The 1st Amendment in the Classroom Series, Number 2

Freedom of RELIGION

The 1st Amendment in the Classroom Series, Number 2

Freedom of RELIGION

EDITED BY HAIG A. BOSMAJIAN

NEAL-SCHUMAN PUBLISHERS, INC.
NEW YORK LONDON

THE FIRST AMENDMENT IN THE CLASSROOM SERIES
Edited by Haig A. Bosmajian

The Freedom to Read Books, Films and Plays. The First Amendment in the Classroom Series, No. 1. Foreword by Ken Donelson. ISBN 1-55570-001-2.

Freedom of Religion. The First Amendment in the Classroom Series, No. 2. ISBN 1-55570-002-0.

Freedom of Expression. The First Amendment in the Classroom Series, No. 3. ISBN 1-55570-003-9.

Academic Freedom. The First Amendment in the Classroom Series, No. 4. ISBN 1-55570-004-7.

The Freedom to Publish. The First Amendment in the Classroom Series, No. 5. ISBN 1-55570-005-5.

Published by Neal-Schuman Publishers, Inc.
23 Leonard Street
New York, New York 10013

Printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data

Freedom of religion.

(The First Amendment in the classroom series; no. 2)
Includes index.
1. Religion in the public schools—Law and legislation—United States—Cases. I. Bosmajian, Haig A. II. Series.
KF4162.A7F74 1987 344.73'0796 86-33317
ISBN 1-55570-002-0 347.304796

Preface

THE *First Amendment in the Classroom Series* responds to the need for teachers, students, parents, and school board members to become more aware of how First Amendment rights apply to the classrooms of a free society. Those cherished rights, if they have any meaning, are directly relevant and essential to our schools. What is especially needed is a wider familiarity with and understanding of the arguments and reasoning used to reach judgments regarding First Amendment issues, so often controversial and divisive, affecting what goes on in the classroom. To be unfamiliar with those arguments is to be unprepared to defend the First Amendment rights of students and teachers. Those arguments will be found in this series devoted to (1) the banning of books, plays, and films; (2) religion and prayer in the classroom; (3) symbolic speech; (4) teaching methods and teachers' classroom behavior; and (5) school publications and underground newspapers. My earlier volume, *Censorship, Libraries, and the Law,* covers cases of school library censorship.

When United States District Judge Hugh Bownes declared unconstitutional a Portsmouth, New Hampshire, Board of Education rule forbidding "distribution of non-school sponsored written materials within the Portsmouth schools and on school grounds for a distance of 200 feet from school entrances," he declared in the order of the court that "this opinion and Order is to be posted on the school bulletin board in a prominent place, and copies of this opinion and Order are to be made available to the students in the school library."[1]

This was a reminder to students, teachers, and school board members—but especially to the students—that First Amendment rights applied to them. As the United States Supreme Court had put it exactly thirty years earlier in *Barnette,* the First Amendment rights need to be practiced in our schools "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[2]

While the actual decisions in the cases involving the First Amendment rights of students and teachers in the classroom are crucial, the arguments and reasoning in the opinions are equally important. *Why* did the court decide that students could not be prohibited from distributing their literature? *Why* did the court decide that students could not be compelled to salute the flag? *Why* could the teacher not be dismissed for using books containing "offensive" language? *Why* could not the school board dismiss the teacher for using "unorthodox" teaching methods? *Why* could not parents have sex education banned from the school? *Why* did the court decide that prayer in the classroom was unconstitutional? Understanding the "whys" leads to an understanding of the workings of a democratic society.

In 1937, when throughout the world democratic institutions were being threatened and some were being destroyed, John Dewey observed that wherever political democracy has fallen, "it was too exclusively political in nature. It had not become part of the bone and blood of the people in daily conduct of life. Democratic forms were limited to Parliament, elections, and combats between parties. What is happening proves conclusively, I think, that unless democratic habits of thought and action are part of the fibre of a people, political democracy is insecure. It cannot stand in isolation. It must be buttressed by the presence of democratic methods in all social relationships."[3]

When the students, teachers, school boards, and parents involved in these

cases insisted on exercising their First Amendment freedoms, they learned that the principles of our democracy are not "mere platitudes." For the students especially, the cases helped demonstrate that the Bill of Rights and "democratic habits of thought and action are part of the fibre of a people." These cases show political democracy "buttressed by the presence of democratic methods" in one realm of our society—the classroom.

