ARTICLE

PUBLIC SCHOOL CHAPLAINS: CONSTITUTIONAL SOLUTION TO THE SCHOOL PRAYER CONTROVERSY

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In the second edition of his highly regarded and widely read treatise on American constitutional law, Harvard law professor Lawrence Tribe writes with confidence that "[p]rayer as an established part of the official school day is always forbidden."[1] What is so remarkable about this unequivocal statement is that it is based upon a line of Supreme Court cases that is not yet thirty years old.[2] Throughout America's colonial period, prayer and Bible reading were central to an educational system dominated by the family and the church. Under the leadership first of Thomas Jefferson in Virginia and then of Horace Mann in Massachusetts, a tax-supported public school system began to emerge in the nation's first one hundred years. It was not until the late eighteenth century that the state began to play any significant role in education. Dominated by open endorsement of a generalized Protestant religion, prayer and Bible reading were continued except for an occasional attack upon such practices in the courts.[3]

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1. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1169 (2d ed. 1988). Professor Tribe's statement is squarely in the mainstream of legal scholarship on the constitutionality of school prayer. *See, e.g.*, G. GUNTHER, CONSTITUTIONAL LAW 1524-29 (12th ed. 1991)

2. The Court's first decision was handed down in Engel v. Vitale, 370 U.S. 421 (1962). One year later, the Court extended the principle announced in *Engel* beyond state-composed prayers in a ruling banning the recitation of the Lord's Prayer. Abington School Dist. v. Schempp, 374 U.S. 203 (1963). Twenty-two years later, the Court struck down an Alabama law authorizing schools to set aside a "one minute period of silence for meditation or for voluntary prayer." Wallace v. Jaffree, 472 U.S. 38 (1985).

3. R. MCCARTHY, J. SKILLEN & W. HARPER, DISESTABLISHMENT A SECOND TIME: GENUINE PLURALISM FOR AMERICAN SCHOOLS 52-72 (1982); Gaustad, *Church, State, and Education in Historical Perspective*, in RELIGION, THE STATE, AND EDUCATION 11, 14-21 (J. Wood, Jr., ed. 1984).

Notwithstanding such legal challenges, and the political challenges to such practices raised by Catholics, Jews, and various other "minority groups," expressions of Christianity by teachers and students through prayer and Bible reading remained largely unchallenged until the 1940s, culminating in the Court's rulings against prayer and Bible reading in the 1960s.[4] Nevertheless, many schools continued prayer and Bible reading practices until they finally died out under persistent threats of lawsuits and under an educational leadership committed to adhering to the Supreme Court's rulings. Prayer and Bible reading would still occupy center stage in most American communities, despite the proliferation of other religious traditions, but for the Supreme Court's consistent rulings since 1962 excluding prayer and Bible reading from the public school classrooms.

In the name of the first amendment's prohibition against the establishment of religion, the Court has insisted that prayer and Bible reading must be excluded lest, according to Professor Tribe, government power be "lent ... to a religious cause."[5] The Constitution, Tribe claims, requires religious neutrality and prohibits "any form of official school prayer [because it] violates principles of neutrality":[6]

> Even if different days were given over to different religions' prayers, government would be endorsing religion over nonreligion, endorsing religions that include prayers over those that do not, and endorsing religions that favor public prayer over those that believe prayer must be private.[7]

So convinced that forbidding prayer in the public school classroom places the government in a neutral position on religion, Tribe never asks whether excluding prayer does not inevitably endorse nonreligion over religion, endorse religions that do not include prayer over those that do, and endorse religions that oppose public prayer over those that favor it. A recent opinion written by Senior Circuit Judge Hugh H. Bownes typifies the blindness of those who claim that outlawing prayer yields a neutral playing field for all religions.[8] In the body of his opinion,

4. Wood, *Religion and Education in American Church-State Relations*, in RELIGION, THE STATE, AND EDUCATION 25, 29-33 (J. Wood, Jr., ed. 1984).

5. L. TRIBE, *supra* note 1, at 1170.

6. *Id.* at 1170-71.

7. *Id.* at 1171.

8. Lee v. Weisman, 908 F.2d 1090, 1090 (1st Cir. 1990) (Bownes, J., concurring).

Judge Bownes embraces the lower court's holding that "it is self-evident that a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion."[9] Yet in an opening footnote, the judge invokes "formidable religious authority condemning prayer in public," citing the words of Jesus Christ in Matthew 6:5-7.[10] The truth is that forbidding prayer is no more religiously neutral than allowing it.

Not only do the Court and its supporters claim that school prayer must be forbidden lest the government take sides in religious disputes, but they also claim that prayer must be excluded from the classroom to avoid religious indoctrination of students. Again, Professor Tribe has stated this rationale with characteristic confidence and conviction:

> Even where dissenting students are entirely free to leave the room, state power remains at issue. The choice presented to students—either to take part in a particular religious exercise or to wait passively elsewhere—implies that the exercise is a valid element of a legally required education; the norm is religion and dissenters must opt out. In addition, the combination of official ceremony and peer pressure is likely to make any such religious session inherently coercive.[11]

If prayer is forbidden in order not to coerce those students who oppose prayer, what happens to the student who wants to pray? Must he opt out and go elsewhere for prayer? Must he bow his head hurriedly in silence hoping that his fellow students not notice him and that he not miss the morning announcements? If prayer is not offered, is it not inevitable that the norm is "nonreligious" and "religious" dissenters will be coerced to conform to that standard?

As was the case with his neutrality claim, Tribe does not even consider the possibility that excluding prayer does not alleviate the problem of coercion. It merely shifts the coercive power of the state from one favoring a God-centered view of life and learning to one favoring another view.[12]

A third claim made by those who support the exclusion of school prayer is that prayer in the public school "may polarize

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9. *Id.* at 1095.

10. *Id.* at 1090 n.1.

11. L. TRIBE, *supra* note 1, at 1170.

12. *See, e.g.*, Ball, *Parental Rights in Schooling*, in A BLUEPRINT FOR EDUCATION REFORM 11, 14-21 (C. Marshner ed. 1984).

citizens and leaders around a religious axis, creating the sort of divisiveness that the first amendment was partly intended to minimize."[13] In other words, the Court fears not only religious totalitarianism but religious anarchy. According to this view, the threat of anarchy has multiplied as the number of nonbelievers has increased and as America's civil Protestant religious tradition has receded into the twilight of the twentieth century. So the solution to this loss of religious homogeneity is to eliminate all religious exercises from taking place in school during the day.

Again, what is remarkable about this claim is that it is taken seriously. Has the elimination of prayer from the public schools removed the element of divisiveness and polarization from American political life? To the contrary, the Court's relentless attack on prayer and Bible reading in the public schools has polarized citizens and their leaders around a "religious axis" that only the most myopic observer would miss. For example, a variety of amendments to the Constitution have been offered to restore school prayer over the past two decades. These proposals have been as politically divisive as any in America's history and have pitted Christians against Jews, Catholics against Protestants, Fundamentalists against Evangelicals, as well as believers against unbelievers.[14]

Exclusion of prayer from the public schools will not resolve the divisiveness issue any more than it will resolve the neutrality and indoctrination issues. Yet the promise of neutrality, the fear of indoctrination, and the threat of anarchy continue to be paraded before the American people and the courts as the American Civil Liberties Union and others continue without abatement their campaign to rid the public schools of all vestiges of religion. School boards are attacked with lawsuits to remove prayer from graduation exercises and from school sporting events.[15] Music directors are cautioned about the inclusion of traditional Christmas carols in the annual Christmas holiday program. Indeed, brochures are written for anxious principals advising them how to walk the

13. L. TRIBE, *supra* note 1, at 1171.

14. *See, e.g.*, Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980).

15. *See, e.g.*, Graham v. Central Community School Dist., 608 F. Supp. 531 (D. Iowa 1985) (prayer at high school graduation); Jager v. Douglas County School Dist., 862 F.2d 824 (11th Cir. 1989) (prayer before high school football game). *See generally* DuPuy, *Religion, Graduation, and the First Amendment: A Threat or a Shadow?*, 35 DRAKE L. REV. 323 (1985-86); *Prayers Ignore Court Ban*, CHRISTIANITY TODAY, Nov. 13, 1989, at 38.

tight-rope between teaching about religion and celebrating a religious holiday to comply with the latest court decisions.[16]

Efforts to hold back this tidal wave of court rulings have not yielded a single victory of great significance. For the most part, the litigation strategy, adopted by those who have tried to stop further erosion of the soil holding religion in the public schools, has been to accept the Supreme Court's three-part establishment clause test and attempt to meet it.[17] That strategy has clearly failed and for good reason: Each prong of the test embodies one of each of three claims made on behalf of the opponents of prayer, Bible reading, and other "religious activities" in the public schools. Until those claims—the promise of neutrality, the fear of indoctrination, and the threat of anarchy—are challenged, the erosion of religion in the public schools will continue.

