# RECENT DEVELOPMENTS IN THE AREA OF RELIGIOUS ACTIVITIES IN PUBLIC SCHOOLS AND OTHER PUBLIC PLACES. 1974.







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## Introduction

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

U.S. Constitution, Amendment I

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws..."

U.S. Constitution, Amendment XIV

From the time that the Bill of Rights was ratified to the late 1940's, the Establishment Clause, as applied to the federal government, or to the states through the due process clause of the 14th Amendment, had not been the subject of consideration by the Supreme Court. It was not until 1948, in Illinois ex rel McCollum v. Board of Education, 333 U.S. 203 (1948), that the Supreme Court struck down some form of state action on the grounds that it had violated the Establishment Clause.[1/] However, the pace of litigation and public concern in this area picked up considerably only after the Supreme Court handed down its decisions in Engel v. Vitale, 370 U.S. 421 (1962), and Abington School District v. Schempp, 374 U.S. 203 (1963), where the Court found state-sanctioned devotional exercises in the public schools to be violative of the Establishment Clause. As lower courts applied the principles enunciated in Engel and Abington to new fact situations, the public response became increasingly hostile to what was viewed by some as an encroachment on the essentially religious character

1/ An attempt to define exhaustively the content of the Establishment Clause was undertaken by Justice Black in Everson v. Board of Education, 330 U.S. 1 (1947); however, the "state action" at issue, the reimbursement of transportation costs to parents of parochial school students, was not found to be violative of the Establishment Clause.

of the American People.

Instances of citizen resistance to the pronouncements of the courts are manifested in a number of cases contained in Part I of this report.[2/] Recent activity in the Congress also reflects the fact that the controversy has not abated since 1962. This report summarizes the Supreme Court cases on the subject of religious exercises in the public schools, and many lower federal and state court decisions which have applied the language of the Court to some highly diverse situations. In addition, recent Congressional attempts to alter the effect of the Supreme Court decisions are noted.

2/ See, for example, State Board of Education v. Board of Education of Netcong, N. J., 262 A. 2d 21 (1970), aff'd 270 A. 2d 413 (1970). cert. den. 401 U. S. 1013 (1971); Sullivan v. School Committee of the Town of Leyden, 267 N. E. 2d 226 (1971), cert. den. 404 U. S. 849 (1971); American Civil Liberties Union v. Albert Gallatin Area School District, 307 F. Supp. 637 (1969), aff'd 438 F. 2d 1194 (1971).

TABLE OF CASES*



*Principal cases under discussion are identified by an asterisk.

Part I

## Religious Activities In Public Schools

The Supreme Court decisions in Engel v. Vitale, 370 U.S. 421 (1962), and in Abington School District v. Schempp, 374 U.S. 203 (1963), if read together, stand for the proposition that a state or its instrumentality cannot institutionalize or sanction any form of religious exercise in the public schools, notwithstanding the fact that students may have the option to refrain from participating. However, because the language of the Court in these opinions has not been unambiguous, an interpretation has been made by some governmental bodies that a state-sanctioned prayer in the public schools would not be violative of the First Amendment if only it were shown to be truly voluntary. Yet, in the majority decision in Engel, supra, Justice Black wrote:

> ...the fact that its [the prayer's] observance on the part of students is voluntary can [not] serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause ...The Establishment Clause...is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. 370 U.S. at 430.

Despite this language, many of the school plans scrutinized by the lower courts in the cases that follow have involved an attempt by the school authorities to avoid the element of coercion. If a truly voluntary, non-coercive prayer program were devised, it was believed, this fact would place the program outside of the ambit of the Engel and Abington holdings. Nevertheless, the lower courts have consistently held that any formal action by school authorities in providing for a prayer program in public schools cannot be constitutionally justified on the basis that the students are not coerced into attending the program.[3/]

3/ But cf. Wood v. Mt. Lebanon Township School District, 342 F. Supp. 1293 (1972), infra.

It is important to note what Engel and Abington did not decide. They did not determine whether a religious exercise resulting from a spontaneous expression on the part of the students, without any overt encouragement from the state, would be violative of the Establishment Clause. In the cases which follow, some of the courts have pointed out that the participation of students in religious exercises in itself is not contrary to the Establishment Clause. It is only when the school authorities take an action in support of the exercise that the Establishment Clause has been deemed to have been violated.

The Engel and Abington decisions did not affect the right of school districts to hold activities on school premises which are religiously neutral. The study of the Bible as literature in the public schools, for example, would be untouched by the Establishment Clause.[4/]

In his concurring opinion in Abington, Justice Brennan noted other practices which in theory might violate the Establishment Clause, but which were nevertheless probably valid. The furnishing of churches and chaplains at military establishments or in penal institutions, for example, could arguably be sustained as an appropriate accomodation of the Free Exercise of religion rights of persons deprived by the Government of normal opportunities for worship. A similar rationale might validate the draft exemption for ministers and divinity students or the excusal of children from school on their religious holidays.