It has been clearly established at several levels of our judicial system that protecting the First Amendment freedoms of teachers and students is crucial in a free society. In *Barnette,* the United States Supreme Court declared: "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

In giving First Amendment protection to junior and senior high school students who had worn black armbands to school to protest U.S. involvement in the Vietnam War, the United States Supreme Court spoke most clearly in *Tinker* on the issue of the First Amendment rights of teachers and students. Justice Abe Fortas, delivering the opinion of the Court, said in 1969: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."[4]

When in 1978 United States District Court Judge Joseph Tauro ordered school authorities to return to the high school library a book which had been removed because it contained a "dirty, filthy" poem, he reiterated in his own words what had been declared in *Tinker:* ". . . the First Amendment is not merely a mantle which students and faculty doff when they take their places in the classroom."[5]

On these pages are the stories of students and teachers who risked much to fight for their First Amendment rights in the classroom, who did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" and did not see the First Amendment as "merely a mantle which students and teachers doff when they take their places in the classroom." What is encouraging is that in almost all the cases appearing in this series, students and teachers have been given First Amendment protection by the courts.

The reasons given in the opinions on these pages are applicable to many of those First Amendment controversies which may never reach the courts. Edward Jenkinson, who has done much research and writing on censorship in the schools and who chaired the National Council of Teachers of English Committee Against Censorship has reported: "During the early seventies, approximately one hundred censorship incidents were reported to the ALA [American Library Association]'s Office for Intellectual Freedom each year. By 1976, the number had risen to slightly less than two hundred and climbed to nearly three hundred in 1977." Shortly after the 1980 Presidential election, Judith Krug of the American Library Association estimated a threefold increase in reported censorship incidents, "which would mean roughly nine hundred reported incidents a year." But as Jenkinson points out, the reported incidents "are only a small part of the censorship attempts each year. . . . After talking with teachers, librarians and administrators in meetings in 33 states, I believe that for every reported incident of censorship at least fifty go unreported."[6]

The First Amendment in the Classroom makes available the many substantial

arguments that can be used by students, teachers, and parents involved in First Amendment controversies surrounding teachers and students in the classroom. The reasons given by the judges on these pages are there for students, teachers, and parents to use in their efforts to persuade school boards and others that the First Amendment applies to the school environment and that the "Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."

In his discussion of the nature and function of the judicial court opinion, legal scholar Piero Calamandrei has observed that "the most important and most typical indication of the rationality of the judicial function is the reasoned opinion." Of the need for the judge to present the reasoned opinion, Calamandrei says that

> "ever since justice descended from heaven to earth and the idea gained ground that the judge is a human being and not a supernatural and infallible oracle to be adored, whose authority is beyond question, man has felt the need of a rational explanation to give validity to the word of the judge." [The major function of the reasoned opinion, explains Calamandrei,] "is an explanatory or, one might say, a pedagogical one. No longer content merely to command, to proclaim a *sic volo, sic iubeo* [So I wish, so I command] from his high bench, the judge descends to the level of the parties, and although still commanding, seeks to impress them with the reasonableness of the command. The reasoned opinion is above all the justification of the decision and as such it attempts to be as persuasive as it can."[7]

Like the judge, neither supernatural nor infallible, we are asked for rational explanations to justify our decisions. The judicial opinions on these pages provide useful and persuasive reasons.

