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LOCAL SCHOOL BOARDS AND RELIGION: THE SCOPE OF PERMISSIBLE ACTION

The problems of prayer and religion issues at the local school board level have not been solved by the flood of publications which followed *Engel v. Vitale*,¹ and *School District of Abington v. Schempp*.² In the former decision, the United States Supreme Court held, in 1962, that the New York laws requiring or permitting use of "The Regents' Prayer" were violative of the establishment clause of the first amendment to the Constitution of the United States. The Regents' prayer was non-denominational and had been composed by or for the Regents of the State of New York. In the *Schempp* case, the Court held that requirements in Pennsylvania for daily Bible reading or recitation of the Lord's Prayer in the public schools also were violations of the establishment clause. The decisions were unpopular³ and apparently were widely misunderstood. For example, suggestions that Thanksgiving or Christmas programs and baccalaureate services were now illegal, that the National Anthem could not be sung in public schools, or that the Pledge of Allegiance must be banned because it contains the words "under God," were widely circulated.⁴

School boards have been summoned into court because they would not permit voluntary prayer at school,⁵ and in another case, because they did permit such prayers.⁶ Parents with opposing views of the problem are demanding school board action at public meetings.⁷ Such pressures pose difficult problems. What is the law under which a local board now must handle complaints from parents favoring or condemning practices which are tentatively characterized

¹ 370 U.S. 421 (1962).

² 374 U.S. 203 (1963).

³ Two months after the *Engel* decision, the Gallup Poll reported that 79% of those questioned in a nationwide poll favored the continuation of religious observances in the public schools. Dissatisfaction and alarm publicly expressed was commented upon in *Time*, Aug. 24, 1962, p. 40. By June 1964, 115 Congressmen had introduced a total of 154 proposed constitutional amendments to overcome the effects of the Court's rulings in the prayer and Bible reading cases. The proposed amendments are set forth in *Hearings Before the House Committee on the Judiciary*, 88th Cong., 2d Sess., ser. 9, pt. 1, at 1-59 (1964).

⁴ *U.S. News and World Report*, July 9, 1962, p. 44; *Newsweek*, July 9, 1962, p. 44; *U.S. News and World Report*, July 1, 1963, p. 41.

⁵ *Stein v. Oshinsky*, 224 F. Supp. 757 (E.D.N.Y. 1963), *rev'd*, 348 F.2d 999 (2d Cir. 1965).

⁶ *Reed v. Van Hoven*, 237 Supp. 48 (W.D. Mich. 1965).

⁷ For example, see *San Jose Mercury*, March 16, 1965, p. 15, Col. 6-8 (4 star ed.), reporting complaints of parents to the Scotts Valley (California) Union School District governing board alleging that school prayer practices permitted were illegal.

“religious”? This is a vital political and legal question, but one which has been difficult to answer in any meaningful way, since we are only starting to refine this radical change in constitutional interpretation. The true meaning and the limits on the changes required are just now emerging from the decisions of the courts as they consider issues raised in new controversies in the light of the *Engel* and *Schempp* decisions.

WHAT THE SUPREME COURT DECIDED

The *Engel* decision, for all the furor it created, was a narrow one which altered the definition of the constitutional phrase “establishment of religion,” and pointed out that the mere *enactment* of a state law *respecting* establishment of religion is violative of the establishment clause of the first amendment. The *Schempp* decision a year later held that daily Bible reading or recitation of the Lord’s Prayer is a religious activity, and that the enactment of any state law or rule requiring or authorizing such activity is violative of the establishment clause. The Court drew attention to the rigidity of the establishment clause: “‘But, the First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*.’”⁸

The minimum meaning, then, of the majority opinions⁹ of *Engel* and *Schempp* taken together appears to be that neither daily prayer nor Bible reading may be required or authorized by a state as part of the school program without violating the establishment clause of the Constitution. The prohibition against rule making concerning activities which constitute “establishment” appears to be absolute. No degrees of rule making are suggested. The holding in *Schempp* indicated that the prohibition of the first amendment that *no law* respecting an establishment of religion shall be made is intended to include even a local school board regulation. Therefore it appears that any leeway for rule making can only involve the interpretation given to the phrase “establishment of religion.”

