United States Senate

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P.S. I'm trying to use up these cards before Aug. 14!

Lilli

file
school Prayer

WITNESS LIST

Hearings Regarding

VOLUNTARY SCHOOL PRAYER

Before

THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

April 29, 1983
9:00 A.M., Room SD-628

MR. EDWARD SCHMULTS
DEPUTY ATTORNEY GENERAL
Department of Justice

BONNIE BAILEY
STUDENT
Lubbock (Texas) High School

PROFESSOR ROBERT CORD
PROFESSOR OF POLITICAL SCIENCE
Northeastern University

PROFESSOR WALTER DELLINGER
PROFESSOR OF LAW
Duke University School of Law

WILLIAM P. THOMPSON
STATED CLERK OF
UNITED PRESBYTERIAN CHURCH, U.S.A.

STATEMENT OF SENATOR ORRIN G. HATCH OF UTAH, CHAIRMAN, UNITED STATES SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, HEARINGS ON PROPOSED CONSTITUTIONAL AMENDMENTS RELATING TO SCHOOL PRAYER, APRIL 29, 1983.

LADIES AND GENTLEMEN, THIS IS THE FIRST OF TWO DAYS OF HEARINGS BY THE SUBCOMMITTEE ON THE CONSTITUTION ON PROPOSED AMENDMENTS TO THE CONSTITUTION RELATING TO SCHOOL PRAYER. IN PARTICULAR, WE HOPE TO FOCUS UPON S.J.RES. 73 WHICH SENATOR THURMOND AND MYSELF HAVE INTRODUCED AT THE REQUEST OF THE ADMINISTRATION. THIS AMENDMENT WOULD RESTORE THE RIGHT OF SCHOOL-CHILDREN TO ENGAGE IN VOLUNTARY GROUP PRAYER AT THE OUTSET OF THE SCHOOL DAY. NO STUDENT, HOWEVER, COULD BE REQUIRED TO PARTICIPATE IN SUCH PRAYER.

I REGRET HAVING TO SUPPORT ANOTHER AMENDMENT TO THE UNITED STATES CONSTITUTION. THERE IS NO ONE IN THIS BODY WHO IS MORE RESPECTFUL OF THE WORK DONE BY THE FOUNDERS, AND LESS CONFIDENT OF THE ABILITY OF CONGRESS TO IMPROVE UPON THAT WORK. ONCE AGAIN, HOWEVER, THE PROPOSED CONSTITUTIONAL AMENDMENT BEFORE THIS SUBCOMMITTEE IS ONE THAT SEEKS TO RESTORE TO THE CONSTITUTION A TRADITIONAL UNDERSTANDING ABRUPTLY OVERTURNED BY THE SUPREME COURT IN RECENT YEARS. IN MY VIEW, IT IS THE SUPREME COURT THAT HAS ENGAGED IN CONSTITUTIONAL AMENDMENT IN THEIR DECISIONS IN ENGEL V. VITALE, 370 U.S. 421 (1962) AND ABINGTON V. SCHEMP, 374 U.S. 203 (1963). I DO NOT SEE WHAT ALTERNATIVE CONGRESS NOW HAS IN RESTORING THE TRADITIONAL UNDERSTANDING OF THE FIRST AMENDMENT "ESTABLISHMENT" CLAUSE SHORT OF A CONSTITUTIONAL AMENDMENT ADOPTED THROUGH THE PROPER ARTICLE V ROUTE.

IN DECISIONS SUCH AS ENGEL AND ABINGTON, AS WELL AS OTHERS NOT RELATING DIRECTLY TO SCHOOL PRAYER, THE SUPREME COURT HAS ESTABLISHED A THEORY OF THE FIRST AMENDMENT THAT IS THOROUGHLY CONTRARY TO THE INTENTIONS OF THE FOUNDERS, THE SPIRIT OF THE CONSTITUTION, THE HISTORICAL DEVELOPMENT OF THE FIRST AMENDMENT, AND THE WILL OF THE CITIZENRY.

THE PURPOSE OF THE FIRST AMENDMENT "ESTABLISHMENT" CLAUSE WAS NOT TO ERECT A "WALL OF SEPARATION" BETWEEN THE STATE AND ALL EXPRESSIONS OF RELIGIOUS SENTIMENT. AS PROFESSOR CORD HAS MADE CLEAR IN HIS MONUMENTAL WORK ON THE FIRST AMENDMENT, ITS PURPOSE WAS TO PROHIBIT THE NATIONAL GOVERNMENT FROM ESTABLISHING A PREFERRED RELIGION, OR AN OFFICIAL CHURCH. IT WAS NOT TO DIVORCE ENTIRELY THE STATE FROM ANY RELATIONSHIP WITH THE RELIGIOUS IMPULSE. TO DO THAT, AS PROFESSOR CORD DEMONSTATES, WOULD HAVE BEEN TO DIVORCE THE STATE FROM THE VERY INFUSION OF VALUES THAT MOTIVATED THE CONSTITUTION IN THE FIRST PLACE.

WHAT WE HAVE SEEN RECENTLY IN THE LUBBOCK CASE IS AN ATTEMPT TO CARRY THE "WALL OF SEPARATION" MISCONCEPTION OF THE FIRST AMENDMENT TO ITS LOGICAL EXTREME. LUBBOCK GOES BEYOND PROHIBITING THE STATE FROM ENCOURAGING RELIGION IN EVEN A GENERAL MANNER, AND SEEMS TO REQUIRE THAT THE STATE ADOPT A HOSTILE POSTURE TOWARD RELIGION. ALONE AMONG STUDENT EXTRA-CURRICULAR ACTIVITIES, THOSE THAT RELATE TO RELIGION ARE TO BE BARRED FROM SCHOOL PREMISES. THIS IS NO LONGER AN "ESTABLISHMENT OF RELIGION" ISSUE BUT ONE IN WHICH THE VERY "FREE EXERCISE" OF RELIGION IS INVOLVED.

WHILE I BELIEVE THAT S.J.RES. 73 IS A MERITORIOUS AMENDMENT, I SHARE SOME OF THE CONCERNS RAISED BY SENATOR THURMOND WHEN HE INTRODUCED THIS MEASURE. I AM CONCERNED THAT ANY AMENDMENT APPROVED BY THIS SUBCOMMITTEE ENSURE THAT REASONABLE ACCOMODATION WILL BE MADE TO THOSE SCHOOL-CHILDREN WHO CHOOSE NOT TO PARTICIPATE IN GROUP OR INDIVIDUAL PRAYER. I AM ALSO CONCERNED ABOUT THE ISSUE OF HOW THE CONTENT OF ANY GROUP PRAYER IS TO BE DETERMINED. ANY RESPONSIBLE AMENDMENT WILL HAVE TO BE CONSISTENT WITH THE VALUE STRUCTURE OF OUR CONSTITUTION-- PROTECTION OF THE RIGHTS OF MINORITIES, TOLERANCE OF DIVERSE RELIGIOUS VIEWPOINTS, AND THE NEED TO ENSURE THAT THE VERY DISTINCT SPHERES OF CHURCH AND STATE ARE MAINTAINED AS DISTINCT SPHERES.

I VERY MUCH LOOK FORWARD TO OUR WITNESSES TODAY AND MONDAY OFFERING A DIVERSE PERSPECTIVE ON WHICH DIRECTION OUR NATION OUGHT TO HEAD IN REGARDS TO THE ISSUE OF THE RELATIONSHIP BETWEEN THE STATE AND EXPRESSIONS OF RELIGIOUS VALUES.

STATEMENT

OF

THE HONORABLE EDWARD C. SCHMULTS

DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

ON

S.J. RES. 73, THE SCHOOL PRAYER AMENDMENT

Before the

SUBCOMMITTEE ON THE CONSTITUTION

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

April 29, 1983

Mr. Chairman and Members of the Committee:

I am pleased to appear today on behalf of the Administration to support Senate Joint Resolution 73, a resolution proposed by the Administration and introduced in the Senate by Senators Thurmond, Hatch, Chiles, Abdnor, Nickles and Helms. This resolution proposes an amendment to the Constitution to restore the opportunity to engage in prayer in our public schools and institutions. The proposed amendment reads as follows:

> "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."

The President feels strongly that Congress should support this proposed amendment and should act on it as quickly as possible. We would ask that the Committee and the Senate work toward passage early in the 98th Congress, so that the states can begin the process of ratification during 1983.

In my statement, I will explain why this amendment is a sound and necessary solution to the problems resulting from the prohibition of prayer in our public schools and institutions. Mr. Chairman, I would also like to submit for the record a copy of the Administration's Analysis of this amendment.

I.

The President has proposed this amendment in order to permit, once again, voluntary prayer in public schools and other

public institutions. It is intended to reverse the effect of two decisions of the Supreme Court, Engel v. Vitale, 370 U.S. 421 (1962), and Abington School District v. Schempp, 374 U.S. 203 (1963), which held that it is an impermissible "establishment of religion" in violation of the First Amendment for a state to foster group prayer or Bible readings by students in public schools.

In Engel v. Vitale, the Court embraced an interpretation of the First Amendment that prohibited group recitation of the New York State Regents' prayer in the public schools. Although it was clear that students were not required to participate in the prayer, the Court determined that state sponsorship and endorsement of a particular prayer violated the Amendment's proscription against an establishment of religion. In Abington School District v. Schempp, the Court struck down Pennsylvania and Maryland laws requiring that public schools begin each day with readings, without comment, from the Bible. Although the states' practices furthered secular purposes and excused unwilling students from participation, the Court found them to violate the Establishment Clause. Emphasizing the strict separation between church and state adopted in its previous constructions of the First Amendment, the Court concluded that the Establishment Clause precluded the government from favoring religion as against non-believers.