Not only have proponents of Bible reading and prayer in the public schools adopted a litigation strategy doomed to fail, they have sought legislative solutions of dubious merit. Senator Jesse Helms has introduced several bills to oust the federal courts from exercising jurisdiction over constitutional cases involving "involuntary prayer" in the public schools.[18] Such a measure is of doubtful constitutional validity; moreover, it would leave intact state court jurisdiction over such matters governed by existing Supreme Court precedents that, if followed, would ban all religious activities in the public schools. Of greater constitutional merit are the several proposed constitutional amendments overruling the Court's decisions in the prayer and Bible-reading cases. But none of these amendments have met with success in the United States Congress, having failed to secure the necessary two-thirds vote required for amendments to the Constitution.[19]

The first purpose of this article is to lay down the gauntlet to the Supreme Court's three-part establishment clause test. Thus, in part I, I demonstrate that the three claims of that test—the

16. *School Caught in Uproar Holds Religion-Free Program,* Richmond (Va.) Times Dispatch, Dec. 15, 1990 (Located in NEWSBANK [Microform], Education, 1990 141:D2, fiche); *Celebrating Christmas in Public Schools,* CHRISTIANITY TODAY, Dec. 11, 1987, at 55-56; Goodhue, *Introducing Religion into the Classroom,* CHRISTIAN CENTURY, Apr. 17, 1991, at 431.

17. For exceptions to this strategy, see Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987) and Brief for the Petitioners at 9-14, Lee v. Weisman, 908 F.2d 1090 (1st Cir. 1990), *cert. granted,* 111 S.Ct. 1305 (Mar. 18, 1991) (No. 90-1014) [hereinafter Petitioners' Brief].

18. G. GUNTHER, *supra* note 1, at 46-47.

19. *Id.* at 1525 n.3.

promise of neutrality, the freedom from indoctrination, and the avoidance of anarchy—are all false and inevitably prejudicial to religion.

The second purpose is to propose a constitutionally viable and educationally sound solution. Thus, in parts II and III, I outline a strategy to establish public school chaplaincies at the local level to meet the educational needs of society and to preserve free choice of religion for America's parents and school children and, at the same time, to satisfy the constitutional ban on laws respecting an establishment of religion.

I. BANNING RELIGION FROM PUBLIC SCHOOLS: THREE CONSTITUTIONAL FALLACIES

Prior to 1963, the Supreme Court tested claims that the establishment clause had been violated by determining if the government had backed with its coercive power, directly or indirectly, a religious activity.[20] In *Abington School District v. Schempp*,[21] however, the Court, following dictum in the 1962 *Engel* case, enlisted a new test in ruling that the Pennsylvania law prescribing daily recitation of the Lord's Prayer and reading of selected Bible verses violated the establishment clause. Justice Tom Clark's majority opinion stated "that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[22] Later, this two-pronged approach would be expanded by the Court in *Lemon v. Kurtzman*[23] into a three-part test, as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[24]

In both the *Schempp* and the *Lemon* cases, the secular purpose requirement axiomatically followed from the Court's assumption that the establishment clause demanded government neutrality

20. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 453 (1961); Zorach v. Clauson, 343 U.S. 306, 311 (1952); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 209 (1948); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

21. 374 U.S. 203 (1963).

22. *Id.* at 222.

23. 403 U.S. 602 (1971).

24. *Id.* at 612-13 (citations omitted).

regarding religion and that passing the secular purpose prong of the Court's test was a prerequisite to that neutrality.

A. The Myth of Neutrality

At the very heart of the Supreme Court rulings against prayer in the public school classroom is the claim that prayer serves no secular purpose. The Justices have assumed that prayer is solely an act of religious worship that, if allowed to take place in the classroom, requires the government to prefer one religion over another. Thus, they have reasoned that only by eliminating prayer can the government be neutral and, thereby, avoid sectarian disputes in public education.

The irony of this claim is that the Justices continue to make it despite the political controversy that has raged since 1962 over prayer in public schools. It remains a hotly debated issue that shows no sign of going away. And for good reason. The elimination of prayer from the public school classroom is *not* neutral. The goal of neutrality long pursued by the Court in the prayer and Bible-reading cases is, in fact, unreachable because religious neutrality in education is a myth.[25]

Education is defined by *Webster's* as "the act or process of providing with knowledge, skill, [or] competence."[26] All educators have a philosophy of how best to impart that knowledge. Before one can become a teacher in the public schools in America, he must obtain a college degree. Part of his training includes the philosophy of education, its methods and goals. Typically today's teacher is trained to believe that respect for the authority of human experts in various fields is the beginning of learning.[27] One does not learn the rudiments of reading, writing, and arithmetic, for example, if one does not learn to fear the authority of the teacher and his selected roster of experts.

According to the Bible, however, "[t]he fear of the Lord is the beginning of knowledge."[28] Indeed, the writer of Proverbs claims that men "hated knowledge" if they "did not choose the

25. *See* Baer, *American Public Education and the Myth of Value Neutrality*, in DEMOCRACY AND THE RENEWAL OF PUBLIC EDUCATION 1, 1-24 (R. Neuhaus ed. 1987).

26. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 723 (1976) [hereinafter WEBSTER'S].

27. This man-centered educational philosophy is held both by conservatives and liberals. *See, e.g.*, W. BENNETT, OUR CHILDREN AND OUR COUNTRY (1988); B. HONIG, LAST CHANCE FOR OUR CHILDREN (1985).

28. *Proverbs* 1:7.

fear of the Lord."[29] Not only is the fear of God the key to knowledge, it is the key to wisdom. And wisdom is defined by the book of Proverbs to comprehend all things, including moral character,[30] law and justice,[31] economics and business,[32] engineering and other practical sciences,[33] philosophy,[34] and the natural sciences.[35] So it is not just religious truths that the writer is talking about, but it is the kind of wisdom that God gave King Solomon: about justice,[36] botany and biology,[37] philosophy and music,[38] architecture and building construction,[39] and art and sculpture.[40] So comprehensive was Solomon's "wisdom and understanding" that the Bible describes it as "exceeding ... the sand that is on the sea shore," and as having "excelled the wisdom of all the children of the east country, and all the wisdom of Egypt for he was wiser than all men."[41]

It was because of Solomon's reputation for great wisdom that the Queen of Sheba "came to prove him with hard questions." And the queen, after Solomon answered all of her questions, concluded that Solomon's "wisdom ... exceedeth the fame which I heard."[42] Indeed, the queen's testimony confirmed what God had previously revealed to Solomon: "I have given thee a wide and understanding heart; so that there was none like thee before thee, neither after thee shall any arise like unto thee."[43]

Only one man in all of history has excelled in wisdom over that of Solomon, that is the God/man Jesus Christ. In the gospel according to Saint Matthew, Jesus gave this account of Himself: "The queen of the south shall rise up in the judgment with this generation, and shall condemn it: for she came from the uttermost parts of the earth to hear the wisdom of Solomon; and, behold, a greater than Solomon is here."[44] Jesus' wisdom excelled that of Solomon for He is wisdom personified.

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29. *Proverbs* 1:29
30. *Proverbs* 8:13.
31. *Proverbs* 8:15-16.
32. *Proverbs* 8:18.
33. *Proverbs* 8:12.
34. *Proverbs* 8:14.
35. *Proverbs* 8:22-29.
36. 1 *Kings* 3:16-28.
37. 1 *Kings* 4:33.
38. 1 *Kings* 4:32.
39. 1 *Kings* 5 & 6.
40. 1 *Kings* 7.
41. 1 *Kings* 4:29-31 (King James).
42. 1 *Kings* 10:1-3, 7 (King James).
43. 1 *Kings* 3:12 (King James).
44. *Matthew* 12:42 (King James).

The writer of Proverbs gave witness to this truth: "The Lord by wisdom hath founded the earth; by understanding hath he established the heavens."[45] The apostle John confirmed this in the very first part of the first chapter of his gospel: "In the beginning was the Word, and the Word was with God, and the Word was God. The same was in the beginning with God. All things were made by him; and without him was not any thing made that was made."[46] And Paul seconded John in his letter to the church at Colosse when he encouraged the saints to be filled with all knowledge and wisdom through the Lord Jesus Christ "[i]n whom are hid all the treasures of wisdom and knowledge":[47]

> For by [Christ] were all things created, that are in heaven, and that are on earth, visible and invisible, whether they be thrones, or dominions, or principalities, or powers: all things were created by him, and for him; and he is before all things, and by him all things consist.[48]

In today's public schools, the Court and its allies have ruled that America's school children must be shielded from all knowledge of Jesus Christ as the Second Person of the Trinity. In the name of religious neutrality, the Court, the American Civil Liberties Union, the National Education Association, and other powerful groups deny the claim of Christ: that He is the key to all knowledge. They impose their "secular" worldview upon everyone, including America's Christian majority.

A true Christian philosophy of education accepts no division between the sacred and the secular. Yet, the Supreme Court has devised a constitutional test under the establishment clause that has, at its very foundation, a requirement that state educational policy have only one purpose, a "secular" one. That requirement excludes from the public school a Christian philosophy of education because it forbids expressing the fear of the Lord through prayer and hearing the Word of God from the Bible. "The fear of the Lord" is, according to the writer of Proverbs, "the beginning of wisdom: and knowledge of the holy [one] is understanding."[49] Prayer and Bible reading then are as essential to those who seek to learn reading, writing, and arithmetic as they are to those

45. *Proverbs* 3:19 (King James).
46. *John* 1:1-3 (King James).
47. *Colossians* 2:2-3.
48. *Colossians* 1:16-17 (King James).
49. *Proverbs* 9:10 (King James).

who seek to know the saving grace of Jesus Christ. The Bible is the foundation of all education, and prayer is the cornerstone.