Maximum Compliance—Liberal Interpretation

Certainly a school board may act as if the *Schempp* doctrine prohibits making rules about anything remotely touching upon the subject of religion, if it chooses to do so. This could be done even

⁸ 374 U.S. 203, 220 (1963).

⁹ Only the two majority opinions are considered binding, since the various minority opinions can not be accommodated in any one coherent theory. In the author’s opinion, there is no rational basis for accepting one of the minority opinions over others which disagree.

without the *Schempp* doctrine, for the powers given to a local school board to administer the educational program largely discretionary in nature. It is clear that the courts will not require local officials to undertake Thanksgiving, Christmas, baccalaureate, or similar programs against their wishes and judgment. Such an attempted interference by a court would meet the fate of the injunction issued in *Stein v. Oshinsky*,¹⁰ where the Second Circuit Court said:

[W]e shall assume, *arguendo*, in plaintiff's favor that the Establishment Clause would not prohibit New York from permitting in its public schools prayers such as those here at issue. Nevertheless New York is not bound to allow them unless the Free Exercise Clause or the guarantee of Freedom of Speech of the First Amendment compels.

Neither provision requires a state to permit persons to engage in public prayer in state owned facilities wherever and whenever they desire.¹¹

But such assurances of immunity from court action, if a school board prohibits every sort of activity which might remotely touch a religious theme, are of no help. The board probably had such power before the *Engel* and *Schempp* decisions were made. Moreover, few boards or local communities will wish to conduct a "witch hunt" against all religious activities. Instead, boards are seeking to know exactly what they are now *legally prevented* from authorizing, so the full scope of retained discretion can be understood and applied as policy may direct.

Minimum Compliance—Strict Interpretation

It seems clear that no subdivisions, agencies, or employees of the state will be privileged to do the very thing that the state is prohibited from doing, that is to read the Bible or recite a prayer each day as part of the school program. It cannot be argued successfully that the local board, or even local school employees are not "the state" in this context. Only the most tenuous connection of a defendant to the state is necessary to show "state action."¹² It must be assumed that federal courts will enforce the very prohibition which the Supreme Court has established. But it is not necessary to assume that there will be an extension of the interpretation of the meaning of the phrase "establishment of religion." Perhaps daily prayers at school are not an "establishment of religion" prohibited by the first amendment if state employees do not supervise the activity and attendance is voluntary. Perhaps reading the Bible as part of a Thanksgiving, Christmas or Hanukkah program may

¹⁰ 348 F.2d 999 (2d Cir. 1965).

¹¹ *Id.* at 1001.

¹² *Monroe v. Pape*, 365 U.S. 167, 184-87 (1961).

not be "establishment of religion" even if done under the instructions of a state employee. Perhaps religious baccalaureate services may not be "establishment of religion" even though planned as school activities prior to actual graduation. Perhaps even the most religious verses of the National Anthem may be sung or recited as often as school authorities may require. Perhaps other hymns may be used in school as appropriate. These possibilities seem to fit into a category of activities outside the strict interpretation of the prohibitions laid down in the *Schempp* doctrine.

A narrow interpretation of the meaning of the decisions has judicial support. United States Circuit Court Judge Irving R. Kaufman has said:

The decisions of the Court in the School Prayer and Bible-Reading cases must be read with an eye toward the very limited character of their holdings. . . . A reading of not only the majority opinion but also of the concurring opinions reveals the narrowly constricted character of the Court's holding as well as its reiteration of the pervasiveness of the role of religion in our society.¹³

Moreover, it seems reasonable, on the doctrine of *de minimis*, that there will be no new extensions of specific prohibitions by the Supreme Court in the religion-in-schools matter in the near future. Remaining related issues do not nearly approach the importance of those already decided. In this connection, it must be appreciated that prior to the *Engel* decision, thirty-seven of the states required or permitted Bible reading in school each day.¹⁴ The New York statute alone affected approximately one tenth of all the school children in the United States. More than half of all public school children were subject to some sort of state authorized religious program prior to these decisions. Whatever local difficulties may arise with or in one school district in the future, the national significance underlying these decisions will be missing.

