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ABSTRACT

By considering the historical background, relevant court decisions, constitutional alternatives, and practical and political implications, this paper examines the legal issues surrounding proposals calling for prayer, Bible reading, or posting of the Ten Commandments in public schools. Historically, the secularization of public schools occurred when educators sought to redesign them for all children by eliminating or modifying religious material. Since the Supreme Court decisions in the early 1960's declaring prayer in public schools unconstitutional and similarly excluding Bible reading as a religious exercise, subsequent litigation has addressed the issues of religion in the schools. Among the alternatives to school prayer permitted by the United States Constitution are private unobtrusive prayer, student-initiated group prayer, and the secular study of religious materials. Moreover, though polls show public support for a constitutional prayer amendment, such proposals are often defeated when put to a vote. Such defeats imply rejection of a constitutional amendment providing official encouragement for religion. (PB)

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The Issue

Today, many groups and individuals seek a place in the public school curriculum for prayer, Bible reading, or posting of the Ten Commandments. Some argue that the public school teaches the religion of "secular humanism" and that these materials are needed to balance the fare. Some argue that the public school system has become hostile to religion. This Issuegram discusses the legal implications of such proposals.

The History

A century ago, most of America's public schools were evangelical, Protestant institutions. Today, with only a few lapses, public schools are secular. The religious orientation of the past seriously polarized people. Most notably, Roman Catholics shunned the public system, and formed their own. Over time, public educators regretted the alienation of so many people, and sought to redesign public schools for all children, by eliminating or modifying religious material. The courts accelerated this trend, and in 1962, the Supreme Court ruled that officially mandated prayer in the public schools was unconstitutional. In 1963, the Court similarly excluded Bible reading as a religious exercise.

In response to the Supreme Court's decisions, some parents instructed their children to pray in school on their own. When a New York school principal stopped kindergartners from reciting a grace before cookies and milk, parents went to court. The United States Court of Appeals for the Second Circuit upheld the school, in the 1965 decision Stein v. Oshinsky. Seeing the case as a restriction on individually initiated prayer, Senator Everett Dirksen of Illinois unsuccessfully sought passage of a constitutional amendment to clarify these court decisions. Only recently has the issue resurfaced on the national political scene.

Supreme Court Decisions

In addition to the prayer and Bible reading cases of the sixties -- Engel v. Vitale and School District of Abington Township v. Schempp -- in early 1982 the Supreme Court struck down a Louisiana law for voluntary prayer in the schools. Unaffected by the Court's decision was an unchallenged provision for silent meditation. In 1981, in Widmar v. Vincent, the Court upheld the right of college students to meet for religious purposes, basing its ruling on the "open forum" doctrine. As the university had made its facilities available for a wide variety of activities, the Court held that the campus had become an open forum. The university could not then selectively close the forum based on the content of the message. In 1980, the Court struck down Kentucky's law requiring the posting of the Ten Commandments, finding that the purpose was to promote religion and not the discussion of social, historic, literary or other secular aspects of the work, in Stone v. Graham.

Lower Court Activity in 1982

- In October, federal court Judge L. Clure Morton voided a Tennessee law that called for a minute of silence for "meditation or prayer or personal beliefs." The court held that the law was intentionally designed to inject prayer into Tennessee public schools. The state plans an appeal. In a very similar decision, the Supreme Court of Massachusetts declared unconstitutional a proposed law which would require teachers to announce that "voluntary prayer or meditation may be offered by a student or volunteer . . . ."
- In March the Fifth Circuit struck down a policy of the Lubbock Independent School District in Texas that

permitted students to participate in student-initiated group prayer before or after school. The case raises again the issue of whether high schools are subject to the 1981 Supreme Court decision in Widmar v. Vincent, giving university students a right to use public university facilities, otherwise open for student use, for religious services.

- In August, in Jaffree v. James, federal district court Judge W. Brevard Hand found two Alabama prayer laws unconstitutional. A few months later, however, he reversed himself, ruling that the first amendment did not apply to states. To be sure, the language of the first amendment begins "Congress shall make no law respecting an establishment of religion . . . ." However, the fourteenth amendment requires states to extend due process to all citizens, and the courts long ago decided that this includes first amendment rights. Supreme Court Justice F. Powell Jr. has issued a temporary order enjoining further prayer in Alabama schools, good until the appellate courts review the matter.

  At one point, Governor Fob James risked contempt of court charges for urging Alabama citizens to ignore the original decision by Hand invalidating a law prohibiting prayer in the schools. The law would have allowed teachers, including college professors, to "lead willing students in prayer."

  Judge Hand consistently upheld another law that required teachers in grades 1 through 6 to announce "that a period of silence . . . . . shall be observed for meditation . . . ." at the start of the school day.

- A moment of silence has been approved by the New Jersey legislature, overriding a governor's veto. The New Jersey Civil Liberties Union has filed suit, and state officials, including the governor and attorney general, have refused to defend the state's law. In early 1983, a federal district court judge temporarily stopped implementation of the law until the case can be fully argued. If the suit prevails, it will be the only case striking down a law calling for a moment of silence, without mentioning prayer. If it is struck down, it will be because the court found an unlawful religious purpose, based upon statements by some New Jersey legislators. Such a decision may also raise the strange spectacle of an identical law being upheld in sister states, because of a different legislative record.

