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RETHINKING RELIGION AND PUBLIC SCHOOL EDUCATION

By Marjorie A. Silver*

I. INTRODUCTION

Despite the separation between church and state demanded by the First Amendment,¹ we are a nation founded on a tradition of a theistic civil religion.² Examples abound throughout our history. Virtually every Presidential Inaugural Address has recognized the Deity and prayed for Divine Guidance.³ Every state constitution invokes God's name.⁴ "In God We Trust" has appeared on United States money since the 1860's.⁵ Congress added "under God" to the pledge of allegiance in

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Although I have never dedicated an Article before, I wish to dedicate this one to the memory of Milton Sorokin, co-founder of The Center for First Amendment Rights, who passed away on January 28, 1996.

1. U.S. CONST. amend. I; *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (describing Framers intent to create "a wall of separation between Church and State"); *Committee for Pub. Edu. and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (calling for a resurrection of the high wall of separation between Church and State).

2. See generally Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986). See also *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being").

3. CHARLES E. RICE, *THE SUPREME COURT AND PUBLIC PRAYER* app. C at 177-93 (1964). See also Sanford Levinson, *The Multicultures of Belief and Disbelief*, 92 MICH. L. REV. 1873, 1874 (1994) (Book Review Essay of Stephen Bates, *Battleground: One Mother's Crusade, the Religious Right, and the Struggle for Control of Our Classrooms* and Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*) ("[i]t remains suicidal for any politician to suggest that she has no belief in God and finds the idea of prayer to be a childlike reversion to magical thinking. . . ." (citing Michael Kinsley, *Martyr Complex*, NEW REPUBLIC, Sept. 13, 1993, at 4)).

4. RICE, *supra* note 3, app. B at 167-76.

5. See THE AMERICAN NUMISMATIC ASSOCIATION, *COIN COLLECTING*, at 11 (1990). "The 2-cent piece, first issued in 1864, was the first coin to bear the motto 'In God We Trust.'" *Id.*

1954,⁶ and made it our national motto in 1956.⁷ Since 1952, we have had a congressionally-enacted national prayer day.⁸ Some of our most treasured public speeches have invoked the divine: Lincoln's Second Inaugural Address; Martin Luther King, Jr.'s "I Have a Dream" speech.⁹ Even the Supreme Court opens each day of its session with "God save the United States and this Honorable Court."¹⁰ After the April 19, 1995 disaster in Oklahoma City, President Clinton entreated all Americans to pray for the victims and their families. Americans were asked to participate in a moment of silence on the one-week anniversary of the bombing. A New York Times article described Oklahoma City as a devoutly religious city whose population turned to God to see them through this tragedy.¹¹

Within public schools, religion generally, and prayer in particular, has always been, and continues to be, a source of dissension. In *Engel v. Vitale*¹² and *Abington v. Schempp*,¹³ the Supreme Court definitively held that officially directed prayer in schools violates the Establishment Clause. Recently, the Court reaffirmed that holding in *Lee v. Weisman*,¹⁴ holding that the Establishment Clause prohibits clergy selected by the schools from giving benedictions at public school commencement exercises.¹⁵ The Court has held that officially sanctioned silent prayer, too, may transgress the Constitution. In *Wallace v. Jaffree*,¹⁶ the Court struck down Alabama's Moment of Silence statute, finding that it had been promulgated by the state legislature with a clear religious purpose.¹⁷

6. 36 U.S.C. § 172 (1954).

7. 36 U.S.C. § 169(h) (1956). See also Alan Hogland, Petersburg, N.Y., *Letter to the Editor*, N.Y. TIMES, Nov. 27, 1994; Mirsky, *supra* note 2, at 1237.

8. 36 U.S.C. 186 (1952). See also *President Abraham Lincoln's Proclamation of a Day of National Humiliation, Fasting and Prayer*, April 30, 1863, reprinted in RICE, *supra* note 3, app. D at 195-96.

9. Mirsky, *supra* note 2, at 1238-39.

10. *Lee v. Weisman*, 505 U.S. 577 (1992) (Rehnquist, J., dissenting).

11. Melinda Henneberger, *A Shaken City, Ever Devout, Turns to God*, N.Y. TIMES, Apr. 30, 1995, at A1.

12. 370 U.S. 421 (1962).

13. 374 U.S. 203 (1963).

14. 505 U.S. 577. But see *Tanford v. Brand*, 883 F. Supp. 1231 (S.D. Ind. 1995) (refusing to enjoin invocation and benediction in commencement ceremonies of publicly-funded university).

15. 505 U.S. 577.

16. 472 U.S. 38 (1985).

17. *Id.* The Court left open the question of whether a moment of silence without religious motivation would create an Establishment Clause question, although its dicta suggested that it would not. *Id.* at 59. "The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during

Despite these cases, there has always been, and continues to be, flagrant disregard of the law banning school prayer in many parts of the country.¹⁸ In the deep south, daily prayer and Bible reading in schools are commonplace. When Lisa Herdahl moved from Wisconsin to Ecu, Mississippi with her six children in 1993, she discovered to her amazement that morning prayers were recited daily over the loud-speaker, and Bible lessons rotated with physical education and music classes, commencing in kindergarten and continuing through sixth grade.¹⁹ Her campaign and ultimate lawsuit to try to get the Ecu schools in line with Supreme Court rulings drew rage from the citizens of Ecu.²⁰

In 1993 in Jackson, Mississippi, Principal Bishop Knox was dismissed by the Superintendent of schools after allowing his students to read a 21-word prayer over the loudspeaker.²¹ The response:

Thousands of students in 15 Mississippi counties, many with the support of their teachers and superintendents, have walked out of class in the last few weeks to protest court-mandated sanctions against school prayer. Parents and students, black and white, gathered at large rallies at the state Capitol. . . . "When you get a man fired for allowing school prayer, people woke up to the fact that this is just plain wrong and we're not going to take it anymore" said Bobby Clanton, president of a conservative political action group. . . .

* * *

The furor over school prayer was stoked by Governor Kirk Fordice, who

an appropriate moment of silence during the school day." *Id.*; see *infra* notes 78-79 and accompanying text. Lower courts are split on the constitutionality of moment of silence laws. In *May v. Cooperman*, 780 F.2d 240 (3rd Cir. 1985), *appeal dismissed sub. nom.* *Karcher v. May*, 484 U.S. 72 (1987), for example, the Third Circuit deferred to the district court's finding that the legislature in enacting New Jersey's permissive Moment of Silence law lacked the requisite secular purpose to survive the *Lemon* test. *Accord* *Bown v. Gwinnett County Sch. Dist.*, 895 F. Supp. 1564 (N.D. Ga. 1995); *Duffy v. Las Cruces Pub. Schs.*, 557 F. Supp. 1013 (D. N.M. 1983); *contra* *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976).

18. See, e.g., Stephen L. Carter, *The Supreme Court 1992 Term: The Resurrection of Religious Freedom*, 107 HARV. L. REV. 118, 131 n.83 (1987 Gallup Poll indicating that of those who were aware of a constitutional amendment designed to overturn the school prayer decisions, two-thirds were in favor; 1992 USA Today, CNN, and Gallup poll finding 62% of respondents more likely to support candidate who favored an amendment to permit school prayer).