This prohibition against favoring religion as against non-believers, some have argued, would appear to preclude any action by the states or the federal government affirming a belief in

God. Thus, in the view of many Americans, the one provision of the Constitution expressly intended to protect the religious liberty of the people has instead been construed to prevent them from expressing their religious beliefs through prayer.

In the years following Engel v. Vitale and Abington School District v. Schempp, the courts have increasingly restricted the states from incorporating religious observances into the daily schedule of students in public schools. In one case, for example, a school principal's order forbidding kindergarten students from saying grace before meals was upheld. 1/ In another case, the Supreme Court affirmed a lower court decision striking down a school board policy of permitting students, upon request and with their parents' consent, to participate in a one-minute prayer or meditation at the start of the school day. 2/

The principles established in Engel v. Vitale and Abington School District v. Schempp have been extended recently to bar the accommodation or even toleration of students' desire to pray on school property even outside regular class hours. For example, one court prevented a school from allowing students to conduct voluntary meetings for "educational, religious, moral, or ethical purposes" before or after school, even though other, non-religious

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1/ Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965). See also DeSpain v. DeKalb County Community School District, 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).

2/ Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 102 S. Ct. 1267 (1982).

groups may do so. 3/ Other courts have forbidden voluntary prayer meetings, 4/ even the reading of prayers from the Congressional Record. 5/

Even the venerable tradition of having chaplains open legislative sessions with a prayer -- a tradition going back before the First Congress and widely followed in the states -- is now under serious attack in the courts. One federal court of appeals has already ruled that it is unconstitutional for a state legislature to have a chaplain to open its sessions with a prayer. 6/ A similar challenge to chaplains in Congress is now pending. 7/

II.

Against the background of these decisions, the President has proposed a constitutional amendment that will, in his words, "restore the simple freedom of our citizens to offer prayer in

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3/ Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1042-48 (5th Cir. 1982), cert. denied, 103 S. Ct. 800 (1983); see also Brandon v. Board of Education, 635 F.2d 971, 977-79 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981); Trietley v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

4/ Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.), cert. denied, 102 S. Ct. 322 (1981).

5/ State Board of Education v. Board of Education, 108 N.J. Super. 564, 262 A.2d 21, aff'd, 57 N.J. 172, 270 A.2d 412 (1970), cert. denied, 401 U.S. 1013 (1971).

6/ Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982), cert. granted, 103 S. Ct. 292 (1982) (No. 82-23).

7/ Murray v. Buchanan, 674 F.2d 14 (D.C. Cir. 1982), vacated for rehearing en banc, No. 81-1301 (D.C. Cir.).

our public schools and institutions." The pressing need for this amendment is apparent from numerous considerations.

In reversing the two principal Supreme Court decisions foreclosing prayer in public schools, the Administration's proposed amendment would restore prayer to a place in public life consistent with the Nation's heritage and, in our view, would accurately reflect the historical background of the Establishment Clause. The Administration's analysis of the proposed amendment demonstrates that the Establishment Clause was not intended to prohibit governmental references to or affirmations of belief in God. In discussing the scope of the Establishment and Free Exercise Clauses, Erwin N. Griswold, former Dean of Harvard Law School and former Solicitor General of the United States, stated: "These are great provisions, of great sweep and basic importance. But to say that they require that all traces of religion be kept out of any sort of public activity is sheer invention." 8/ And Justice Story concluded that "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation" at the time the First Amendment was drafted. 9/

Second, this amendment reflects and reinforces this country's long history of recognizing the existence of a deity to

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8/ Griswold, Absolute is in the Dark--A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167, 174 (1963).

9/ 3 J. Story, Commentaries on the Constitution of the United States, § 1868 (1833).

whom humility and thanksgiving are due. For over 170 years, prayers or Bible readings were a familiar part of the school day for American children, and were viewed as an appropriate expression of humility and gratitude for the blessings which had been bestowed upon this nation and its people.

Our country's most important public documents and occasions have traditionally been marked by a recognition of our dependence on a Supreme Being. For example, references to God can be found in the Mayflower Compact of 1620, the Declaration of Independence, the Pledge of Allegiance, and the National Anthem; on the Liberty Bell, the American Seal, our legal tender, monuments such as the Tomb of the Unknown Soldier, the Washington Monument, and the Lincoln and Jefferson Memorials; and in the oath of office taken by federal employees (including the President, all federal judges and members of Congress) and witnesses in judicial and legislative proceedings. American institutions have continued to reflect these religious beliefs as evidenced by the employment of chaplains in the legislatures and the armed forces, the proclamations and Inaugural Addresses made by almost every President, and the public recognition of Thanksgiving Day as a time set aside to express gratitude to a Supreme Being. 10/ Virtually all of the state constitutions refer to dependency on God. As the

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10/ In response to a request by the Congress, the President has proclaimed 1983 to be the Year of the Bible. Pub. L. No. 97-280, 96 Stat. 1211, Oct. 4, 1982; Proc. No. 5018, Weekly Comp. of Pres. Docs. 181 (Feb. 3, 1983).

Supreme Court has stated, "We are a religious people whose institutions presuppose a Supreme Being." 11/

Third, and closely related to the second point, this amendment is needed because the free expression of prayer is of such fundamental importance to our citizenry that it should not be proscribed from public places. The overwhelming majority of Americans have repeatedly made it clear that they favor a restoration of voluntary prayer to the public schools. Prayer in the public schools has long been considered a desirable and proper means of imparting constructive moral and social values to schoolchildren, while generally encouraging in them a practice of self-reflection and meditation. Conversely, the exclusion of prayer from the daily routine of students could convey the misguided message that religion is not of high importance in our society.

Fourth, by prohibiting students' voluntary prayers before meals, periods of meditation before class, and student prayer meetings in school buildings outside of class hours, the courts' concern with the Establishment Clause has appeared to overshadow the First Amendment right of students to free exercise of religion. As Justice Stewart has stated, "there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible." 12/

11/ Zorach v. Clauson, 343 U.S. 306, 313 (1952).

12/ Abington School District v. Schempp, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting).

Although some may argue that those parents could pay to send their children to private or parochial schools, the Supreme Court has stated that "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." 13/

Fifth, the unintended but inevitable result of current judicial interpretations of the Establishment Clause is not state neutrality but a complete exclusion of religion which is, in effect, state discouragement of religion. The governmental "neutrality" mandated by the Supreme Court on matters of religion has proven in fact to be unachievable.

Finally, the amendment is needed because it would allow decisions of essentially local concern to be made by states and localities rather than the federal judiciary. For over 170 years, school prayer issues were resolved at the state and local levels by the residents of the affected communities. Their choices regarding school prayer reflected the desires and beliefs of the parents and children who were directly and substantially affected.

III.

The proposed constitutional amendment is essentially intended to restore the status quo with respect to the law governing prayer in public schools that existed before Engel v. Vitale and Abington School District v. Schempp were decided,

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13/ Id. at 312-13, quoting Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

i.e., when prayers such as the Regents' prayer and readings from the Bible without comment were not thought to be unconstitutional. However, the proposed amendment affirms the fundamental right of every person to reject any religious belief, as he or she deems fit, and not participate in the expression of any religious belief.

By establishing that "Nothing in this Constitution shall be construed to prohibit individual or group prayer," the proposed amendment would make clear that the Establishment Clause of the First Amendment could no longer be construed to prohibit the government's facilitation of individual or group prayer in public schools. The amendment also would foreclose reliance upon the "implied coercion" theory advanced by the courts, which presumes that any group prayer by consenting students has a coercive effect upon the objecting students in violation of their right to free exercise of religion, and that therefore no prayer is constitutionally permissible. However, as discussed below, the proposed amendment expressly protects the right of objecting students not to participate in prayer. This provision is sufficient to protect the rights of those who do not wish to participate without denying to all others who desire to pray an opportunity to do so.

The intent of the proposed amendment is to leave the decisions regarding prayer to the state or local school authorities and to the individuals themselves, who may choose whether they wish to participate. The proposed amendment would not require school authorities to allow or participate in prayer,

but would permit them to do so if desired. Group prayers could be led by teachers or students. Alternatively, if the school authorities decided not to take part in a group prayer, they would be free to accommodate the students' interest in individual or group prayer by permitting, for example, prayer meetings outside of class hours or student-initiated prayer at appropriate, nondisruptive times, such as a brief prayer at the start of class or grace before meals. School authorities could, of course, develop reasonable regulations governing the periods of prayer, in order to maintain proper school discipline.

If the school authorities choose to participate in a group prayer, the selection of the particular prayer -- subject of course to the right of those not wishing to participate not to do so -- would be left to the judgment of local communities, based on a consideration of such factors as the desires of parents, students and teachers and other community interests consistent with applicable state law. Thus, the proposed amendment would restore the practice maintained throughout most of this nation's history, in which the determination of the appropriate circumstances of prayer was made by state and local authorities. The amendment does not limit the types of prayer that are constitutionally permissible and is not intended to afford a basis for intervention by federal courts to determine whether or not particular prayers are appropriate for individuals or groups to recite. Because the proposed amendment merely would remove the bar of the Establishment Clause as construed by the Supreme Court, state laws regarding the availability of prayer in public schools would not be affected.

The amendment by its terms is not limited to public schools, and would apply to prayer in other public institutions as well. The intent of this language is to make the remedial provisions of this amendment coextensive with the reach of the First Amendment's Establishment Clause as construed by the Supreme Court. Although most questions relating to public prayer arise in the context of public schools, the proposed amendment is drafted to apply to prayer in other public institutions, including prayers in legislatures.

The second sentence of the proposed amendment guarantees that no person shall be required to participate in prayer. This prohibition assures that the decision to participate in prayer in public schools and other public institutions will be made without compulsion. Those persons who do not wish to participate in prayer may sit quietly, occupy themselves with other matters, or leave the room. Reasonable accommodation of this right not to participate in prayer must be made by the school or other public authorities. Thus, the exercise of the right to refrain from participating cannot be penalized or burdened.