Yet the first prong of the Court's three-part test necessarily bans both the Bible as the Word of God[50] and prayer. Such a ban is not neutral. To the contrary, the Court's prayer and Bible-reading rulings directly oppose Christians and a Christian philosophy of education. Religious neutrality in education ought to be recognized for what it is, a myth that has been perpetrated upon the American public far too long by a group of disingenuous judges, legal scholars, and lawyer-advocates who wish to impose their philosophy of truth through the school system upon teachers, parents, and children who do not subscribe to their "secular" worldview.

Ironically, this group has persuaded many, even Christians, to believe that those who call for prayer and the Bible in the public school classroom are the ones who want to impose their values on an unsuspecting American public. The truth is just the opposite.

B. The Fear of Indoctrination

In 1979, Justice Lewis Powell, Jr., concluded that the system of public schools in America had been deliberately designed to prepare children to participate as citizens in a democratic society and to preserve the values upon which that society rests.[51] Citing the works of two educationists, one of whom was John Dewey, Justice Powell acknowledged that the architects of the public school system "have perceived public schools as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground."[52] Citing the works of five social scientists, the Justice confirmed that studies have shown that the system of public schools has accomplished this "assimilative" goal by "inculcating [in the students] fundamental values necessary to the maintenance of a democratic political system."[53]

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50. It allows the Bible to be taught as literature or as just another book. Abingdon School Dist. v. Schempp, 374 U.S. at 225.

51. Ambach v. Norwick, 441 U.S. 68, 76-77 (1979).

52. *Id.* at 77.

53. *Id.* For an historical and philosophical examination of this point, see Glenn, *"Molding" Citizens,* in DEMOCRACY AND THE RENEWAL OF PUBLIC EDUCATION 25, 25-56 (R. Neuhaus ed. 1987).

This "assimilative" and "inculcative" role of the public schools was endorsed three years later by Justice William J. Brennan, Jr., when he wrote: "We have . . . acknowledged that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'"[54] This inculcative process, Brennan further acknowledged, takes place primarily in the classroom, "in matters of *curriculum*" where there is a "duty to inculcate community values."[55] Earlier in this same opinion, Brennan expressed "full agreement ... that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'"[56]

So, the Supreme Court from moderately conservative Justice Powell to firmly liberal Justice Brennan has agreed: The system of tax-supported public education in America is to be an assimilative force, transmitting and promoting community and traditional values by inculcating into the students those values through the curriculum in the classroom.

The word *inculcate,* as defined by *Webster's,* means "to teach and impress by frequent repetitions or admonitions: urge on or fix in the mind."[57] It is taken from the Latin word *inculcare,* which literally means "to tread on, trample."[58] Indeed, the middle part of the Latin word *inculcare* is derived from *calx,* meaning "heel."[59] No wonder *Roget's* defines inculcate as follows: "(1) To fix (an idea) in someone's mind by reemphasis and repetition. (2) To instruct in a body of doctrine or belief."[60] Equally unsurprising are the synonyms for inculcate: "impress" and "indoctrinate."[61]

The word *assimilate* is defined by *Webster's* as "to make similar . . . : absorb."[62] In sociology the word *assimilation* means the process "wherein individuals and groups of differing ethnic heritage acquire the basic habits, attitudes, and mode of life of an embracing national culture."[63]

54. Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (citations omitted).
55. *Id.* at 869 (emphasis in the original).
56. *Id.* at 864.
57. WEBSTER'S, *supra* note 26, at 1146.
58. *Id.*
59. *Id.*
60. ROGET'S II: THE NEW THESAURUS 497 (1980) [hereinafter ROGET'S II].
61. *Id.*
62. WEBSTER'S, *supra* note 26, at 132.
63. *Id.*

The word *transmit* means not only "to send or to convey" but also "to give or convey (a disease or infection) to another person or organism."[64] It is also used to mean "to pass on by inheritance or by heredity: hand down."[65] The word *promote* means "to contribute to the growth, enlargement, or prosperity of; further, encourage."[66] The thesaurus adds these synonyms for promote: "cultivate, ... encourage, feed, foster."[67]

To recapitulate, the United States Supreme Court and its favored educationists and social scientists all agree that the American public school system is designed to, and does, act as a force to absorb all students in a common culture by handing down and advocating selected values through an indoctrination process that takes place five days a week, six hours per day, and approximately 180 days per year in the classroom.

So the question is not whether the schools indoctrinate. They do. Rather, the question is: What will the schools indoctrinate their students to believe? The Court has reassured us that the teachers will pass on community or traditional values. But one need only read the newspapers (or watch television) for a short time to discover that the values taught in the public schools, like the issues of prayer and Bible reading, are a battleground.[68]

On closer look, one finds not only that there is a serious conflict over what constitutes community or traditional values, but that the battle is not being fought on an equal playing field. The second prong of the Court's three-part test requires that a public school activity neither primarily advance nor inhibit religion. In a rare moment of candor, federal District Judge Francis J. Boyle, ruling that a benediction or invocation that invokes a deity violates this test, confessed: "God has been ruled out of public education as an instrument of inspiration or consolation."[69] He explained that he had reached this unfortunate conclusion because he was obligated to do so by the Supreme Court's *Lemon* test:

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64. *Id.* at 2429.

65. *Id.*

66. *Id.* at 1815.

67. ROGET'S II, *supra* note 60, at 726.

68. Brown, *Some Fear Schools Using New Age Religion,* Birmingham (Ala.) News, May 19, 1990 (Located in NEWSBANK [Microform], Education, 1990 61:A4, fiche); Doyle, *Honors-Class Condom Project Still Controversial,* Tallahassee (Fla.) Democrat, May 1, 1990 (Located in NEWSBANK [Microform], Education, 1990 48:G14, fiche); *Ed Board Debate Raises Doubts on HS Condom Plan,* (N.Y.) Daily News, Dec. 6, 1990 (Located in NEWSBANK [Microform], Education, 1990 148:G2, fiche).

69. Weisman v. Lee, 728 F. Supp. 68, 70 (D.R.I. 1990).

> The fact is that an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people. School-sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today. But the Constitution as the Supreme Court views it does not permit it.[70]

Once again, the Christian parent, the Christian teacher, and the Christian student have been told that his religious values do not belong on the secular turf of the public school. Oftentimes, the Christian is told that he cannot impose his values on those who do not share them because value imposition, *per se,* is anathema to the educational process and philosophy of the public school. That kind of objection is hypocrisy. The acknowledged purpose of public education is to inculcate values; thus, indoctrination of students is inevitable. The establishment clause, as applied by the courts under the *Lemon* test, has become an instrument to exclude "religious values" from the "community values" inculcated in public school children.

This fact has been well documented in a recent study by New York University psychology professor Paul Vitz.[71] Funded by the National Institute of Education, Vitz conducted a systematic investigation of "how religion and traditional values are represented in today's public school textbooks."[72] Generally, Vitz found such values either ignored altogether or, if treated, presented with a bias against them.

> Our survey of the total sample of 670 pieces in these basal readers produced several notable results. First, we found no references to serious religious motivation in any of the pieces. There were few references to Christianity or Judaism .... [W]e found virtually no mention at all of Protestantism ....
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> Altogether, the basal readers in the sample ... clearly represented a systematic denial of the history, heritage, beliefs, and values of a very large segment of the American people.[73]

One explanation given for such omissions and biased treatment is that America has become so pluralist in its religious beliefs, that reference to them would either introduce confusion or

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70. *Id.* at 75.

71. P. VITZ, CENSORSHIP: EVIDENCE OF BIAS IN OUR CHILDREN'S TEXTBOOKS (1986).

72. Vitz, *A Study of Religion and Traditional Values in Public School Textbooks,* in DEMOCRACY AND EDUCATION 116, 116 (R. Neuhaus ed. 1987).

73. *Id.* at 140.

excessive selectivity. Thus, in the place of the fear of indoctrination that could result from introducing "religious values" there is substituted the threat of anarchy.

C. *The Threat of Anarchy*

This claimed threat of anarchy surfaced in opposition to the Equal Access Act of 1984. The Act provides *inter alia:*

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny access ... to ... any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[74]

Because of a claimed ambiguity in the statutory language and in the legislative history, opponents argued that this statute opened the door "to every religious, political, or social organization, no matter how controversial or distasteful its views may be."[75] Thus, Justice John Paul Stevens, dissenting in the case upholding the constitutionality of the Equal Access Act, warned that the majority's interpretation of that statute would likely create a statutory obligation "to allow student members of the Ku Klux Klan or the Communist Party to have access to school facilities."[76]

Turning to the establishment clause, Stevens, drawing on the "excessive entanglement" portion of the *Lemon* test, argued that to allow Bible clubs to use school facilities would raise the spectre of "divisiveness" and would directly undermine the public school as "'the symbol of our democracy and the most pervasive means for promoting our common destiny.'"[77]

This threat of anarchy—loss of control over the number and the nature of the views expressed in the public schools—has been voiced by some who oppose the reinstitution of prayer in public schools. As America continues to be a safe haven for an increasing number of religious views other than Christianity and Judaism, some have contended that the Constitution would require equal time for all religious views to be expressed through prayer. Even

74. Equal Access Act of 1984 § 802(a), 20 U.S.C. § 4071(a) (1988).
75. Board of Educ. v. Mergens, 110 S.Ct. 2356, 2383 (1990) (Stevens, J., dissenting).
76. *Id.* at 2386.
77. *Id.* at 2391.

those who favor school prayer have balked at the prospect of their children or grandchildren being led in prayer by a Hindu or, worse yet, a Satanist.