I hope that readers of the books in this series—students, teachers, school board members, parents, and others—will develop their appreciation for and commitment to the First Amendment rights of students and teachers in the classroom and will recognize the variety of arguments available to counter those who would not have the First Amendment apply to teachers and students. The First Amendment freedoms were put into the Bill of Rights to be used; the court opinions in this book demonstrate that teachers and students usually get First Amendment protection from the courts. We must recognize, however, that freedoms not exercised by the citizenry lose their vitality. Teachers and students, said Chief Justice Earl Warren, "must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[8]

NOTES

1. *Vail* v. *Bd. of Ed. of Portsmouth School Dist.*, 354 F. Supp. 592 (1973).
2. *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943).
3. John Dewey, "Democracy and Educational Administration," *School and Society*, 45(April 3, 1937), p. 462.
4. *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969).
5. *Right to Read Defense Committee* v. *School Committee, Etc.*, 454 F. Supp. 703 (1978).
6. Edward Jenkinson, "Protecting Holden Caulfield and His Friends from the Censors," *English Journal*, 74(January 1985), p. 74.
7. Piero Calamandrei, *Procedure and Democracy*, trans. John C. Adams and Helen Adams (New York: New York University Press, 1956), p. 53.
8. *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957).

Constitutional Amendments

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE XIV

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

Judicial Circuits

Circuits	*Composition*
District of Columbia	District of Columbia
First	Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island
Second	Connecticut, New York, Vermont
Third	Delaware, New Jersey, Pennsylvania, Virgin Islands
Fourth	Maryland, North Carolina, South Carolina, Virginia, West Virginia
Fifth	Louisiana, Mississippi, Texas
Sixth	Kentucky, Michigan, Ohio, Tennessee
Seventh	Illinois, Indiana, Wisconsin
Eighth	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
Ninth	Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, Hawaii, Northern Marianna Islands
Tenth	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming
Eleventh	Alabama, Georgia, Florida

Foreword

by Albert J. Menendez

READING the cases and the admirable synopses preceding them in this very necessary and helpful volume, I was taken back in time to my days as a student growing up in northern Florida during the 1940s and 1950s.

What occurred in the schools of my youth seems amazing in retrospect. I can vividly recall the daily prayers, Bible readings, religious devotions, and evangelistic services conducted by jocks who encouraged us to score a touchdown for Jesus, religious clubs, and full-fledged holiday observances. And I mean full-fledged.

I think it was the fall of 1952 when, as a fifth-grader with a mellifluous voice, I was selected to play the role of a Puritan father in the annual Thanksgiving pageant. Came the time, and I, bedecked in suitable attire, delivered a sermon worthy of the finest Puritan divines of old. (It was written by a teacher. I did not ad lib, thank God.) The service concluded with several fine old Protestant hymns traditionally associated with the season.

A few weeks later we had a Christmas pageant that would have rivaled any good High Episcopal service, complete with processional, choir robes, a creche, and triumphant carol singing. As I recall, we sang "Come All Ye Faithful" in Latin, much to the delight of our music teacher. The whole community was involved. Parents and faculty thought it was delightful. Looking back, I wonder how they got away with it. No one suggested that this was an inappropriate activity for a public school. The religious homogeneity of my community—almost all were conservative Protestants—was undoubtedly a factor in keeping Lake Forest School on the side of religious conformity.

But even in a large urban high school—Jacksonville's Robert E. Lee, with its 2,000 students—the religious emphasis was no less intense. Daily prayers were read over the loud speaker during home room. Bible readings were assigned to each student. (Fortunately, no one read the more lurid passages from the Old Testament.) We even had denominational student clubs, in addition to Young Life and Youth for Christ. Once or twice a year, required student assemblies included harangues from local evangelists and religious workers assigned to public school "ministries."

None of these mandated activities seemed to have elicited much positive response by my fellow students. Some looked out the window, studied or daydreamed during the religious devotions. Most seemed indifferent to it all.

At graduation time we were all required to attend a Baccalaureate service at a local church. This time I put my foot down. I felt that to compel a student to attend a service in order to graduate was an unfair imposition. I requested that my

---

Albert J. Menendez is Director of Research at Americans United for Separation of Church and State.

parents write a respectful letter asking that I be excused. It was not because of any hostility toward religion; I attended church faithfully in those days. I was too young to say that this requirement was unconstitutional or constituted a probable violation of the Establishment Clause. But I knew it was wrong. After numerous appeals, the principal relented, and about thirty of the 540 graduates opted out for reasons of conscience. We were immediately labeled irreligious troublemakers by conformist students who themselves rarely if ever attended church.