The guarantee against required participation in prayer parallels and reaffirms the protection already afforded by the Free Exercise Clause of the First Amendment. Thus, the second sentence of the proposed amendment assures that students and others will never have to make a forced choice between their religious beliefs and participation in a state-sponsored prayer. Indeed, the second sentence of the proposed amendment provides greater protection than the Free Exercise Clause, because a

person desiring not to participate in prayer need not show a religious basis for his belief. Accordingly, there would be no need for an inquiry into the religious basis for a person's decision not to participate in prayer.

The fact that one or more students do not wish to participate in prayer, however, would not mean that none of the students would be allowed to pray. The provision forbidding required participation in prayer is intended to be sufficient to protect the interests of those students. As the Supreme Court stated with respect to the Pledge of Allegiance, "the refusal of these persons to participate in the ceremony does not interfere with or deny the rights of others to do so." 14/ This would be the proper rule to apply with respect to school prayer: persons who do not wish to participate in prayer should be excused or may remain silent, but that should not interfere with or deny the rights of others who do wish to participate.

IV.

For these reasons, we strongly urge prompt action on this proposed amendment, so that the process of state ratification can begin. We began our national history with an unforgettable Declaration that governments were instituted in order to secure to the people those inalienable rights, including life, liberty and the pursuit of happiness, with which people were "endowed by their Creator." Those rugged and inspired individuals who

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14/ West Virginia State Board of Education v. Barnette, 319 U.S. 624, 630 (1943).

founded this nation understood the importance of recognizing the source of our blessings. It is time that we restore the ability of our schoolchildren to do so as well.

Mr. Chairman, I shall be glad to answer any questions you or members of the Committee might have.

TESTIMONY

OF

BONNIE BAILEY

Student at Monterey High School, Lubbock, Texas

At a Hearing on S.J.Res. 73

Before the

SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CONSTITUTION

Honorable members of the committee, I am pleased to be here. I appreciate your valuable time and your attention. I am Bonnie Bailey, a 17 year old senior at Monterey High School in Lubbock, Texas, which is a school of the Lubbock Independent School District. My parents are Ronald and Betty Bailey.

I feel that I can speak with some authority on the views of my students peers. This past year I was elected Governor of the State of Texas by 600 students who participated in the Youth in Government program, sponsored by the Y.M.C.A. I also serve on the Student Council of my school.

Until last year, the Lubbock School District permitted voluntary meetings of students on school property to discuss religious, moral or ethical matters before or after regular school hours. This policy was held unconstitutional last year in a case called Lubbock Civil Liberties Union against Lubbock Independent School District, of which you are all probably aware. Students are no longer allowed to meet on school property for these purposes. The court decision has had a bad impact on us students in Lubbock. On behalf of my fellow students, I want to share what the impact has been.

We have been taught that the Constitution guarantees freedom of speech to all citizens in this country, including students. However, apparently religious speech is not protected speech for us students. Americans are allowed to picket, demonstrate, protest, use four letter words, and take God's name in vain, and the courts seem to uphold their actions and their words as being protected by the Constitution even though they are highly offensive to some people who see or hear them. I have been told that students are guaranteed these freedoms of speech so long as they are not disruptive. However, we students are not allowed to speak of religious matters on school property in Lubbock or, I suppose, anywhere else. I do not understand this inconsistency.

Through my sophomore year in high school I participated in an activity at school called "Morning Watch". This was a voluntary program in which about 35 students out of 1200 met together in a school room before school began. Sometimes we had speakers. Sometimes students spoke. It was a few minutes of inspiration before the school day began. It was totally voluntary, and in fact, students had to make a special effort to get to school a half an hour early in order to attend the meeting. No one was forced or coerced into attending. A teacher served as an advisor. However, students ran this meeting. It was not my impression that the Lubbock schools favored our religious views over others. The school board and administration took this time of sharing and meeting together away from us. They took something very valuable from us when they refused to let the Morning Watch meeting continue this year.

I also participated in the Fellowship of Christian Athletes in ninth grade. Again, this was a group of about 65 students out of 700 meeting on a voluntary basis after school with a religious emphasis. Although two coaches served as advisors, we students elected officers and ran the meetings. Because of the new policy in Lubbock, we can no longer use the school building for meetings of the Fellowship of Christian Athletes.

My sister was a member of Y-Teens, an organization sponsored by the Y.W.C.A. and open to all girls regardless of their religious beliefs. This group was allowed to meet after school hours in the school building. Howevef, it can no longer do this. I belong to Tri-Hi-Y, which is sponsored by the Y.M.C.A., and our group cannot meet at school at any time.

The impression of many students is that the school administration or the school board or the courts, or all of them, are hostile toward religion. Many Lubbock students were not aware that the school district defended in court its policy which would have allowed us to meet. When told that we could not meet for religious discussions, we assumed that the decision was willingly made by the school, not knowing that they were forced by the courts to discriminate against us.

It seems to us that the government is not neutral but that it is against religion. Many students look up to and respect the school board members, teachers, principals and judges. But on this important issue, the students feel that they have let us down. We look up to these leaders, and we see in them an antagonism toward religious speech. I, for one, cannot believe that the Constitution of the United States requires this, or that it is in the best interest of students.

Many students are confused by what they see. Congress is led in prayer. Our pledge to the flag, our coins, and many of our patriotic songs refer to God. Why should we be officially requested to say the pledge to the flag and refer to God on school property but not be permitted to have a voluntary discussion about the same God? Why should we be able to study great national heroes such as Presidents Lincoln and Kennedy and their faith in God, but not be permitted to discuss those same heroes and their faith on school property in a meeting of the Fellowship Christian Athletes?

Not being able to meet in empty school facilities before or after regular school has placed an additional burden on students and parents. Schools are ideal for student meetings as they are centrally located, and are usually empty before and after school hours. Our parents are paying for these facilities while they sit empty.

It appears to me that all student groups can meet except those which may have some religious motive or purpose. Social clubs, home economics clubs, vocal groups, foreign language students, and every other group can meet at school, but the Morning Watch, Fellowship of Christian Athletes, Y-Teens, and Tri-Hi-Y must meet somewhere else. This does not agree with what I read of the underlying principles upon which our nation was founded. What is the big difference which made religious free speech so important to our forefathers that they would fight and die for it, and so unimportant now that the courts would strike down a school policy which permits my friends and me to discuss religious matters on school property. I confess to not being smart enough to figure that out.

We need legislation to protect students' guaranteed freedom of speech. I am asking from each of you to make right a grievous wrong which now exists in this country. It is wrong that a student may use the name of God profanely but may not use it reverently. I hope that you will do your duty and remedy this perplexing situation.

Prepared Statement of Robert L. Cord
Professor of Political Science
Northeastern University
Boston, Massachusetts
April 29, 1983

Mr. Chairman, members of the Committee and the Committee's Staff:

I am Robert L. Cord, professor of political science at Northeastern University in Boston, Massachusetts. For more than 25 years I have had the privilege of studying, teaching and writing about aspects of American Constitutional Law. In 1982 Lambeth Press of New York published my most recent book Separation of Church and State: Historical Fact and Current Fiction.[1]

I have not accepted your invitation today to argue as a partisan for or against a prayer amendment. I am here primarily as a student of the American Constitution to share my research and my understanding of the meaning of the American tradition of separation of church and state. Further, while it may be axiomatic that a constitutional amendment by its very nature cannot be unconstitutional, I am also here to urge you not to submit to the Congress--and eventually to the States--any proposed amendment that violates the principles of Church-State separation embraced by the Founding Fathers and enshrined in the First Amendment. What are these First Amendment principles regarding religion that the Framers held so dear? To answer that question we must look to their words and actions.

James Madison introduced the Bill or Rights in the First Congress (1789) in part because many of the State Ratifying Conventions wanted more limitations placed on the authority of the Federal Government than existed in the original Constitution drawn up in the Philadelphia Convention. Madison's first draft of what ultimately became the Establishment Clause shows his intent clearly: "...The Civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established...."[2] (Emphasis added.) Even

after Madison's draft was changed by congressional committee deliberations, when asked in debate on the House floor what the re-worded Clause meant, Madison said he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law. . ."[3]

On the basis of the resolutions passed by the Maryland, Virginia, New York, North Carolina and Rhode Island State Ratifying Conventions,[4] the original draft of Madison's religion amendment,[5] the debates within the First House and Senate,[6] and Madison's final statement on the floor of the First House of Representatives,[7] I conclude that, regarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the placing of any one religious sect, denomination, or tradition into a preferred legal status which characterized religious establishments. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion by the national government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit.[8]

Despite the fact that the First Amendment was added to the Constitution in 1791, it was not until the Everson Bus Transportation Case in 1947[9] that the U.S. Supreme Court comprehensively defined what its doctrine of church-state separation meant.[10]

In Everson, the Supreme Court ruled essentially that the purpose of the Establishment Clause was to create a "high and impregnable" wall between church and state. In that case, and since, the opinions of the Court have invariable cited carefully selected historical documents and instances to justify their broad interpretation of the separation of church and state required by the Constitution. In brief, in all of the major Establishment Clause cases, for over one-third of a century, the Supreme Court has sought to justify its church-state decisions

with appeals to the actions of James Madison, Thomas Jefferson, the Virginia Legislature of 1786, the framers of the First Amendment, and the historical events of the early years of the American Federal Republic.[11] Following the High Court's lead, so too have the lower courts of the land. "What does the historical intent behind the Establishment Clause require us to rule in this case?" seems to be the unuttered question always to be answered by the Court's opinion. Simply put, the Court has used its "American history" to legitimize its decisions. "Thus saith history!" has been the Court's most common and consistent approach in deciding what the Establishment Clause forbids. But, a careful, and not an extremely selective, search of American primary historical documents indicates beyond a reasonable doubt that, in fact, no "high and impregnable" wall between church and state was historically erected by the First Amendment, and for a very simple reason--none was constitutionally intended by the framers of that Amendment.[12] To be sure, the framers of the First Amendment believed in separation of church and state. In 1791, no other country had provided so carefully to prevent the combination of the power of religion with the power of the national government.