4/ Justice Clark, in Abington, supra at 225, wrote: "Nothing we have said here indicates that... study of the Bible... when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."

Also likely to be insulated from constitutional challenge, according to Justice Brennan, were the invocational prayers in state and federal legislative chambers, the use of the motto "In God We Trust" on currency, documents, and public buildings, and various patriotic exercises which contain a reference to the Deity such as the Pledge of Allegiance. Many of these practices, in Justice Brennan's view, were religious in origin but have ceased to have religious meaning. Cases challenging some of these activities are treated, infra.

(A) Prayers and Bible Reading

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

On November 30, 1951, the New York State Board of Regents, a state agency which has broad powers over education, adopted "The Regents Statement on Moral and Spiritual Training in the Schools." This statement sponsored the following non-denominational prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country," and suggested that "at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God." On July 8, 1958, the Board of Education of a Union Free School District in North Hempstead resolved that the Regents prayer be said daily in the schools. The parents of ten children sought an order of mandamus prohibiting the use of the prayer. They argued that the practice violated the Establishment and Free Exercise Clauses of the United States Constitution. The trial court held that the School Board could authorize, but not require, the recital of the prayer, and had to take affirmative steps to assure that parents knew of the procedure available for getting their children excused from the recital.[5/] On

5/ Matter of Engel v. Vitale, 18 Misc. 2d 659 (1960).

On appeal, the Court of Appeals of New York, that state's highest tribunal, upheld the lower court's ruling. 6/

On June 25, 1962, the United States Supreme Court reversed the decision of the New York Court of Appeals. Writing the majority opinion for five members of the Court, 7/ Mr. Justice Black held that the prayer recital was an establishment of religion prohibited by the Constitution. In his words,

> ...We think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in 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. 8/

In reply to the respondent's argument that the non-denominational and voluntary character of the prayer withdrew it from the area of constitutional proscription, Justice Black noted some of the differences between the Establishment and Free Exercise Clauses of the First Amendment. Indicating that facts of voluntariness and non-denominational character might serve to withdraw such a prayer from the purview of the Free Exercise Clause, he said the same was not true of the Establishment Clause.

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. 9/

6 Matter of Engel v. Vitale, 10 N.Y. 2d 174 (1961).
7/ Mr. Justice Black was joined by Chief Justice Warren, and Justices Harlan, and Brennan. Justice Douglas concurred separately, Justice Stewart dissented, and Justices Frankfurter and White took no part in the decision.
8/ Engel v. Vitale, 370 U.S. 421, 425 (1962).
9/ Engel v. Vitale, at 430.

In the majority's view the Regents prayer established the religious beliefs espoused therein, and, under the circumstances, its recitation was therefore unconstitutional. Mr. Justice Stewart, the lone dissenter, felt that the activities were not sufficient to create an "official religion," and were, in fact, just one more expression of recognition of a Supreme Being, similar to the inscription "In God we trust" on United States coins.

Abington School District v. Schempp; Murray v. Curlett, 374 U.S. 203 (1963)

These two cases were joined by the Supreme Court because they presented the same constitutional questions.

In the Abington case, parents of several pupils in the defendant school district objected to the implementation of a Pennsylvania statute that provided for the compulsory reading without comment, of ten verses of the "Holy Bible" as part of opening exercises in the public schools.[10/] Provision was made for excusing children from attending morning devotionals upon written request of the parents. Petitioners brought suit in federal district court to enjoin enforcement of the statute, on the grounds that it was both an establishment of religion and an interference with the free exercise of religion. In support of their contention, plaintiffs testified that although children could be excused from the readings, their absence would be noticed by their classmates, who would think them "oddballs" and possibly put an immoral connotation on their actions. The three-judge court held that the statute was an unconstitutional establishment of religion. Accordingly, it found it unnecessary to pass on the free exercise arguments.[11/] The

10/ 24 Pa. Stat. §15-1516, as amended by Public Law 1928 (Supp. 1960), December 17, 1959.
11/ Schempp v. Abington School District, 201 F. Supp 815 (1962).

decision was appealed to the U. S. Supreme Court.