I recall earlier incidents from my past: my third-grade teacher, a Miss Tidd, lectured the class one Monday on Armageddon, the Second Coming, and the certain damnation of all who rejected fundamentalist Protestantism. A ninth grade teacher, a Baptist from South Carolina, made insulting and ignorant remarks about Catholics and Jews several times during the year 1956. All of these experiences left permanent marks, and undoubtedly shaped my views on religious liberty, the voluntary character of true religion, and the importance of preserving separation of church and state.

Fortunately, conditions like this began to change after the Supreme Court ruled against mandated prayer and devotional Bible reading in 1962 and 1963. But many southern communities remain recalcitrant, even in 1987.

This is why this admirably up to date and complete volume of relevant court cases involving religious activities in the classroom is so important: The problem persists everywhere in this nation.

Since certain fundamentalist groups have given notice that they consider American public schools legitimate targets for evangelization—and in some southern states have been encouraged by local authorities to do so—we can be certain of frequent legal battles over the constitutionally proper place of religion in the classroom and in the curriculum. Recent efforts to legitimate the teaching of creationism in public school science classes is evidence of this.

There are many strengths in *Freedom of Religion* which should commend it to prospective readers. Not only does it contain important U.S. Supreme Court decisions, but relevant Appeals Court, District Court, and state Supreme Court decisions are also included. While these latter do not always have the same precedential value as the High Court rulings, they are useful in understanding how courts have tried to resolve the complex issues surrounding religion in the classroom. The thrust of these decisions is strongly against state sponsorship of religious activities.

Those who need to be informed about the legal context of this vital topic will find essential information in Professor Bosmajian's clear and precise volume. *Freedom of Religion* will be of great value to law students and professors, scholars, teachers, school personnel, school board members and attorneys—indeed to anyone interested in the subject.

Contents

Introduction

WHEN in 1962 the United States Supreme Court declared unconstitutional New York's school prayer statute in *Engel* v. *Vitale,* the Court's decision was lauded by some, but many condemned it as "asinine," the eight-man majority was referred to as "eight silly old men," and the decision was characterized as constituting another "major triumph for the forces of secularism and atheism." In *The Wall Between Church and State,* Philip Kurland wrote: "The reaction was an unenlightened one in the sense that the spokesmen for the various groups in the community committed themselves without reading and weighing what the Court said. They were all prepared to speak out on the basis of fragmentary news stories and statements of the Court's conclusion" [Dallin Oaks, ed., *The Wall Between Church and State,*1963, p. 148].

The twenty-one opinions in *Freedom of Religion* appear in their entirety and have been made available so that we can speak out, not on the basis of fragmentary stories and statements, but on the basis of having read and weighed what the courts have said about religion in our public school classrooms. The cases represent major Supreme Court and lower court rulings made over the past forty years. They address classroom prayer, periods of silence, Bible readings in the classroom, and other issues surrounding the First and Fourteenth Amendments. Each case is preceded by a brief introduction encapsulating the reasoning behind the decisions. In the cases of *McCollum, Engel, Schempp,* and *Jaffree* reprinted here, the opinions of the Court appear but the concurring and dissenting opinions do not because the latter opinions comprise over two hundred twenty-five pages in the United States Reports.

The United States Supreme Court has consistently applied the First Amendment to attempts to bring prayer and religion into the classroom; with few exceptions, the lower courts too have decided to keep religious practices out of public school classrooms. In only two of the cases compiled here did the courts decide to allow "religion" into the classroom. In one case (*Florey,* 1980), the United States Court of Appeals, Eighth Circuit, did not find unconstitutional a school's use of religious music, art, and history as part of classroom lessons on religious holidays. In the other case (*Gaines,* 1976), a United States District Court in Massachusetts upheld the constitutionality of a Massachusetts statute which provided that, at the beginning of the school day, there was to be a period of silence for meditation and prayer in each class, a statute similar to others struck down by various courts, including one declared unconstitutional by the United States Supreme Court (*Wallace* v. *Jaffree,* 1985). However, as the cases in this volume clearly reveal, the courts at all levels have been generally consistent in keeping prayer and religious activities out of our nation's public schools.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The First Amendment protects the citizenry against federal abridgment of religious freedom; the Fourteenth Amendment, through its "life and liberty" provision, protects it against abridgment by the states. The Establishment Clause ensures that the government—federal or state—will not impose religion or any religious tests on anyone through its agencies, statutes, and practices. It is the Establishment Clause that prohibits the State from requiring as a condition of employment that individuals assert a belief in God; it is the Establishment Clause which prohibits the State from requiring