Those who have interposed this threat in the debate over prayer in the schools have assumed either that the Constitution would require equal time or that the classroom teachers of America would simply reflect the proliferation of religious views in the nation so that unwelcome prayers would inevitably be offered. On the constitutional point, one must remember that the Court has never conceded that the public school classroom is an open forum for all points of view. Even Justice Brennan has admitted that the classroom and the curriculum is within the broad discretionary authority of local school boards.[78] While that discretion must be constitutionally tempered by "the transcendent imperatives of the First Amendment,"[79] one of those imperatives is *not,* for example, to force the public school student to be exposed to the ritual of a flag burning just because he is exposed to the ritual of the flag salute. In other words, there is no constitutional requirement for equal time for all competing points of view in the curriculum or within the four walls of the classroom. Hence, the concerns expressed by Stevens in the *Mergens* case, arguably applicable to extracurricular activities, would not apply to curricular matters.

But what does apply here is the third prong of the Court's *Lemon* test; namely, that religion if made part of the public school curriculum would foster an excessive government entanglement with religion. The "excessive government entanglement" concern, in reality, reflects ultimately the Court's claim that religion is a divisive force in society and must be excluded from the public school classroom if young people are to be "inculcated with democratic values." Justice Brennan articulated this position most forcefully in his opinion for the Court in *Grand Rapids School District v. Ball.*[80]

> For just as religion throughout history has provided for spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with the particular religions or sects that have from time to time achieved dominance.[81]

78. Board of Educ. v. Pico, 457 U.S. at 863-64.
79. *Id.* at 864.
80. 473 U.S. 373 (1985).
81. *Id.* at 382.

Justice Brennan's solution to this perceived threat of anarchy on the one hand and totalitarianism on the other is to exclude all religion from the jurisdiction of the public school. That solution is not consistent with Brennan's acknowledgment elsewhere that a public school classroom ought to be a crucible for students to become effective citizens in American democratic society. How will students be prepared for the potential divisiveness of a President's call for the nation to pray for success in a military conflict if those student have been "shielded" from such calls to prayer in the very place that was to prepare them for citizenship? The entanglement concern, if faithfully followed, would create an atmosphere in the public school that would stray so far from reality that public education could no longer serve to "inculcat[e] fundamental values necessary to the maintenance of a democratic political system."[82]

This is not to say that there is no threat of religious anarchy or of religious totalitarianism in the public schools. The threat of anarchy coming from diverse religious views of the nation's primary and secondary teachers is real, although greatly exaggerated in some parts of the country where traditional Christianity still permeates the local culture. Likewise, the threat of totalitarianism is real, although greatly exaggerated because there is so much religious diversity even within single localities.

The answer to these threats is not to remove altogether religious values and activities from the schools, but to reexamine whether those values and activities are best delivered through the teachers who have been called upon in the past to present daily Bible reading and to lead in prayer. Such activities and values have traditionally been introduced in other government institutions, most notably the nation's legislatures and the United States military, through the office of a chaplain. In 1983 the United States Supreme Court found the legislative chaplaincy constitutional. Lower courts have consistently rejected claims that chaplains in the armed forces are unconstitutional. It is to that constitutional legacy that I now turn before addressing the constitutionality of a proposal to establish chaplains for the public schools.

II. TAX-SUPPORTED CHAPLAINS: THE CONSTITUTIONAL LEGACY

In 1983, in the case of *Marsh v. Chambers*,[83] the United States Supreme Court refused to apply the three-part establishment

82. Ambach v. Norwick, 441 U.S. at 77.
83. 463 U.S. 783 (1983).

clause test in a case testing the constitutionality of state legislative chaplains. Had the Court applied the *Lemon* rule, the historic practice of American legislative bodies, both national and state, would have flunked all three parts of the test. As Justice Brennan pointed out in dissent:

> That the "purpose" of legislative prayer is pre-eminently religious rather than secular seems to me to be self-evident. "To invoke Divine guidance on a public body entrusted with making the laws" is nothing but a religious act....
>
> The "primary effect" of legislative prayer is also clearly religious.... [I]nvocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State....
>
> Finally, ... the practice of legislative prayer leads to excessive "entanglement" between the State and religion.... First, ... [i]n the case of legislative prayer, the process of choosing a "suitable" chaplain ... and insuring that the chaplain limits himself or herself to "suitable" prayers, involves precisely the sort of supervision that agencies of government should if at possible avoid.
>
> Second, excessive "entanglement" might arise out of "the divisive political potential" of the state statute or program.... The controversy between Senator Chambers and his colleagues ... has split the Nebraska Legislature precisely on issues of religion and religious conformity.[84]

Because Chief Justice Warren Burger's majority opinion rested primarily upon the fact that legislative chaplaincies had continuously existed from the beginning of the American Republic, Brennan dismissed *Marsh* as an isolated exception to the Court's establishment clause jurisprudence. But *Marsh* has proved more vital and versatile a precedent than Brennan had hoped. It has been successfully invoked by defenders of the chaplaincy system in the military and by defenders of prayer at public school graduation exercises.[85] While *Marsh* may be a case precedent in search of a constitutional principle, it is now more firmly established than many establishment clause rulings of the past thirty years because a majority of the Justices of the current

84. 463 U.S. at 797-800 (Brennan, J., dissenting) (citations omitted).

85. Katcoff v. Marsh, 755 F.2d 223, 232 (2d Cir. 1985) (military chaplaincy); Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987) (While the defenders were unsuccessful on the specific facts, the court applied *Marsh* not *Lemon* to assess the constitutionality of prayers at graduation ceremonies).

Supreme Court have expressed dissatisfaction with the *Lemon* three-part test.[86]

A. In the Legislatures of America

Undaunted by Brennan's challenge to halt a nearly two-hundred-year-old practice of appointing chaplains to legislative bodies, Chief Justice Warren E. Burger, writing for a majority of six, succinctly stated the legacy of prayer currently practiced in the legislatures and courtrooms of America:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.[87]

Rejecting the claim that the legislative practice of hiring a chaplain and paying his salary out of tax funds violated the first amendment's prohibition of the establishment of religion, the Chief Justice responded further with an even more specific lesson from history:

> [T]he Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain.... [T]he First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer.... On April 25, 1789, the Senate elected its first chaplain; the House followed suit on May 1, 1789. A statute providing for the payment of these chaplains was enacted into law on September 22, 1789.[88]

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86. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1976) (White, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting); County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in the judgment and dissenting in part).

87. Marsh v. Chambers, 463 U.S. at 786.

88. *Id.* at 787-88 (citations omitted).

The significance of these acts and these dates was not lost upon the Court:

> On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states ....[89]

In reliance on these uncontested historical facts, the Chief Justice later concluded that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not ... an 'establishment' of religion or a step toward establishment."[90]

This ruling upholding the constitutionality of the employment of chaplains to open legislative sessions in prayer came despite the fact that the chaplaincy practice at issue in the case had these three salient features: (1) for sixteen consecutive years the chaplain was a Presbyterian clergyman; (2) the chaplain was paid at public expense; and (3) the prayers offered were in the Judeo-Christian tradition.[91]

With regard to the obvious denominational preference reflected in the employment of a Presbyterian for sixteen unbroken years, the Court stated:

> We cannot ... perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church.... Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.[92]

As for paying the chaplain with funds from the state treasury, the Court sustained that practice by relying solely upon the historic record: "[R]emuneration is grounded in historic practice initiated ... by the same Congress that drafted the Establishment Clause of the First Amendment."[93]

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89. *Id.* at 788-89 (citations omitted).
90. *Id.* at 792.
91. *Id.* at 793.
92. *Id.* at 793-94.
93. *Id.* at 794.

As to the content of the prayers offered by legislative chaplains, the Court refused even to address it:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.[94]

Equally significant to its decision upholding "officially sponsored legislative prayer" through a chaplain paid for out of tax revenues was the Court's refusal to subject this practice to its traditional three-part establishment clause test. Relying on that test, the Court had consistently struck down prayer in the public schools. Dissenting from the majority's view in the legislative chaplaincy case, Justice Brennan applied the school prayer precedents and their doctrinal underpinnings to draw this conclusion: "In sum, I have no doubt that, if any group of law students were asked to apply the principles of [the three-part test] to the question of legislative prayer, they would nearly unanimously find the practice unconstitutional."[95]

So the legislative prayer case not only established a precedent upholding the tradition of using tax funds to employ clergymen as legislative chaplains, it called into question the legitimacy of applying the establishment clause three-part test to the issue of prayer when conducted by an ordained minister employed by the state as a chaplain.

B. In the Military

In 1985 the U.S. Court of Appeals for the Second Circuit had occasion to address whether the establishment clause prohibited the system of military chaplaincies. As in the legislative chaplaincy case, the court acknowledged the long history of that institution, from "Revolutionary days" to the present time:

> Upon the adoption of the Constitution and before the December 1791 ratification of the First Amendment Congress authorized the appointment of a commissioned Army chaplain.

