

Appendix D - UNIVERSITY HONORS PROGRAM
SENIOR PROJECT - APPROVAL

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I have reviewed this completed senior honors thesis with this student and certify that it is a project commensurate with honors level undergraduate research in this field.

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CHAPTER 1

There has been an ongoing debate involving the Establishment and Free Exercise clauses of the United States Constitution concerning religious activity in public schools. Politicians, school board officials, parents and students have found themselves trying to accurately determine exactly how much freedom public school students should have under the Free Exercise clause without violating the Establishment Clause. The First Amendment of the Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances".¹ In this amendment there are two distinct clauses that deal with religion: the Establishment Clause and the Free Exercise Clause. Throughout the years, various state and federal courts have attempted to remain consistent in their rulings when dealing with cases that involve these clauses, especially when it comes to applying First Amendment rights to adults. However, judgment calls can become a bit more difficult when it comes to using them in the lives of children, particularly those that attend public schools. There have been several Supreme Court rulings that have limited the religious expression of public school students due to the Court's interpretation of the Establishment Clause. In response to these rulings, school boards and state legislatures have enacted policies to promote the exercise of religious beliefs without violating the Establishment Clause. This paper will discuss some of those school board policies and pieces of state legislation, and examine the ways in which these policies came about. This paper will attempt to show that more

¹ John R. Vile, *A Companion to the United States Constitution and its Amendments*. 2nd ed., (Westport: Praeger Publishers, 1997), p. 249.

and more public school boards are implementing their own policies to advocate the rights of the First Amendment amongst their students, without violating the Constitution.

This paper will explore some of the existing policies throughout the United States. There will be four primary questions answered as it pertains to these policies: first; what provoked the need for such a policy in the specified school district, second; who was involved in the creation of the policy, third; how does the policy promote First Amendment rights amongst public school students and, fourth; is there any possibility that the policy can violate the Establishment Clause.

It is beneficial to examine the history of the Bill of Rights because without knowledge of the origins of these rights it will be difficult to fully comprehend the validity of these rights as it pertains to children. We must remember that before there was the United States of America, there were thirteen colonies. These colonies were established by people who had come to the “New World” in search of freedoms they had not been granted in Europe. Although the colonies were separated from the British by an ocean and had initially set up self-governments, England eventually came to rule over each colony. Many notable and instrumental individuals, who were involved in the independence process of the colonies, were challenged to express their concerns openly.

At the Second Continental Congress on June 7, 1776 a delegate from Virginia named Richard Henry Lee introduced three resolutions. The first of these resolutions read:

That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is and ought to be, totally dissolved.²

² Winton U. Solberg, *The Federal Convention and Formation of the Union of the American States*, (New York: Liberal Arts Press, 1958).

The other two resolutions called for the formations of military alliances and a plan of confederation.

Shortly thereafter five men were appointed to a committee to write a Declaration of Independence: John Adams, Benjamin Franklin, Thomas Jefferson, Robert Livingston, and Roger Sherman. Jefferson proved to be the most instrumental of the five. In later years (1825) in a letter to Richard Henry Lee, Jefferson described the purpose of the document,

Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent. Neither aiming at originality of principles or sentiments, nor yet copied from any particular or previous writing, it was intended to be an expression of the American mind.³

The third resolution made by Richard Henry Lee, which was to create a new confederation, was assigned to John Dickinson of Pennsylvania. Although he submitted his work in August 1776 it was not reviewed until 1777. The delegates who had the task of reviewing Dickinson's work ended up weakening the power and authority of the central unit of the government, which they viewed as a benefit to the States. Dickinson's work would come to be known as the Articles of Confederation. These Articles were adopted in 1781 and served as a "valuable trial government that was responsible for a number of important political achievements".⁴ However, there were a number of problems that arose with the Articles. The Articles proved themselves to be weak with virtually non-existent branches and very unstable legislatures.

³ Carl L. Becker, *The Declaration of Independence*, (New York: Harcourt, Brace, 1922).

⁴ John R. Vile, *A Companion to the United States Constitution and its Amendments*. 2nd ed., (Westport: Praeger Publishers, 1997), p. 12.

The problems with the Articles of Confederation led to the Constitutional Convention of 1787. Although many of the delegates came thinking that they had the task of revising the Articles, this would not prove to be true. Actually, the Articles would eventually be thrown out and the government system as a whole would have to be rethought. At the Convention George Washington was chosen as president and they also adopted a number of rules by which they would govern themselves. There were two plans proposed to the convention, The Virginia Plan and the New Jersey Plan. The Virginia Plan,

proposed that three branches of government be established. The legislature was to be bicameral, rather than unicameral, as under the Articles of Confederation. Both house were to be apportioned according to population, the first chamber to be elected by the people and the second house to be chosen by the first chamber from among members of state legislatures. The executive – probably conceived of a single individual – was to be chosen by the legislative branch and limited to a single term. So too, the judicial branch was to be chosen by the legislature and to consist of men who would serve during good behavior.⁵

This plan was discussed for two weeks then the alternative plan was introduced which was the New Jersey plan. It was extremely similar to the Virginia Plan and actually,

Accepted the idea that the new government would have three branches. Whereas the Virginia Plan proposed a bicameral legislature, however, the New Jersey Plan wanted to keep a unicameral legislature in which each state would continue to have a single vote. Moreover, the New Jersey Plan favored a plural executive appointed by Congress for a fixed term. The judiciary would be appointed by this executive branch.⁶

Finally the convention decided to primarily stick with the Virginia Plan while incorporating many ideas of the New Jersey Plan into the finished product.

⁵ Id. (p. 15)

⁶ Id. (p. 16)

As soon as the Constitutional Convention completed its work the country experienced a difference of opinion amongst its citizens.

Once the members of the constitutional convention reported their work there was a split over whether the document should be ratified. There were the Federalists who were in support of the Constitution and the Anti-federalists who opposed the Constitution. Federalist believed that the new government would not be oppressive because it would be limited to the powers specified in the document.

The Anti-federalists argued that despite the restrictions, the strength of the national government could still be too great. The Anti-federalists opposed the Constitution because of their concern for the strength that the new government would be granted. Although the setup of the government provided many areas of limitation, Anti-federalists feared that there would be abuse of personal rights. Federalists on the other hand supported the Constitution and seemed confident that the new government would not be oppressive. Madison who became a prominent figure in the construction of the Bill of Rights was initially opposed to the Bill of Rights. Thomas Jefferson influenced him, and helped persuade him, to embrace the idea of these amendments and eventually Madison along with other Federalists decided to support the idea of these amendments. Madison along with the other Federalists eventually agreed "if the Constitution were ratified, they would ask for the adoption of a Bill of Rights that would be legally enforceable in the courts".⁷ Although Madison is often referred to as the Father of the Constitution, he had more of a part in the creation of the Bill of Rights. One of Madison's main objectives was "to see that the Bill of Rights guaranteed individual rights

⁷ Id. (p. 123-124)

without otherwise altering the strength of the new national government on which he and others had worked so hard.”⁸

The First Amendment is one of the most highly praised and controversial amendments with the Fourteenth Amendment following close behind. Although every citizen of the United States is entitled to First Amendment rights, the interpretations of these rights are different for minors than for adults. What exactly do the Establishment and Free Exercise clauses mean to the public school student? Many have tried to explain the role of the First Amendment in the lives of public school students. According to one scholar, the Free Exercise clause requires that,

[G]overnment may not hinder children from forming or expressing any idea unless the abridgement of belief or expression serves a compelling purpose (e.g., to prevent disruption of education) that cannot be served in a less restrictive way . . . children have a right to form, express, and communicate any ideas.⁹

Concerning the Establishment Clause he states,

[G]overnment may not restrict children from acting in accord with their religious beliefs unless the restriction serves a compelling purpose (e.g., to prevent a perceived establishment of religion in a public school) that cannot be served in a less restrictive way . . . children have a right to act in accord with their religious beliefs except where restriction serves a compelling purpose (e.g., to prevent harmful or illegal behavior) that cannot be served in a less restrictive way.¹⁰

Although the two clauses are separate in name, in practice, they often find themselves intertwined; causing difficulty when it comes to deciding what place, if any, religion should have in public schools. For years, courts at both the state and federal level have been plagued with cases that concern issues such as school prayer and the wearing of

⁸ Id. (p. 124)

⁹ David Moshman, *Children, Education, and the First Amendment*. David Moshman (Lincoln: University of Nebraska Press, 1989), p. xv,xvii

¹⁰ Id.

religious symbols in public schools.¹¹ Although the majority of Supreme Court decision has attempted to remain faithful to the clauses stated in the Constitution, the enforcement of these rulings has been hindered by the actions of some school boards and state legislatures.