The Supreme Court has decided only one prayer and Bible reading case since *Schempp*. The State of Florida had contended, in *Chamberlin v. Board of Public Instruction*,¹⁵ that *Schempp* was not applicable because the Florida Legislature had declared that the purpose of the Bible reading statute was educational, not religious. The reversal was handled by the Supreme Court in a manner which did not broaden the definition of "establishment of religion." The opportunity to rule directly on the matter of religious baccalaureate

¹³ Excerpts from Proceedings of the Annual Judicial Conference of the Tenth Judicial Circuit, 34 F.R.D. 29, 40 (1963).

¹⁴ BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS 273 (1963).

¹⁵ 377 U.S. 402 (1964).

services under state requirement or authorization was avoided by dismissing that issue. One Justice dissented.¹⁶ Nor has the Court extended the concept of "establishment of religion" to other fringe areas, such as use of the words "In God We Trust" on our coins, or "under God" in our Pledge of Allegiance. It is unnecessary to suppose that the Court would broaden the definition of "establishment of religion" if a new case were presented to it.

One principle which was not established in *Engel* and *Schempp*, despite extensive comment by Justice Douglas, was the idea that an accommodation of religion by the state is violative of the Constitution. The proposal of Justice Douglas that even minor financial accommodation of any religious activity should be held unconstitutional was not joined by any other Justice. His invitation to overrule *Everson v. Board of Education*¹⁷ was not accepted. *Everson* upholds the right of a state to pay bus fares for children attending state schools or church schools.¹⁸ It remains good law that mere accommodation of a religious activity is not unconstitutional, even though it may involve some state expense.

SUBSEQUENT LOWER COURT DECISIONS

A New Jersey Bible reading statute was declared unconstitutional by the New Jersey Supreme Court in *Sills v. Board of Education*.¹⁹ Federal district courts invalidated the state Bible reading statutes in Delaware²⁰ and in Idaho.²¹ The Florida, New Jersey, Delaware, and Idaho decisions so far mentioned were on point with *Schempp*. But none of the other religion in school cases reported since *Schempp* are exactly on point, and the decisions in these cases indicate that the *Schempp* doctrine is being strictly limited in application to exactly parallel fact situations.

Other Issues in the Florida Case

In *Chamberlin v. Board of Public Instruction*²² the state statute was challenged on five issues: Bible reading, recitation of the Lord's

¹⁶ Reversal on the issues of Bible reading and prayer was unanimous. The issue of religious baccalaureate services was dismissed without opinion, Justice Stewart dissenting. The remaining two issues, conducting a religious census among pupils and requiring religious tests for teachers, were dismissed without opinion, Justices Stewart, Douglas, and Black dissenting. The majority dismissal of the issues not related to prayer or Bible reading was "for want of properly presented federal questions."

¹⁷ 330 U.S. 1 (1947).

¹⁸ *Id.* at 17-18.

¹⁹ 42 N.J. 351, 200 A.2d 615 (1964).

²⁰ *Johns v. Allen*, 231 F. Supp. 852 (D. Del. 1964).

²¹ *Adams v. Engelking*, 232 F. Supp. 666 (D. Idaho 1964).

²² 377 U.S. 402 (1964).

Prayer, religious baccalaureate services, religious census of students, and religious tests for qualification of teachers. On the first appeal to the United States Supreme Court²³ the decision of the Florida court affirming the validity of the state statute was vacated. Upon reconsideration, the Florida Supreme Court reaffirmed its previous decision.²⁴ On second appeal, the United States Supreme Court reversed the Florida court as to Bible reading and prayer, but dismissed as to the other issues.²⁵ The Florida court then upheld the Florida statute on the three issues not reversed by the Supreme Court.²⁶ These actions by the Florida court constitute strict interpretation of the *Schempp* decision. The definition of "establishment of religion" was not broadened.