that state composed prayers or any other kind of prayers be recited in public school classrooms; it is the Establishment Clause which prohibits taxpayers' money from being used to support religious proselytizing in our classrooms. The Free Exercise Clause in the First Amendment ensures that we can worship as we please and hold whatever religious beliefs we wish. In the words of the Supreme Court over a century ago in *Watson* v. *Jones* (1872): "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

Over the years, attempts to bring religion into the classroom have taken a variety of forms. In 1940, several religious groups in Champaign, Illinois, as reported by the Supreme Court in *McCollum* v. *Board of Education,* "obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher." Religious teachers were brought into the schools to teach the classes which "were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies."

In 1944, ten-year-old James Terry McCollum did not participate in this religious instruction and on one occasion was ordered to sit at a desk in the hallway where students passing by teased him, thinking that he was being punished. In effect, young McCollum, by being required to leave the classroom and go to some other place in the school building, was compelled by the state to reveal his religious inclinations and beliefs; the child's religious preference, an otherwise private matter, had been made public. Parent Vashti McCollum went to the Illinois courts seeking to prohibit the public schools from teaching religious education during regular school hours.

The Illinois Supreme Court decided against McCollum in 1947. One year later, the United States Supreme Court declared the Champaign, Illinois, religious instruction program unconstitutional. Justice Black, delivering the opinion of the Court, said: "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 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." Citing from *Everson* v. *Bd. of Education,* 330 U.S. 1 (1947), Black wrote: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" At the end of his opinion, Black restated this metaphor: " . . . as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable. 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."

In *Engel* v. *Vitale* (1962), Justice Black, again delivering the opinion of the Court, declared unconstitutional New York's state composed prayer for school children. Justice Black wrote: "There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' [New York] argument to the contrary, which is largely

based upon the contention that the Regents' prayer is 'non-denominational' 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 Fourteenth Amendment."

One year later, the United States Supreme Court, in *Abington* v. *Schempp,* declared unconstitutional a Pennsylvania statute requiring Bible readings at the opening of each school day, and a Baltimore school board rule providing for Bible readings or the recitation of the Lord's Prayer in its classrooms. "The conclusion follows," said the Court, "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.'"

While the Court declared unconstitutional the recitation by public school students of the state composed prayer, the Bible readings, and recitation of the Lord's Prayer, other types of religious activities were still being brought into the classroom. In 1964, a DeKalb, Illinois, kindergarten teacher required the children in her class to recite, prior to the morning snack, the following verse:

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

Before some parents expressed complaints, the teacher had required her students to end the above verse with "We thank you, God, for everything." The parents of five-year-old Laura DeSpain brought action to enjoin school district officials from requiring their child to recite the prayer during regular school hours. After the United States District Court ruled in *DeSpain* v. *DeKalb County Community School Dist. 428* (1966) that the above verse was not a prayer or religious activity within the meaning of the Constitution, the United States Court of Appeals, Seventh Circuit, reversed, stating in *DeSpain* (1967) that "the so-called secular purposes of the verse were merely adjunctive and supplemental to its basic and primary purpose, which was the religious act of praising and thanking the Deity." The District Court judge had asserted that this is "a case *de minimis.* Despite the theologians' characterization of this verse as a prayer, the court believes that set in the framework of the whole school day, its purpose was not to pray but to instill in the children an appreciation of and gratefulness for the world around them—the birds, the flowers, the food, and everything. They asked no blessing; they sought no divine assistance." The U.S. Court of Appeals, however, saw it differently: "Certainly this verse was as innocuous as could be insofar as constituting an imposition of religious tenets upon nonbelievers. We are reminded, however, of what the Supreme Court said in *Schempp*: '[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment.'"