In order to discuss the issues of today, the happenings of yesterday must be taken into consideration. The concept of public education divorced from denominational control was foreign to the colonial mind. Many colonists who settled in what would become the United States of America were used to the church controlling every aspect of their lives, including school. Usually if there was any organized (and free) education in the Western world, it was church education. The basis of most education was the Bible.¹² Although a number of colonial settlers came to America to escape religious oppression and persecution, they failed to keep religious influence out of schools. In many primers, notable biblical characters were used as examples to teach letters and numbers.

Although there was consensus on the Bill of Rights, our founding fathers did not hold the same beliefs concerning the separation of church and state as the majority of society members do today. John Adams is said to have interpreted the two clauses to mean that Congress would never meddle in religion.¹³ He envisioned a high wall between church and state. James Madison was quoted as saying, "It may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctiveness as to avoid collisions and doubts on unessential

¹¹ Some examples are: *Doremus v. Board of Education* (1952), *Engel v. Vitale* (1962), *Murray v. Curlett* (1963), *Abington v. Schempp* (1963), *Netcong v. State Board of Education* (1970).

¹² Kern Alexander & M. David Alexander, *The law of Schools, Students, and Teachers*, (St. Paul: West Publishing Company, 1984).

¹³ *Id.*

points.”¹⁴ However, it was Thomas Jefferson that coined the phrase “wall of separation.” This phrase cannot be found in the Constitution, but it is found in a letter from Jefferson to the Danbury Baptists in 1802. It is also interesting to note that Jefferson and Madison were deists. These men definitely advocated the free exercise of religion, but wanted to make sure that religions and politics were kept separate entities.

The Founders were concerned that if they attempted to establish any type of formal organized national religion that the law would be unenforceable. This was not the only reason the Founders rejected establishment, they also believed that religion needed to be protected by the government because any political support the religion gained would taint the religion.¹⁵ Although the Founders were definitely overwhelmingly separatists, religion and education would remain entangled for years to come.

It was not until the 1830's that an alternate view of education was given. Due to the fact that church and state were not separate there was a heavy religious influence in (what would be considered as) the public schools. Religion and education were definitely intertwined, but not inseparable. Eventually people began to express their disgust and lack of approval concerning the way that schools handled the issue of religion, and although it took a few years, these people gained a spokesperson. Horace Mann created the first state system of public schools in Massachusetts. He insisted that the public schools should have no sectarian religious motivations. The public school system that Mann envisioned was to be based on three principles: one, the legislature should have the power to tax all (even the childless and those that had children who attended private

¹⁴ Kenneth Wald, *Religion and Politics in the United States*. 3rd ed, (Washington D.C.: Congressional Quarterly, 1991).

¹⁵ Id.

schools) in order to provide free education to all; two, the legislature has the power to require every parent to provide for his children a basic education in secular subjects; three, the education provided by the state in the free schools must be secular.¹⁶ Many of the early schools had borrowed techniques from European schools attempting to provide an adequate education for their children, but Mann's system was unlike any other system in countries established before the establishment of the United States.

Horace Mann's vision was embodied in a piece of legislation called the Education Bill of 1837. In this bill, a state board of education was mandated along with a secretary. Mann was the first secretary of the Massachusetts State Board of Education. Under the leadership of Horace Mann the new Massachusetts Board of Education,

Instituted a minimum school year of six months, a doubling of educational appropriations, 50 additional schools, increased public support, higher teacher salaries, new curricula, new teaching methods based upon European models, professional training of teachers, and professional standards overseen by one central authority. In addition, he organized annual educational professional standards overseen by one central authority. In addition, he organized annual educational conventions all over America and he helped to create the first American schools for training teachers.¹⁷

Eventually Horace Mann's dream of public schooling was birthed all across the nation. States and cities found themselves adopting the principles and foundations that Mann had laid down in Massachusetts. However the transition from the heavily religiously influenced public schools, to those of little or not religious influence took years.

Many ordinary citizens and school boards used the courts, and a number of cases arose in the Supreme Court dealing with religion and education. Often times, people

¹⁶ Kern Alexander & M. David Alexander, *The law of Schools, Students, and Teachers*, (St. Paul: West Publishing Company, 1984).

¹⁷ Horace Mann Elementary School, *Who Was Horace Mann* (information taken from the Encyclopedia of American History), <http://www.bcsd.k12.ca.us/horacemann/mannwho.htm>

succeeded in removing major religious influence from public schools. One very notable case took place in 1962. In *Engel v. Vitale*,¹⁸ the court ruled that the recitation of a prayer was unconstitutional because the prayer was being used as a part of a program of moral and spiritual training in the schools.¹⁹ The prayer was actually composed by a group of clergymen, however it was composed on behalf of the New York Board of Regents. As government officials, the Court ruled that they had no constitutional authority to compose official prayers for any American citizen, despite the fact that it was supposed to be part of a religious program carried on by the government. The composers and supporters of the prayer argued that the prayer was acceptable because it was non-denominational. The court responded by saying that although the prayer may have been denominationally neutral that did not excuse itself from the limitations of the Establishment Clause. Although a prayer does not put itself under the name of a formal religion, it does not mean that it ceases to establish a form of religion.

In *Abington School District v. Schempp*,²⁰ the court ruled that devotional reading of the Bible and school sponsored prayer (which was the Lord's Prayer) violated the Establishment Clause of the First Amendment.²¹ Those that supported the morning devotional had 5 major arguments. They argued: (1) there was no establishment of religion because participation was voluntary, (2) Bible reading was not a religious exercise, but secular in intent, seeking to promote moral values, and (3) the time and money devoted to the exercises were insignificant and did not "establish" a church. They also argued that (4) forbidding these practices interfered with the majority's free exercise

¹⁸ *Engel v. Vitale*, 370 U.S. 421 (1962)

¹⁹ Thayer S. Warshaw, *Religion, Education, and the Supreme Court*, (Nashville: Abingdon, 1979).

²⁰ *Abington v. Schempp*, 374 U.S. 203 (1963)

²¹ Thayer S. Warshaw, *Religion, Education, and the Supreme Court*, (Nashville: Abingdon, 1979).

of religion, and prohibiting these practices showed hostility toward religion, established a “religion of secularism” in the schools, and drove the Bible and religion from the schools.²² The Supreme Court rejected the validity of their arguments. The Supreme Court also made sure that they cleared up any misinterpretations of the Establishment (and Free Exercise) clause. In response to their arguments the Supreme Court stated that a violation of the Free Exercise Clause is based on coercion (government by force). For example, the government actually has to participate in the act of persuading or restraining someone against his or her free will for it to be considered a violation. In the case of the Establishment Clause, violation is not predicated on coercion. They also argued that (5) the Bible was an instrument of religion and using it rather than alternative instruments they could have used implied state recognition of Christianity. The court also said that there could be no breach of neutrality because it could cause a trickling stream to become a raging torrent. They concluded by saying that the Bible must be presented objectively as a part of a secular curriculum.²³

The *Lemon v. Kurtzman*²⁴ case provided the Supreme Court with a slightly more extensive method by which to determine state neutrality. Although the *Lemon v. Kurtzman* case dealt with the salaries of sectarian schoolteachers, this case did prompt a question concerning the First Amendment Establishment clause. This case prompted the Supreme Court to make sure that the questions that they were asking to prove the state’s neutrality in any given case brought forth accurate results.