However, I believe, my recent book shows conclusively that the framers of the Establishment Clause meant separation between church and state to be something other than what the United States Supreme Court has been saying in most of its decisions for more than three decades.[13] To the contrary, there appears to be no historical evidence that the First Amendment was intended to preclude all Federal governmental aid to religion when it was provided on a non-discriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide for an absolute separation or independence of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite.

For a few moments, permit me to contrast the Court's views with fact. Item: In 1971 (the Lemon case), Chief Justice Burger said for the Court that "(w)e have

no long history of state aid to church-related educational institutions..."[14] If the Court believes that, how would it explain the hundreds of thousands of federal tax dollars spent in support of Indian church schools until Congress altered the policy by statute in 1896?[15] How would the Court explain the fact that during 1824-1831 alone, only seven years, the Annual Reports of the Commissioner of Indian Affairs indicate that U.S. tax dollars supported church schools run by the Society of the United Brethren, the American Board of Foreign Missions, the Baptist General Convention, the Hamilton Baptist Missionary Society, the Cumberland Missionary Board, the Synod of South Carolina and Georgia, the United Foreign Missionary Society, the Methodist Episcopal Church, the Western Missionary Society, the Catholic Bishop of New Orleans, the Society for Propagating the Gospel among the Indians, the Society of Jesuits, the Protestant Episcopal Church of New York, the Methodist Society, and the Presbyterian Society for Propagating the Gospel?[16]

Chief Justice Burger is in error. In fact, the converse is true. We have had a long history of supporting church schools. And that policy was changed not because it was unconstitutional, but because Congress no longer thought it was desirable. The fact that these schools were almost exclusively Indian schools is constitutionally irrelevant. If the First Amendment absolutely forbids the use of tax dollars to support church schools, the race or culture of the pupils attending these schools is not constitutionally important.

Item: Attributing to Jefferson and Madison an absolute separationist view, the Court frequently documents its interpretaton of those gentlemen with reference to Jefferson's Virginia "Bill for Establishing Religious Freedom". Madison introduced this bill in 1785 as Jefferson's surrogate.[17] And, it did become law in 1786 by act of the Virginia State Assembly.[18] However, the Court neglects to tell us that on the same day, October 31, 1785, Madison also introduced a bill, again attributed to Jefferson, which severly fined "Sabbath Breakers".[19] This too became law in 1786.[20] Does this Jefferson action represent a high and impregnable wall view of separation of church and state?

Item: In 1803, as president, Thomas Jefferson submitted to the United States Senate a proposed treaty with the Kaskaskia Indians, which included a clause pledging the United States to build a Roman Catholic church and provide a yearly stipend for its priest.[21] Is this absolute separation of church and state? After the treaty was ratified, Jefferson asked Congress to act in its "legislative capacity" to meet the treaty obligations.[22] I would like to ask the Supreme Court: When Congress appropriated the U.S. tax dollars to build that Roman Catholic church, did it pass a "law respecting an establishment of religion?"

Item: Most recently the U.S. Senate and House chaplaincies have been assailed in federal court as unconstitutional.[23] James Madison was one of six members of the committee of the First Congress which recommended the congressional chaplain system.[24] Their recommendation was adopted, and an annual salary of $500 for public prayers in the Congress was provided by the very same Congress which proposed the Establishment Clause.[25] Is this absolute separation of church and state? To advocates of absolute separation, obviously the First Congress did not know what the First Amendment--which they authored--meant.

Item: Beginning in 1796 and culminating in 1804, the Congress of the United States passed laws, which in effect paid, with enormous land grants, in trust, an evangelical Christian sect to spread and maintain the gospel among Indians in the Ohio Territory. One of those laws was signed by George Washington,[26] two by John Adams,[27] and the last three by the third president of the United States. Yes, in 1802, 1803, and 1804, Thomas Jefferson, who refused to issue Thanksgiving Day proclamations because he thought they were unconstitutional, signed into law congressional enactments providing land for the "Society of the United Brethren for Propagating the Gospel among the Heathen".[28] Is this a high and impregnable wall of separation between church and state? Apparently, Jefferson did not think those laws were unconstitutional, or else we are logically forced to believe that

he was a rascal, sitting in the White House trying to destroy a principle which he fought so devotedly for--separation of church and state.

No, Jefferson, Madison, Washington, Adams, their Congresses, et al., were not rascals trying to destroy a principle that they themselves had enshrined in the Constitution. For them, the use of religious or sectarian institutions--including prayers--as means to reach secular ends was not a violation of the First Amendment unless, and only unless, preferential treatment was given one church, one religion, or one religious sect, thus elevating it into a prefereed legal status.

Specifically how do these principles of church-state separation relate to a prayer amendment? Discussing the Engel Prayer Case[29] along with Abington[30] and Murray v. Curlett[31] in Separation of Church and State, I argued that the non-coercive daily recitation of the New York State Regent's prayer did not violate the First and Fourteenth Amendments, but, daily Bible reading and recitation of the "Lord's Prayer" did.[32] For me, the Regent's prayer which merely addressed itself to "Almighty God"[33] no more placed a particular religion or religious tradition into a preferred legal status than did James Madison's four Thanksgiving Day Proclamations replete with their references to the "Great Parent and Sovereign of the Universe", the "Benefactor of Mankind", the "Holy and Omniscient Being" as well as "Almighty God".[34] Dissimilarly, daily Bible reading and/or recitation of the New Testament's "Lord's Prayer", in my judgment, elevated the Judeo-Christian or Christian religious traditions respectively into a legally preferred status forbidden by the First Amendment.[35] A prayer amendment which is so open ended as to constitutionally sanction all public school group prayers, even a religiously partisan one conducted by public school teachers, clearly departs from our First Amendment heritage. Unlike the prayer in Engel v. Vitale, which simply made reference to "Almighty God", a daily school prayer under the present proposal in S. J. Resolution 73 could be addressed to the "Lord Jesus" or the "God of our Fathers, Abraham, Isaac and Joseph". For this reason the wording of the

proposed amendment in S.J. Resolution 73 greatly concerns me.

As I said at the outset, I am here to urge that you take care not to violate the historic meaning of the American principle of separation of church and state. If a constitutional amendment merely provided for a moment of silence or a religiously non-partisan prayer, the spirit of the Establishment Clause would, in my judement, not be violated. Any connection of an exclusive school prayer with a particular religious tradition would put that tradition into a legally preferred position--a happening which I believe the Founding Fathers sought to preclude with the First Amendment.

Mr. Chairman, members of the Committee and Staff, thank you for inviting me to be part of this constitutional process.

END NOTES

1. Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction, (Lambeth Press, 143 East 37th Street, New York, New York 10016)

2. Annals of the Congress of the United States: The Debates and Proceedings in the Congress of the United States, com. fr. authentic materials by Joseph Gales, Sr., (Washington: Gales and Seaton, 1834), p. 434. Emphasis added.

3. Ibid., Vol. I, p. 730.

4. Jonathan Elliott, Debates on the Federal Constitution, Vol. II (Philadelphia: J.B. Lippincott Co., 1901), p. 553; Vol. III, p. 659; Vol. I, p. 328; Vol. I, p. 334; Vol IV, p. 244.

5. Annals of the Congress, Vol. I, p. 434.

6. Robert L. Cord, Chapter One, Separation of Church and State: Historical Fact and Current Fiction (New York: Lambeth Press, 1982) and Michael J. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (Washington, DC: American Enterprise Institute, 1978).

7. Ibid., n.3, supra.

8. Cord, Separation, op. cit., p. 15. Recognizing without approval, that the U.S. Supreme Court has held the prohibitions of the First Amendment applicable to the States through the Fourteenth Amendment Due Process Clause, the still relevant purposes of the religious guarantees of the First Amendment now delimit state as well as federal authority.

9. Everson v. Bd. of Education, 330 U.S. 1 (1947).

10. Ibid., at pp. 15-16.

11. Representative opinions of the Court to substantiate this statement can be found in Everson v. Bd. of Ed., 330 U.S. 1 (1947); Zorach v. Clauson, 343 U.S. 306 (1952); McGowan v. Maryland, 366 U.S. 420 (1961); Engel v. Vitale, 370 U.S. 421 (1962), 392 U.S. 236 (1963); Bd. of Ed. v. Allen, 392 U.S. 236 (1968); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

12. See n.6, supra.

13. Cord, Separation, op.cit., Chapters Two, Three, Seven and Eight.

14. Lemon v. Kurtzman, 403 U.S. 622 (1971), p. 626.

15. The Statutes at Large of the United States of America, XXIX (Washington, DC; Government Printing Office, 1897), Fifty-Fourth Congress, Sess. I, Chap. 398, 1896, "Support of Schools", p. 345.

16. Annual Reports of the Commissioner of Indian Affairs: 1824-1831, I (New York: A.M.S. Press, Inc., 1976).

17. Julian P. Boyd, ed., The Papers of Thomas Jefferson, II, 1777 to June 18, 1779, including The Revisal of the Laws, 1776-1786 (Princeton, NJ: Princeton University Press, 1950), p. 307.

18. Ibid., pp. 545-47.

19. Ibid., pp. 555-56.

20. Ibid., see notes, pp. 555-556.

21. Richard Peters, Esq., ed., The Public Statutes at Large of the United States of America, VII (Boston: Charles C. Little and James Brown, 1848), pp. 78-79. Sepeifically, see Article Three of the proposed treaty.