19. *Mother Files Suit to Halt Prayer in a Public School in Mississippi*, N.Y. TIMES, Dec. 23, 1994, at 22 [hereinafter *Mother Files Suit*]. The Herdahl story was also the subject of a 60 minutes broadcast. *60 Minutes: Herdahl v. Pontotoc Co.*, (CBS Television Broadcast, Aug. 13, 1995).

20. *Mother Files Suit*, *supra* note 19.

21. William Booth, *Bring Back School Prayer? That's the Rallying Cry in Mississippi*, WASH. POST, Dec. 20, 1993, at A1.

openly supported Knox. "Who says prayer in school is illegal?" said Fordice, declaring the last weeks' events in Mississippi to be "the start of a movement."

Knox said students approached him wanting a prayer over the intercom. He put it to a student vote, and prayer won, 490-96. . . .

* * *

"Most of the people here, the majority, are Christians," [said Clanton]. "Why do we have to surrender our rights? We're tired of yielding to a tiny minority. What about our rights?"²²

In the last two years, several southern states, including Tennessee, Mississippi, Alabama, Georgia, South Carolina and Virginia have passed measures authorizing either student-initiated prayers or moments of silence.²³ Calls for constitutional amendments have been a chronic phenomenon. In the wake of *Engel v. Vitale* in 1962, for example, twenty-two senators and fifty-three representatives introduced school prayer amendments.²⁴ None achieved ratification. Again, in 1982, the House vote in favor of a voluntary prayer amendment was 240-163; the Senate vote, 56-44, both falling far short of the two-thirds majority necessary for a constitutional amendment.²⁵ In 1992, the Senate defeated a school prayer amendment introduced by Senator Jesse Helms by a vote of 38 to 55.²⁶ Several joint resolutions to amend the Consti-

22. *Id.*

23. Peter Applebome, *A Battle on School Prayer Takes Shape in Georgia*, N.Y. TIMES, Aug. 28, 1994, at 18 [hereinafter Applebome, *A Battle on School Prayer*].

There are laws mandating a moment of silence at the beginning of the day in Alabama, Arkansas, Georgia, South Carolina, and Tennessee. Proponents say the laws provide a moment of reflection and calm at the beginning of the school day. Critics say they are thinly veiled efforts to reintroduce a form of prayer and are likely to be abused over time.

Peter Applebome, *Prayer in Public Schools? It's Nothing New for Many*, N.Y. TIMES, Nov. 22, 1994, at 1.

24. W. M. Beaney & E. N. Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 EMORY J. OF PUB. L. 475, 479 (1964), reprinted in 1 PRAYER IN PUBLIC SCHOOLS AND THE CONSTITUTION 1961-1992, at 415 (Robert Sikorski ed., 1993).

25. J. Hasson & T. Mauro, *School Prayer Atop GOP Agenda*, USA TODAY, Nov. 15, 1994, at A3. "When a school prayer amendment to the Constitution was last voted on in 1984, religious organizations opposing the amendment included representatives of Baptist, Presbyterian, Jewish, Lutheran, Episcopal, Methodist and African Methodist Episcopal groups." Draft Report of ABA Individual Rights & Responsibilities section against school prayer constitutional amendment.

26. ROBERT S. ALLEY, SCHOOL PRAYER, THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT 107 (1994).

tution were introduced during this past legislative session.²⁷ Although not an official part of the Republican Contract With America, religion in schools is very much on the agenda of the far right. Interviewed on the Monday after the November, 1994 election, Congressman Newt Gingrich said "a key part of his philosophy 'is to re-establish the right to teach that there is a Creator from whom your inalienable rights come.'"²⁸ A "religious equality" amendment was the first item in the "Contract With the American Family," unveiled by Ralph Reed, Executive Director of the Christian Coalition on May 17, 1995.²⁹ It is un-

27.

Nothing in this constitution shall prohibit the inclusion of voluntary prayer in any public school or activity. No person shall be coerced by the United States or by any State to participate in such prayer. Neither the United States nor any State shall prescribe the content of any such prayer.

H.R.J. Res. 10, 104th Cong., 1st Sess.

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer. Neither the United States nor any State shall prescribe the content of such prayer.

H.R.J. Res. 16, 104th Cong., 1st Sess. *See, e.g.*, H.R.J. Res. 19, 104th Cong., 1st Sess.; S.J. Res. 6, 104th Cong., 1st Sess.; S.J. Res. 7, 104th Cong., 1st Sess. *See also* Katharine Q. Seelye, *Proposed Prayer Amendment Splits Right*, N.Y. TIMES, Nov. 22, 1995, at D18 (discussing Republican Oklahoma Representative Ernest Jim Istook's introduction of "a constitutional amendment that would provide prayer in public schools").

Other attempts are solely legislative. For example, the proposed Voluntary School Prayer Protection Act states:

(a) IN GENERAL. - Notwithstanding any other provision of law, no funds made available through the Department of Education shall be provided to any State or local educational agency that has a policy of denying, or that effectively prevents participation in, constitutionally-protected prayer in public schools by individuals on a voluntary basis; (b) LIMITATION. - No person shall be required to participate in prayer or influence the form or content of any constitutionally-protected prayer in public schools.

S. 27, 104th Cong., 1st Sess.

28. J. Hasson & T. Mauro, *School Prayer Atop GOP Agenda*, USA TODAY, Nov. 15, 1994, at A3; Frank Rich, *The God Patrol*, N.Y. TIMES, July 12, 1995, op-ed at 17 (describing Rep. Newt Gingrich and Sen. Bob Dole's support of the "Religious Equality" Amendment to the Constitution).

29. Robert Marshall Wells, *Prayer Amendment Unlikely Despite Push From Right*, 53 CONG. Q. 1998, 2000 (1995). The version of the amendment proposed by University of Chicago Law School professor Michael McConnell, provided as follows:

In order to secure the unalienable right of the people to acknowledge God according to the rights of conscience, neither the United States nor any State shall deny benefits to or otherwise discriminate against any persons on account of their religious expression, belief or identity, nor shall the exercise of the people of full and equal rights to freedom of speech, press, association or religion be construed as an establishment of religion because of the religious content thereof.

Tough Questions About the Religious Equality Amendment, FIRST AMENDMENT RIGHTS IN EDUCATION (First Amend. Rights in Educ. Project), Sept. 1995, at 1-2 [hereinafter *Tough Questions*].

likely that these efforts to amend the Constitution will achieve any greater success than their precursors.³⁰

The Supreme Court's religion jurisprudence has received attack from scholars and members of the Court, as well as from politicians. A good deal of the criticism has focused on the failure of the three-part test articulated in *Lemon v. Kurtzman*³¹ to yield either consistent or sensible results.³² The Court continues to hear a disproportionate number of religion cases, and the vast majority of these involve religion in schools.³³ Since the Court's decision in *Lee v. Weisman*,³⁴ in which

30. *Tough Questions*, *supra* note 29, at 1, 7. Wells, *supra* note 29, at 1998.

31. 403 U.S. 602 (1971).