The Murray case involved a similar statute in Maryland.[12] In 1905 the Baltimore Board of School Commissioners adopted a rule pursuant to a statute which provided for the "reading, without comment, of a chapter in the Holy Bible and/or use of the Lord's Prayer." The rule also provided that any child could be excused from the exercises upon the written request of his parents. The petitioners, professed atheists, alleged that the rule violated their freedom of religion and sought a writ of mandamus in the state courts requiring its cancellation. The trial court sustained a demurrer (a pleading which admits facts but denies that they constitute a good cause of action) by the defendants, and the Maryland Court of Appeals, that state's highest tribunal, affirmed by a four to three vote.[13] The Supreme Court granted the appellant's request for review (certiorari).[14]

On June 17, 1963, Mr. Justice Clark delivered the opinion of the Court.[15] Holding both statutes unconstitutional, Justice Clark reasserted the test enunciated by Mr. Justice Frankfurter in the Sunday Blue Law Cases.[16] He said:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the

12/ Annotated Code of Maryland, Art. 77 §202.
13/ Murray v. Curlett, 228 Md. 239 (1962).
14 Murray v. Curlett, 371 U.S. 809 (1962).
15/ Mr. Justice Clark's opinion spoke for himself and Chief Justice Warren, Justice Black, and Justice White; Justices Brennan, Douglas, Goldberg, and Harlan concurred separately. Justice Stewart dissented.
16/ McGowan v. Maryland, 366 U.S. 420 (1961).

> Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion... a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Noting that the lower courts in both cases had found Bible reading to be a religious exercise, the Court concluded that the statutes violated the Establishment Clause by breaching the neutrality imposed upon government, federal and state, by the First Amendment and the Fourteenth Amendment. In words of the Court:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. 17/

Sills v. Hawthorne Board of Education, 200 A. 2d 817 (1963), aff'd 200 A. 2d 615 (1964)

Subsequent to the Supreme Court decision in Abington School District v. Schempp, supra, the Attorney General of New Jersey rendered an opinion in which he stated that the New Jersey statute requiring the reading without comment in each public school classroom of at least five verses from the Old Testament was unconstitutional. The Hawthorne Board of Education then passed a resolution to the effect that Bible reading was not to be halted. The N.J. Attorney General and the State Board of Education then sought an injunction to restrain the Hawthorne Board of Education from permitting Bible reading in public schools.

17/ 374 U.S. at 226.

The court found that the laws and facts surrounding the case were almost identical to those in the Abington case, supra, the only difference being that the reading of the New Testament was permissible under the Pennsylvania statute, whereas the Old Testament was specified in the New Jersey statute. Because the Abington decision would apply to the New Jersey statutes, and thus make the practice violative of the Establishment Clause, the court enjoined the Hawthorne Board of Education directive. As the court wrote, "A reading of the Abington... case leads the court to the conclusion that any law which requires religious exercises in the public schools is violative of the U.S. Constitution." 200 A. 2d at 818.

Adams v. Engelking, 232 F. Supp. 666 (1964)

A class action was initiated by the plaintiffs as parents of public school children to have Sec. 33-1604 of the Idaho Code declared unconstitutional. That statute provided that--

> Selections from the Bible, to be chosen from a list prepared from time to time by the state board of education, shall be read daily to each occupied classroom in each school district. Such reading shall be without comment or interpretation. Any question by any pupil shall be referred for answer to the pupil's parent or guardian.

Finding that the issue was settled by the Abington case, supra, Sec. 33-1604 was held to be in conflict with the First and Fourteenth Amendments and thus invalid.

Johns v. Allen, 231 F. Supp. 852 (1964)

Plaintiffs, parents of children who attended one of the public schools in Delaware, instituted suit to enjoin the reading of verses of the Bible as required by statute, and the recital of the Lord's Prayer in unison, as required by a directive of the State Board of Education pursuant to authority conferred on it by a state statute.

The court interpreted the Abington case to mean that once an activity has been determined to be a religious one, and that activity is required in the public schools by state action, then it must be found to be unconstitutional. In view of the reverent character of the activities in question, as reflected by the participating teachers' testimony, there was no question but that the statutory provision (§4102) requiring Bible reading, and the State Board of Education directive, requiring the recitation of the Lord's Prayer, constituted an establishment of religion in light of the Abington decision.

Stein v. Oshinsky, 348 F. 2d 999 (1965), cert. den. 382 U.S. 957 (1965)

In this case plaintiffs, parents of pupils in a New York public school, brought suit in the federal district court to enjoin school officials from preventing the recitation of prayers by pupils who were acting on their own initiative. The complaint alleged that the defendants, acting on their understanding of the rule laid down in Engel v. Vitale, had prevented kindergarten pupils from reciting two prayers:

> God is Great, God is Good
> and We thank Him for our Food, Amen.
>
> Thank You for the World so Sweet
> Thank You for the Food We Eat
> Thank You for the Birds that Sing--
> Thank You, God, for Everything.