22. James D. Richardson, A Compilation of the Messages and Papers of the Presidents 1789-1897, I (Washington, DC: Bureau of National Literature and Art, 1901), p. 365.

23. Murray, et al. v. Morton, et al., 505 F. Supp. 144 (1981).

24. Report of Committees of the House of Representatives, First Sess. of the Thirty-Third Congress, in three vols. (Washington: A.O.P. Nicholson, Printer, 1854), II, House of Representatives Document 124, "Appointment of Chaplains", p.4.

25. Ibid.

26. Public Statutes at Large, I, "Acts of the Fourth Congress", Sess. I, Chap. 29, pp. 464-69, approved by President Washington, June 1, 1796.

27. Ibid., "Acts of the Fifth Congress", Sess. III, Chap. 29, p. 724, approved by President John Adams, March 2, 1799; id., II, "Acts of the Sixth Congress", Sess. I, Chap. 13, pp. 14-16, approved by President John Adams, March 1, 1800.

28. Ibid., II, "Acts of the Seventh Congress", Sess. I, Chap. 30, pp. 155-156, approved by President Jefferson, April 26, 1802; id., II, "Acts of the Seventh Congress, Sess. II, Chap. 30, pp. 236-237, approved by President Jefferson, March 3, 1803; id., II "Acts of the Eighth Congress", Sess. I, Chap. 26, pp. 271-72, approved by President Jefferson, March 19, 1804.

29. 370 U.S. 421 (1962).

30. 374 U.S. 203 (1963).

31. Ibid.

32. Cord, Separation, op.cit., pp. 160-165.

33. Engel v. Vitale, 370 U.S. 421, at 422.

34. See President Madison's proclamation's of 1812, 1813, and 1814 as reprinted in Cord, Separation, op. cit., pp. 257-260.

35. See n. 32, supra.

W I T N E S S L I S T

Hearings Regarding

V O L U N T A R Y S C H O O L P R A Y E R

Before

SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

Monday, May 2, 1983
10:30 A.M., Room 226 SD

THE HONORABLE T. H. BELL
Secretary of Education
U.S. Department of Education

MR. MICHAEL MALBIN
American Enterprise Institute

PROFESSOR BURKE MARSHALL
School of Law
Yale University

MR. JAMES DUNN
Executive Director
Baptist Committee on Public Affairs

REVEREND ROBERT P. DUGAN, JR.
National Association of Evangelicals

MR. DICK DINGMAN
The Moral Majority

MR. GARY JARMIN
Executive Director
Christian Voice

MS. GAIL MEREL
Bar Association of N.Y.C.

STATEMENT OF SENATOR ORRIN G. HATCH OF UTAH, CHAIRMAN, UNITED STATES SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, HEARINGS ON PROPOSED CONSTITUTIONAL AMENDMENTS RELATING TO SCHOOL PRAYER, MAY 2, 1983.

Ladies and Gentlemen, this represents the second of two days of hearings by the Subcommittee on the Constitution on proposed constitutional amendments relating to school prayer. As with out first day of hearings, we are fortunate to have with us today an outstanding group of witnesses with a diverse variety of perspectives on this important issue.

I would emphasize again, as I did during our first day of hearing, that the issue here is not simply the merits of public school prayer. An equally important issue is how constitutional policy is to be formulated in a free and democratic society.

Whatever one thinks about the merits of public school prayer, is it possible to conclude that the Supreme Court's decisions in such cases as Engel and Abington did anything other than alter the existing understanding of what the establishment clause of the First Amendment meant? Is it possible to conclude that the "wall of separation" erected by these and other recent cases was intended by the Founders when they drafted this provision? Is it possible to argue that these decisions were consistent with the policies and practices that grew from this Amendment during the first 175 years of our Nation's history? Is it possible to argue that these decisions were at all consistent with the will of the people?

Whatever one thinks about the merits of public school prayer, can they reasonably deny that it was the Supreme Court itself that amended the Constitution with their decisions in Engel and Abington. They amended the historic meaning of the First Amendment, not through the normal constitutional amendment route of Article V, not through the deliberate process of fashioning a new consensus for a revised First Amendment, but through the expedient of judicial review. Because a majority of the Court disliked what Madison and Jefferson and Randolph had put together, they took it upon themselves to serve in the capacity of a "continuing constitutional convention".

In the process, they utterly transformed a constitutional provision that had been found to have been compatible with a wide variety of contacts between church and state into one in which some unabridgeable "wall of separation" exists between the expression of religious values and the state. As Professor Cord pointed out in his testimony on Friday, the First Amendment of Madison and Jefferson, as opposed to that of Warren and Brennan, was compatible with tax-supported church schools, chaplaincies, trusts to spread religion to the Indians, construction assistance for churches, and-- of course-- prayer within public institutions.

It is not necessary to endorse any of these policies-- and I would not support several-- to ask nevertheless whether the Constitution in such an important respect ought to be altered by five men on the Supreme Court or by the kind of deliberate consensus required in the amendment article of

the Constitution. If we are going to have a permanent Constitution, one that is not written on water, I believe that we must rely on the citizenry to alter the supreme law of the land, not judges.

As a member myself of a minority religion, I have only the greatest respect for the enduring principles of the First Amendment. Properly understood, these principles are directed at tolerance in religious affairs, protection of those who profess faith in minority religions (or in no religion at all), the avoidance of preferential treatment toward any religious order or denomination, and the maintenance of the distinct spheres of church and state. None of these principles, however, demands the neutrality toward religious values as a whole-- nor indeed the apparent hostility toward it that seems to be emerging from decisions such as Lubbock and Brandon. While our Constitution indeed establishes a secular republic, it was never intended to establish one that was neutral on whether or not religion was to flourish.

I will very much look forward to the testimony of our witnesses today, and thank each of you for being here with us.

STATEMENT OF SENATOR STROM THURMOND (S.C.) BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION IN REFERENCE TO PROPOSED CONSTITUTIONAL AMENDMENTS RELATING TO SCHOOL PRAYER, MAY 2, 1983.

MR. CHAIRMAN:

Today's hearing marks the second of two days of hearings by the Subcommittee on the Constitution on the subject of proposed amendments to the Constitution relating to school prayer. This builds upon three days of hearings on the same subject held last year following the introduction of the Administration's proposed Amendment, as well as an additional day of hearing on Senator Denton's "equal access" legislation.

Let me emphasize once more that there are two distinct issues involved in these hearings: First, there is the Lubbock issue. In a circuit court decision last year, a Lubbock, Texas school board policy was found unconstitutional which permitted students to use public school facilities for student-initiated religious activities on the same basis as student-initiated non-religious activities. Thus, while athletic clubs and political clubs and social clubs can conduct extra-curricular activities on public school grounds, Bible study clubs are constitutionally forbidden to do so, according to the Lubbock decision. Second, there is the issue of school prayer. In a series of Supreme Court decisions, particularly those in Engel v. Vitale and Abington v. Schemp, the practice of voluntary classroom prayer at the outset of the school day has been found in violation of the First Amendment to the Constitution.

Mr. Chairman, I would observe, as I did yesterday, that the fundamental issue involved in the Judiciary Committee's focus is whether the Federal courts have departed from the original intent of the drafters of the First Amendment, as well as from the understanding given it for the first 175 years of our Nation's history.

The clear intent of the Founding Fathers was to ensure that the Federal government not establish a national church or provide preferential treatment to any single religious order or denomination. The purpose was to prevent any national ecclesiastical establishment. There is absolutely nothing in the history or development of the First Amendment, until the past generation, to suggest that it was designed to erect any "wall of separation" between the State and all expressions of religious values. Indeed, there was a profound awareness of the religious roots of the Constitution on the part of the Founders and a desire to ensure that the religious impulse remain a part of the Nation's constitutional and political fabric.

Mr. Chairman, when the Supreme Court in the mid-1960's ruled that voluntary prayer in the public schools was in violation of the Constitution, they engaged in amending the Constitution from the bench. In one fell swoop, they overturned the long-settled public policies of tens of thousands of communities across the country. A moment of prayer at the start of the school day-- a policy that had enriched the education of generations of school-children since the founding of the Republic-- was suddenly viewed as a menace to the First Amendment.

The average child, who is placed in the classroom for eight hours a day is allowed and encouraged to develop intellectually, physically, and emotionally, but even a moment of structured prayer is treated as unconstitutional. The child is educated in political theory, and sex education, and hygeine; he is taught baseball and football; he is instructed in music and art and literature; he is taught everything that goes into the building of individual character, but is absolutely forbidden from even a brief moment of prayer at the outset of the school day.

Because I disagree with the Court's prayer decisions, and because I believe that a well-rounded education requires some measure of personal introspection, I support a proposed constitutional amendment to overturn Engel and Abington. I look forward to the testimony of all of our witnesses to assist us in developing the most responsible proposal that we can develop.

Statement of

T.H. Bell, Secretary of Education

on

S.J. Res. 73 on Voluntary School Prayer

Amendment

Before the

Subcommittee on the Constitution

Senate Judiciary Committee

May 2, 1983

Secretary Bell is accompanied by:

Gary Bauer, Deputy Under Secretary for Planning, Budget and Evaluation

Mr. Chairman, Members of the Subcommittee:

I'm happy to have this opportunity to speak on behalf of the President's amendment on school prayer. The proposed amendment was reintroduced by Sen. Thurmond in the Senate on March 24, 1983 as Senate Joint Resolution 73. When I testified before the full Judiciary committee on Thursday, I briefly commented on President Reagan's proposed amendment. I appreciate this opportunity today to further express my support for the President's position on this matter of such enormous importance to the American people.