Prior to 1970, the Supreme Court used a two-part test that required “the action of the state not be intended to aid one religion or all religions and the principle or primary

²² Id.

²³ Id.

effect of the program be one that ‘neither advances nor inhibits religion.’”²⁵ The Lemon case caused the Supreme Court to consider another aspect, excessive entanglement. So, the court added a third prong that reads, “the statute must not foster an excessive entanglement with religion.”²⁶ This three-pronged test came to be known as the Lemon Test. However, the Lemon test is not interpreted in the way in which it was in the 1970’s.

The Lemon Test, as mentioned before, is an important factor when it comes to the interpretation of the Establishment Clause. The three-pronged test had not always been so. In *Lemon v. Kurtzman* the Court was forced to deal with excessive entanglement, which was something they had never been directly forced to do. However, they had previously been confronted with the issue of entanglement indirectly. In 1970 in *Walz v. Tax Commission*²⁷ the Court was introduced to the notion of excessive entanglement and the court put itself in a very awkward position because although the notion of entanglement was made known, it really did not deal with it. If the concept of excessive entanglement is to be taken seriously, “it raises more questions than it answers. Its broad and amorphous nature makes predictability an impossibility unless the Court refines and

²⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

²⁵ Kern Alexander & M. David Alexander, *The law of Schools, Students, and Teachers*, (St. Paul: West Publishing Company, 1984).

²⁶ Thayer S. Warshaw, *Religion, Education, and the Supreme Court*, (Nashville: Abingdon, 1979).

²⁷ The issue of excessive entanglement figured prominently in one of the most important establishment clause cases ever decided by the Court. By an 8-1 vote, it upheld the constitutionality of property tax-exemptions granted to religious organizations for properties used exclusively for religious worship. Chief Justice Burger for the court reasoned that the legislative purpose of a tax exemption neither advanced nor inhibited religion . . . Burger in effect had contradicted himself. Having declared that the tax exemption did not advance religion, he reasoned that the state had granted the exemption to advance the church’s mission because it was worthwhile to the community. Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment*, (Chapel Hill: The University of North Carolina Press, 1994), p. 164-165.

reduces it to more precise guidelines.”²⁸ It was not until a 1997 case (*Agostini v. Felton*) that the concept of excessive entanglement was directly addressed.

Prior to 1997, in *Lee v. Weisman*²⁹ a Jewish parent challenged the school district’s policy of allowing prayer in graduation ceremonies. The Bush administration agreed with the school board that argued that the prayer did not demonstrate a religious endorsement. The Bush administration went on to call the Court to overturn the three-pronged test that had been established in the *Lemon v. Kurtzman* case, but neither the district nor appellate courts did so.³⁰ The Supreme Court did rule that the prayer did violate the Establishment Clause. The case was significant because,

The Supreme Court rejected the opportunity to reverse the standard it established in *Lemon*. This ruling extended the prohibition of school prayer to graduation ceremonies. It failed to accept that standing during the prayer without sharing the message would not harm a student contained in the prayer.³¹

The *Lee v. Weisman* case is an excellent example of a school board indirectly fighting to preserve the First Amendment rights of their students. This is definitely not the first and most certainly will not be the last time that a school board will be found advocating basic rights that many take for granted. However, it has not always been this way. Throughout the years, there have been many school boards, along with the state legislatures that have not been favor of allowing public school students the freedom to express what they believe. For example, in *Minersville School District v. Gobitis*,³² the court ruled that the school district had a right to force everyone to salute the flag although

²⁸ Donald A. Gianella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, ed. Philip B. Kurland (Chicago: The University of Chicago Press, 1975), p. 115.

²⁹ *Lee v. Weisman*, 505 U.S. 577 (1992)

³⁰ Jeffrey K. Hadden, “*Lee v. Weisman*”, http://cti.itc.virginia.edu/~jkh8x/relfree/court/lee_v_weis.html (Nov. 1999).

³¹ *Id.*

³² *Minersville v. Gobitis*, 310 U.S. 586 (1940)

two Jehovah's Witness children claimed that saluting the flag caused them to violate a precept of their religion. In this case, the school district was completely against the children expressing their religious beliefs. The Gobitis decision was overturned in *West Virginia State Board of Education v. Barnette*³³ when the Supreme Court ruled that the school district violated the rights of the students by forcing them to salute the American flag.³⁴ Although this decision favored the students (in that it provided an avenue for them to exercise their first amendment rights), it is important to observe that the school district was not the party that was in support of the students.

When the government passes laws affecting all school children they run into difficulty because eventually that law will affect students who attend parochial schools.³⁵ The Establishment Clause causes a government to attempt to remain neutral concerning religion; however, a problem arises when education is involved. One such difficulty is the ability of the States to comply with congressional educational mandates requiring equal treatment to all school children without offending the Constitution.³⁶ The most important question that arises is how much governmental involvement is permitted in order to provide religious freedoms to students in parochial schools without offending the Establishment Clause. *Agostini v. Felton* caused the court to carefully examine this problem and give a solution.

³³ Board of Education v. Barnette, 319 U.S. 624 (1943)

³⁴ Jeffrey K. Hadden, *West Virginia State Board of Education v. Barnette*, http://cti.itc.virginia.edu/~jkh8x/relfree/court/west_v_barn.html (Nov. 1999)

³⁵ Pepperdine Law Review. 26 Pep. L. Rev. 407

³⁶ Id.

In *Agostini v. Felton*, the New York City Board of Education in their attempt to comply with the Congressional mandate, Title I³⁷ were accused of violating the Establishment Clause. In a previous case *Aguilar v. Felton*, the Court decided that if public school teachers were sent to campuses of parochial schools that they were not complying with Title I. In fact,

Public school employees that would provide Title I services on private school campuses were given the following guidelines: they were accountable only to public school supervisors; they were to select the children who qualified for Title I services and were to only provide Title I services to those students; they were to only use their materials to provide Title I services; they were not allowed to “team teach” with the private school teachers; and they could not inculcate religion into their teaching nor could they participate in any of the private schools’ religious activities.³⁸

These guidelines clearly show how they attempted to avoid the entanglement, however, “in *Aguilar v. Felton*, the Court held by a 5-4 ruling that the ‘Title I program necessitated an excessive entanglement of church and state in the administration of [Title I] benefits.’”³⁹ *Agostini* challenged this ruling and it was overturned.

Justice O’Connor’s majority opinion provided much evidence and justification for the overturning of the previous ruling. O’Connor noted,

That the Court in *Zobrest v. Catalina Foothills School District* abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In *Zobrest*, a deaf student attempted to bring his state-employed sign-interpreter onto the campus of a Roman Catholic High School to interpret lectures. The *Zobrest* Court held that this practice was not a constitutional violation.⁴⁰

³⁷ Congress enacted Title I of the Elementary and Secondary Education Act of 1965 to provide full educational opportunity to every child regardless of economic background. Title I funds were allocated by the federal government through States to local educational agencies, or LEA’s.

³⁸ Pepperdine Law Review. 26 Pep.L.Rev. 407

³⁹ Id.

⁴⁰ Id.

Ultimately Justice O'Connor stated that the interpretation of the Establishment Clause had been significantly changed since the *Aguilar* decision. Due to the *Agostini* case, public school teachers were immediately permitted to provide Title I services on parochial school campuses because there was no longer "a constitutional bar to public school employees providing educational services in private schools under other Federal programs under similar circumstances."⁴¹

This relaxation of the Lemon Test is extremely significant and extremely useful. *Agostini* did not alter the first prong, however it did alter the second and third prongs. Concerning the second prong, the Court made it clear that strictly governmental presence and neutral aid would not be enough to find a secular effect.⁴² The most significant alteration was the third prong that dealt with excessive entanglement. This prong was largely de-emphasized.⁴³ Finding excessive entanglement now, is much more difficult than it was twenty years ago.

Students who attended a high school in the Westside school district were denied permission to form a Christian Club. The school board argued that because all student-led clubs had to have a faculty advisor, that having an advisor would promote that specific religion. The Supreme Court disagreed. The students were able to utilize The Equal Access Act, which required "groups seeking to express 'religious, political,

⁴¹ Id.

