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ABSTRACT

To help clarify the school prayer controversy, this article examines recent court decisions concerning three issues: organized prayer, silent prayer or meditation, and prayers at graduation, assemblies, and extracurricular activities. In "Wallace vs. Jaffree" (1985), the United States Supreme Court reaffirmed its consistent opposition to organized school prayer by overturning an Alabama law authorizing silence for meditation or voluntary prayer. Whether compulsory or voluntary, prayer recitations are clearly prohibited. However, schools may require a moment of silence for reflection or meditation without violating the First Amendment. Statutes authorizing silence for "meditation or prayer" may be permissible. The Supreme Court had not yet ruled on prayer at school ceremonies; lower courts have consistently applied the "Lemon vs. Kurtzman" three-part test requiring statutes to have a secular purpose and effect and avoid excessive entanglement with religion. Although the Jaffree case met the test, Justices Warren and Burger wrote dissenting opinions viewing prevention of an established national religion as the real issue. The Burger-Rehnquist stance may predominate if President Ronald Reagan appoints new Supreme Court justices who share his intent to reestablish school prayer. (MLH)

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PRAYER, THE COURTS AND THE SCHOOLS: A CONTINUING CASE OF CONFUSION

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Judicial decisions concerning prayer in the public schools continue to be hotly debated and frequently misunderstood. Two recent events illustrate this concern and confusion. First, on June 4, 1985, the U.S. Supreme Court ruled against an Alabama law authorizing one minute of silence in schools "for meditation or voluntary prayer." As a result, newspapers across the country published misleading headlines such as: "Moment of Silence Laws Unconstitutional." Second, in his 1986 State of the Union Address, President Reagan again supported a controversial constitutional amendment to permit organized prayer in the public schools in these words: "We must give back to our children their lost right to acknowledge God in their classrooms."

This article attempts to clarify some of the confusion and misunderstanding surrounding the school prayer debate by addressing three questions: Why did the Supreme Court outlaw organized prayer? Did the Court prohibit silent prayer or meditation in the schools? How have courts ruled on other types of prayer cases -- at graduation, assemblies, and extracurricular activities?

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I. Vocal Prayer

The purpose of the recently proposed prayer amendment supported by President Reagan is to permit "individual or group prayer in public schools." School sponsored prayers have been prohibited since the Supreme Court's 1961 decision in Engel v. Vitale.[1] This decision held that the following prayer recommended by the New York Board of Regents was unconstitutional:

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

In Engel, a group of parents argued that the Regents' Prayer violated the First Amendment, and the Supreme Court agreed. On behalf of the Court, Justice Hugo Black wrote that "the constitutional protection against laws respecting an establishment of religion must at least mean in this country it is no part of the business of government to compose official prayers for any group of the American people to recite..."

Justice Black then outlined the history of religious oppression in England and by the established churches in the American colonies. It was because of this history that our founders knew that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the government's placing its official stamp of approval upon one particular kind of prayer..." Therefore, the First Amendment was added to the Constitution "as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say

-- that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office."

But why does prayer violate the Constitution if it is non-denominational and voluntary? In answer, Justice Black explained that the Establishment Clause is violated "by the enactment of laws that establish an official religion" whether those laws are coercive or not. According to the Court, "There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer."

Although the Regents' prayer was not compulsory, Justice Black indicated that it still involved some coercion. Thus he wrote, "When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

But doesn't the prohibition of prayer indicate a hostility to religion? "Nothing," wrote Justice Black, "could be more wrong." Although the framers of the First Amendment were men of faith, their effort to put an end to government control of religion and prayer "was not written to destroy either" but to protect the freedom and respect for religion as well as government. For the Establishment Clause rests on the belief "that a union of government and religion tends to destroy government and degrade religion." Thus "it is neither sacrilegious nor antireligious" to say that the state and federal governments "should

stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves."

In a lone dissenting opinion, Justice Potter Stewart criticized the majority with arguments that continue to be heard today. "I cannot see," he wrote, "how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." " The Court's decisions," observed Justice Stewart, "are not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution."