- A suit challenging New Mexico's law authorizing a moment of silence for "contemplation, meditation, or prayer" is pending. Another pending suit challenges Oklahoma's voluntary prayer law.

Constitutional Alternatives

The first amendment guarantees both freedom from government-established religion and freedom to practice one's chosen religion. This two-fold protection permits public agencies to accommodate individual religious beliefs, but it prohibits public promotion of religions. While it clearly requires a delicate balance, the Constitution permits many alternatives.

Private unobtrusive prayer. Although the courts have never been requested to review it -- probably because no one ever thought it needed court review -- private and unobtrusive individual prayer is clearly permissible in the public schools. If a child is permitted free time to express private views, converse socially with other children, or to talk about other nonschool matters during lunch or recess, then it would be unconstitutionally hostile to religion to prohibit the child from a quiet, religiously motivated utterance during such free time.

Student-initiated group prayer. As noted, the Supreme Court has upheld the right of a group of individuals to free exercise of religion in a postsecondary setting, in Widmar v. Vincent. In a 1969 case, Tinker, the Court held that a public high school is also an open forum for the expression of political views. Lower courts do not agree on this point.

A moment of silence. Where state law provides only for a moment of silence at the start of the school day, most courts have readily upheld it. Justice Brennan, a member of the Court who is unalterably opposed to prayer in the schools, has nonetheless recommended a moment of silence as an alternative. Several states, including Alabama, Arizona, Connecticut, Louisiana, Maine, Michigan, and Pennsylvania, have moment of silence laws.

Speeches and national documents. Justice Brennan has also suggested that "[t]o the extent that such benefits result not from the holding of such a solemn exercise at the opening of the day, it would seem that less sensitive materials might equally well serve the same purpose." He suggested reading from speeches of great Americans or national documents.

Released time. In 1948 the Supreme Court struck down a program for religious instruction in Illinois, in which persons selected by private religious groups provided the instruction on school premises during regular school hours. In 1952, however, the Court approved a "released time" program developed in New York. Children were excused from the public schools to attend parochial school for part of the day. The essential difference was that the activity was moved off-campus.

The secular study of religious material. The Supreme Court has observed that the study of the Bible could be undertaken for its historic, social or literary value.

Practical and Political Implications

Inclusion of religious material in the school program for the purpose of promoting religion -- either specific religions or religion in the broad sense -- is unconstitutional. The direct result of such action is unnecessary and expensive litigation.

Nonetheless, those supporting prayer, Bible reading or similar religious content in the public school program may do so for political reasons, but the political gains are not clear. While a 1982 Gallup Poll indicated wide support for a constitutional prayer amendment, after public debate people often reject the idea of religious practice in the public schools. Opposition comes not only from traditional civil rights organizations, but from ecumenical religious groups and individual clergy. They are often persuasive. As an example, voters in the Clear Creek Community School District, Iowa, defeated an initiative to require that the Bible be included as a supplemental text along with regular texts in a wide variety of courses, and to authorize teachers "to make reference to this textbook." The vote, in November of 1981, was 689 against; 90 for the initiative. It did not indicate lack of religious sentiment among voters, but a belief that the public school should not provide religious values, and an unwillingness to pay for the inevitable lawsuit were the law to pass.

Some political leaders opposed to the introduction of religious material in the schools have met political pressure with positive ideas, proposing that schools use relevant constitutional and historical materials. In 1982, State Senator Joseph T. Fitzpatrick of Virginia offered a resolution urging schools to distribute copies of Thomas Jefferson's Virginia Statutes on Religious Freedom. Jerry

Falwell, founder of Moral Majority, Inc., campaigned vigorously but unsuccessfully against the resolution. It passed by a unanimous voice vote. At the federal level, Rep. Stephen Neal has sought passage of a resolution to affirm the validity of periods of silence.

A Constitutional amendment permitting prayer would remove objections based on the unnecessary expense of litigation. However, given the widespread acceptance of private, unobtrusive prayer in schools, such an amendment provides official encouragement for religion -- a goal rejected by the framers of the Constitution out of experience with the abuses that can accompany such sanctions.

What to Read

Lines, Patricia M. "Educational Institutions as Open Forums for Religious Expression," West's Education Law Reporter, vol. 2, no. 2, p. 333-337, (LEC-82-2). Reprints, $1.50/copy.

Lines, Patricia M. "Excusal From Public School Curriculum," Requirements," West's Education Law Reporter, vol. 5, no. 3, pp. 691-699 (1982) (LEC-82-5). Reprints, $2/copy.

Lines, Patricia M. "Prayer and the Public Schools," (a more detailed and annotated treatment of the materials contained in this Issuegram), Education Commission of the States, February, 1983 (LEC-83-3). $1.50/copy.

Lines, Patricia M. "Religious and Moral Values in Public Schools: A Constitutional Analysis," Education Commission of the States, (LEC-1), January 1981, 61 pp. $5/copy.

NCRPE Bulletin, published quarterly by the National Council on Religion and Public Education, University of Kansas, Lawrence, KS 66045. The NCRPE Bulletin reports on development in the use of religious material, including prayer, in the schools. It is free to key persons in the field; otherwise subscribers are encouraged to make a $5 contribution.

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