32. *Id.* *Lemon* held that in order to withstand an Exercise Clause challenge, state action must have (1) a secular purpose; (2) a secular primary effect that neither advances nor inhibits religion; and (3) must create no excessive government entanglement. *Id.* at 612-13. Justice Rehnquist has been one of its principal detractors. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 110-12. "[T]he *Lemon* test has caused this Court to fracture into unworkable plurality opinions . . . depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results." *Id.* Within the Academy critics have included Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940-41 (1986); Mirsky, *supra* note 2, at 1243-47; LYNDIA BECK FENWICK, SHOULD THE CHILDREN PRAY? 181 (1989). See also Mark V. Tushnet, *Free Speech and the Religion Clauses: May a State University Refuse to Use Student Fees to Support a Religious magazine?*, 5 PREVIEW 229 (1995). "[T]he Court still adheres to the *Lemon* standards, but they have not played a decisive role in any Supreme Court Establishment Clause case for at least a decade." 403 U.S. at 612-13. In the Court's most recent pronouncement, there is no mention of *Lemon* in the majority opinion. *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 115 S. Ct. 2510 (1995). In fact, the only mention of *Lemon* in any of the four *Rosenberger* opinions was that of Justice Souter in a footnote string cite, and in the last paragraph of his dissent, and then only to quote then Chief Justice Burger's warning about constitutional adjudication, having nothing to do with the application of the *Lemon* test itself to *Rosenberger*. *Id.* at 2542 n.8, 2551 (Souter, J., dissenting).

33. The Court decided the following cases after *Kurtzman*:

1. State Aid to Private Religious Schools: *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (struck down state payments to private school for maintenance and repair, tuition reimbursement to parents, and tax relief); *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upheld state law authorizing public funds to reimburse private schools for performing various state-required testing and reporting services); *Mueller v. Allen*, 463 U.S. 388 (1983) (upheld Minnesota state tax deductions for public and private school expenses); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993) (upheld state-provided interpreter for deaf child in parochial school); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994) (struck down creation of public school district coterminous with religious enclave of Hasidim established to provide handicapped children with public school education).

2. Socialization and Free Exercise Rights: *Edwards v. Aguillard*, 482 U.S. 578 (1987) (struck down Louisiana statute requiring teaching of Creationism whenever Evolution is taught).

3. Prayer and Moments of Silence: *Jaffree*, 472 U.S. 38 (struck down Alabama statute providing for a moment of silence to enable voluntary prayer); *Weisman*, 505 U.S. 577

the Court ruled that utilizing a member of the clergy to deliver a "non-sectarian" benediction approved by the school board at graduation violated the Establishment Clause, a good deal of debate in the nation,³⁵ in the Academy³⁶ and among the lower courts has focused on "voluntary," student-led prayer.³⁷ Recently, despite a split in the circuits, the Court reversed and remanded as moot a Ninth Circuit decision invalidating a school district resolution allowing for student-led prayer at graduation.³⁸ The Court gave no reasons for its action, thus enhancing speculation on how the Court might inevitably decide the merits.³⁹

But no matter what transpires in the courts and in the state and federal legislatures, religion is unlikely to cease being a subject of controversy in this nation. Must the question of religion in the public schools inevitably *divide* the nation? Might it be possible to redefine the debate? I believe so. What follows is an attempt to refocus the debate about religion in schools away from the issue of "school prayer" and towards tolerance of religious diversity and acknowledgement of religious differences.

(held Establishment Clause prohibits clergy selected by school from giving benedictions at public school commencement exercises).

4. Equal Access: Board of Educ. v. Mergens, 496 U.S. 226 (1990) (upheld Equal Access to Facilities Act, 20 U.S.C. § 4071); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (held school district violated Free Speech Clause of First Amendment by denying church access to public school premises solely because program dealt with religious subject matter; allowing church access would not violate Establishment Clause); *Rosenburger*, 115 S. Ct. 2510 (held that University violated Free Speech Clause by denying university funding to student religious publication).

34. 505 U.S. 577.

35. See, e.g., Rich, *supra* note 28 (commenting on a Utah case where a public school choir was required to sing two Christian songs at graduation).

36. See, e.g., Thomas A. Schweitzer, *The Progeny of Lee v. Weisman: Can Student-Invited Prayer at Public School Graduations Still be Constitutional?*, 9 B.Y.U. J. PUB. LAW 291 (1995).

37. Compare *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) (upholding Texas school district resolution allowing for student-led prayer at graduation) with *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994) (striking down similar resolution in Idaho), *cert. granted and case vacated and remanded to dismiss as moot*, 115 S. Ct. 2604 (1995). Challenges have been brought in Mississippi, see *Ingebretson v. Jackson Pub. Schs.*, 864 F. Supp. 1473 (S.D. Miss. 1994) (issuing preliminary injunction against enforcement of student-led prayer statute), and the District of Columbia, see L. Goodstein, *Group Sues Over School Prayer*, WASH. POST, May 17, 1994, at B3. See also *Tanford v. Brand*, 883 F. Supp. 1231 (S.D. Ind. 1995) (denying injunction against graduation prayer at Indiana University commencement ceremonies).

38. *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *cert. granted and case vacated and remanded to dismiss as moot*, 115 S. Ct. 2604 (1995).

39. *Id.*

II. WHERE ARE WE? LOCATING RELIGION IN THE SCHOOLS

There is a prevalent misunderstanding among those involved with the education of our young concerning the distinction between teaching about religion, and preaching about religion, about what the First Amendment requires or permits, and what it forbids.⁴⁰ Anecdotes are rife. A kindergarten teacher told her class members to each bring in their favorite book. One little boy brought in the Bible; the teacher told him that it was unconstitutional to read that book in school.⁴¹ An elementary school child was disciplined for saying grace out loud over his school lunch.⁴² A school district adds Halloween to its list of religious holidays that may not be celebrated.⁴³ Far more than simply anecdotal, however, is the pervasive evidence that uncertainty about the parameters of the Establishment Clause led many textbook publishers to purge their schoolbooks of any references to religion and the importance it has played in the history of our nation and our world.⁴⁴ The fallout from this has been enormous. Many religious persons sense governmental hostility against, rather than neutrality towards, religion pervading our public schools.⁴⁵ This has increased suspicion and ignorance of the diversity of religions among us.

We need to find a way to foster inclusiveness of religious (mean-

40. See, e.g., *President's Memorandum on Religious Expression in Schools*, N.Y. TIMES, July 13, 1995, at B10. "It appears that some school officials, teachers and parents have assumed that religious expressions of any type is either inappropriate, or forbidden altogether, in public schools. . . . Public Schools may not provide religious instruction, but they may teach about religion, including the Bible or other scripture. . . ." *Id.* On July 12th, President Clinton issued a memorandum on religious expression in schools in which he directed the Secretary of Education "to provide every school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools." Secretary Richard W. Riley issued that statement of principles on August 10, 1995. The statement relied heavily on a longer document issued jointly by some thirty-five civic and religious organizations in April 1995 entitled *Religion in the Public Schools: A Joint Statement of Current Law*. See also, e.g., ALLEY, *supra* note 26, at 164 (quoting Senator Bayh's 1966 resolution endorsing voluntary prayer: "Whereas these decisions [of the Supreme Court regarding religious practices in schools] have been widely misrepresented, misinterpreted and misunderstood. . . .").

41. See Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607, 636-37, n.163 (1995) (cataloguing numerous reported instances of religious intolerance, most of which proved to be unsubstantiated upon further investigation). Joshua Burton reportedly was expelled after two students complained he was reading his Bible before school. Wells, *supra* note 29, at 1998.

