which can be used as a reference in the development of division policies. Please initial the appropriate space on the enclosed form if you desire the results of this study or the sample policies. Thank you in advance for your assistance.

Sincerely,

Jeff Perry

APPENDIX C

SUMMARY OF THE POLICY ANALYSIS MATRIX

APPENDIX C
ANALYSIS OF SCHOOL BOARD POLICIES GOVERNING ISSUES RELATING TO THE ESTABLISHMENT CLAUSE

NUM	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	TOT
002	1	1	1	1	1	1	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	8
003	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1	1	0	0	0	0	4
004	1	1	1	1	0	0	1	1	1	1	0	1	0	0	0	0	0	0	0	0	0	9
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029	1	1	1	1	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	1	7
030	1	1	1	1	1	1	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	8
031	1	1	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	3
032	1	1	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	4
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084	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	1	1	4

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092	1	1	1	1	1	1	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0	8
094	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1	1	1	0	0	0	0	5
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TOT	**35**	**40**	**22**	**29**	**18**	**17**	**22**	**13**	**3**	**1**	**4**	**33**	**15**	**12**	**8**	**14**	**14**	**7**	**10**	**15**	**32**	**364**

APPENDIX D

RESPONSE FORM

085

Please sign the first statement and return this form if your school division has not adopted any policies which related to Establishment Clause issues. Please sign the second statement and enclose this form with your policies if your school division has adopted any policies which relate to Establishment Clause issues.

Our school division **has not officially adopted** any policies that relate either directly or indirectly to issues involving the Establishment Clause. For the purpose of this study Establishment Clause issues will involve matters such as prayer, meditation or moments of silence, the distribution of religious materials within the schools, release time for religious activities, scripture reading and equal access for religious groups.

_____

Superintendent of Schools

Our school division **has officially adopted** the enclosed policies that I feel relate either directly or indirectly to issues involving the Establishment Clause. For the purpose of this study Establishment Clause issues will involve matters such as prayer, meditation or moments of silence, the distribution of religious materials within the schools, release time for religious activities, scripture reading and equal access for religious groups.

_____

Superintendent of Schools

Please initial the line below if you want the results of this study returned to you

_____

Superintendent of Schools

VITA

PERSONAL INFORMATION

Charlie Jeff Perry
P.O. Box 2114
Coeburn VA 24230
DOB July 20, 1964

EDUCATION

High School:	Pound High School, Pound, Virginia
Undergraduate:	Clinch Valley College of the University of Virginia, Wise, Virginia; Graduated 1986 with a Bachelor's Degree in Education, American History, World History and Social Sciences.
Graduate:	Virginia Polytechnic Institute and State University, Blacksburg, Virginia; Graduated 1991 with a Master's Degree in Educational Administration.
	Virginia Polytechnic Institute and State University, Blacksburg, Virginia; Graduated 1994 with a Doctoral Degree in Educational Administration.

PROFESSIONAL EXPERIENCE

1986 - 1991	Teacher of American, World History and related social sciences, John I. Burton, Norton City Schools, Norton, Virginia.
1991 - 1993	Assistant principal, Auburn High and Middle School, Montgomery County Public Schools, Riner, Virginia.
1993 - 1994	Assistant principal, Powell Valley High School, Wise County Public Schools, Big Stone Gap, Virginia.

PROFESSIONAL ORGANIZATION

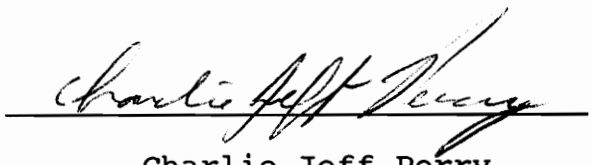
National Association of Secondary School Principals

Virginia Association of Secondary School Principals

Southwest Chapter Phi Delta Kappa

Montgomery County Principals Association

Wise County Assistant Principals Association



Charlie Jeff Perry