A different kind of attempt to bring religion into the classroom was made in

1978, when the state of Kentucky passed legislation which required that a copy of the Ten Commandments be posted on the wall of each public classroom in the state. The Kentucky Supreme Court in *Stone* v. *Graham* (1980) decided that the statute did not violate the First Amendment. The United States Supreme Court disagreed, and in deciding that posting the Commandments on the classroom walls was a violation of the Establishment Clause, the Court said in *Stone* v. *Graham:* "The pre-eminent purpose for posting the Ten Commandments is plainly religious in nature. The 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."

In the 1980s, the courts at various levels have had to rule on more subtle attempts to bring religion into the public schools, such as statutes requiring a period of voluntary prayer or meditation. For example, the Massachusetts legislature was considering an act which provided: "At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held shall announce that a period of voluntary prayer or meditation may be offered by a student volunteer, not to exceed one minute in duration." In *Opinions of the Justices to the House of Representatives, Mass.* (1982) the Massachusetts Justices concluded that the bill "if enacted, could violate the First and Fourteenth Amendments to the Constitution."

The same year, a United States District Court in Tennessee declared unconstitutional Tennessee's statute which stated: "At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer or personal beliefs and during any such period, silence shall be maintained." In *Beck* v. *McElrath* the court rejected the state's contention that "the statute merely provides for enforcement of a moment of silence in public schools. . . . As all terms in the statute are viewed together and accorded reasonable meaning, it is difficult to escape the conclusion that the legislative purpose was advancement of religious exercises in the classroom."

New Jersey took a different approach, not mentioning in its statute "prayer" or "meditation" or "personal beliefs"; instead, the New Jersey statute required that public school principals and teachers "shall permit students to observe one minute of silence to be used solely at the discretion of the individual students, before the opening exercises of each day for quiet and private contemplation or introspection." Declaring the statute unconstitutional, a United States District Court concluded in *May* v. *Cooperman* (1983) that, in response to public sentiment, New Jersey legislators had introduced "one bill after another in an attempt to reintroduce prayer in the public schools notwithstanding the Supreme Court's ruling." The statute was a guise to bring prayer into the classroom; the court declared that "the purpose of Bill 1064 was to mandate a period at the start of each school day when all students would have an opportunity to engage in prayer." The purpose of the New Jersey statute, said Judge Debevoise, "is religious, not secular."

In 1985, the United States Supreme Court declared unconstitutional an Alabama statute which read: "At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in." Justice Stevens, delivering

the opinion of the Court in *Wallace* v. *Jaffree,* asserted that the record in this case revealed that the enactment of the statute "was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose."

Again and again, the courts have invoked the metaphoric "wall of separation" between church and state in declaring these numerous statutes unconstitutional, whether the activities required in classrooms took the form of a state composed prayer, verses read from the Bible, recitation of the Lord's prayer, a "period of voluntary prayer or meditation," or a minute for "quiet and private contemplation or introspection." The "wall of separation" has stood as a strong argument against bringing religious practices into our public schools. In 1985, a United States District Court in West Virginia, in declaring unconstitutional a West Virginia "prayer amendment," relied in *Walter* v. *West Virginia Bd. of Education* on the "wall" metaphor as applied by Supreme Court Justice Black in *Everson*:

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

While the "prayer" cases predominate in this volume, the courts have had to deal with other classroom-religion issues. For example, the New York Supreme Court decided in *La Rocca* v. *Board of Ed. of Rye City Sch. Dist.* (1978) against a teacher who had used the classroom for religious proselytizing; the United States Court of Appeals decided in *Nartowicz* v. *Stripling* (1984) against a Georgia county school district which had permitted the schools' public address systems to be used for announcements of church-sponsored activities; a United States District Court held in *Malnak* v. *Yogi* (1977) that teaching the course "Science of Creative Intelligence/Transcendental Meditation" in the New Jersey public high schools violated the Establishment Clause.