42. See *Personal Prayer is not illegal*, N.Y. TIMES, Dec. 10, 1994, at A1.

43. See *District's Ban on Halloween Riles Parents*, N.Y. TIMES, Oct. 13, 1995, at A20.

44. See FENWICK, *supra* note 32, at 186; Paul C. Vitz, *Religion and Traditional Values in Public School Textbooks*, THE PUB. INTEREST, Summer 1986 at 79-80.

45. See Wells, *supra* note 29, at 1998.

ing people of *all* religions) *and* nonreligious people. We need to find a way to foster *tolerance* and *acceptance* of differences. Nowhere is this need more acute than in our schools, among our young. Misunderstanding abounds about what is, and what is not, constitutionally acceptable. Before suggesting approaches for enhanced tolerance and accommodation, it is important to clarify what the First Amendment permits, forbids and requires in terms of education in the public schools.

First, the Free Exercise Clause assures that no one is forbidden from praying voluntarily and on their own.⁴⁶ The school that interferes with a child's right to say grace over his food in the lunchroom violates the First Amendment no less than the school whose principal reads a prayer over the loudspeaker.⁴⁷

Second, Congress has acted to insure through the 1984 Equal Access to Facilities Act that schools must make their facilities open to religious clubs and organizations on the same basis that they are open to secular clubs and organizations.⁴⁸ In *Board of Education v. Mergens*,⁴⁹ the Supreme Court sustained the EAFA against an Establishment Clause challenge.⁵⁰ Prior to *Mergens*, lower courts largely rejected as unconstitutional allowing prayer clubs to meet on school premises.⁵¹ In *Widman v. Vincent*,⁵² the Court struck down as a violation of the Free Speech Clause, a university's proscription against the use of school facilities "for purposes of religious worship or religious teaching."⁵³ Subsequently, in *Bender v. Williamsport Area School District*,⁵⁴ the Third Circuit held that given the relative immaturity of high school students, to allow religious clubs to meet on the same basis

46. "Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the schoolday." *Jaffree*, 472 U.S. at 67 (O'Connor, J., concurring in the judgment).

47. See *Church and State*, ACLU BRIEFING PAPER (ACLU, New York, N.Y.), No. 3, at 2. However, the First Amendment does not guarantee the right to say prayers during instructional time. *Id.* Nor does it prohibit a teacher from declining to approve a research paper topic on a religious subject. See *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir.), *cert. denied*, 116 S. Ct. 518 (1995).

48. 20 U.S.C. §§ 4071-4074 (1984).

49. 496 U.S. 226 (1990).

50. *Id.* at 253.

51. See *Board of Educ. v. Mergens*, *Brief of the Anti-Defamation League of B'nai B'rith, et. al*, reprinted in 3 PRAYER IN PUBLIC SCHOOLS AND THE CONSTITUTION 1961-1992, at 84 (Robert Sikorski ed., 1993).

52. 454 U.S. 263 (1981).

53. *Id.* at 265.

54. 741 F.2d 538 (9th Cir. 1989), *vacated on other grounds*, 475 U.S. 534 (1986).

as other clubs, would violate the Establishment Clause.⁵⁵ The Supreme Court avoided the merits by resolving the case on standing grounds.⁵⁶ In *Mergens*, the Court ratified the Eighth Circuit's deference to Congress' finding that high school students were not "likely to confuse an equal access policy with state sponsorship of religion."⁵⁷

Three years after *Mergens*, in *Lamb's Chapel v. Center Moriches Union Free School District*,⁵⁸ the Court entertained a challenge brought by a church group seeking after-hours access to public school premises to screen an anti-abortion film. The school had argued that allowing the Church to use the school's facilities would violate the Establishment Clause. The Court found both that there was no Establishment Clause problem, and that not allowing the group to use the school's facilities on the same basis as all other organizations were allowed to use them, would be a violation of Free Speech.⁵⁹ Again, last term, the Court found that the Free Speech Clause trumped any Establishment Clause concerns in *Rosenberger v. Rector and Visitors of University of Virginia*.⁶⁰ The Circuit Court had held that for the University to give funds to a religious magazine would violate the Establishment Clause.⁶¹ The Supreme Court reversed, holding that to withhold funds solely on the basis of the religious nature of the magazine impermissibly discriminated against religious speech.⁶²

55. *Id.* at 554-55.

56. *Bender*, 475 U.S. at 536. Justices Burger, White and Rehnquist dissented, and would have reversed the Court of Appeals on the merits. *Id.* at 551.

57. *Mergens*, 496 U.S. at 250.

58. 113 S. Ct. 2141 (1993).

59. *Id.* at 2149.

60. 115 S. Ct. 2510 (1995).

61. 18 F.3d 269, 281 (4th Cir. 1994). The court held that although the denial of funds constituted viewpoint discrimination, it was justified by the "compelling interest in maintaining strict separation of church and state." *Id.*

62. *Rosenberger*, 115 S. Ct. at 2510. Both *Rosenberger* and *Lamb's Chapel* are representative of the Court's "Either/Or" First Amendment jurisprudence. Seldom is a governmental unit given discretion as to whether to include or exclude religious enterprise: either allowing the enterprise will violate the Establishment Clause, or, as the Court has more frequently found recently, disallowing the enterprise will run afoul of the Free Speech clause, as viewpoint discrimination. As Professor Tushnet has noted:

One line [of precedent] involves cases in which the Court treats the expenditure of funds as a way in which government itself speaks [and thus an Establishment clause violation]; the other line involves cases in which the Court treats such expenditures as a way in which government facilitates the speech of private parties [thus protected by the free speech clause].

Tushnet, *supra* note 32, at 229. Why not allow the University discretion as to whether it wishes to fund religious magazines?

In *Rosenberger*, the University's position was that its choice to prefer cultural activities

Third, nothing in the First Amendment prohibits public schools from teaching *about* religion. In fact, the omission in the teaching of history of the role religions and religious leaders have played is arguably a demonstration of discrimination towards religion in violation of the free speech clause.

III. VOLUNTARY PRAYER AND MOMENTS OF SILENCE

Often the religion in schools debate has blurred the distinction between prayer and moments of silence. There are important theoretical and practical distinctions between organized prayer in schools, and organized moments of silence. We must resist attempts to put officially-endorsed "voluntary" prayer back into the schools. Nonsectarian prayer is an oxymoron.⁶³ There is no prayer imaginable that would be acceptable to all religions; at best, most attempts are likely to trivialize religion.⁶⁴ At worst such attempts are blatantly offensive, to believers and nonbelievers alike.⁶⁵ Most clergy agree, and thus have consistently opposed organized attempts to reintroduce prayer in schools.⁶⁶

Furthermore, many believe that voluntary prayer is a misnomer. Peer pressure and fear of ostracism for non-participation may make the choice not to participate intolerably difficult for many children.⁶⁷ Giv-

over political, social, and religious ones is a reasonable decision about the most socially valuable way to distribute its limited resources consonant with its educational mission, even though its decision may in some ways discriminate against religious points of view.

Id.

63. "The bill in question has remained in committee because no one could resolve the question, 'What does a non-denominational prayer look like?' The answer is, of course, no one knows, because it is impossible to compose a prayer that is not denominational." ALLEY, *supra* note 26, at 171-74 (quoting from 117 CONG. REC. 39895 (1971) (remarks of Rep. Celler and Rep. Drinan)).

64. Cf. Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 64 (1986) (noting that certain critics of moments of silence in public schools believed such exercises trivialized religion).