⁴² The second prong of the Lemon Test is violated only when the effect of advancing religion is "direct and substantial." 1999 Maryland Law Review. 58 Md. L. Rev. 300

⁴³ *Agostini* also limited the reach of the "entanglement" prong. Because it was assumed by the Court in *Aguilar* that teachers were likely to inculcate religion, the *Aguilar* court found that the Title I program would require "persuasive monitoring" to be "certain" that the Establishment Clause was not violated. The Court held that the pervasive monitoring itself would "inevitably" constitute excessive entanglement. However, in *Agostini*, the Court held that because it had abandoned the assumption that teachers were likely to inculcate religion, it "must also discard the assumption that pervasive monitoring of Title I teachers is required." 1999 Maryland Law Review. 58 Md. L. Rev. 300

philosophical, or other content' messages not to be denied the ability to form clubs" as their weapon.⁴⁴ The students won this case because the Supreme Court ruled that they did have the right to begin their club.

Along with the Equal Access Act, the Recognition of Religious Beliefs and Customs Policy of the Clovis Unified School District in Fresno County, California also attempts to promote the exercise of religious beliefs without violating the Establishment Clause.

An excerpt from an article in the Knoxville News-Sentinel states that the Establishment Clause plays an important part in public school policies,

As the U.S. Supreme Court considers whether to allow students to lead prayer at high school football games, Knox County could be looking at the same issue. The Knox school system has had a policy in place since at least 1995 forbidding public prayers "at any school-sponsored or school-directed activity. Periods of silence are permitted at the discretion of each school's principal."⁴⁵

It can be concluded from this excerpt that the Knox County School system has provided a way for their students to pray, or meditate or do whatever they would like to do during the period of silence. The period of silence, to the majority of people in the United States, is interpreted to be a time where they can pray. The only reason the policy cannot be deemed unconstitutional is because of the way that the policy is worded.

Another important issue that will be discussed in the next chapter will be the nature of the First Amendment as it pertains to minors, specifically those that attend public schools. Without knowledge, people are subjected involuntarily to ignorance.

⁴⁴ Jeffrey K. Hadden, "Board of Education of the Westside Community Schools", http://cti.its.virginia.edu/~jkh8x/relfree/court/boar_v_merg.html (Nov. 1999).

⁴⁵ David Keim, *Knox Co. school officials may re-examine policy*, The Knoxville News-Sentinel, 16 November 1999, sec. A, p. 1.

This holds true for children also. If a child is not taught that they have rights, then they'll never know. If a child is taught that they have rights, but is not educated as to how they can apply those rights to their life, then they will not be able to operate freely in that right.

Overall, this paper should provide the reader with a better understanding of the First Amendment as it pertains to the Establishment Clause and children who are a part of the public school system. Also, this paper should present a deeper awareness of the presence of policies that occur within public schools that promote First Amendment rights amongst their students.

CHAPTER 2

It is a fact that the majority of elementary age children do not understand their First Amendment Rights. For years adults have successfully restricted the freedoms of children for their own good, however this cannot necessarily be a valid excuse for restricting rights. One thing that further complicates the issue is the notion of rationality. One must ask if it is proper for the one who considers themselves to be able to make rational choices to restrict or even strip another of their freedom because they are not considered to fully possess adult capacities of rational choice. It may be true that a child is,

not the best authority on his own interests or the means of achieving them. It is, of course, true – since nothing is certain in human life – that on some occasions a prudent adult may choose wrongly while the child, for all his ignorance of the world, would have chosen the wiser course.⁴⁶

This chapter will attempt to display that the only reason many children do not operate in the First Amendment rights is because they are not given the opportunity to learn them in a way in which they can understand them. For clarification, the First Amendment must be re-examined and taken apart. While the Constitution and Bill of Rights mean one thing to adult U.S. citizens. Interpretations of clauses can become even more difficult when it comes to applying them to public school student.

David Moshman wrote an exceptional book entitled Children, Education and the First Amendment. In this book he makes a psycho-legal analysis on the status of children's applicable rights. Moshman states that he "became concerned that supporters of public schools have been too quick to invoke the First Amendment as a legal weapon against fundamentalists and have often failed to see the deeper First Amendment

⁴⁶ C.A. Wringer, *Children's Rights: A Philosophical Study*, (London: Routledge and Kegan Paul, 1981), p. 107.

problems inherent in public education.”⁴⁷ Without properly identifying the rights of our children it is easy and inevitable to violate them. By violating their rights we deny them a number of things. The First Amendment discusses the freedom of many things; freedom of speech, freedom of religion, freedom of the press, and the freedom to assemble. All of these things involve choice. One must choose to operate in the freedoms they have been given. However, if a person is never taught what their rights are, and how they can exercise them then it is apparent that their rights will be violated.

Many students are subjected to discrimination simply because of their age; “Age is like sex because there are certain physical differences between people that are associated with age and because age differences may contribute to social stereotypes.”⁴⁸ Many men in society treat women in an extremely chivalrous manner; similarly, just because of their age, young people are often subjected to paternalistic treatment. Youth who find themselves in courts, schools, and other public places are often subjected to harsh and rather insensitive treatment simply because of their age. Many times this paternalistic behavior includes the act of sheltering. There are thousands of youth that do not know their constitutional rights because not enough time is taken to explain the ways in which to put them into practice. Time after time adults withhold important information from children for fear of what they might do once they acquire this knowledge. It almost seems forbidden to allow a child to make choices for him (or her) self. The goal of society should not be to shelter youth and make all their choices for them. The goal of society should be to wholly educate the youth, providing them with

⁴⁷ David Moshman, *Children, Education, and the First Amendment*, (Lincoln: University of Nebraska Press, 1989), p. ix-x

⁴⁸ Donald Jackson, *Even the Children of Strangers: Equality Under the U.S. Constitution*, (Lawrence: The University Press of Kansas, 1992), p. 190.

adequate knowledge of a variety of subjects, that they would be able to make sensible and responsible decisions for themselves. It could be argued that many youth make such foolish decisions because they do not know any other means by which to express themselves. By properly teaching children (and their parents) what constitutional rights mean in reference to them and their ages many lawsuits and misunderstandings could be avoided. The majority of American children attend public schools supported by the federal government. The government influences and dictates an enormous part of what is taught in public schooling. In Children, Education and the First Amendment, Moshman includes two tables. The first table is entitled “Children’s First Amendment Rights: Proposed Principles”⁴⁹ and the second table is entitled “Children’s Intellectual Rights: Proposed Principles.”⁵⁰ These tables not only state the constitutional rights of a child, but they go a bit further to explain what the right means when it comes to the intellectual aspect of the right.

In many public schools, the Preamble of the Constitution is given to the students (as early as the fourth grade) to be memorized. Once the children have been tested, not on the knowledge and understanding of the text, but on their memorization skills, the child often forgets what they had been made to memorize. The Preamble becomes a useless piece of information. The same thing goes for the major amendments of the Constitution. Children will be given the text of the amendment, and be made to write its number beside it. This takes no extreme thought and understanding. It can come down to the memorization of two or three words, a phrase or two and the child has done what he or she needed to do in order to pass the quiz or the test. However, after the quiz, after the

⁴⁹ See Appendix A

⁵⁰ See Appendix B

test, a vast number of children know the basic wording and phrasing of the amendments, but if they were to be asked the meaning thereof as it pertains to them, it would be shocking to hear how many would say, “I don’t know.”⁵¹

There are a number of definitions and synonyms for the word “right”. With all of the variations of this word, “questions of justification presuppose some preliminary clarification of meaning.”⁵² There are three traditional theories that concern the status and applicability of rights in general. However, each theory proves to be unsuitable when it comes to applying rights to children.