94. *Id.* at 794-95.

95. Marsh v. Chambers, 463 U.S. at 800-01 (Brennan, J., dissenting).

> Since then, as the Army has increased in size the military chaplaincy has been extended and Congress has increased the number of Army chaplains.[96]

Military chaplains "are appointed as commissioned officers with rank and uniform but without command."[97] Before appointed they must be endorsed by an "ecclesiastical endorsing agency recognized by the Armed Forces Chaplains Board."[98] In addition, they must meet minimum standards set by the Department of Defense "to insure the applicant's ability to communicate with soldiers of all ranks and to administer religious programs."[99] Finally, the applicant must fit the denominational needs as determined by the office of the Chief of Chaplains, which "establishes quotas based on the denominational distribution of the population of the United States as a whole."[100]

Military chaplains, unlike their legislative counterparts, have a much greater task than leading the troops in prayer. They must "engage in activities designed to meet the religious needs of a pluralistic military community, including military personnel and their dependents."[101] Especially important needs are the problems that arise from being stationed in foreign countries and from being called into military combat. The military chaplain is a key counselor and spiritual advisor to the soldier who must face combat or separation from loved ones. While such chaplains are not authorized "to proselytize soldiers or their families," their "principal duties are to conduct religious services (including periodic worship, baptisms, marriages, funerals and the like), to furnish religious education ..., and to counsel soldiers with respect to a wide variety of personal problems."[102]

In addition, chaplains oftentimes mediate between soldiers and their commanding officers dealing with such matters as racial unrest and drug or alcohol abuse. The great majority of the chaplaincy's services are funded by tax revenues, supplemented by voluntary contributions for special denominational needs.

After careful review of the military chaplaincy, as summarized above, the court of appeals openly acknowledged that "it would

96. Katcoff v. Marsh, 755 F.2d at 225 (citations omitted).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 225-26.
101. *Id.* at 226.
102. *Id.* at 228.

fail to meet" the conditions of the three-part *Lemon* test.[103] Nevertheless, it refused to apply that test to the case. Its refusal was based not only upon the long history of the military chaplaincy, but upon the special constitutional authority of Congress to provide for the common defense through a well-trained and disciplined military and upon the recognized need to provide opportunities to exercise freely one's religious faith while engaged in the defense of one's country.

On the former point the court noted that even those who attacked the military chaplaincy as unconstitutional conceded that "some chaplaincy is essential."[104] They argued that a civilian chaplaincy funded by private sources could meet the military and free exercise needs. The court disagreed. Not only did the court find a wholly voluntary civilian chaplaincy "financially infeasib[le],"[105] the court determined the incorporation of a chaplaincy program into the military establishment was absolutely essential in order for there to be an effective program to meet the needs of the soldiers and their dependents:

> The purpose and effect of the program is to make religion, religious education, counseling and religious facilities available to military personnel and their families under circumstances where the practice of religion would otherwise be denied as a practical matter to all or a substantial number. As a result, the morale of our soldiers, their willingness to serve, and the efficiency of the Army as an instrument for our national defense rests in substantial part on the military chaplaincy, which is vital to our Army's functioning.[106]

If such a program of religious education, counseling, and training is so crucial to our national defense thereby necessitating a tax-supported chaplaincy for our nation's soldiers, one might ask if the same kind of program is no less crucial for our nation's school children who, after all, are being prepared by tax-supported schools to take their place as citizens whose duties include the defense of the nation.

C. In the Public Schoolhouse

One will look in vain to find a long history of school chaplaincies on a par with that of the legislative and military programs outlined

103. *Id.* at 232.
104. *Id.* at 235.
105. *Id.* at 236.
106. *Id.* at 237.

above. But that does not mean that prayer and religious education, training, and counseling have not played an essential role in the education of America's youth. In the first one hundred years of this nation's history, education was almost exclusively in private hands. And those private hands were, in turn, almost exclusively those of the church. Not surprisingly, when the task of education was gradually transferred to the state through the establishment of local school boards, prayer and religious teaching came with the transfer. Thus, the Supreme Court pronouncements in the last thirty years excluding prayer and Bible reading have rejected history, not embraced it.

What happened in this educational transformation was the failure of public school supporters to recognize that to retain the religious element in education they would have to separate it out from other functions performed by the classroom teacher in the public schools. Instead, they left the religious function in the hands of ordinary government officials and made themselves vulnerable to the attacks on prayer that came in the early 1960s. To illustrate this point one need only reexamine Justice Hugo Black's oft-repeated statement in the New York Regent's prayer case: "[I]n this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[107] Had the New York Board of Regents created a chaplaincy program it would have avoided having imposed upon itself the duty of composing a prayer. That task would have been left to an ordained clergyman in each school district who could have performed this duty in a constitutional manner just as his counterpart in the New York Legislature and at West Point had been doing for decades.

This confusion of roles for lack of the establishment of a chaplaincy has extended from the board level down to the classroom. If the teacher leads the students in the Lord's Prayer and in Bible reading, his recognized authority in reading, writing, and arithmetic may spill over into the time of religious training. But if the functions are separate, then the teacher may inculcate his students in literature, grammar, and mathematics while the chaplain meets the spiritual needs of the children. This is the very kind of separation of functions that is the hallmark of the legislative and military chaplaincies. It would enable the teacher to inculcate the students in the secular subjects, but with the

107. Engel v. Vitale, 370 U.S. at 425.

support of a chaplaincy program within the school system to meet the religious needs of the students.

Without such a spiritual foundation, public education today flounders on the shoals of racial unrest, drug abuse, and suicide. If a military chaplaincy is needed to deal with such problems, how much more is such a chaplaincy needed in the nation's schools. Educationists have long claimed that the power to maintain a tax-supported public school system is no less than the power to maintain military forces.[108]

The Kentucky Court of Appeals echoed this sentiment when, in defense of public education, it wrote as follows:

> The place assigned [public education] in the deliberate judgment of the American people is scarcely second to any. If it is essentially a prerogative of sovereignty to raise troops in time of war, it is equally so to prepare each generation of youth to discharge the duties of citizenship in time of peace and war. Upon preparation of the younger generations for civic duties depends the perpetuity of this government.[109]

And the United States Supreme Court has joined this roster of witnesses to the importance of public education in a democratic society:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[110]

How ironic that both the nation's legislatures and its military branches provide a spiritual support system to its participants, but the Supreme Court in its prayer and Bible-reading cases has taken such support away from the nation's school children. If those schools are to succeed in the Court's own definition of their task—"inculcating fundamental values necessary to the maintenance of a democratic political system"—then the establishment of a public school chaplaincy system is as essential to that mission as the military and legislative chaplaincies are to

108. *See, e.g.*, N. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS 23-24 (3d ed. 1971).
109. City of Louisville v. Commonwealth, 134 Ky. 488, 492, 121 S.W. 411, 412 (1909).
110. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

the defense and lawmaking missions of the nation's armed services and legislative bodies.

III. Public School Chaplains: A Constitutional Solution

On March 18, 1991, the United States Supreme Court granted the Petition for Writ of Certiorari in *Lee v. Weisman*.[111] That case involves the constitutionality of invocations and benedictions delivered by clergy of various faiths in junior and senior high school graduation ceremonies throughout the United States. The parallels between that historic practice and the legislative chaplaincy and various other acts seeking the protection of Divine Providence have not gone unnoticed by the petitioners.[112] Given the current composition of the Supreme Court, it would come as no surprise that the *Weisman* case will provide an excellent opportunity for the Court to renounce the *Lemon* three-part test and to extend the holding of *Marsh*. If so, a local school board would be presented a window of constitutional opportunity to implement a chaplaincy program patterned after those upheld in the *Marsh* and *Katcoff* cases.

Even if the Court would choose to leave the *Lemon* test alone or would choose not to extend the *Marsh* holding to *Weisman*, a local school board may still take advantage of the *Marsh* and *Katcoff* precedents. The task of the board, in either case, would be the same: to put into place a chaplaincy program patterned after those which have already been upheld as constitutional. First, the board should determine the need for such a program to support its educational program. Second, it must define the role to be assumed by the chaplain in that program. Finally, it must build a constitutional case defending a chaplaincy program in the public schools.

The task of any school board, then, in establishing a chaplaincy is to place it squarely within the historic tradition of the legislative and military chaplaincies.

A. Educational Policy and Purpose

Under state law, local school boards have broad powers related to educational policy and programs. The Supreme Court

111. 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S.Ct. 1305 (1991).
112. Petitioners' Brief, *supra* note 17, at 26-32.

has expressly conceded that these powers include the authority "'to establish and apply their curriculum in such a way as to transmit community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, and political.'"[113] The initial task of a school board in establishing a chaplaincy program is to make the findings necessary and the conclusions responsive to their educational mandate.

Former United States Secretary of Education William J. Bennett recently observed that "the three R's—reading, writing, and arithmetic" were not sufficient to meet the educational challenges of the modern world.[114] He recommended that educators in America supplement the three R's by attending "to the 'three C's': content, character, and choice."[115] Mr. Bennett's recommendation could well serve a local school board as it addresses how to meet its educational responsibilities.