The courts have been consistent in their decisions to keep religious practices and proselytizing out of the classroom, recognizing that at times the arguments that these practices are "secular" and hence not violations of the Establishment Clause are a guise. When, in 1985, a United States District Court declared in *Walter* (1985) that West Virginia's "prayer amendment" was unconstitutional, District Court Judge Hallanan rejected the Board of Education's argument that the prayer amendment had "the primary purpose and effect of promoting not religion, but religious freedom. The promotion of religious freedom is a legitimate secular purpose, consonant with the purpose of the Free Exercise Clause of the First Amendment." The District Court did not find this argument persuasive, condemning the manner in which the citizenry had been misled: "This Court cannot refrain from observing that in its opinion a *hoax* conceived in political expediency has been perpetrated upon those sincere citizens of West Virginia who voted for this amendment to the West Virginia Constitution in the belief that even if it violated the United States Constitution 'majority rule' would prevail. There is no such provision in the Constitution." [italics added].

Deception and pretext on the part of legislators and school board members came under attack two years earlier when a United States District Court in New Mexico in *Duffy* v. *Las Cruces Public Schools* (1983) declared unconstitutional that state's statute authorizing one minute of silence at the beginning of the school day for "contemplation, meditation or prayer": "The Board members now

say that their purpose in implementing the moment of silence was to enhance discipline and instill in the students the 'intellectual composure' necessary for effective learning. These justifications are clearly the product of afterthought. They are no more than an elaborate effort to inject a secular purpose into a clearly religious activity. . . . It is clear that the educational benefits alleged by the Board members are a mere *pretext.* Their purpose was to institute a devotional exercise in public school classrooms" [italics added]. The court concluded that the school board "must be permanently enjoined from instituting any program similar to the moment of silence. . . . If the defendants are not so enjoined, the moment of silence issue could well be brought before them again. But the defendants would be more careful to *disguise* their purpose the next time. With *a wink and a nod,* they could discuss the secular purposes for the moment of silence and prohibit any discussion of the school prayer issue. Having avoided the factors which lead the Court to rule against them in this case, they could reinstitute the moment of silence" [italics added].

Under the guise of "academic freedom," efforts have been made by some to bring religion into the classroom through the "creation science" door. In 1981, the Louisiana legislature enacted a "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" law which required the teaching of creation science in Louisiana public schools whenever evolution was taught. The Act was declared unconstitutional by a United States District Court and subsequently the United States Court of Appeals, Fifth Circuit, affirmed the district court's judgment; the Court of Appeals declared in *Aguillard* v. *Edwards* (1985): "In truth, notwithstanding the supposed complexities of religion-versus-state issues and the lively debate they generate, this particular case is a simple one, subject to a simple disposal: the Act violates the Establishment Clause of the First Amendment because the purpose of the statute is to promote a religious belief." As to the legislature's claim that the statute had as its purpose to "protect academic freedom," the court responded: "Although we must treat the legislature's statement of purpose with deference, we are not absolutely bound by such statements or legislative disclaimers. . . . Although the record here reflects *self-serving statements* made in the legislative hearings by the Act's sponsor and supporters, this testimonial avowal of secular purpose is not sufficient, in this case, to avoid conflict with the First Amendment" [italics added]. Louisiana officials appealed to the United States Supreme Court, arguing that creation science embodies a scientifically tenable theory that life appeared abruptly in complex form and that such a theory does not depend on religious teaching. Seventy-two Nobel Prize winners and twenty-four scientific organizations urged the Supreme Court to declare the Louisiana statute unconstitutional, telling the Court that the case threatens American science by disparaging scientific facts to promote fundamentalist Christian beliefs.*

The courts have recognized that those who would bring religious teachings and practices into the classroom have attempted to bring in through the back door what the Constitution and the Supreme Court have barred from coming in through the front door. It is too late in the day to blatantly introduce Bible readings, state composed prayers, and postings of the Ten Commandments in public school classrooms; that front door has been closed. The courts have strongly condemned attempts to bring religious exercises through the back door with "self-serving statements" about academic freedom, one minute of silence "for meditation, contemplation or prayer," or some variation thereof, referring to them as "pretexts," "hoaxes," and "disguises." The decisions in this volume clearly demonstrate a general agreement among the courts that the First Amendment prohibits bringing religious exercises and practices into public school classrooms, whether through the front door or the back door.

---

*On June 19, 1987, in a 7–2 vote, the Supreme Court upheld the Court of Appeals' decision. The full text will appear in *Academic Freedom*, Volume 4 of this series.