65. See, e.g., David Klinghoffer, *Give Us This Day Our Daily Pabulum*, N.Y. TIMES, Dec. 27, 1994, op-ed at 21 (prayers that are the result of political compromise trivialize religion and alienate adherents); J. F. Dean, *Orange County Voices: Commentary on School Prayer*, L.A. TIMES, Dec. 11, 1994, op-ed at B5 ("It is difficult to contemplate a gathering of the 78 church leaders whose goal is a prayer acceptable to each congregation.").

66. See, e.g., ALLEY, *supra* note 26, at 128-29, 131, 138-39, 200 (1964 and 1982 attempts at prayer amendment opposed by various religious organizations and leaders).

67. Many have assumed that peer pressure renders *voluntary* school prayer a misnomer. See, e.g., Carter, *supra* note 18 (citing *Lee v. Weisman*, 505 U.S. 577, 592-94 (arguing that peer pressure makes an adolescent's choice to opt out a meaningless one)); Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV.

en the extant opportunities for private prayer even within the school day, no persuasive argument exists for sanctioning prayer over the loudspeaker or in the classroom, voluntary or not.⁶⁸

Officially mandated moments of silence may create opportunities for personal prayer. However, careful implementation is needed to insure that religious neutrality is maintained.⁶⁹ The moment of silence law the Supreme Court struck down in *Wallace v. Jaffree*⁷⁰ established that a law enacted solely and explicitly for the purpose of reintroducing prayer back into the public schools was constitutionally intolerable. Alabama had previously enacted a moment of silence law, which provided that a public school teacher could commence the school day with "a period of silence not to exceed one minute in duration [which] shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."⁷¹ The law under attack⁷² added "or voluntary prayer" after the word "meditation."⁷³ Given the relatively uncontroverted evidence that the statute was enacted in an "effort to return voluntary prayer" to the public schools,⁷⁴ and that there was no secular purpose behind it,⁷⁵ the Court, in a splintered 6-3 decision⁷⁶ struck down the Alabama law. Dicta in the Court's opinion,⁷⁷ ratified in each of the other decisions,⁷⁸ would suggest that mo-

1874, 1874 n.1 (1983) (citing Justice Frankfurter in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948)) ("The law of imitation operates, and non-conformity is not an outstanding characteristic of children."); FENWICK, *supra* note 32, at 163 (documenting arguments by Senators Dodd and Leahy during 1984 debates that peer pressure and desire to please teachers would make it all but impossible for students to exempt themselves from organized classroom prayer). *But see* Rossow & Rossow, *Prayer Clubs*, *infra* note 99.

68. Fears regarding ostracism and peer pressure, however, may be misplaced on the role played by prayer. While we are sorely lacking in empirical documentation of the harm caused by school prayer, I would wager that ostracism and discomfort exist for those of a minority belief (or disbelief) in a class where there is a dominant religion whether prayers are recited out loud or not.

69. See Laycock, *supra* note 64, at 217-18.

70. *Jaffree*, 472 U.S. at 60-61.

71. ALA. CODE § 16-1-20 (Supp. 1984), *quoted in Jaffree*, 472 U.S. at 40 n.1.

72. Although plaintiffs had originally challenged ALA. CODE § 16-1-20, they abandoned that challenge on appeal. *Jaffree*, 472 U.S. at 41.

73. ALA. CODE § 16-1-20.1 (Supp. 1984), *quoted in Jaffree*, 472 U.S. at 41 n.2.

74. *Jaffree*, 472 U.S. at 57.

75. *Id.* at 56.

76. There were six different opinions filed in *Jaffree*. In addition to Justice Stevens' opinion for the Court, joined by Justices Brennan, Marshall, Blackmun and Powell, Justices Powell and O'Connor filed concurring opinions. Each of the dissenters (Burger, White and Rehnquist) filed separate opinions.

77. *Jaffree*, 472 U.S. at 59. "The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." *Id.*

78. See *id.* at 62 (Powell, J., concurring); *id.* at 67, 72-73 (O'Connor, J., concurring in the

ment of silence laws are presumptively constitutional. Those wishing to enhance opportunities for personal prayer in the schools might well focus attention here. As long as the state has remained genuinely neutral⁷⁹ on whether such moments are used for prayer, observation of moments of silence are constitutionally unobjectionable.⁸⁰ While moments of silence are not uncontroversial, they have received much broader support than voluntary prayer.⁸¹ At the time the Court decided *Jaffree*, twenty-five states had statutes requiring or permitting teachers to lead their classes in observing moments of silence.⁸² Moment of silence laws now exist in Georgia, South Carolina, Tennessee and Massachusetts, although Massachusetts has not enforced its statute.⁸³

My own experience as a parent has shaped my views towards reflective silence. My son, now in college, and my daughter, in elemen-

judgment); *id.* at 88 (Burger, J., dissenting); *id.* at 90 (White, J., dissenting); *id.* at 91-128 (Rehnquist, J., dissenting). Lower courts are divided. *See supra* note 17.

79. *See* Laycock, *supra* note 64, at 1-3. Professor Laycock voices concern over the ability of the classroom teacher to administer a moment of silence in a content-neutral manner, while endorsing it in theory. *See id.* at 57-58.

80. *See Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring in the judgment). "The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer." *Id.*

81. *See, e.g.,* S. H. Verhovek, *Past Sheds Light on Clinton and School Prayer*, N.Y. TIMES, Nov. 17, 1994, at 28 (describing Moment of Silence legislation passed by Arkansas legislature with Clinton's support after Court issued decision in *Jaffree*).

State-mandated moments of silence are probably constitutional, unless they are a subterfuge for state-sponsored prayer. . . . A school prayer amendment is unnecessary and pernicious because the Bill of Rights does a good job of reconciling the religious rights of individuals and groups with the imperative to separate church from state.

Prof. Perry Dane, *Letter to the Editor*, N.Y. TIMES, Nov. 27, 1994. "As a Presbyterian. . . I would support a moment of silence at the opening of the school day or, for that matter, the beginning of each class, primarily to allow the students 'to get their act together.'" Dean, *supra* note 65. None of the 20 "teachers of the year" polled by the New York Times opposed having a moment of silence and the vast majority did oppose school prayer. *See* Kimberly J. McLarin, *Curriculum or Not, Teachers Values*, N.Y. TIMES, Feb. 19, 1989, at A1.

82. *Jaffree*, 472 U.S. at 84. *See also* Note, *supra* note 67, at 1874 n.1. "Although some mention only meditation, most give the student a choice between prayer and meditation." *Id.* at 1875. *First Amendment Rights in Education*, August 1995, at 1.