First, there is the theory concerning rights and power. Parental power is extremely substantial when it comes to the lives and futures of children. There is a tendency to automatically associate rights with power and power with rights. More often than not, the person with power knows their rights, just as the person who knows their rights has power or an advantage over the person who doesn’t know their rights. Some would go even further and say that, “possession of some degree of power is at least a necessary condition of having a right.”⁵³ So how do children who are public school students fit into this definition? A parent or the government (who determine the lines for school districts) tells a public school student where they are permitted to attend school.

⁵¹ It is interesting to point out that not only children are the only ones that do not fully comprehend their First Amendment rights. There are also a number of college-educated individuals that do not know how to use their rights to their benefit. Although many people do not realize it, their First Amendment rights are frequently violated.

⁵² C.A. Wringe, *Children’s Rights: A Philosophical Study*, (London: Routledge and Kegan Paul, 1981), p. 23.

⁵³ Id. It is beneficial to point out that there is a difference between having and exercising a right.

They have no power when it comes to this issue.⁵⁴ This is just one example that shows how children are somewhat powerless when it comes to decisions that concern their lives. Although students may lack power to make decisions concerning their life, it does not give those who do have power free course to deny them access to their rights. Power should not “be any part of the necessary justification of a claim to rights . . . to have the power . . . is to actually be able to do, have or receive the thing in question, whereas to have the right is to have a particular kind of justification for so doing.”⁵⁵

Second, there is the theory for rights as correlatives of duties. Many people attack this theory by seeking examples of duties that fail to grant rights. This theory is based on the presumption that the

Appropriate manner of deciding whether children or any other category of individuals have certain rights would be simply to examine the duties of others towards them in the light of whatever ethical doctrine one felt prepared to defend.⁵⁶

By making duties more important than the rights that the duties are supposed to render, one can be left wondering if there were no duties, would there be a right to render in the first place.⁵⁷

⁵⁴ This is not necessarily a bad thing because “it is argued that children can not be responsible for their own welfare because by their nature they lack an adequate conception of their own present and future interests”. Due to the lack of experience of children, some decisions should be made for them. However, “parents often do not know what is best for their children, and children often can make sensible decisions for themselves about their own lives. Victor L. Worsfold, *A Philosophical Justification of Children's Rights*, (Cambridge: Harvard Educational Review, 1974), p. 29-30

⁵⁵ C.A. Wringer, *Children's Rights: A Philosophical Study*, (London: Routledge and Kegan Paul, 1981), p. 24

⁵⁶ Id. (p.25)

⁵⁷ Though rights and duties are certainly related, they are not related in the straightforward and relatively uninteresting way suggested by the correlativity theory or indeed by the view to be considered in the following section that rights are some form of claim. For the present it may perhaps be said that if someone has a right (other than a right of action) there is at least *prima facie* obligation to respect that right. Arguably, a right provides a particularly strong ground of obligation, to override which always involves a wrong of some kind. H Morris, *Persons and Punishment*, “*The Monist*”, vol. 52, no. 4, October 1968, p. 499.

Finally there is the theory that examines rights as claims. The important thing to remember about a claim is that it can be overruled. Unlike a right, which cannot be overruled or denied according to the U.S. Constitution, and the Declaration of Independence.

It seems as though until the students are taught their rights in a way in which they can understand, comprehend, and properly operate them, they do not really have rights. In fact it seems as their parents (or guardians) hold their rights, however, as a public school student there are extra avenues that ultimately lead to the rights provided to all Americans that are stated in The First Amendment – policies.

The majority of school board systems have a number of policies that promote First Amendment (and other) rights for their students. Influential people in the community, such as administrators, educators, politicians and religious leaders often create these policies. Usually a variety of people are selected to be on these committees so that each point of view can be fully examined and accurately and properly represented.

CHAPTER 3

As stated before, the majority of school board systems have one or more policies that promote freedom of expression of any religious belief held by a student. School board officials, and other people involved in the creation of these policies have to be careful with the manner in which they word these different policies, for a single word or phrase can cause the whole policy to be deemed unconstitutional.

Throughout the 1990's "around the country, school boards [were expanding the boundaries of religious expression in recognition of students' First Amendment rights]." ⁵⁸ It seemed as if not only parents were fighting for the rights of their children, but also students were prompted to fight for their rights themselves. It is evident that many students were not initially fighting for their constitutional rights, rather for the right to maintain traditions that had been part of their schools for years. For example:

Tehachapi High School . . . stopped letting ministers give prayers before football games. The prayer was a tradition at the school for years until being discontinued at the end of last year's football season, said Tehachapi Unified School District [spokesperson] Kent Ashworth. The prayers tended to revolve around themes of sportsmanship . . . Speakers at a senior awards ceremony have sometimes struck religious tones, something the district also no longer allows, Ashworth said. ⁵⁹

The basis for these type of claims give the impression that those who bring these claims feel as if someone challenges them when it comes to continuing in their tradition, they feel as if their rights are being stripped away from them. People fight for what they believe in, and they will struggle to keep what they feel is theirs. However, it seems somewhat contradictory that Congress opens with prayer by a paid chaplain, but when a

⁵⁸ Concerned Women For America, *Steps Toward Religious Freedom*, www.cwfa.org/library/freedom/1999-09-14_schools.shtml.

⁵⁹ "Tehachapi High no longer lets ministers lead football prayers". The Bakersfield Californian. 14 November 1999.

public school student chooses to express him or herself through a prayer, or even by referring to something religious it is considered a violation of the constitution.

The Santa Fe Independent School District Policy

In Texas, the Santa Fe Independent School District (ISD) has been fighting a battle to determine whether or not their tradition of prayer before football games would be considered unconstitutional or not. The 5th Circuit Court of Appeals upheld “the constitutionality of graduation prayers in a case involving the Clear Creek ISD.”⁶⁰ The Santa Fe ISD “tried applying the Clear Creek ruling to prayers delivered before football games.”⁶¹ Along with the application of the Clear Creek ruling,⁶² the Santa Fe ISD wanted to eliminate restrictions on mentioning specific deities (for example, Jesus). However, in 1996, Judge Samuel Kent ruled that “the district may not eliminate the restrictions in its guidelines for graduation prayers,” and he went on to allow “the Clear Creek model to be used for football games.”⁶³ As stated before, the 5th Circuit Court of Appeals agreed with Kent, saying that restrictions may not be lifted, but they did overturn his ruling concerning football game prayers. When the Court administered this ruling many high schools ended the tradition of praying before football games, however, all high schools in Texas did not cease to pray at football games,

In Andrews . . . trustees have decided to continue student-led prayer at football games – at least until a lawsuit is filed. “If someone says, ‘Hey, you’re violating my rights,’ then I guess we’ll have to stop,” Andrews

⁶⁰ Terri Langford, *Appeals court panel says student-led prayer at Texas football game is unconstitutional*, www.reporternews.com/1999/texas/prayer0303.html, (March 1999).

⁶¹ Id.

⁶² In *Jones v. Clear Creek Independent School District*, the Fifth Circuit Court of Appeals decided that the policy of allowing student-selected, student-given, nonsecretarian, non-proselytizing prayers at a high school graduation was allowable under the United States Constitution. This came to be known as the Clear Creek Prayer Policy.

⁶³ Terri Langford, *Appeals court panel says student-led prayer at Texas football game is unconstitutional*, www.reporternews.com/1999/texas/prayer0303.html, (March 1999).

superintendent Pete Francis told the Odessa American. “It is the feeling of our community that the community wants it.”⁶⁴

A student named Marion Ward, the daughter of a Baptist minister, gained the representation of a Houston attorney (Kelly Coghlan) to fight the ban against prayer. Coghlan argued that, “the school policy – which prohibits ‘prayers, blessings, invocations, and references to a deity’ – interfered with Ward’s right to free speech.”⁶⁵ Although it may not have been known by Ward, the purpose of the policy was not necessarily to prevent the students from praying, but rather to make sure that the school district, a government funded institution was not indirectly promoting and encouraging the establishment of religion. The school district was not necessarily wrong in their attempts to prevent Marion from praying. The question is, how far can the school district go in order to prevent establishment? Is it acceptable to restrict freedom of expression and speech to prevent establishment?