Two New York Cases

In *Stein v. Oshinsky*,²⁷ the federal district court issued an injunction requiring local school officials to permit voluntary daily prayers in the Whitestone, N.Y. schools. The Second Circuit Court reversed, but the court avoided any extension of the establishment clause prohibition by deciding the case on the free exercise and freedom of speech clauses. This is an exercise of restraint, if not strict interpretation.

A New York court held, in *Lawrence v. Buchmueller*,²⁸ that a resolution of a local school board which permitted erection of a crèche on school property during a portion of the Christmas vacation period did not amount to "establishment of religion." The *Engel* and *Schempp* cases were cited in the opinion, but quite clearly the thrust of Justice Douglas' concurring opinions in those cases was not accepted as a limitation. Again, no extension of the *Schempp* doctrine occurred.

The Arizona Case

Members of the Jehovah's Witness religious sect sought an injunction in *Sheldon v. Fannin*²⁹ to ban the use of the National Anthem in public schools. The court said:

The singing of the National Anthem is not a religious but a patriotic ceremony, intended to inspire devotion to and love of country
The Star Spangled Banner may be freely sung in the public schools,

²³ 374 U.S. 487 (1963).

²⁴ 160 So. 2d 97 (Fla. 1964).

²⁵ 377 U.S. 402 (1964).

²⁶ 171 So. 2d 535 (Fla. 1965).

²⁷ 224 F. Supp. 757 (E.D.N.Y. 1963), *rev'd*, 348 F.2d 999 (2d Cir. 1965).

²⁸ 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup. Ct. 1963).

²⁹ 221 F. Supp. 766 (D. Ariz. 1963).

without fear of having the ceremony characterized as an "establishment of religion."⁸⁰

Although the singing of this hymn was not banned under the establishment clause, the children who object to singing it for religious reasons are to be permitted to sit quietly while other children stand and sing. Requiring participation would have involved coercion in violation of the free exercise clause of the first amendment of the Constitution.

The Michigan Case

A clear example of a disinclination to extend the *Schempp* doctrine beyond exactly parallel fact situations is shown in *Reed v. Van Hoven*.⁸¹ In this case the federal district court is co-operating with pro-prayer, anti-prayer, and school official groups to work out a means, if possible, of providing an opportunity for voluntary prayers at school and within the limitations of the first amendment. Groups of children are meeting voluntarily before or after school in space provided by the school, but without a school employee leading the group. The court retains jurisdiction of the case to consider and adjust future difficulties. The solutions being attempted appear to be based upon a strict, narrow interpretation of the *Schempp* decision.

SUMMARY AND CONCLUSION

The scope of the Supreme Court's decisions in the prayer and Bible reading cases was very narrow. Under this new doctrine, daily prayer or Bible reading at school, as part of the school program, is prohibited as an "establishment of religion." It does not necessarily follow that occasional prayer or Bible reading by school personnel, or regular prayer or Bible reading not under the direction of school personnel, are "establishment." Neither federal nor state courts have taken advantage of opportunities which have been presented to broaden the interpretation of the term "establishment of religion" beyond the narrow limits indicated.

Arrangements to accommodate parents and school children who wish to utilize school premises for voluntary religious activities have been permitted by both federal and state courts. A state law specifically authorizing religious baccalaureate services has been upheld by the Florida Supreme Court, and review of the issue was dismissed on appeal to the United States Supreme Court, one Justice dissenting.

⁸⁰ *Id.* at 774.

⁸¹ 237 F. Supp. 48 (W.D. Mich. 1965).

Children who object to participating in particular school activities for religious reasons must be permitted to withdraw, however, to avoid coercion in violation of the free exercise clause of the first amendment of the Constitution.

A narrow interpretation of the prayer prohibition is indicated, which leaves the local school board wide discretion in religion-related matters. And if the school board uses its discretionary power to refuse an accommodation of religion, the decision is a political one, probably not subject to court review.

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