As for content, the board could find that the texts assigned to students are woefully inadequate because they omit the religious values that have traditionally undergirded the teaching of social, moral, and political truths that are essential to the functioning of a democratic society. For example, the board could examine New York University Professor Paul Vitz's comprehensive study in which he concludes that religion is either misrepresented, underrepresented, or not represented at all in the ordinary texts assigned to be read by public school children.[116]

The board could also find that what is actually being taught in the classroom is equally neglectful of or biased against these foundational religious values. They could discover that many public school teachers have not received sound instruction in those values. Recent studies have demonstrated that college curricula are becoming increasingly "politicized" away from the traditional "western values"[117] that the board may desire to be imparted in the classroom.[118]

Finally, the board may find a need for special courses or special parts of existing courses in the curriculum needful of an infusion of religious values. The new courses may be part of the

113. Board of Educ. v. Pico, 457 U.S. at 864.

114. W. BENNETT, *supra* note 27, at 15.

115. *Id.*

116. *See* Vitz, *supra* note 72, at 116-140.

117. D. D'SOUZA, ILLIBERAL EDUCATION (1991).

118. Hadeed, *The Politicization of the Classroom,* in A BLUEPRINT FOR EDUCATION REFORM 111, 111-129 (C. Marshner ed. 1984).

elective curricula and could be taught by part-time instructors, or special guest lecturers might be brought in to teach the religious values section of existing courses.

In summary, the board's concern for the content of its curriculum would include findings of the essential role that religion plays in the truths taught and the necessity of taking steps to impart those values to the children for whose education the board has both authority and responsibility.

As for character, the board could make some general findings regarding the state of discipline in the schools. That there are crises in public school order and discipline in most districts is so well known that it hardly needs documentation.[119] Nevertheless, each board should probably make some findings documenting the special disciplinary problems that it faces.

Once such findings are made, it would be incumbent upon the board also to document that it is within its purview to teach character and to utilize religious values in support of that enterprise.. As former Secretary Bennett has pointed out, "Americans have always believed that in education the development of intellect and character go hand in hand."[120] Character is defined as "'strength of mind, individuality, independence, moral quality.'"[121] As Mr. Bennett has further noted, it is difficult to understand how such traits can be developed without teaching a variety of Christian virtues, among them: "thoughtfulness, fidelity, kindness, honesty, respect for law, standards of right and wrong, diligence, fairness, and self-discipline."[122]

Such teaching may best be imparted by example, by one's personal lifestyle reflecting the basic moral virtues. If any lesson has been learned in the past decade or so, it is that character building does not come through guiding children to develop their own values through role playing, games, or other modern methods.[123]

As for choice, the school board must be mindful that it serves a rather diverse constituency and that such service requires accountability to the parents of the children that are being

119. *See, e.g.*, Clegg, *Discipline in the Classroom*, in A BLUEPRINT FOR EDUCATION REFORM 59, 59-73 (C. Marshner ed. 1984).

120. W. BENNETT, *supra* note 27, at 17.

121. *Id.*

122. *Id.*

123. Vitz, *Ideological Biases in Today's Theories of Moral Education*, in WHOSE VALUES? 113, 113-26 (C. Horn ed. 1985).

educated in the schools under its authority. The focal point of this inquiry should be how well the schools are reinforcing the values being imparted by the parents at home. If the board finds a strong contingent of Christian parents who seek the benefits of diversity in the public schools or who do not have the financial wherewithal to send their children to private school, then the board may make findings that such parents should be accommodated with a curriculum and character development program suitable to their needs. Again, as former Secretary Bennett has so well stated: "More than anything else, parents need to be able to choose environments that affirm their principles. They need to find schools where their own values will not be lost or distorted."[124]

After making such foundational findings, the board could conclude that the best means available to meet these educational goals is to establish a school board chaplaincy. Such a chaplaincy should combine features drawn from the role of the chaplains in both the military and the legislatures where they have traditionally been appointed.

B. Roles of the Chaplain

In the military, the chaplain has traditionally assumed three roles. As advisor, he instructs "his commander and fellow staff officers on matters pertaining to religion and morality."[125] As counselor, the chaplain administers "a comprehensive program of religious education" and serves "as counselor . . . to the personnel of the command."[126] As mediator, he plays the role of "friend" assisting in the building and the repair of human relationships so vital to a well-functioning military organization.[127]

In the legislatures, the chaplain has played primarily the role of spiritual leader. Through regular prayer opening legislative sessions, and pastoral care of the legislators and their families, the legislative chaplains have traditionally inspired, exhorted, and

124. W. BENNETT, *supra* note 27, at 21.

125. 3 THE NEW ENCYCLOPEDIA BRITANNICA: MICROPAEDIA 93 (15th ed. 1990).

126. *Id.*

127. *Id.*; Note, *The United States Military Chaplaincy Program: Another Seam in the Fabric of Our Society?*, 59 NOTRE DAME L. REV. 181, 189-93 (1983).

challenged America's legislative bodies to serve the people who elected them.[128]

These four roles—advisor, counselor, mediator, and spiritual leader—are as suitable to the needs of public schools, their administrators and teachers, and public school children as they are, and have been, to the armed services and to the legislatures.

1. The Chaplain as Advisor

During the American Revolution, chaplains were looked upon by the nation's founders as indispensable to the cause. General George Washington knew that his army needed more than men and arms; it needed divine guidance and favor: "*The blessings and protection of Heaven are at all times necessary,* but especially is it in times of public distress and danger."[129] Thus, Washington continuously and earnestly appealed to Congress to appropriate better salaries to "encourage men of abilities" to serve as military chaplains.[130]

Indeed, it was the American clergy who instilled the colonial war effort with fervor. Not surprisingly, members of the clergy and chaplaincy became most odious to the British who thought them to be the instigators of the rebellion.[131] J. T. Headley, in his historical account of the role of the chaplains and clergy during the Revolution, lauded the military chaplains as "[m]en of learning and culture ... looked up to for advice and counsel ... [and] praise[d] ... throughout the land, for their integrity, ability and patriotism."[132]

Obviously, the American clergy who played this key role at the time of this nation's founding did not embrace a pacifist theology. But they were not "war mongers" either. While they taught consistent with the goals and objectives of the war effort, they gave transcendent meaning to that effort, carefully

128. *See, e.g.,* J. MONTGOMERY, PRAYERS: OFFERED BY THE CHAPLAIN REV. JAMES SHERA MONTGOMERY AT THE OPENING OF THE DAILY SESSIONS OF THE HOUSE OF REPRESENTATIVES DURING THE SEVENTY-FOURTH, SEVENTY-FIFTH, AND SEVENTY-SIXTH CONGRESSES 1935-1941, at 27, 50, 63 (1941). In his Introduction Sam Rayburn, the Speaker of the House, commends this book of prayers as "an inspiration and a great help to all who are fortunate enough to come into possession of it." Rayburn, *Introduction* to J. MONTGOMERY, *supra,* at v.

129. *See* J. HEADLEY, THE CHAPLAINS AND CLERGY OF THE REVOLUTION 66 (New York 1864).

130. *Id.* at 61-62.

131. *Id.* at 58.

132. *Id.* at 73.

articulating the inalienable principles of liberty and, when suppressed by a tyrant, the justifications for taking up arms to preserve those liberties.[133]

Today, military chaplains continue to play this vital role in the military, with commanders and soldiers alike. War demands purpose and justification. Military success is fostered by moral and ethical convictions which, in turn, are fundamentally religious. The recent Persian Gulf War clearly demonstrated that things have not changed in America as the country was reminded again and again that America's war with Saddam Hussein's Iraq was a "just cause." America's fighting men and women, typified by their Commanding General Norman Schwarzkopf, invoked the name of God and their love for country and freedom as reasons for their having gone to battle.[134]

This same inspired fervor, sense of duty, moral integrity, and pursuit of excellence found in those who go to war should also carry over into education. How long will an army fight without a clear moral purpose? How long will a teacher teach or a child learn without such a purpose? A chaplain, properly trained and equipped, is prepared to give the necessary advice regarding the reasons and rules of warfare and in the reasons and foundational principles of truth.

As advisor, then, the chaplain's role in education will focus on the first of Secretary Bennett's "C's," content. He will provide counsel, consistent with the goals and objectives set by the educational authorities, as to the relationship of religion to the curriculum of the school. This advice may range from the purpose of education—"ye shall know the truth and the truth shall set you free"[135]—to the foundational Biblical principles underpinning each subject matter taught and each discipline studied.

2. The Chaplain as Counselor

Chaplains who served under General Washington during the Revolution were a great comfort to him and to his men for it

133. *Id.* at 40, 51-53, 54.

134. Address by H. Norman Schwarzkopf before the Joint Session of Congress, Washington, D.C. (May 8, 1991), *reprinted in* 57 VITAL SPEECHES OF THE DAY 482, 482-83 (June 1, 1991).