Coghlan said, “We filed this suit to allow a girl to ask God to bless her school and to be able to do so without apology or shame or government retribution against her.”⁶⁶ Marion Ward attended Santa Fe High school and “was runner-up in a class election naming a student to give inspirational remarks before the school’s football games. Ward succeeded 16-year-old Stephanie Vega, who resigned because she feared disciplinary action if she prayed.”⁶⁷ The school district Superintendent Richard Ownby had promised to discipline any student who violated the appeals court ruling that banned pre-game prayer. It seemed as though if Ward were to go ahead and pray on Friday, September 3,

⁶⁴ Chris Fletcher, *Students, at least one district, play to buck prayer ban*, www.reporternews.com/1999/texas/pray0829.html, (August 1999).

⁶⁵ Concerned Women For America, *Steps Toward Religious Freedom*, www.cwfa.org/library/freedom/1999-09-14_schools.shtml.

1999, she would be in direct violation of the appeals court ruling. This did not happen because, “hours before the game, U.S. District Judge Sim Lake of Houston issued a temporary restraining order barring officials in the Santa Fe Independent School District from punishing Miss Ward if she led the prayer.”⁶⁸

The Santa Fe ISD’s policy concerning prayer at graduation “allowed graduating students to chose by secret ballot whether to have an invocation and benediction as part of their graduation ceremony.”⁶⁹ The reason prayer was even considered to be a part of graduation was because graduation was considered to be an “once-in-a-lifetime event that could appropriately be marked with prayer.”⁷⁰ However, when this same policy was attempted to be applied to football games the U.S. 5th Circuit Court of Appeals stated, “football games are hardly the sober type of annual event that can be appropriately solemnized with prayer.”⁷¹ In the dissenting opinion Appeals Judge Grady Jolly wrote:

Today for the first time in our court’s history, the majority expressly exerts control over the content of its citizens’ prayers . . . and it does so notwithstanding that the Supreme Court has never required, suggested, hinted, or implied that the Constitution controls the content of citizens’ prayers in any context.⁷²

In an effort not to violate the Establishment Clause, it seems as if the government violated the First Amendment rights of the students. Governor George W. Bush agreed that free exercise of religion was being violated. A spokesperson for Gov. Bush said,

⁶⁶ Associated Press, *Houston attorney seeks order to allow pre-game prayer*, www.reporternews.com/1999/texas/ordre0903.html, (October 1999).

⁶⁷ Id.

⁶⁸ Chris Fletcher, *Texas student gets thunderous applause for leading pre-game prayer*, www.reporternews.com/199/texas/pray0904/html (Sept. 1999)

⁶⁹ Id.

⁷⁰ Jim Vertuno, *Court refuses to reconsider school prayer decision*, www.sccoe.k12.ca.us/briefs/footballprayers.htm, (June 1999).

⁷¹ Chris Fletcher, *Texas student gets thunderous applause for leading pre-game prayer*, www.reporternews.com/199/texas/pray0904/html (Sept. 1999)

he believes government should not dictate or censor the contents of student-led prayers and he supports the constitutionally guaranteed right of students to participate in the free exercise of religion.⁷³

It is important to note that Gov. Bush's emphasis was not on the violation of the Establishment Clause, but rather on the upholding of the Free Exercise Clause.⁷⁴

The Knox County Board Of Education Policies

The Knox County Board of Education (Knoxville, TN) has three policies that involve religion. The first policy is named, "Prayer and Period of Silence", and it reads:

Public prayer shall not be allowed at any school-sponsored or school-directed activity, but a period of silence may be observed at the discretion the principal of each school. The principal of each school shall be responsible for calling the students to order and announcing that a moment of silence is to be observed. No other action shall be taken by a teacher other than to maintain silence for the full time. There shall be no sponsorship of a baccalaureate service or other activity which is religious in nature by the Board or its employees, and no school funds, including paid staff time, will be used for such activities.⁷⁵

The second policy is named, "Recognition of Religious Beliefs, Customs and Holidays," and an excerpt from it reads:

No religious belief or nonbelief shall be promoted by the school system or its employees, and none shall be belittled. All students and staff members shall be tolerant of each other's views. The school system shall use its opportunity to foster understanding and mutual respect among students and parents, whether it involves race, culture, economic background or religious beliefs. In that spirit of tolerance, students and staff members shall be excused from participating in practices which are contrary to their religious beliefs.⁷⁶

The third policy is named, "Religion in the Curriculum", and an excerpt from it reads, "student initiated expressions to questions or assignments which reflect their beliefs or

⁷² Terri Langford, *Appeals court panel says student-led prayer at Texas football game is unconstitutional*, www.reporternews.com/1999/texas/prayer0303.html, (March 1999).

⁷³ Chris Fletcher, *Texas student gets thunderous applause for leading pre-game prayer*, www.reporternews.com/199/texas/pray0904/html (Sept. 1999)

⁷⁴ See Appendix C

non-beliefs about a religious theme shall be accommodated . . . for example . . . in compositions, art forms, music, speech and debate.”⁷⁷

Each of these policies have been carefully drawn up to make sure that the Knox County Board of Education can not be accused of being the “establisher” of religion. However, it seems as if some principals in the Knox County School District do not know this because there have been numerous accounts of prayers at high school football games and other events. Although this policy has been in place since 1995, according to Mike Cohen (system spokesperson), schools still allow prayers before football games. Cohen himself accounted that he was “virtually certain he heard a prayer at a Central high game.”⁷⁸ In this situation, and others around Knoxville, the one responsible for implementing the policy is the principal. Cohen said that if the system had a policy that was not being followed, they would need to check that policy which could mean changing the policy or asking the principals to stop the prayers.⁷⁹

Clovis Unified School District Policy

During the summer of the 1999 the Clovis Unified School District⁸⁰ gathered members of the Clergy Advisory Council (a local group of clergy) along with their administration, staff and legal counsel and they composed the "Recognition of Religious Beliefs and Customs Policy." The purpose of this policy according to Dr. Jim Fugman

⁷⁵ From the Policy Book of the Knox County Board of Education

⁷⁶ Id. Can be seen in its entirety in Appendix D.

⁷⁷ Id. Can be seen in its entirety in Appendix D.

⁷⁸ David Keim, *Knox Co. school officials may re-examine policy*, The Knoxville News-Sentinel, 16 November 1999, sec. A, p. 1.

⁷⁹ Id.

⁸⁰ Located halfway between Los Angeles and San Francisco, the Fresno/Clovis area lies at the foot of the Sierra Nevada, in the geographical and economic heart of the agriculture-rich San Joaquin Valley. The Clovis Unified School District serves the city of Clovis, northeast Fresno and pockets of unincorporated neighborhoods and borders California State University, Fresno.

(deputy superintendent) is to "provide staff and students a framework to appropriately deal with constitutional issues."⁸¹

In this policy, one line says, in reference to graduation prayers and baccalaureates, "school officials may not mandate, sponsor or organize prayer at a graduation."⁸² The interesting thing to note is it does not say that students are not allowed to mandate, sponsor or organize prayer at a graduation, or at any other time. The policy goes on to say, "in order to respect each student's individual right to freedom of religious practice, religious indoctrination is forbidden in the public schools."⁸³ In this case it is clear to see that the word indoctrination means establishment. However, the staff is told not to encourage or discourage any religious development despite the traditions of the students at the school. The neutrality of the staff presents somewhat of a problem for the students, because if teachers believe that a student is disrupting the educational environment, they are allowed to stop the student. According to the Fresno Bee, "teachers are not permitted to influence students with their own religious beliefs."⁸⁴ Teachers are however, "permitted to wear necklaces with religious symbols such as a cross or Star of David as long as it's not so big that it is much more than a necklace, that it's more of a religious statement".⁸⁵

Each of these policies provides a way for students to express their religious beliefs. Although these policies do not go into detail about what is acceptable and what

⁸¹ Timothy A. Rowe, *First day jitters as 1999-2000 school year approaches*, Clovis In The News, <http://www.clovisusd.k12.ca.us/CUSDNews/default.htm> (September 1999).