As this Committee is aware, this amendment reflects the wishes of the President and many Americans across the Nation as well.

In a public opinion poll completed just last year, the New York Times found that between 69 to 85 percent of the population approves of voluntary school prayer. At the same time, the Washington Post found that 75 percent of the American people support a constitutional amendment to allow prayer in public schools (Washington Post, May 22, 1982). This is an issue very much on the minds of Americans today. A response to the public's wishes seems to me to be long overdue.

In my testimony last week, I noted that the 'Equal Access' concept would serve to restore voluntary religious activity to an equal status with other extracurricular activities permitted on public school premises. Because we have drifted so far from the standards of liberty established by the Founding Fathers of our nation, such a suggestion might seem dramatic. For the first 170 years of our nation's experience under the First Amendment, states and localities were entrusted to make the delicate decisions required in determining the relationship of government to

religion. This Administration believes the historical record clearly reveals that the Founding Fathers never intended the Constitution to suppress religious speech in public places. Indeed, the history of public education in this country until 1963 was in actuality one of religious freedom. As a biographer of Horace Mann, the founder of modern public education has observed:

> He [Mann] took a firm stand against the idea of purely secular education, and on one occasion said he was in favor of religious instruction "to the extremest verge to which it can be carried without invading those rights of conscience which are established by the laws of God, and guaranteed to us by the Constitution of the State."

Schools represent the marketplace of ideas in which our future leaders are trained. Character, which is the bedrock of a civilization, is formed through making good choices rather than by limiting the selection of available options. Constitutional freedoms are nowhere more vital than in the context of American public schools (Shelton v. Tucker, 364 U.S. 479, 487 (1960). Mr. Justice Jackson observed in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943),

> That [boards of education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

In fact, prior to 1962, local school authorities demonstrated a respect both for religion and diverse views about religion.

The implied coercion theory presumes that group prayer by consenting students has a coercive effect upon the objecting students in violation of their right to the free exercise of religion. As one deeply engaged with public education for years I must register my disagreement over this charge. When teachers wore black armbands to protest the Vietnam war, wasn't their right of expression successfully defended against any charge that they were manipulating children? We know from letters and from public opinion polls that parents would welcome the influence upon their children of other students seeking to develop their character through involvement in religious activities in the public school setting.

This amendment only allows students to participate in prayer if they so desire. In local situations when children are too young to make independent decisions, the wishes of parents or guardians would be honored.

The President's school prayer amendment primarily revolves around the question of religious liberty. This Nation was founded upon the theme of religious liberty and freedom. Our heritage is a deeply religious one. The pledge of allegiance proclaims that we are "one Nation under God". Our coins are engraved with the motto, "in God We Trust". Since Benjamin Franklin requested that prayer be observed by the Constitutional Convention, prayer has been a part of our national assemblies. Today, both the Congress and the Supreme Court invoke God's name and ask his

blessings at the opening of every session and until 1962, the widespread practice of prayer had been allowed in public schools. In every inaugural address and in every Constitution of every State, reference is made to God. In the Chamber of the U.S. House of Representatives there is a sign over the Speaker's Chair that says "In God We Trust."

The 1962, 1963 Decisions marked the the erosion and decline of religious liberty in our Nation. Court decisions since then have served to limit the freedom of speech and the free exercise rights of students in America's schools. The President's proposal will, as he expressed, "restore the simple freedom of our citizens to offer prayer in our public schools and institutions."

From the beginning, America has been a profoundly religious nation with a tradition of publicly declaring and encouraging a belief in and dependence upon God; and from the beginning, education was treated as an enterprise with inseparable religious and moral components. To the Founders, a wholly secular education would have been a contradiction in terms, a certain blueprint for disaster.

The President's amendment would enable students the opportunity to exercise their Constitutional right of freedom of speech. I hope that this distinguished committee will rule promptly and favorably on this matter and by so doing reflect the will of the people of this Nation.

Thank you.

MICHAEL J. MALBIN
AMERICAN ENTERPRISE INSTITUTE
WASHINGTON, D.C.

TESTIMONY BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

MY NAME IS MICHAEL MALBIN. I AM A POLITICAL SCIENTIST AT THE AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, WHERE I AM A RESIDENT FELLOW.

I APPRECIATE YOUR ASKING ME TO TESTIFY TODAY ON WHAT THE MEMBERS OF THE FIRST CONGRESS INTENDED THE ESTABLISHMENT CLAUSE TO MEAN, AND THE IMPLICATIONS OF THE ORIGINAL MEANING FOR CONTEMPORARY CONCERNS ABOUT SCHOOL PRAYER AND OTHER ISSUES. WHAT I HAVE TO SAY WILL BE MY OWN OPINIONS, BASED ON MY OWN PUBLISHED INVESTIGATION OF THE HISTORICAL RECORD. AS YOU KNOW, AEI TAKES NO

ORGANIZATIONAL POSITIONS ON MATTERS OF PUBLIC POLICY. ON THIS SUBJECT, AS ON MANY OTHERS, THERE IS A WIDE DIVERSITY OF OPINION AT THE INSTITUTE.

MR. CHAIRMAN, I KNOW YOUR TIME IS LIMITED. I WILL SUMMARIZE MY HISTORICAL RESEARCH BRIEFLY. TO SUPPORT WHAT I SAY, I REQUEST THAT THREE ITEMS BE ENTERED INTO THE RECORD: MY BRIEF MONOGRAPH, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (AEI, 1978), A REPRINT OF A SPEECH I GAVE TWO YEARS AGO AT CLEMSON UNIVERSITY ENTITLED RELIGION, LIBERTY AND LAW IN THE AMERICAN FOUNDING (AEI, 1981) AND A CHAPTER CALLED "RELIGION AND THE FOUNDING PRINCIPLE" FROM WALTER BERNS' BOOK, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (BASIC BOOKS, 1976).

THE SUPREME COURT HAS HELD SINCE 1947 THAT THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE APPLIES TO THE STATES AS WELL AS CONGRESS, AND THAT IT PROHIBITS BOTH STATE AND FEDERAL LAW FROM GIVING DIRECT OR INDIRECT ASSISTANCE TO RELIGION. THE LAW, ACCORDING TO THE COURT, MUST BE STRICTLY NEUTRAL BETWEEN RELIGIOUS AND SECULAR INSTITUTIONS AND ACTIVITIES.

THE SUPREME COURT ASSERTED IN THE EVERSON, ENGEL AND SCHEMPP CASES THAT ITS NEUTRALITY TEST WAS BASED ON THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT. AS EVIDENCE, IT DREW UPON A PRIVATE LETTER WRITTEN BY THOMAS JEFFERSON IN 1802, AND SOME STATEMENTS JEFFERSON AND JAMES MADISON MADE IN SUPPORT OF THE 1784 VIRGINIA BILL FOR ESTABLISHING RELIGIOUS FREEDOM. BUT JEFFERSON WAS NOT EVEN A MEMBER OF THE FIRST CONGRESS. MADISON

WAS THE FLOOR MANAGER FOR THE AMENDMENTS, TO BE SURE, BUT ONE SHOULD NOT INTERPRET THE RESULT OF A COLLECTIVE DELIBERATION SOLELY FROM STATEMENTS MADE BY A FLOOR MANAGER IN AN ENTIRELY DIFFERENT SETTING FIVE YEARS BEFORE, PARTICULARLY NOT WHEN WE HAVE BETTER RECORDS AVAILABLE, THE ANNALS OF CONGRESS.

THE DEBATES OVER THE BILL OF RIGHTS IN THE ANNALS ARE LESS COMPLETE THAN WE MIGHT WISH. THERE WAS MORE DISCUSSION OF THE ESTABLISHMENT CLAUSE, HOWEVER, THAN OF MOST OF THE OTHER PROPOSED AMENDMENTS. ALTHOUGH THAT DEBATE LEFT MANY QUESTIONS UNSETTLED, IT WAS CLEAR ON SOME KEY POINTS.

MADISON THOUGHT THE BILL OF RIGHTS WAS NOT NECESSARY, GIVEN HIS VIEWS ON ENUMERATED POWERS AND THE NECESSARY AND PROPER CLAUSE. THE BEST PROTECTION, HE THOUGHT, AGAINST A NATIONAL RELIGIOUS ESTABLISHMENT, OR ALL FORMS OF MAJORITY TYRANNY, WAS AN EXTENDED REPUBLIC THAT WAS FRIENDLY TO AND FOSTERED A MULTIPLICITY OF SECTS, OPINIONS AND INTERESTS.

NEVERTHELESS, TO RESPOND TO CONCERNS RAISED DURING RATIFICATION, MADISON AGREED TO SPONSOR A SET OF AMENDMENTS IN THE FIRST CONGRESS. ONE OF THEM READ "NO RELIGION SHALL BE ESTABLISHED BY LAW". IT WAS INTERPRETED BY MADISON TO MEAN "THAT CONGRESS SHOULD NOT ESTABLISH A RELIGION." PLEASE NOTE WHAT MADISON SAID: CONGRESS SHOULD NOT ESTABLISH A RELIGION; NOT: CONGRESS SHOULD NOT ESTABLISH RELIGION AS SUCH.