135. This motto, taken from John 8:31, has been the trademark of American education throughout the twentieth century. *See* C. ELIOT, *The Religious Ideal in Education*, in 1 CHARLES W. ELIOT: THE MAN AND HIS BELIEFS 205, 211-12 (W. Neilson ed. 1926). Indeed, education and freedom have always been coupled in America by her leaders. *See, e.g.*, Adams, *Liberty and Knowledge*, in THE AMERICAN READER 12-14 (D. Ravitch ed. 1990).

was often the clergy who "sustained the courage of the people."[136] Today, this role of counselor has become the primary mission of the American military chaplain. In this regard the Army, itself, has described the duties of the chaplain "as analogous to those performed by clergymen in civilian life."[137] The significance of this should not be underestimated. As Judge Mansfield observed in his opinion sustaining the constitutionality of the military chaplaincy program:

> The problem of meeting the religious needs of Army personnel is compounded by the mobile, deployable nature of our armed forces, who must be ready on extremely short notice to be transported ... to distant parts of the world for combat duty in fulfillment of our nation's international defense commitments.... In the opinion of top generals ..., unless chaplains were made available in such circumstances the motivation, morale and willingness of soldiers to face combat would suffer immeasurable harm and our national defense would be weakened accordingly.[138]

In the recent Gulf War, the trauma normally experienced only by the soldier and his immediate family spread to America's school children. Educators dispatched psychologists to advise teachers and families on how to deal with the psychological and emotional needs of the children, especially of those whose fathers or mothers had been called to the Gulf.[139] Some of these experts suggested role playing or puppetry to help the children to cast their worries and fears into symbolic form thereby easing the tension.[140] A principal of a public school in Cleveland, Ohio was reported to have instructed her teachers to answer children's questions about religion and God should tragedy strike.[141] How ironic that the military provided chaplains to answer those questions if raised by an adult soldier, but the schools were not

136. J. HEADLEY, *supra* note 129, at 73.

137. UNITED STATES, DEPARTMENT OF THE ARMY, PAMPHLET NO. 165-2 THE CHALLENGE OF THE CHAPLAINCY IN THE UNITED STATES ARMY (1970); UNITED STATES, DEPARTMENT OF THE ARMY, ARMY REGULATION NO. 165-20, paras. 2-3 (1972), cited in Note, *supra* note 127, at 193 n.56.

138. Katcoff v. Marsh, 755 F.2d at 228.

139. *E.g.*, Viotti, *Helping Kids Deal with War*, Honolulu (Haw.) Advertiser, Jan. 17, 1991 (Located in NEWSBANK [Microform], Education, 1991 24:F1, fiche).

140. *Id.*

141. *Schools by Army Base Mobilize to Prepare for Children's Grief*, (Cleveland, Ohio) Plain Dealer, Jan. 15, 1991 (Located in NEWSBANK [Microform], Education, 1991 8:E7, fiche).

similarly prepared to respond to such questions if raised by that soldier's primary age son or daughter in the public school.[142]

War is not the only tragedy that school children face. Sudden deaths of loved ones, tragic school bus accidents, and assaults by crazed gunmen may strike without notice. The need for ready access to counseling in such emergencies is evident.

But counseling extends beyond emergency circumstances. In the military, chaplains are available to soldiers facing the daily demands of life: "financial hardships, personality conflicts, and drug, alcohol or family problems."[143] Currently, counseling for such matters is available in almost every school system in America. Yet, many times students are counseled in a way contrary to the religious faith of their parents.[144] Moreover, as former Secretary William Bennett has so well documented, many a public school, having become "a desert of moral relativism,"[145] offers no counseling whatsoever:

> [I]n 1985 the *New York Times* ran an article quoting New York area educators proclaiming that "they deliberately avoid trying to tell students what is ethically right and wrong." The article told of one counseling session involving fifteen high school juniors and seniors.
>
> In the course of that session the students concluded that a fellow student had been foolish to return $1,000 she found in a purse at school .... [W]hen the students asked the counselor's opinion, "He told them he believed the girl had done the right thing, but that, of course, he would not try to force his values on them. 'If I come from the position of what is right and wrong,' he explained, 'then I'm not their counselor.'" Now, once upon a time, a counselor offered counsel, and he knew that an adult does not form character in the young by taking a stance of neutrality toward questions of right and wrong or by merely offering "choices" and "options."[146]

As counselor, then, the school chaplain would attend to Bennett's second "C," the development of character. Instruction

142. The *Cincinnati Post* reported that the schools were attempting to meet their students' need "for reassurance in face of Mideast bloodshed, by giving the school faculty a crash course in counselling." Petrie, *Students Need Reassurance in Face of Mideast Bloodshed*, Cincinnati (Ohio) Post, Jan. 18, 1991 (Located in NEWSBANK [Microform], Education, 1991 24:F2, fiche).

143. Katcoff v. Marsh, 755 F.2d at 228.

144. S. BLUMENFELD, N.E.A.: TROJAN HORSE IN AMERICAN EDUCATION 229, 237-38 (1984).

145. W. BENNETT, *supra* note 27, at 71.

146. *Id.* at 80.

in good character has long been the goal of American public education and religion has long been the hallmark of that effort. Thus, Thomas Mott, then Superintendent of the Richmond, Indiana public schools, exhorted teachers attending the 1906 National Education Association convention:

> We must look upon man in the full roundness of character ... as the ideal product of the highest educational process. The *end* must ever be *character,* based upon true habits of moral conduct, and a strong religious faith.
>
> ....
>
> ... In the conflict of life, when in the midst of success or failure, temptation, despair, or sorrow; when the battle of life is strong between the forces of good and evil, the human heart finds little aid in questions of expediency, utility, or custom, but intuitively reaches upward in hope of aid and inspiration from an infinite and all-loving, all-powerful God and Father.
>
> It is significant that religious and moral instruction should be so often joined together in our thought of educational processes. In the very nature of the development of personal character, they are necessarily involved.[147]

3. The Chaplain as Mediator

In the military, the chaplain is a member of two institutions, the military, in which he holds the rank of an officer, and the church, in which he has been ordained as a minister.[148] As a member of two such disparate groups, the chaplain is the natural choice to mediate disputes that might arise within the military, itself. This role is especially important in matters of discipline where

> the chaplain, because of his close relationship with the soldiers in his unit, often serves as a liaison between the soldiers and their commanders, advising the latter of racial unrest, drug or alcohol abuse, and other problems affecting the morale and efficiency of the unit, and helps to find solutions.[149]

147. NATIONAL EDUC. ASSOC., FIFTIETH ANNIVERSARY VOLUME 1857-1906, at 35-36 (1907).

148. C. ABERCROMBIE, THE MILITARY CHAPLAIN 68 (1977).

149. Katcoff v. Marsh, 755 F.2d at 228.

In other words, the chaplain serves the military as an ombudsman. He is perceived by soldiers and their officers as "different," with a higher allegiance than the role owed by an ordinary officer and with special skills in mediating disputes.

In a system of compulsory education financed by tax revenues, public schools are not the first choice for many parents. Yet as Secretary Bennett has noted, his third "C"—choice—is crucial to the success of public schools. Nevertheless, "in the elementary and secondary levels, ... there is choice for so few."[150]

Given the economic realities that limit parental choice, tensions inevitably arise between public school authorities and families "caught" in the public school net. Many of those families have deep religious convictions that they perceive to be undermined and disrespected by their children's teachers. While a mediator may not be able to resolve some of these disputes, a chaplain with commitments to a denomination like that of the parents could explain the families' concerns to school authorities and, perhaps, propose workable solutions. Without some mediating structure, clashes between such families and public school authorities will continue to be handled by lawyers in the courts.

4. The Chaplain as Spiritual Leader

One of the main purposes of the chaplaincy, both in the military and in the legislature, has been prayer. As a nation, we have historically been called by our Presidents to prayer. That tradition was invoked most recently by President George Bush when, upon announcing the start of the ground war in the Persian Gulf War, he appealed to the American people:

> Tonight as this coalition of countries seeks to do that which is right and just, I ask only that all of you stop what you were doing and say a prayer for all the coalition forces ....
>
> May God bless and protect each and every one of them and may God bless the United States of America.[151]

The American people responded readily to this appeal when called to prayer, and actual prayers themselves appeared on

150. W. BENNETT, *supra* note 27, at 21.

151. Address by President George Bush to the American people, Washington, D.C., (Feb. 23, 1991), *reprinted in* 57 VITAL SPEECHES OF THE DAY 325, 326 (Mar. 15, 1991).

billboards, bumper stickers, and business signs. Truly, these became indelible evidence upon the minds of every American that her war effort was being undergirded with prayer.

Yet public schools, charged with "inculcating" America's children with the values of a democratic society, were required to be neutral on prayer. The nation's legacy of prayer laid down in the appeal of the Declaration of Independence for the "protection of divine Providence" could not be honored in the very place where that legacy is required by law to be taught.

Without question, America's school children ought not be deprived of the opportunity to pray as they undertake their civic duty, preparation for citizenship, while America's President, members of the House and Senate, and her military leaders are led in prayer by chaplains employed to assist them in the discharge of their civic duties.

C. Constitutional Defense

If the constitutionality of a proposal to establish public school chaplaincy depended upon meeting the Supreme Court's three-part *Lemon* test, then it would doubtless fail.[152] As pointed out above, however, the Supreme Court has expressly refused to apply that test in assessing the constitutionality of legislative chaplains.[153] Moreover, several Justices have expressed serious reservations about the continued vitality of the *Lemon* rule.[154]

The first line of constitutional defense of a public school chaplaincy program would be to rest that defense squarely upon the court precedents upholding the legislative and military chaplaincies. Unless those chaplaincies are dismissed as historical anomalies, a public school chaplaincy patterned after them should survive an establishment clause challenge.