83. R. Kim, *School Prayer: Should Religion, Class be Separate?*, NEWSDAY, Jan. 1, 1995, at A64. In Arkansas, the law enacted during Clinton's governorship was repealed in 1994, upon findings that it was not being observed. *Id.* New York has had a law on the books since 1971 allowing voluntary "silent meditation." This too, is seldom observed. In 1993, School District #29 in Queens, New York passed a resolution to start the day with a moment of silence. Reporters for New York Newsday could not find any schools that actually observed the practice. Recently, the principal of Public School 156 in that district substituted a "pledge to academic success" in lieu of a moment of silence: "Malcolm, Martin, Robert and John all died for freedom to help us get strong. With books and pens and notebooks too, let's all work together to make that dream come true. Success is me, my teacher and my work." *Id.*

tary school, both have been enrolled in a private school under Quaker auspices. Quakers have silent meetings for worship. Silent meetings and moments of silence (of age appropriate lengths) are woven into the school's curriculum. I am invariably moved by the hush that falls over the Meeting House at these times. Students stop fidgeting.⁸⁴ It is likely that some pray. Some probably think about their plans for after school. Some will let their minds wander. My own experience is often one of individual peace and community harmony. Moments of silence are centering, calming. The virtue of the moment of silence is that there is no orthodoxy on how it will be used.⁸⁵ Of course in the private school attended by my children, there are no constitutional obstacles to organized moments of silence. But the secular *benefits* of moments of silence transcend the private school arena and have equal validity in the public school context. To my mind, because of these benefits, excessive concern in divining the legislators' motive is misplaced.⁸⁶

Thus, the law already affords opportunities for personal prayer, permits schools to observe moments of silence and prohibits schools from acting in a way hostile towards any religion, all religions, or no religion whatsoever. Yet the law has failed to resolve the maelstrom of religious discord in our schools and our communities. The answer may lie in transcending legal battles and seeking solutions beyond the parameters of First Amendment proscriptions and protections to help achieve religious harmony.

84. "A quiet moment would 'still the tumult of the playground and start a day of study.'" *Jaffree v. James*, 544 F. Supp. 727, 732 (1982) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 281, n.57, *quoting* WASH. POST, June 28, 1962, at A22).

85. See Laycock, *supra* note 64, at 6 ("Students so inclined may use the moment of silence to pray; others may use it to meditate, daydream, plot mischief, or ogle their favorite classmate.").

86. See, e.g., *Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment) (taking issue with Justice Rehnquist's dissenting opinion, *id.* at 108, that after *Jaffree*, whatever the true motives, legislators will express only secular purposes and conceal sectarian ones). Justice O'Connor offered "little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one." *Id.* Both ignore the multiplicity of intentions that may inform the multitude of legislators' votes.

[A] court has no license to psychoanalyze the legislators. . . . If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent.

Jaffree, 472 U.S. at 74-75 (O'Connor, J., concurring in the judgment) (citations omitted).

IV. RELIGION AS PART OF A MULTICULTURAL CURRICULUM

In my second-grade classroom some of my students come from churchgoing families. Some come from families who choose not to practice religion. I have a Buddhist Vietnamese student, a Hindu East Indian student and an American Jewish girl. It is a beautiful thing to see these children of diverse backgrounds studying, learning, working and playing together.

The question for me is, how in the world could a teacher lead this class in prayer without making some of the students feel excluded or coerced?⁸⁷

In his April, 1995 Law Day message George E. Bushnell, President of the American Bar Association, entreated the bar to embrace multiculturalism:

As you prepare for Law Day USA 1995, consider for a moment how your neighborhood and community has been strengthened and enriched by the diversity of its members. Find ways to celebrate that diversity in all of its forms. And remember, that it is law that is the unifying factor for all peoples of America.⁸⁸

Most of the focus on multiculturalism and diversity tends to be on differences in race and ethnicity. Differences in traditions and physical characteristics are acknowledged and valued, so that students may feel comfortable as themselves within the larger school community, whether or not they are racial or ethnic minorities.⁸⁹ More recently, attention

87. Laura-Lee Tolliver, Seattle, *Letter to the Editor*, N.Y. TIMES, Nov. 27, 1994.

88. President's Message: *Celebrating Law Day Through Diversity: 'E Pluribus Unum' is Guiding Principle for all Peoples of America*, A.B.A. J., April 1995, at 8.

89. See David Shipler, *Are White Schools Bad for Black Children?*, N.Y. TIMES, Feb. 19, 1995, at 11 (reviewing VIVIAN GUSSIN PALEY, KWANZAA AND ME: A TEACHER'S STORY (1995)).

In "White Teacher," [a book written by Mrs. Paley sixteen years earlier] Mrs. Paley conceded that her image of the intelligent, capable child was never black. "In the beginning it was more comfortable to pretend the black child was white," she wrote then. Therefore, she avoided addressing differences. Once, when a white child told a black girl that she looked like chocolate pudding, "I became rigid and pretended not to hear," Mrs. Paley confessed. At a faculty meeting, teachers agreed that color must be ignored. "We must bend over backward to see no color, hear no color, speak no color," she wrote. "I did not argue against this position because I could not justify another."

She came to see another way only gradually, first by reflecting on her own memories of being Jewish in a mostly gentile classroom. The teachers never acknowledged the children's Jewishness, which threw her into a quandary. "The more my parents provided me with roots in my own culture, the more I felt my differences from the culture of the school," she wrote. "Failing to be recognized as a Jew, and knowing I was not gentile, I did not know what I was at school."

has been drawn to lifestyle differences and differences in family compositions. We of course recognize that differences in religions exist as well, yet there has been far less focus on teaching children about religious diversity than on teaching them about racial and ethnic differences. This may be due in large measure to a misguided assumption by educators that to do so might overstep Establishment Clause bounds.⁹⁰

Public schools should teach religious diversity as part of multicultural education.⁹¹ If we teach it well, we might quell the call for more prayer in schools. If we *teach* about religion, we might disempower those who wish to *preach* religion in the public schools.⁹²

Next, a black mother told her that it was nonsense to pretend not to see color, that black children knew they were black and that parents wanted it recognized as a positive difference. . . .

Id.

90. See FENWICK, *supra* note 32, at 189.

91. See Shipler, *supra* note 89; "It seems to me . . . that in this age where children are taught by the state school system that they must be tolerant of racial differences, tolerant of homosexuality, tolerant of political differences and tolerant of cultural and language diversity, that this same system should be tolerant when it comes to religious freedom." Wells, *supra* note 29, at 2000 (quoting Mark Burton, father of child expelled for reading Bible in school). Teaching religion as part of multiculturalism is, perhaps, beginning to gather momentum. See, e.g., John Clayton, *Religion in the Classroom*, N.Y. TIMES, July 10, 1994, at 11 ("To the Editor: We should teach Christian values. Jewish values. Quaker values. Muslim values. Buddhist values and more. Our children can learn that no one denomination has a monopoly on values.—John Clayton, *Columbia, Maryland*"); Peter Steinfeld, *Trend Gaining in Public Schools to Add Teaching About Religion*, N.Y. TIMES, Mar. 19, 1989, at A1 ("Many conservatives and liberals agree that discussion of religion belongs in the schools, although their reasons for supporting it differ. Conservatives are drawn to the cause by a belief that the absence of religion carries an implicitly anti-religious message, *liberals by a belief that learning about religious diversity strengthens pluralism.*") (emphasis added). The Birmingham, Michigan public school system has apparently advocated teaching about "the importance of religion to an understanding of society and of the richness and diversity of the human experience" since at least 1977, and in 1990, joined with religious leaders to develop a comprehensive religion curriculum for its schools. See Birmingham Public Schools Policy 6141.2, *Religion in Schools*. This curriculum was successfully implemented in 1992. *First Amendment Rights in Education*, August 1995, at 1. There are probably other school systems that have formulated policy on this.

See also Levinson, *supra* note 3, at 1876 ([Carter] points out correctly "that liberals who are wont to praise multiculturalism and diversity in most contexts are often hesitant to extend the same welcome to those who speak, and act in accordance with, the language of traditional religion.").