II. Silent Prayer or Meditation

In 1978, Alabama passed a law authorizing one minute of silence "for meditation" in all public schools. In 1981, this law was amended by adding the words "or voluntary prayer." As a result, Ismael Jaffree, on behalf of his children, argued that the amended law was intended to promote prayer and was therefore unconstitutional. In 1985, a sharply divided Supreme Court ruled in Jaffree's favor.[2]

On behalf of the Court, Justice Stevens reaffirmed the three part test of Lemon v. Kurtzman, used since 1971 to judge education laws that were alleged to violate the Establishment Clause: "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 statement must not foster an excessive government entanglement with religion."[3] In Jaffree, the first test resolved the case since the law "was not motivated by any clearly secular purpose -- indeed, the statute had no secular purpose." According to the sponsor of the bill, the law was an "effort to return voluntary prayer" to the public schools. In addition, the State of Alabama "did not present evidence of any secular purpose."

Justice Stevens noted that the intent to return prayer to the schools is quite different from protecting every student's right to engage in voluntary prayer during a moment of silence which was already guaranteed by the pre-existing 1978 statute. Thus, the Court concluded that the Alabama Legislature enacted their law "for the sole purpose of expressing the State's endorsement of prayer" and that the Legislature added the words "'or voluntary prayer' to characterize prayer as a favored practice." Such an endorsement is not consistent with the obligation of the government to "pursue a course of complete neutrality toward religion." Therefore, the Court ruled that the challenged Alabama law violated the Establishment Clause of the First Amendment.

Since about 25 states have moment-of-silence statutes, the Jaffree decision raises two questions: Would the Court hold other laws authorizing silence "for prayer or meditation" unconstitutional? Second, might the decision lead the Court to also outlaw statutes that simply require silence for meditation?

In answer to the second question, most, if not all, of the justices would probably uphold moment-of-silence statutes that do not mention prayer. As Justice Stevens explained on behalf of the Court, returning prayer to schools is quite different "from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day." (Italics added.)

Justice O'Connor's concurring opinion was even stronger and clearer on this point. She wrote that laws providing for a moment of silence "for the purpose of meditation alone" were not like the unconstitutional New York prayer law in Engel. "Silence, unlike prayer," wrote the justice, "need not be associated with a religious exercise." During a moment of silence, students who object to prayer are left with their own thoughts and are "not compelled to listen to the prayers" of others. "It is difficult," she concluded, "to discern a serious threat to religious liberty from a room of silent, thoughtful children."

In a second concurring opinion, Justice Powell endorsed Justice O'Connor's views[4] and added that the effect of a "straightforward moment-of-silence statute" is unlikely to advance religion, nor would it "foster an excessive government entanglement with religion."

Since the Supreme Court held that the Alabama law authorizing silence for meditation or prayer violates the First Amendment, many observers believe that the Court would also void similar laws in other states. Thus, Massachusetts recently amended its "prayer or

meditation" law to simply require a "period of silence...for personal thoughts."[5] And one legal commentator wrote that moment-of-silence laws that "mention prayer" would be unconstitutional.[6] But this interpretation is questionable. In fact, I believe that a majority of the Court (including at least the two concurring justices and the three dissenters)[7] are much more likely to uphold other moment-of-silence laws for prayer or meditation since they are unlikely to have the peculiar defects of the Alabama statute.

The concurring opinions of Justices O'Connor and Powell support this view. Both justices seemed reluctant to vote against the Alabama law, and both indicated that all moment-of-silence laws for prayer or meditation were not unconstitutional. Thus, Justice Powell wrote that he would have voted to uphold the Alabama statute "if it also had a clear secular purpose." But since the state "failed to identify any non-religious reason for the statute's enactment," he was "required by our precedents" to hold the law unconstitutional.

Justice O'Connor went even further than Justice Powell. She carefully explained the limited nature of the Jaffree decision and provided unusual legal advice to those who wanted to enact constitutional silent prayer laws. She began by emphasizing that nothing in the Supreme Court's decisions "prohibits public school students from luntarily praying at any time before, during, or after the school day." The only thing prohibited by Jaffree is a law "enacted solely to officially encourage prayer during the moment of silence."