⁸² See Appendix E

⁸³ Id.

⁸⁴ Concerned Women For America, *Steps Toward Religious Freedom*, www.cwfa.org/library/freedom/1999-09-14_schools.shtml.

⁸⁵ The Fresno Bee. 8/31/99. Quoted from Concerned Women For America, *Steps Toward Religious Freedom*, www.cwfa.org/library/freedom/1999-09-14_schools.shtml.

is not, usually it is not extremely difficult to determine what actions would be challenged by these policies. None of the policies presents a pressing problem with the Establishment Clause. Each of the policies made sure that they have adequately covered the school district and their staff; so, the problem is obviously not with the policies, but the enforcement thereof.

Constitutionality of the Policies

Although the exact wording of the Santa Fe ISD policy was not available it is certain that the policy (in reference to the Establishment Clause) is constitutional. The policy itself does not violate the Establishment Clause because the policy forbids references to the mentioning of a specific deity. Although the First Amendment does guarantee the free exercise of religion,

this guarantee is obviously not absolute. At least since the Supreme Court upheld the conviction of a Mormon for bigamy in *Reynolds v. United States* (1879), the distinction has often been made between religious belief and religious practice. While both have broad protection, the first obviously has the wider, because it is confined within an individual's mind. Religious practice will necessarily be more circumscribed because it so directly affects other[s]. Religious advocacy, or speech, occupies an intermediate category, to be regulated, as shall be apparent from subsequent discussions of freedom of speech, not so much according to content as according to time and place considerations. Thus, an individual has the right to believe in polygamy and, under most circumstances, to argue for legislation to repeal current antipolygamy laws. An individual who marries more than one spouse may, however, end up before the courts.⁸⁶

In reference to the Establishment Clause, the policies from the Knox County Board of Education are constitutional. Specifically in the "Recognition of Religious Beliefs, Customs and Holidays" policy, the Board of Education deliberately states that,

⁸⁶ John R. Vile, *A Companion to the United States Constitution and its Amendments*. 2nd ed., (Westport: Praeger Publishers, 1997), p. 131

"no religious belief or nonbelief shall be promoted by the school system or its employees, and none shall be belittled."⁸⁷ Although the policy is constitutional it is very possible that the implementation of the policy could cause other rights to be violated

The Clovis Unified School District Policy clearly does not violate the Establishment Clause. Of the policies examined in this study, this was the most thorough. The policy was broken up into different sections, which made it clear what was and was not acceptable behavior.⁸⁸ By specifying what students and staff could and could not do, many questions and doubts were eliminated. However, although the policies were so detailed, it seems as though they would have been written in vain if they were not enforced by the administration of the school, or if the parents (or guardians) and students do not know about the policies.

It seems as if what causes the policies to violate the Establishment Clause is the way in which the different policies are enforced. The First Amendment reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.⁸⁹

It seems as though, of the six rights given to the citizens of the United States of America in the First Amendment, the two that are denied the most to public school students are the Free Exercise and Freedom of Speech Clauses. In the attempts to enforce the Establishment Clause, and prevent the school system from looking as if they are in

⁸⁷ See Appendix D

⁸⁸ The different sections were: Graduation Prayer and Baccalaureates, School Staff: Official Neutrality Regarding Religious Activity, Religious Holidays, Religious Excusals, Release Time, Student Use of School Facilities, and Religious Expression/Activities Involving Outsiders. These policies can be seen in their entirety in Appendix E.

⁸⁹ John R. Vile, *A Companion to the United States Constitution and its Amendments*. 2nd ed., (Westport: Praeger Publishers, 1997), p. 249.

support of (or establishing) a particular religion, students are denied their constitutional rights that would allow them to freely express their spiritual beliefs.

What seems to be happening in most of the cases that deal with religious issues is the administrators, legislators, and other people who are involved with the creation of these policies, do not define specifically what is acceptable and what is not acceptable. For example, when people bring their own PA system to a football game and pray during the scheduled moment of silence, they cannot be stopped. Their guaranteed right of freedom of speech allows them to do such a thing, even if it is a student of that particular school (or school district). However, if a public school student is give permission (by the administrators, or even a U.S. District Appellate Court Judge) to pray, according to the First Amendment the Establishment Clause has been violated.

As stated above, in Knox County there are a number of schools that have prayer at their football games, usually student-led, principal approved. So the question arises, should the principal be held responsible for failing to enforce the policy, or should the student be punished for attempting to operate in their First Amendment right of free expression. Often times it seems as if those who want to exercise their right of free expression come into conflict with the Establishment Clause. School boards and state legislators cannot ban religious expression in the school because they would be in violation of the Free Expression Clause and possibly the right to freedom of speech. At the same time, they cannot support it either for fear of violating the Establishment Clause.

In conclusion, it seems as though school boards need to do three things. First, they need to make sure that parents or guardians (especially) and students aware of the policies by which they are governed and make sure that the policies are understood. This

would ensure that when a policy was violated, there would be no ignorance involved. All parties would have knowledge of the policy and know what they had and had not been in violation of. Second, school boards need to attempt to provide a more extensive and thorough method of educating their students when it comes to their First Amendment rights. There are so many students who do not understand that they have rights, and that they can express themselves as long as they are not disruptive to the educational environment. Thirdly, and lastly, school boards need to properly enforce the policies that they create pertaining to religious matters. When the policies are not enforced the school board needs to have in place some sort accountability system so that staff that is in violation of the policies can be properly and efficiently dealt with.

For years the Establishment Clause and Free Exercise Clause have caused so much uproar among American citizens. It is important that public school students understand these clauses and the rights that they have pertaining to them. Hopefully in the future, society will evolve into a more understanding and educated state thereby ensuring that the Constitution and all the rights guaranteed therein will be upheld with truth and justice.

APPENDICES

Appendix A
Taken from Children, Education and the First Amendment
By David Moshman

Table 1: Children's First Amendment Rights: Proposed Principles. 1. *Free Expression*.

(a) Government may not hinder children from forming or expressing any idea unless the abridgment of belief or expression serves a compelling purpose (e.g., to prevent disruption of education) that cannot be served in a less restrictive way. (b) *Freedom of Nonexpression*. Government may not require children to adopt or express a belief in any idea. 2. *Free Exercise of Religion*. Government may not restrict children from acting in accord with their religious beliefs unless the restriction serves a compelling purpose (e.g., to prevent a perceived establishment of religion in a public school) that cannot be served in a less restrictive way. 3. *Freedom of Association*. Government may not hinder children from associating with others of their own choice, nor require undesired associations, unless the abridgment of free association or no association serves a compelling purpose (e.g., to enable education) that cannot be served in a less restrictive way. 5. *Limited Inculcation*. (a) *Limited Purpose*. Government may inculcate ideas and values, but only when it has a legitimate purpose for doing so (e.g., to produce educated citizens). (b) *Religious Neutrality*. Government inculcation may not have, as its purpose or principal effect, the advancement or hindrance of any religion or of religion in general. (c) *Nonindoctrination*. Government may not indoctrinate – that is, it may not inculcate ideas or values in a way that unnecessarily limits that possibility of critical or rational analysis. 6. *Nonarbitrary Distinction of Child from Adult*. Protection of children from harm due to their limited rationality may be a compelling reason for limiting First Amendment rights provided it can be shown that (a) the children in question are less

rational than a minimally normal adult; (b) the difference in rationality is of a nature and extent such that substantial harm is likely unless the First Amendment freedoms are abridged; and (c) the potential harm outweighs countervailing parental and First Amendment interest.