92. Cf. *Right Confirms Retreat on School Prayer*, FIRST AMENDMENT RIGHTS IN EDUCATION (First Amend. Rights in Educ. Project), Sept. 1995, at 7 (quoting Gregory S. Baylor, Assistant Director of the Christian Legal Society's Center for Law and Religious Freedom).

The debate over 'school prayer' has become rhetorical shorthand for [the] broader problem. Recent calls for a 'prayer amendment' are thus better understood as a more sweeping challenge to the legal, social and cultural disregard for religious individuals, institutions and ideas—a reaction to a society and government that have grown increasingly anti-religious.

The treatment of religion in schools, regardless of the form it takes, may create certain perils. Any proposal for teaching religion as part of multiculturalism must address these concerns, and bear the burden of demonstrating that the gains exceed the risks involved. One risk is possible interference with the belief systems of teachers, students and parents.⁹³ For certain fundamentalists, any discussion of different religions and different moral principles might be heresy. Liberalism presupposes tolerance, but tolerance of other belief systems is antithetical to fundamentalist religion. Permitting the children of fundamentalists to be excused from curriculum coverage that would be inconsistent with their religious beliefs might successfully accommodate their religion, but would fail to promote tolerance of other belief systems, a fundamental tenet of liberalism. This, as Professor Stolzenberg has so perceptively described, is the paradox of liberalism.⁹⁴ Related to this concern is one of the alienation of the non-believer. Even within the diverse classroom, the child raised with no religious belief system may be in the minority. Exploration of religious pluralism may leave the nonbeliever estranged.

Difficulties may arise for the teacher in balancing her responsibility as a role model and authority figure on one hand, and as a facilitator of discussion of differences on the other. How does the teacher answer the young child who asks, "Do you believe in God?" An answer in the affirmative might trouble the child who has learned from her parents, her authority figures at home, that God, like Santa Claus, is someone that some people choose to believe in, but who does not really exist. Similarly, an answer in the negative would likely be very unsettling for the child who has been raised in a theistic home. A refusal to answer the question might be unsettling for young children, who are being

Id.

93. On one hand, I believe no teacher should be coerced to engage in practices with which they feel uncomfortable, whether moments of silence or otherwise. Yet I am not sure I can reconcile this with my belief in the value of sharing religious orientations with one another. "Civil libertarians are concerned about the rights and needs of children from religious minorities or from nonpracticing homes. They need to extend their concern to the rights and needs of school staffs. Some of us will be unable or unwilling to lead classes in prayer." Laura-Lee Tolliver, Seattle, *Letter to the Editor*, N.Y. TIMES, Nov. 27, 1994. In Atlanta, Georgia, a high school social studies teacher, Brian Bown, was dismissed for refusing to comply with a state-mandated moment of silence in 1994. Applebome, *A Battle on School Prayer*, *supra* note 23, at 18.

94. See Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination and the Paradox of a Liberal Education, 106 HARV. L. REV. 581 (1993). (analyzing *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988), as posing the tension between tolerance and fundamentalism).

asked to share their own religious orientations.⁹⁵ Unquestionably, sensitive teaching and age-appropriate curriculum would be necessary to ameliorate these concerns.⁹⁶

Both the problems of religion in schools and the potential solutions to those problems are likely to vary depending upon the demographics of the particular school. Ostracism, and lack of receptivity on the part of students and teachers to *learning* about other religions, are likely more prevalent in largely homogeneous settings, where the overwhelming majority of the students are of the same religion.⁹⁷ It is in such schools, primarily in the South, where Supreme Court rulings abolishing school prayer have been largely ignored.⁹⁸ In a heterogeneous environment, where a multitude of religions are represented, these concerns diminish. Receptivity to multicultural education is more likely to flourish in a multicultural classroom, whether the differences be ones of race or religion.

There is a paucity of empirical evidence regarding any harm caused by how religion, prayer and moments of silence are dealt with in schools.⁹⁹ In the equal access cases, for example, many courts sim-

95. See McLarin, *supra* note 81, at A1 (quoting one teacher who says "he never tells his students how he votes, although they often ask"). See also Steinfelds, *supra* note 91, at A1 (describing the dangers and difficulties of teacher biases in discussion of religion). The Birmingham Public Schools Instruction guidelines on Policy 6141.2, *supra* note 91, contains a privacy provision which states that "[i]ndividuals should not be required to disclose their personal religious preferences or beliefs or those of their family members. No one should be compelled to profess a belief or disbelief in any religion." Respecting the student's desire not to share her religious orientation, however, does not preclude creating an environment where a student should feel welcome to do so. If we relegate religion to the unspeakably private, we may be unwittingly communicating an anti-religion, or at least anti-minority religion, message.

96. It is beyond the scope of this undertaking to solve all of these problems. The law professor defers to the professional educators.

97. See *Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226, 268-69 (1990) (Marshall, J., concurring in the judgment) (cautioning that in school where prayer club was supported by substantial proportion of student population, peer pressure and ostracism of nonconforming student would be at their worst. "[W]e should not be so quick to dismiss the problem of peer pressure as if the school environment had nothing to do with creating and fostering it."). In his dissenting opinion in *Mergens*, Justice Stevens observed that "one purpose of the proposed Bible Club was to convert students to Christianity. App. 185." *Id.* at 287 (Stevens, J., dissenting).

98. See *60 Minutes*, *supra* note 19 (residents of rural Mississippi admitting that Supreme Court's 1962 ruling banning school-sponsored prayer was completely ignored).

99. Mariellen F. Scott and Perry A. Zirkel, *The Legality of Prayer in the Public Schools: Teachers' Knowledge, Attitude and Practice*, 36 Educ. L. Rep. (West) 533, 534 (1987). My research turned up only one study from 1988. This study, conducted in three high-schools in a medium-sized Midwest town, concluded that a positive relationship existed between the levels of perception of religious neutrality of high school and college students. No significant relationship existed between the level of religious neutrality and the student's year in high school and no significant relationship existed between the level of peer influence and the students' year in school.

ply assumed that high school students lacked the requisite maturity to distinguish state neutrality from state endorsement.¹⁰⁰ This stands in bold contrast with the empirical studies that were critical evidence in the Court's landmark desegregation case, *Brown v. Board of Education*.¹⁰¹ Despite some sentiment that empirical evidence is unnecessary in an Establishment Clause case,¹⁰² it would be useful to test assumptions one may make about both the harm and the good of introducing discussion of religion into public school curriculums.

Although the concerns are substantial and warrant educators' attention, the potential benefits that incorporating religion into multicultural education might yield are likely to outweigh the drawbacks. It is disingenuous to pretend as if religion were an aspect of a person that existed only outside the schoolhouse doors. Religion—or non-religion—is for many of us a valued aspect of personal identity and ought to be embraced as such. Intolerance is largely a function of ignorance. Difference is threatening when it is foreign to our experience. The more we know about one another, the better we understand one another, and the greater the opportunity for mutual empathy and respect.

Finally, while controversy fomented over the teaching of “values,”

Lawrence F. Rossow and Nancy D. Rossow, *High School Prayer Clubs: Can Students Perceive Religious Neutrality?*, 45 Educ. L. Rep. (West) 475, 476-83 (1988) [hereinafter Rossow and Rossow, *Prayer Clubs*]. It is unclear what the schools' religious demographics were, and thus does not necessarily shed light on the experience of the minority student in a majority religion school. *Id.* at 477. In a subsequent article, Rossow and Rossow noted that Senate Report 98-357 to the Equal Access Act, relied in part on a 1983 Yale Law Journal note attesting to the psychological maturity of high school students. The authors take issue with the probity of the psychological research relied on therein. See Lawrence F. Rossow and Nancy D. Rossow, *Student Initiated Religious Activity: Constitutional Argument or Psychological Inquiry*, 19 J. L. & EDUC. 207, 212-17 (1990).