BUT MADISON'S INTERPRETATION DID NOT MATCH HIS ORIGINAL LANGUAGE. THIS LED MEMBERS OF CONGRESS TO EXPRESS TWO DIFFERENT KINDS OF CONCERNS. ONE, TO QUOTE BENJAMIN HUNTINGTON, WAS "THAT THE WORDS MIGHT BE TAKEN IN SUCH LATITUDE AS TO BE EXTREMELY HURTFUL TO THE CAUSE OF RELIGION". THE OTHER WAS THAT THE AMENDMENT MIGHT PERMIT CONGRESS TO PASS LAWS THAT WOULD THREATEN RELIGIOUS ESTABLISHMENTS IN THE STATES. VARIOUS FORMULAS WERE OFFERED TO DEAL WITH THESE ISSUES. SOME WOULD HAVE LIMITED THE AMENDMENT TO THE ESTABLISHMENT OF ARTICLES OF FAITH, BUT THAT DID NOT SATISFY MEMBERS WHO WERE CONCERNED ABOUT OTHER, LESS DRASTIC, FORMS OF DISCRIMINATION. ONE FORMULA ADOPTED TEMPORARILY, WOULD HAVE PROHIBITED ANY LAW "TOUCHING RELIGION"--A FORM THAT WOULD SATISFY TODAY'S MOST EXTREME SEPARATIONISTS AT THE NATIONAL LEVEL, WHILE ALSO BARRING ANY LAW THAT EVEN INDIRECTLY AFFECTED ESTABLISHMENTS IN THE STATES. THE FINAL LANGUAGE COMPROMISED BOTH ISSUES. LAWS TOUCHING RELIGION WERE ALLOWED, BUT NOT ONES DIRECTLY "RESPECTING AN ESTABLISHMENT OF RELIGION" IN THE STATES. AT THE SAME TIME, THE LANGUAGE PROHIBITED FEDERAL LAWS THAT FAVORED ONE RELIGION OR GROUP OF RELIGIONS OVER OTHERS--NOTE THE PHRASE RESPECTING AN ESTABLISHMENT OF RELIGION RATHER THAN THE ESTABLISHMENT OF RELIGION--BUT THE LANGUAGE DID NOT PROHIBIT LAWS THAT MIGHT TEND TO ASSIST RELIGION AS SUCH.

THE FIRST CONGRESS DID NOT EXPECT THE BILL OF RIGHTS TO BE INCONSISTENT WITH THE NORTHWEST ORDINANCE OF 1787, WHICH THE CONGRESS REENACTED IN 1789. ONE KEY CLAUSE IN THE ORDINANCE READ AS FOLLOWS:

"RELIGION, MORALITY, AND KNOWLEDGE BEING NECESSARY TO GOOD GOVERNMENT AND THE HAPPINESS OF MANKIND, SCHOOLS AND THE MEANS OF LEARNING SHALL FOREVER BE ENCOURAGED." THIS CLAUSE CLEARLY IMPLIES THAT SCHOOLS, WHICH WERE TO BE BUILT ON FEDERAL LANDS WITH FEDERAL ASSISTANCE, WERE EXPECTED TO PROMOTE RELIGION AS WELL AS MORALITY. IN FACT, MOST SCHOOLS AT THIS TIME WERE CHURCH-RUN SECTARIAN SCHOOLS. THE AID WAS OPEN, HOWEVER, TO ANY SECT THAT APPLIED.

IN SUMMARIZING THE HISTORY, I SHOULD LIKE TO EMPHASIZE THE BROAD AREA OF AGREEMENT BETWEEN MADISON AND THE OTHERS IN THE FIRST CONGRESS. THEY ALL WANTED RELIGION TO FLOURISH; BUT THEY ALL WANTED A SECULAR GOVERNMENT. THEY ALL THOUGHT A MULTIPLICITY OF SECTS WOULD HELP PREVENT DOMINATION BY ANY ONE SECT, AND THUS HELP AVOID THE RELIGIONS DIVISIVENESS AND WARFARE WITH WHICH THEY WERE ALL SO FAMILIAR FROM RECENT ENGLISH HISTORY. WE SHOULD NOT LOSE SIGHT OF THE IMPORTANCE OF THIS CONCERN TO THE FRAMERS, AS WE SEEK TO CORRECT RECENT MISINTERPRETATIONS OF THEIR INTENT.

AT THE SAME TIME, HOWEVER, MOST MEMBERS OF THE FIRST CONGRESS ALSO THOUGHT RELIGION WAS USEFUL, PERHAPS EVEN NECESSARY, FOR TEACHING MORALITY. MOST ALSO THOUGHT A FREE REPUBLIC NEEDED CITIZENS WHO HAD A MORAL EDUCATION. THEY THUS TENDED TO VIEW NONDISCRIMINATORY AID TO RELIGION NOT AS A POLICY DESIGNED TO ACHIEVE RELIGIOUS OBJECTIVES, BUT AS ONE, TO USE THE CURRENT LANGUAGE "WITH A SECULAR PURPOSE AND EFFECT."

WHAT DOES ALL THIS MEAN FOR CONTEMPORARY DELIBERATIONS? OBVIOUSLY, THE INTENTIONS OF THE FRAMERS CANNOT BE BINDING UPON YOU. THE AMENDING POWER SPECIFICALLY GRANTS YOU THE AUTHORITY TO MAKE YOUR OWN DETERMINATIONS ON THESE MATTERS. ON THE OTHER HAND, I PERSONALLY BELIEVE THE FRAMERS' INTENTIONS OFFER MORE THAN HISTORICAL GUIDANCE. I BELIEVE THEIR INTENTIONS WERE WISE, AND REMAIN SO TODAY.

IN APPLYING THE FRAMERS' VIEW OF ESTABLISHMENT, WE FIRST HAVE TO DECIDE HOW TO HANDLE THE FEDERALISM ISSUE. THE ESTABLISHMENT CLAUSE, WE SAW, PROHIBITED CONGRESS MAKING LAWS TO HELP OR HURT THE STATE RELIGIOUS ESTABLISHMENTS. THE EVERSON CASE OF 1947 SAID THE FOURTEENTH AMENDMENT APPLIED THE ESTABLISHMENT CLAUSE TO THE STATES. THIS CREATED A LOGICAL ABSURDITY. APPLYING THE ORIGINAL INTENTION TO THE STATES WOULD MEAN THAT NO STATE COULD MAKE ANY LAW TO HELP OR HURT A STATE RELIGIOUS ESTABLISHMENT. NOR CAN ONE GET OUT OF THIS LOGICAL ABSURDITY BY SAYING THAT THE FOURTEENTH AMENDMENT CHANGED THE SITUATION. IF THE AUTHORS OF THE FOURTEENTH AMENDMENT HAD THOUGHT THIS, BLAINE WOULD NOT HAVE OFFERED HIS OWN FAMOUS AMENDMENT, WHICH PASSED THE HOUSE AND FAILED IN THE SENATE IN 1876 AND READ AS FOLLOWS: "NO STATE SHALL MAKE ANY LAW RESPECTING AN ESTABLISHMENT OF RELIGION OR PROHIBITING THE FREE EXERCISE THEREOF." THIS AMENDMENT CLEARLY WOULD HAVE BEEN REDUNDENT IF THE ORIGINAL SUPPORTERS OF THE FOURTEENTH AMENDMENT, BLAINE INCLUDED, HAD THOUGHT OF IT AS "INCORPORATING" THE ESTABLISHMENT CLAUSE.

THAT HAVING BEEN SAID, I WOULD NOT HAVE THE TEMERITY HERE TO SUGGEST HOW YOU MIGHT ADDRESS THE FEDERALISM ISSUE TODAY. ITS IMPLICATIONS GO WELL BEYOND ESTABLISHMENT AND WOULD INVOLVE YOU IN ISSUES RELATING TO THE WHOLE OF THE BILL OF RIGHTS. THEREFORE, LET US ASSUME, THE FEDERALIZATION OF THE ESTABLISHMENT CLAUSE FOR THE SAKE OF DISCUSSION--EITHER BECAUSE IT IS A JUDICIAL AND POLITICAL GIVEN OR BECAUSE WE ACCEPT IT, AS I DO, AS SOUND POLICY, IF NOT GOOD LAW, IN ISSUES RELATING TO RELIGIOUS ESTABLISHMENTS.

UNDER THIS ASSUMPTION, HOW DO SOME CONTEMPORARY ISSUES MEASURE UP TO THE REST OF WHAT THE FRAMERS INTENDED IN THE ESTABLISHMENT CLAUSE? SOME ISSUES ARE EASY, IN MY OPINION--DESPITE SOME LOWER COURT RULINGS. TUITION TAX CREDITS AND EDUCATION VOUCHERS WOULD BE ALLOWED UNDER ANY NONDISCRIMINATION TEST. UNDER THE FRAMERS' TEST, THEY CLEARLY DO NOT DISCRIMINATE AMONG RELIGIONS. UNDER THE MORE MODERN TEST, THEY WOULD NOT DISCRIMINATE IN FAVOR OF RELIGION AS SUCH, AS LONG AS THE AMOUNT OF AID DOES NOT EXCEED GOVERNMENT SPENDING FOR PUBLIC SCHOOL STUDENTS.

EQUAL ACCESS IS SLIGHTLY MORE DIFFICULT--BUT ONLY SLIGHTLY. PROVIDING EQUAL ACCESS TO SCHOOL FACILITIES FOR RELIGIOUS CLUBS AFTER HOURS SEEMS TO RAISE NO PROBLEMS OF DISCRIMINATION, AS LONG AS THE BUILDING REMAINS OPEN FOR OTHER CLUBS ANYWAY. ALLOWING THIS DURING SCHOOL HOURS MIGHT BE MORE PROBLEMATIC, DEPENDING UPON PARTICULAR FACT SITUATIONS, SINCE SECONDARY SCHOOLS ARE NOT PRECISELY THE SAME AS COLLEGES, WHERE A STUDENT'S TIME OUTSIDE OF CLASS IS HIS OR HER OWN.