Appendix B
Taken from Children, Education and the First Amendment
By David Moshman

Table 2: Children's Intellectual Rights: Proposed Principles. 7. *Free Expression II*. (a) Children have a right to form, express, and communicate any ideas. (b) *Freedom of Nonexpression II*. Children have a right not to adopt or express belief in ideas they do not wish to hold or express. 8. *Free Exercise of Religion II*. Children have a right to act in accord with their religious beliefs except where restriction serves a compelling purpose (e.g., to prevent harmful or illegal behavior) that cannot be served in a less restrictive way. 9. *Freedom of Access II*. Children have a right of access to all ideas and sources of information. Those responsible for their development have an affirmative obligation to provide access to diverse sources of information and a reasonable diversity of opinions and perspectives. 10. *Freedom of Association II*. Children have a right to associate with other of their own choice, and to avoid undesired associations. 11. *Limited Incultation II*. Children have a right not to be subjected to incultation except for legitimate reasons, and not to be indoctrinated. 12. *Nonarbitrary Distinction of Child from Adult II*.

Restrictions on children's intellectual rights should be limited to those necessitated by the individual child's circumstances and intellectual limitations. 13. *Right to Education*. To the extent that their rights are restricted on the basis of limited rationality, children have a

right to the sort of environment that will facilitate their intellectual development and thus render such restriction unnecessary.

Appendix C

Knox County Board Of Education Policies

“Recognition of Religious Beliefs, Customs and Holidays”

No religious belief or nonbelief shall be promoted by the school system or its employees, and none shall be belittled. All students and staff members shall be tolerant of each other's views. The school system shall use its opportunity to foster understanding and mutual respect among students and parents, whether it involves race, culture, economic background or religious beliefs. In that spirit of tolerance, students and staff members shall be excused from participating in practices which are contrary to their religious beliefs.

RELIGIOUS HOLIDAYS

Observance of religious holidays shall be as follows:

1. The several holidays throughout the year which have both a religious and a secular basis may be observed in the public schools;
2. The historical and contemporary values and the origin of religious holidays may be explained in an unbiased and objective manner without sectarian indoctrination;
3. Music, art, literature and drama having religious themes or basis are permitted as part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday; and
4. The use of religious symbols that are part of a religious holiday are permitted as a teaching aid or resource, provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature. These holidays include Christmas, Easter, Passover, Hanukkah, St. Valentine's Day, St.

Patrick's Day, Thanksgiving and Halloween.

"Religion in the Curriculum"

It is essential that the teaching about religion-and not of a religion be conducted in a factual, objective and respectful manner in accordance with the following guidelines:

1. Music, art, literature, or drama with a religious theme or basis are permitted as part of the curriculum for school-sponsored activities and programs provided it is essential to the learning experience in the various fields of study and is presented objectively;
2. The emphasis on religious themes in the arts, literature and history should be only as extensive as necessary for a balanced and comprehensive study of these areas. Such studies shall never foster any particular religious tenets or demean any religious beliefs; and
3. Student-initiated expressions to questions or assignments which reflect their beliefs or non-beliefs about a religious theme shall be accommodated. For example, students are free to express religious belief or non-belief in compositions, art forms, music, speech and debate

Appendix D

Clovis Unified School District Policies

"Recognition of Religious Beliefs and Customs"

The District recognizes that students' education would be incomplete without an understanding of the role of religion in history and society. It is both proper and important for teachers to objectively discuss the influences of various religions, using religious works and symbols to illustrate their relationship with society, literature, or the arts. The District expects that such instruction will identify principles common to all religions and foster respect for the multiple creeds practiced by the peoples of the world. Though schools must be neutral with respect to religion, the District shares responsibility with the community to develop in its students' appropriate moral and ethical character

incorporating American ideals of liberty, justice, the pursuit of happiness, and equality of opportunity. The fact that some of these values are also held by religions does not make it unlawful to teach them in school. In order to respect each student's individual right to freedom of religious practice, religious indoctrination is forbidden in the public schools. Instruction about religion must not favor, promote, or demean the beliefs or customs of any particular religion or sect. Staff should be highly sensitive to their obligation not to encourage or discourage religious development of any student in whatever tradition the student embraces. Staff, when acting in an official capacity, shall not endorse, encourage, or solicit religious or anti-religious expression or activities among students. They shall not lead students in prayer or participate in student-initiated prayer. However, staff shall be highly sensitive to student religious beliefs and shall not prohibit or discourage any student from praying or otherwise expressing his/her religious belief as long as this does not disrupt the classroom or the educational environment. Students may express their beliefs about religion in their homework, artwork, and other written and oral reports if the expression is germane to the assignment. Such work shall be judged by ordinary academic standards, free of discrimination based on religious content. Instruction, which is contrary to a student's religious beliefs and teachings, may be optional for that student in accordance with the Education Code or at the discretion of the Superintendent or designee. The Board directs the administration to develop regulations that provide general guidance regarding recognition of religious beliefs and customs consistent with existing law.

Graduation Prayer and Baccalaureates

School officials may not mandate, sponsor or organize prayer at graduation nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may, in some instances, be obliged to disclaim official endorsement of such ceremonies.

School Staff: Official Neutrality Regarding Religious Activity

School staff, when acting in an official capacity, are prohibited from endorsing, soliciting, encouraging, or participating in religious expression or activities with students, on campus or at school-sponsored, off-campus events. School Staff (including coaches) shall not lead students in prayer or participate in student-initiated prayer. School staff may supervise school religious club activities to maintain a safe school environment, but school staff may not initiate, participate, promote or conduct religious club activities. School staff, when acting in an official capacity, also are prohibited from discouraging religious expression because of its religious content and from soliciting or encouraging anti-religious activity. For the purposes of this regulation, school staff are deemed to be acting in an official capacity when school staff is on campus at any time when school facilities are open for student use and when school staff is required by the District to be at school-sponsored, on or off-campus events. School Staff may engage in non-disruptive private religious expression and activities on campus during non-instructional time away from students and may factually respond to student-initiated questions about religion.

(cf. Board Policy/Administrative Regulation 6144 - Controversial Issues) Religious Holidays Schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays. However, schools may not observe holidays as religious events or promote such observance by students. Schools should make every reasonable effort to avoid scheduling examinations, school-sponsored trips, special laboratories, picture-taking days and class parties on established religious holidays.

Religious Excusals

Subject to applicable state and federal laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the student's parents on religious, spiritual or other conscientious grounds. However, students generally do not have the right to be excused from lessons that may be inconsistent with their religious, spiritual or other conscientious beliefs. School officials may neither encourage nor discourage students from availing themselves of an excusal option.

(cf. Board Policy/Administrative Regulation 3206 - Family Life/Sex Education.)

Release Time

Schools may dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do or do not attend. Schools may not allow religious instruction to students on school premises during the school day (from outsiders) as part of release time. However, outsiders may be present on campus and provide instruction in accordance with regulations regarding religious expression/activities involving outsiders.

Student Use of School Facilities

A school creates a limited open forum, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other non-instructional time during the school day, as well as when it allows students to meet before and after the school day. Student religious groups at secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Schools that allow one or more student non-curriculum-related clubs to conduct meetings on their premises during non-instructional time may not refuse similar access to student religious groups. A meeting for this purpose includes a prayer service, scripture reading, or other worship exercise.

Religious Expression/Activities Involving Outsiders

Religious proselytization, religious recruitment, the promotion of religion by outsiders or the demonstration of preference for one religious sect over another is prohibited on school premises during school hours and during off-campus, school-sponsored events. Outsiders announcing or encouraging attendance at religious events, or events sponsored by religious organizations, is considered prohibited promotion of religion. Similarly, anti-religious proselytization, recruitment or the discouragement of religion, or the demonstration of preference against one religious sect is prohibited on school premises during school hours and during off-campus, school-sponsored events. Outsiders must abide by all District policies and laws. For example, all outsiders must register at the school site, wear appropriate identification, and not disrupt school activities. This regulation is not intended to address limitations or rights of community members to express religious preference at public events, such as football games. Outsiders may attend and participate in student religious club meetings at the request of the club.

However, outsiders may not direct, conduct, control or regularly attend activities or meetings or student clubs. Schools may not allow the active and direct distribution of religious or anti-religious materials by outsiders on school premises during the school day or at school-sponsored, off-campus events. (cf. Board Policy/Administrative Regulation 9202 - School Visitors; Board Policy/Administrative Regulation 9205 - Relations with Special Interest Groups.)

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