Next, Justice O'Connor explained that "even if a statute specifies that a student may choose to pray," it is not necessarily unconstitutional if the state "has not encouraged prayer" over other alternatives. On the contrary, "since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation...suggests it has the primary purpose of endorsing prayer."

What about the primary effect of a law authorizing silence for "prayer or meditation?" Justice O'Connor's answer was unambiguous. "A moment-of-silence law that is clearly drafted and implemented so as to permit prayer, meditation and reflection...without endorsing one alternative over the others, should pass this test." Thus, Justice O'Connor's concurring opinion provides clear guidance to legislators and school boards on how to pass and implement moment-of-silence laws authorizing prayer or meditation without violating the First Amendment.

III. Other Types of School Prayer

Are prayers at graduation ceremonies, school assemblies, or extracurricular activities unconstitutional? The Supreme Court has not ruled on these particular questions. However, in analyzing these issues, lower courts have consistently applied the three-part Lemon test (prohibiting a religious purpose or effect and excessive entanglement) to the specific facts of the case.

In a recent Iowa controversy, a federal court ruled against the popular custom of having a Christian minister open and close the high school graduation ceremony.[8] When two parents complained about the religious invocation and benediction, the president of the school board remarked that she hoped their children "could be exposed to Christianity at school." And more than 700 local citizens signed a petition supporting the custom. The minister selected to give the invocation and benediction considered their purpose "solely religious" and in the tradition of "Jesus Christ."

Based on the evidence in this case, the judge concluded that "prayer is inherently religious," and that the invocation and benediction "serve a Christian religious purpose." Therefore, the custom violates the Establishment Clause. Concerning the wish of most students and parents to include an invocation and benediction, the judge concluded: "The enforcement of constitutional rights is not subject to the pleasure of the majority....Indeed, First Amendment rights...would be meaningless if they were not available to minorities, the unpopular, and those courageous enough to speak out against the prevailing views of the majority."

Most cases, however, have ruled that prayers at graduation do not violate the Constitution. Typical of this view is a 1985 decision by a federal court in Michigan.[9] In this case, the court recognized a "dual nature" of the prayer: to the minister it is religious; to many in the audience it is "merely a formal way of opening and closing the graduation ceremony." According to Judge Gibson, if the speaker's purpose is religious, "the practice may still be constitutional if the

purpose of the sponsoring governmental body is primarily secular." And there was no evidence that the school district was seeking to "proselytize the audience to accept the tenets of any particular faith."

Several other factors led the court to uphold these graduation prayers. (1) The school had no control over the content of the invocation and benediction. (2) There is no danger of daily indoctrination ("The prayers take only a few minutes and are given only once a year"). (3) The fact that the audience consists primarily of parents and graduating seniors who are beyond the age when they are "readily susceptible to religious indoctrination." (4) The graduation "is not pedagogical; it is merely ceremonial." Thus the court found that neither the purpose nor primary effect of the invocation and benediction were to advance religion and that the once-a-year ceremony would "not foster excessive entanglement of government with religion." Other courts have upheld prayers at graduation as "a permissible accommodation between church and state"[10] and as "customary remarks" that "are commonplace in our society"[11] without the repetitive function that characterized the school prayer decisions.

May schools permit student initiated prayers? Not according to a 1981 federal appeals decision. The case involved an Arizona high school that allowed student volunteers to open assemblies with prayers. But the court ruled that there was "no meaningful distinction" between school authorities organizing the prayers and "merely permitting' students to direct the exercises.[12] Since opening the assemblies with prayer has no secular purpose, since their primary effect is to promote

religion, and since they occur in the "coercive setting" of the public schools, the court held that they violated the Establishment Clause.

Can schools encourage the reciting or singing of prayers at extracurricular activities? A federal court found this practice unconstitutional in the case of a Texas high school that posted the words of its "school prayer"[13] at the entrance to its gym. The prayer, "In Jesus' Name," was often led by the principal and was sung or recited at extracurricular activities such as sports events, pep rallies, and at graduation.