PRAYER IS MUCH TRICKIER THAN TAX CREDITS, VOUCHERS OR EQUAL ACCESS. I THINK MOST PEOPLE TODAY WOULD AGREE THAT REQUIRING A STUDENT TO SAY A PRAYER WOULD BE UNACCEPTABLE. THERE IS NO SUCH THING AS A NONDISCRIMINATORY PRAYER. EVEN A NONDESCRIPT PRAYER THANKING GOD FOR THE FOOD WE EAT INVOKES A BEING NOT AT ALL CONSISTENT WITH THE SUPREME POWERS ACCEPTED BY THOSE AMERICANS WHO MAY BE BUDDHISTS, HINDUS OR MEMBERS OF ONE OF THE OTHER LARGE EASTERN RELIGIONS.

WHAT ABOUT VOLUNTARY PRAYER? HERE WE HAVE TO BE MORE PRECISE THAN THE PRESIDENT'S PROPOSED AMENDMENT ABOUT WHAT IS OR IS NOT VOLUNTARY. IS A PRAYER VOLUNTARY IF STUDENTS ARE TOLD BY THEIR TEACHER THAT THEY MAY STAND SILENTLY WHILE THEIR CLASSMATES RECITE WORDS WRITTEN BY PUBLIC OFFICIALS--THE SITUATION IN THE ENGEL CASE? I THINK SUCH A SITUATION MIGHT BE VOLUNTARY FOR ADULTS, BUT NOT FOR CHILDREN. CHILDREN MAY OPT OUT, BUT ONLY AT THE COST OF ASSERTING AND MAINTAINING THEIR DIFFERENCE FROM THEIR PEERS. THIS CAN BE A HIGH PRICE TO ASK OF CHILDREN, ONE THAT IS NOT ENTIRELY FREE, AND ONE THAT, I BELIEVE, HELPS PROMOTE THE TENSION AND DIVISIVENESS THE FRAMERS' WERE TRYING TO AVOID.

DOES IT MAKE ANY DIFFERENCE IF WE KEEP THE ABOVE FACTS, BUT USE A PRAYER THAT WAS NOT WRITTEN BY PUBLIC OFFICIALS--SUCH AS THE LORD'S PRAYER USED IN THE SCHEMPP CASE? HERE AGAIN I BELIEVE THE SUPREME COURT REACHED A DECISION THAT WAS CONSISTENT WITH THE FRAMERS' INTENTIONS EVEN AS IT MISSTATED THEM AND APPLIED A MISGUIDED RULE OF LAW. THE SITUATION IS NO MORE VOLUNTARY THAN THE ONE IN ENGEL.

IN ADDITION, PRAYERS FROM ONE RELIGIOUS SOURCE MUST IN THEIR NATURE DISCRIMINATE AMONG RELIGIONS; THEY CANNOT HELP DOING OTHERWISE.

WHAT IF A TEACHER JUST ASKS STUDENTS TO TAKE TURNS LEADING THE CLASS IN WHATEVER THE STUDENT MAY WISH? THAT WOULD CHANGE THE DISCRIMINATION'S PREDICTABILITY, AND INCREASE POTENTIAL DIVISIVENESS, BUT LEAVE EVERYTHING ELSE THE SAME.

WHAT IF THE TEACHER JUST SAID "LET US PRAY," FOLLOWED BY SILENCE? THAT WOULD BE LESS OF A PROBLEM, BUT STILL A PROBLEM--EVEN USING THE FRAMERS' TEST. THE FACT IS THAT MANY RELIGIOUS PEOPLE DO NOT PRAY, AS MOST OF US THINK OF PRAYER. PRAYER, IN MY OWN RELIGION, INVOLVES WHAT MARTEN BUBER CALLS AN "I-THOU" RELATIONSHIP. ONE PRAYS <u>TO</u> A DIVINE BEING WHO CARES. THE IDEA OF PRAYER THEREFORE IS VERY DIFFERENT FROM THAT OF MEDITATION, WHICH IS WHAT ONE DOES IN MANY EASTERN SECTS. MEDITATION AMONG SOME BUDDHISTS, FOR EXAMPLE, INVOLVES <u>BECOMING</u> SOMETHING, NOT ASKING, THANKING OR PRAISING.

FINALLY, WHAT IF THE TEACHER SAYS JUST A LITTLE MORE AND CALLS FOR A MOMENT OF SILENCE FOR MEDITATION, PRAYER, OR PERSONAL REFLECTION? HERE, I CAN SEE NO PROBLEM. SOME LOWER COURTS, IT IS TRUE, HAVE HELD THAT ALTHOUGH TEACHERS MAY CALL FOR MOMENTS OF SILENCE FOR MEDITATION OR PERSONAL REFLECTION, THEY MAY NOT MENTION PRAYER. I FIND THIS PERVERSE. THE TEACHER IN THIS SITUATION IS NOT RECOMMENDING PRAYER BUT SUGGESTING IT AS ONE OF SEVERAL POSSIBILITIES. YES, INCLUDING PRAYER AMONG THE OPTIONS MAY ENCOURAGE MORE STUDENTS TO PRAY. BUT, ALTHOUGH THE LOWER COURTS FOUND THIS DECISIVE, I

THINK IT IS CONSTITUTIONALLY IRRELEVANT. IT IS PERFECTLY NEUTRAL AMONG RELIGIONS AND BETWEEN RELIGION AND IRRELIGION. TWO LOWER COURTS HAVE DENIED THE LATTER BY SAYING THAT INCLUDING PRAYERS SERVES TO ENCOURAGE RELIGION. IT DOES, BUT NOT AT THE EXPENSE OF ANYTHING ELSE. THE FUNDAMENTAL MISTAKE HERE, MOVING BACK TO THE PERSPECTIVE OF 1789, IS THAT THE FRAMERS THOUGHT THEY WERE SERVING SECULAR PURPOSES PRECISELY BY ENCOURAGING RELIGION AND RELIGIOUS DIVERSITY IN NONDISCRIMINATORY WAYS.

THE LOWER COURT DECISIONS ON SILENCE EXPOSE A PROBLEM THAT I THINK LIES AT THE HEART OF THE CURRENT PRESSURE FOR A SCHOOL PRAYER AMENDMENT. THE COURTS HAVE PROVEN THEMSELVES TO BE EXTREMELY INSENSITIVE IN ISSUES THAT RELATE TO RELIGION. PEOPLE WHO THINK THE COURTS HAVE MOVED BEYOND NEUTRALITY TO HOSTILITY, DO HAVE SOME BASIS FOR THEIR COMPLAINTS. THERE IS A GRAVE DANGER, HOWEVER, THAT REACTING TO INSENSITIVITY MAY PRODUCE SOME INSENSISTIVITY OF THE OPPOSITE SORT.

LET ME GIVE A PERSONAL EXAMPLE TO EXPLAIN WHAT I MEAN. I GREW UP IN NEW YORK. FOR TWO YEARS, I WAS THE ONLY JEW IN A CLASS THAT WAS REQUIRED TO SAY THE REGENTS' PRAYER THAT WAS OVERTURNED IN ENGEL. I HAD NO PROBLEM PERSONALLY WITH THAT PRAYER. ALL IT SAID WAS "ALMIGHTY GOD, WE ACKNOWLEDGE OUR DEPENDENCE ON THEE, AND WE BESEECH THY BLESSINGS UPON US, OUR PARENTS, OUR TEACHERS, OUR COUNTRY, AND UPON ALL MANKIND," BUT MOST OF MY CLASSMATES DID HAVE A PROBLEM. NO, THEY WERE NOT BUDDHISTS OR ATHEISTS. MOST WERE LUTHERANS OR CATHOLICS WHO THOUGHT OF THE PRAYER AS PABLUM. SO, MANY OF THEM ADDED SOMETHING TO GIVE

THE PRAYER MEANING. AT THE END, THEY WOULD ADD: "IN THE NAME OF THE FATHER, THE SON AND THE HOLY GHOST, AMEN." NOW, I DO NOT BLAME THEM FOR ADDING THOSE WORDS. AFTER ALL, WHAT IS THE PURPOSE OF A PRAYER THAT HAS NO MEANING FOR THE PERSON PRAYING?

BUT WHAT WAS THE REAL EFFECT OF THE REGENTS' PRAYER IN THIS SITUATION? THE MAJORITY WERE FACED WITH A CHOICE: ADD SOMETHING TO GIVE THE PRAYER MEANING, OR STAND THERE AND BE OFFENDED. BY NOT DISCIPLINING THE STUDENTS WHO ADDED SOMETHING, THE TEACHER, WHO WAS FACED WITH AN IMPOSSIBLE CHOICE, PERMITTED THE PRAYER TO REINFORCE THE RELIGION OF THE MAJORITY, AND THUS SERVE SOME OF ITS PURPOSE. BUT SHE DID SO AT THE COST OF PROMOTING DIVISIVENESS AND INTOLERANCE, HEATING UP THE VERY PASSIONS THE FRAMERS WERE TRYING TO COOL OFF BY PROMOTING RELIGIOUS DIVERSITY. THESE PASSIONS WERE THE VERY ONES THAT PRODUCE RELIGIOUS WARFARE ON A GRAND SCALE, SCHOOLBOY FIST-FIGHTS ON A LESSER ONE. AND WHAT FOR? DID THIS EXERCISE REALLY DO ANYTHING MORE TO REINFORCE THE RELIGIOUS BELIEFS OF THE MAJORITY THAN WOULD A MOMENT OF SILENCE? I THINK NOT.

IN CONCLUSION, THE FRAMERS WANTED TO ENCOURAGE RELIGION BOTH (1) BECAUSE THEY THOUGHT RELIGION WAS SALUTARY AND THUS SERVED A SECULAR PURPOSE, AND (2) BECAUSE THEY THOUGHT DIVERSITY AND THE REQUIREMENT OF NONDISCRIMINATION WOULD PROMOTE CIVIL PEACE. BOTH HALVES OF THIS WERE EQUALLY CRUCIAL TO THEM. I URGE YOU TO KEEP THEM BOTH IN MIND AS YOU PROCEED WITH YOUR DELIBERATIONS.