However, individual anecdotes abound. See, e.g., 1995 Work Plan of the American Civil Liberties Union, at 2 (describing taunting and harassment of Lisa Herdahl's children in Ecru, Mississippi whose mother asked that they be excused from Bible course and daily prayers over school's intercom). The ACLU Work Plan includes plans to collect “stories that illustrate the dangers of school prayer.” *Id.* See also Booth, *supra* note 21 (“If you don't feel the way the majority does, they'll ostracize you. . . . If you excuse yourself from the classroom, you could be branded a Satanist or an anti-Christ. People are calling us, scared to death.”—attorneys for ACLU in Mississippi). Clearly abuses such as this one demand an effective remedy. See *infra* notes 108-109 and accompanying text.

100. See Laycock, *supra* note 64, at 176.

101. 347 U.S. 483 (1954).

102. See 1 PRAYER IN PUBLIC SCHOOLS AND THE CONSTITUTION 1961-1992, at xii (Robert Sikorski ed., 1993) (Speaking of *Engel v. Vitale*, the “Court stated that ‘religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate’ . . . thus the families did not have to demonstrate that their children were injured.”).

exploration of different belief systems is an opportunity for discussion about values: where they come from and what they mean.¹⁰³ Many educators believe the furor over “values curriculum” is a tempest in a teapot. Good teachers teach values throughout the curriculum.¹⁰⁴ No matter what Jane is being taught at home, the school must teach, or reinforce, values such as courtesy, civility, nonviolence and personal responsibility.¹⁰⁵ Parents have no monopoly on values education. Opportunities for exploration of values reinforces the importance of developing a values system through critical inquiry. Recognition of conflicting values creates opportunities for appreciating the world’s complexity and fosters critical thinking.

V. DIRECTIONS FOR FURTHER INQUIRY

My thoughts here have been preliminary and intended primarily to spur further consideration and dialogue on the relationship between religion and the public schools. The attention of educators, lawmakers and members of the Academy needs to be focused on finding creative solutions to the seemingly intractable problem of how to tolerate and teach about religion, while maintaining neutrality. In conclusion, I suggest some specific avenues for further focus:

- How can we incorporate religion into a public notion of personal identity?
- How can we best encourage students to share their religious identity, so as to reinforce their self-worth, without increasing their self-consciousness and feelings of otherness?¹⁰⁶

103. See, e.g., *supra* note 91. Teaching about religion for purposes of enhancing tolerance should not be confused with this separate goal of focusing on values, morality and ethics. Many, however, who favor the former are wary of the latter. See, e.g., Steinfeld, *supra* note 91, at A1. But see McLarin, *supra* note 95, at A1 (national debate over values curriculum ignores that good teachers teach values throughout the curriculum); Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Incultation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 778 (1995) (“it remains questionable whether it is even humanly possible to teach without at least unconsciously transmitting the values of the teacher or school”).

104. See McLarin, *supra* note 95.

105. See generally Bitensky, *supra* note 103, at 827, 836 (First Amendment allows inculcation of core transcending values such as those found in U.S. Constitution, domestic and international laws).

106. Colman McCarthy, *Teach Religion, Don't Impose It*, WASH. POST., Nov. 26, 1994, op-ed at A23 (“Instead of prayer in schools, the drive should be for religion in schools: as a subject to be taught. I’m ever amazed—blown away some days—by the ignorance of my students about

- Ought curriculum be mandated by the state, or should discretion be given back to schools and teachers in deciding whether and how to teach about religion?¹⁰⁷
- How can we create effective remedies for abuse of religious rights and freedoms?¹⁰⁸ How do we guard against abuses of First Amendment principles in the classroom? For example, perhaps we should have federal legislation requiring schools to implement administrative procedures for addressing religious harassment and discrimination as a condition for federal financial assistance.¹⁰⁹
- What are the possibilities, within the framework of the First Amendment, for experimentation and empiricism?¹¹⁰ What

the world's religions. . . . With some coaxing, I've been able to persuade some of my students to study the history of faith and belief, which includes prayer.").

Many would draw a clear distinction between teaching about faith and teaching about religions. *See, e.g.*, Joe Loconte, *Lead Us Not Into Temptation: There are theological reasons why school prayer is a bad idea*, L.A. TIMES, Feb. 14, 1995, Metro at 7 ("Why, for example, don't schoolchildren learn that one of the most comprehensive urban outreach efforts—the Salvation Army—was begun by evangelical William Booth? We must help ensure that such facts are part of the curricula, for these examples of faith in action shape world views."); FENWICK, *supra* note 32, at 189 (People will make up their own minds about the religion debate. "Unfortunately, they will probably have had little formal education on the history related to the issue, since America's public schools have avoided teaching religious history and the impact of religion upon political events from a fear of violating constitutional prohibitions. This book was written to make that history available so that the opinions of more Americans, regardless of what those opinions may ultimately be, will have benefited from the lessons of history."); Steinfelds, *supra* note 91, at A1 (describing how more and more states are putting religion back into their curricula. For example, "the California Department of Education informed school districts that 'students must become familiar with the basic ideas of the major religions and ethical tradition of each time and place.' To gauge the results, statewide tests for students will be phased in by 1992").

107. *See* Laycock, *supra* note 64, at 65 (arguing against leaving implementation of moment of silence statutes to individual teachers, and in favor of implementation by state board of education guidelines and procedures).

108. Even those convinced that equal access is constitutionally mandated are concerned about the great potential for abuse. *See, e.g.*, Laycock, *supra* note 64, at 52-57.

Another issue that arises is when religious parents object to the "secular curriculum." *See, e.g.*, *Mozert*, 827 F.2d 1058 (held mere exposure to secular views found objectionable by religious parents not violation of Free Exercise clause). Some have argued in favor of allowing such children to opt out of the objectionable portions of the curriculum. *See, e.g.* Carter, *supra* note 18, at 133-34; George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 923-27 (1988).

109. *See, e.g.*, 34 C.F.R. § 106.8 (1995) (Title IX regulations, Education Amendments of 1972, 20 U.S.C. §§ 1681-82) (requiring educational recipients of federal financial assistance to adopt policies and procedures to address gender discrimination complaints).

110. *See, e.g.*, M. Novak, *Good Tidings From All*, WASH. POST, Dec. 25, 1994, op-ed at C7

is being done, and might be done in the future, to monitor the intersection of religion and public schools? How are equal access laws and moment of silence laws operating? Is there freedom under the Constitution to try various approaches and then assess what works and what does not?

Perhaps the amount of constitutional, legislative and litigation discordance over religion in schools would ultimately subside were state and local governments, the schools, and the Supreme Court to adopt parameters that a larger percentage of the population would find acceptable. For too long we have let the religious right define the debate about religion in schools. It is time for progressives and moderates to reclaim it.

(proposing that National Public Radio give first and last three minutes of each day for public prayer, rotating among all the religions represented in the nation, chosen and read by representatives of those religions).