A defense based upon such analogous precedent, however, is probably not sufficient without addressing two crucial factors that are present in the military and legislative contexts, but allegedly not in the public schools. First, there is no historic chaplaincy institution or office in the public schools parallel to that in the military and in the legislatures. Second, public schools

152. "If the current Army chaplaincy were viewed in isolation, there could be little doubt that it would fail to meet the *Lemon v. Kurtzman* conditions." Katcoff v. Marsh, 755 F.2d at 232.

153. *See supra* text accompanying note 83.

154. *See supra* note 86 and accompanying text.

involve children, most of whom are not there by choice, whereas the military and legislatures are composed of adults all of whom are there by choice.

While it is true that the military and legislative chaplaincies enjoy an unbroken historic continuity from colonial times to the present day, it would be a mistake to assume that chaplains are foreign to education. The *Oxford English Dictionary* definition of chaplain includes a clergyman assigned to serve a school or college along with a legislative chamber or regiment.[155]

Throughout America's history clergymen have served as chaplains to schools, colleges, and universities. More important, clergymen have served as teachers in American schools in a variety of subjects not limited to theology. Indeed, clergymen were the first to serve in that capacity in the United States. After all, education in the eyes of most of America's founders belonged to the family and to the church, not the state. Not surprisingly, then, in the early days of the American Republic, there was no occasion to provide by law for chaplains for the public schools; those schools, if any existed, were operated by the clergy, themselves.[156]

In the nineteenth century when the movement for establishing a system of tax-supported public schools began, there was no effort to divorce the new educational system from religion; rather public school proponents supported the adoption of a system that integrated a nondenominational Protestant religious ethic into the curriculum. The teachers, themselves, were expected to bring a nonsectarian, nondenominational religion into their classrooms without having to call upon the clergy except for special occasions. Chaplaincies were not established, not because of some doctrinal commitment of separation of church and state, but because every teacher would play the role of a chaplain so there was no need of a special office. This interrelationship between educator and religion continued unabated even after the Civil War with only one proviso—that the system of public schools be "free from Sectarian control."[157]

Freedom from sectarian control did not mean exclusion of prayer, Bible reading, or other religious teaching. Those activities

155. OXFORD ENGLISH DICTIONARY 277 (1933).

156. Tyack, *The Kingdom of God and the Common School: Protestant Ministers and the Educational Awakening in the West*, 36 HARV. EDUC. REV. 447, 447-69 (1966); Pitzer, *Christianity in the Public Schools*, in PROTEST AND POLITICS 151, 151-61 (R. Clouse, R. Linder & R. Pierard eds. 1968).

157. *See generally* R. MCCARTHY, J. KILLEN & W. HARPER, *supra* note 3, at 52-72.

continued under the oversight of the public school authorities until the Supreme Court made in 1962 the first of a series of rulings excluding prayer and Bible reading from the public schools. Speaking for the Court, Justice Hugo Black emphasized in his majority opinion that a nondenominational prayer composed by the New York Board of Regents violated the most basic principle of the establishment clause, namely, "that ... it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[158] While subsequent cases did not involve state-composed prayers or state-written devotions, all involved direct participation by the state's educational authorities. Therefore, the Court readily found that students could not freely choose to absent themselves from the religious exercises when they were such an integral part of a compulsory educational system.

The point to be made here is that the interposition of a chaplain or chaplains could have made the difference in what otherwise was an inherently coercive atmosphere. The chaplain, by definition, has a limited role. He serves as advisor and counselor, not as decisionmaker and implementer. Moreover, he is a mediator who serves both the schools and the families as reflected in his dual appointment both as employee of the state and appointee of his church. When religious activities are assigned to the chaplain, the state's imprimatur on such activities is lessened and, consequently, those who choose not to participate are more free to make that choice.[159]

If the establishment clause means that the government may not use its power to coerce religion,[160] that noncoercion principle may be met by the creation of a chaplaincy for the public schools so long as the chaplain is endowed only with responsibilities like his counterparts in the military and in the legislature as proposed above.[161] The fact that the schools have failed to adopt the chaplaincy in the past should not preclude a school from modifying its practices now in order to meet the strictures of the Constitution.

158. Engel v. Vitale, 370 U.S. at 425.

159. Some might argue that the risk of the state's imprimatur could be entirely eliminated by allowing the churches to provide the services that would be available through the school chaplain. That point was implicit in the effort to claim that a civilian chaplaincy could serve the armed forces just as well as a military one. Katcoff v. Marsh, 755 F.2d at 235-36. But the court in *Katcoff* found the suggestion impractical. *Id.*

160. Board of Educ. v. Mergens, 110 S.Ct. at 2377 (Kennedy, J., concurring); *see also* Petitioners' Brief, *supra* note 17, at 14-44.

161. *See supra* text accompanying notes 125-51.

Some would contend, however, that the establishment noncoercion principle cannot be met because of the "highly structured environment" of the primary and secondary schools.[162] Implicit in this argument is the notion that children at the primary and secondary levels are just too impressionable and too susceptible to peer pressure to allow for any religious activity even under the auspices and supervision of a chaplain.

The argument from impressionability or susceptibility fails to take into account the fact that exclusion of religious activity from public schools affects negatively those students whose lifestyle away from school includes trusting and acknowledging God's goodness and protection in everything they do. Moreover, it fails to acknowledge that the very purpose of education is to "inculcate" values in impressionable and susceptible children. At bottom then, the argument emphasizing the impressionability and susceptibility of children presupposes that one can be "neutral" about religion which, as pointed out above,[163] is impossible.

The constitutionally correct response to the impressionability or susceptibility issue is the one endorsed by the Supreme Court in *Zorach v. Clausen*:[164]

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state *encourages* religious instruction or *cooperates* with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs.[165]

This accommodation principle serves three essential purposes, as pointed out in a 1987 issue of the *Harvard Law Review:*

> First, and most important, it attempts to encourage and promote the free exercise of religion in civic life. Second, it strives to recognize and commemorate the importance of

162. Board of Educ. v. Mergens, 110 S.Ct. at 2379 (Marshall, J., concurring).
163. *See supra* text accompanying notes 25-50.
164. 343 U.S. 306 (1952).
165. *Id.* at 313-14 (emphasis added).

> religion in America's historical traditions and cultural heritage. Third, it serves the state's interest in promoting social cohesion and community identity by admitting shared symbols and values into the civic sphere.[166]

This three-fold objective is especially important when applied to a system of tax-supported public education dedicated to the inculcation of fundamental values necessary to the maintenance of a democratic political system. Total exclusion of religion, as the *Lemon* test commands, creates an atmosphere of unreality as well as one of hostility to those students and their families whose lives center upon God and the Holy Bible. No argument based upon "peer pressure" or "immaturity" ought to dissuade the courts from finding a school board chaplaincy program as a constitutional accommodation of religion so long as students whose lives do not center on God or the Scriptures are not required to participate in the accommodating activities.[167]

Finally, any attempt to distinguish the military from public education on the grounds that people voluntarily join the armed forces whereas school children must go to school should be rejected. The constitutionality of the military chaplaincy has not turned on the existence or nonexistence of an all-volunteer military force. During the times of military conscription, the chaplaincy was not been suspended. Indeed, the military draft has usually been employed by the nation in times of war, the very kind of crisis in which the military authorities have found chaplains most needful.

Moreover, the compulsory education laws do not require children to attend public schools; nor could such laws constitutionally command such attendance.[168] While economic circumstances may be the primary influence for many families that choose public schools for their children, economic factors are equally pressing upon many who choose to join the armed forces.[169]

In summary, there are no differences of constitutional significance between the role of the chaplain proposed for the

166. Note, *Developments in the Law--Religion and the State,* 100 HARV. L. REV. 1606, 1643 (1987).

167. It is also possible to hire more than one chaplain if the board determines that this is necessary to meet the needs of the families of the school district. Thus, chaplains serving distinct Christian denominations and other religious faiths may be appointed, if appropriate.

168. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

169. *E.g., Blacks: Too Much of the Burden,* TIME, Feb. 4, 1991, at 43; Postrel, *What's Fair in War,* REASON, Feb. 1991, at 4.

public schools and that currently played in the military and in the legislatures. And there are no differences of significance between the place of children in the public schools and that of the soldier in the military. Therefore, the case precedents affirming the constitutionality of legislative and military chaplaincies are equally supportive of a chaplaincy in the public schools.

CONCLUSION

Throughout this article, I have critiqued and utilized arguments without challenging the conventional premise that the state has jurisdiction to educate the children. I have argued elsewhere that the establishment clause, if it is applicable to the states, prohibits the establishment of a tax-supported public education system.[170] So long as the courts continue to assume that the states have jurisdiction to establish such a system of education, they should cease all efforts to insure religious neutrality, eliminate religious indoctrination, and stem both religious anarchy and totalitarianism in the public schools. Such goals are not only impossible to achieve, but they are not commanded by the Constitution. To the contrary, public school programs that accommodate the role that religion plays in American life should be found constitutional so long as they encourage, but do not coerce, religious activities and principles in a larger educational enterprise. Chaplaincy programs designed to help accomplish this objective would meet the legal and constitutional responsibilities of the local school board.

170. Titus, *Education, God's or Caesar's: A Constitutional Question of Jurisdiction*, 3 J. CHRISTIAN JURIS. 101, 101-80 (1982).