The school argued that the prayer had the secular purpose of instilling "school spirit or pride" and lessening disciplinary problems. However, the court rejected this rationale since a school "cannot seek to advance non-religious goals and values, no matter how laudatory, through religious means." As the judge explained, if a school could use religious means to further secular goals, "any religious activity...could be justified by public officials on the basis that it has a beneficial secular purpose." The court concluded that "initiating, leading, or encouraging" a school prayer at school-sponsored events or posting the prayer on school property violated the First Amendment.

IV. Conclusions

In 1985, a majority of the justices of the Supreme Court reaffirmed their consistent opposition to organized, government-sponsored prayer in the public schools. The recitation of prayers -- whether led by students or teachers, and whether compulsory or voluntary -- is

clearly prohibited. On the other hand, schools may require a moment of silence for reflection or meditation without violating the First Amendment. And it appears that a majority of the Court would not oppose statutes that authorize silence for "meditation or prayer" if the law has a "plausible secular purpose."

In Jaffree, most of the justices supported the Court's three-part test that requires challenged laws to have a secular purpose and effect and avoid excessive government entanglement with religion. But will these constitutional principles continue to be applied by future courts in school prayer cases?

In his dissenting opinion in Jaffree, Chief Justice Burger wrote that the majority has a "naive preoccupation" with the three-part Lemon test in judging Establishment Clause controversies. Instead, he suggested that the Court simply determine "whether the statute or practice at issue is a step toward establishing a state religion."[14] Only then should it be declared unconstitutional. Similarly, Justice Rehnquist believes that a majority of the Court has misinterpreted the Establishment Clause because of "a mistaken understanding of constitutional history." And he suggested that the clause "should be read no more broadly than to prevent the establishment of a national religion or the government preference of one religious sect over another."[15] This Burger-Rehnquist view is reflected in President Reagan's statements urging that prayer return to the public schools. If President Reagan has an opportunity to appoint several new Supreme Court justices who share his views, the Court might reverse its 25-year pattern of decision on school prayer. However, the Jaffree decision indicates that this is not likely to happen with the present composition of the Court.

NOTES

1. Engel v. Vitale, 370 U.S. 421 (1961). The text of the Senate's version of the proposed 1984 school prayer Amendment that was supported by the White House states:

> "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. Neither the United States nor any state shall compose the words of prayers to be said in public schools."

Under this proposed amendment, teachers could lead students in prayer, but schools still could not institute the kind of official prayer outlawed in Engel.

2. Wallace v. Jaffree, 105 S.Ct. 2479 (1985).

3. Lemon v. Kurtzman, 403 U.S. 602 (1971).

4. Id. at 2493 note 2, and at 2495 note 9.

5. Chapter 690, General Laws of Massachusetts, Approved December 30, 1985.

6. "Court Rules Out Moment for Prayer," NOLPE Notes Vol. 20, No. 7 (July, 1985) p. 1.

7. Concurring opinions were written by Justices Powell and O'Connor; dissenting opinions were written by Chief Justice Burger and Justices Rehnquist and White.

NOTES, cont'd:

8. Graham v. Central Community School District of Decatur, 608 F.Supp. 531 (D.C. Iowa 1985).

9. Stein v. Plainwell Community Schools, 610 F.Supp. 43 (D.C. Mich. 1985).

10. Wiest v. Mt. Lebanon School District, 320 A.2d 362 (Pa. 1974).

11. Wood v. Mt. Lebanon School District, 342 F.Supp. 1293 (W.D. Pa. 1972).

12. Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir. 1981).

13. The prayer says, "Dear God, please bless our school and all it stands for. Help keep us free from sin, honest, and true, courage and faith to make our school the victor. In Jesus' name we pray, Amen." Doe v. Aldine Independent School District, 563 F.Supp. 883 (S.D. Tex. 1982).

14. Wallace v. Jaffree at 2507.

15. Id. at 2513.