The district court granted the plaintiff's motion for a summary judgment, and entered an order prohibiting any interference with the prayer, and requiring that a reasonable opportunity be provided for it each day.[18/]

On appeal, the plaintiffs, who had prevailed in the lower court, argued that since the prayers were voluntary, to refuse to permit them was a restriction

18/ Stein v. Oshinsky, 224 F. Supp. 757 (1963).

of the Free Exercise of religion guaranteed by the First Amendment. The court of appeals first noted that it was debatable whether voluntary prayers such as these could be conducted without the participation of teachers, thus converting the activity into illicit State action. However, it did not decide the question. Instead it pointed out that the State of New York and its political subdivisions could refuse to permit prayers in schools unless the United States Constitution, under its Free Exercise and Freedom of Speech provisions, compelled a different result. The court held that "neither provision requires a state to permit persons to engage in public prayer in state-owned facilities wherever and whenever they desire."[19/] The plaintiff's suit was dismissed, and the Supreme Court refused to grant certiorari.

Chamberlin v. Dade County Board of Public Instruction, 171 So. 2d 535 (1965)

At issue in this case, inter alia, was the constitutionality of a Florida statute requiring the reading of the Bible in the public schools. The statute, Sec. 231.09, F.S.A. (1961) stated in part:

> 231.09 Duties of instructional personnel
>
> Members of the instructional staff of the public schools, subject to the rules and regulations of the state board and of the county board, shall perform the following functions:
>
> 2) Bible reading.--Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment.

By appropriate regulation, the Dade County Board of Public Instruction required that pupils be excused from attendance upon request by the parents or guardians. In its original opinion, at 143 So. 2d 21 (1963), the Florida Supreme Court found that Bible reading in the public Schools was not contrary to any constitutional

19/ Stein v. Oshinsky, 348 F. 2d 999, 1001 (1965).

provisions. The U.S. Supreme Court, at 374 U.S. 487 (1963), vacated that judgment and remanded the cause for further consideration in the light of the Abington case.

The Florida Supreme Court, at 160 So. 2d 97 (1964), then distinguished the Florida statute from the Pennsylvania statute found invalid in the Abington decision on the fact that the Florida statute was founded upon secular rather than sectarian considerations. To apply the Abington rationale to the present case, the court felt, would enlarge the U.S. Supreme Court's holding, and the responsibility for any enlargement should have been left to that Court. Accordingly, the court affirmed its original decision.

The plaintiffs appealed the decision to the U.S. Supreme Court. The Court remanded the case, 377 U.S. 402 (1964), in respect to the issues raised by Sec. 231.09, Flor. Stats. (1961). The Florida Supreme Court, construed the remand to mean that "prayer and devotional Bible reading in the public schools pursuant to a statute or as sponsored by the school authorities are violative of the Federal Constitution," and held the Florida statute to be unconstitutional. 171 So. 2d 535 (1965).

Reed v. Van Hoven, 237 F. Supp. 48 (1965)

Parents of public school children brought suit against the members of the Jenison Public School Board to enjoin religious exercises in the public schools permitted by a school board regulation. Instead of granting an injunction, the district court devised a substitute policy and plan which it determined would not conflict with the strictures of the Establishment Clause.

The court determined that if the practice or enactment had the net effect of placing the official support of the local or national government behind a particular denomination or belief, there would then be a violation of the Es-

tablishment Clause. However, the court argued that there are areas in which the interplay between government and religion does not constitute an establishment of religion, noting Zorach v. Clauson, 343 U.S. 306 (1952), where it was stated:

> When the state... 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. Id. 343 U.S. at 314.

The plan devised by the district court to reach this accommodation between church and state consisted of providing for a room, before or after classes, for those students who wished to say a prayer or read scriptures according to their choice. The students would have to meet in a room other than their homerooms. There would be a five minute gap between the completion of the prayer and the beginning of the school day in the morning, and the completion of classes and the beginning of the prayers in the afternoon. There should be a commingling of praying and non-praying students before classes begin and after they are completed. If a prayer is to be said during the lunch period, it should be a silent prayer. Finally, the role of the teacher at these prayer sessions should be one of merely keeping order. The teacher should not select the prayers or the readings. The students should determine what the prayers or readings should be by means of their own choosing.

Opinion of the Justices, 228 A. 2d 161 (1967)

The New Hampshire Senate propounded questions to the state Supreme Court concerning the constitutional validity of several pending bills. The justices found the proposal to require some form of morning exercises each day in the discretion of the classroom teacher, who was authorized to include "the use of the

Lord's Prayer, or any other prayer of some general use, or readings from the Holy Bible or from other religious works..." would violate the Establishment Clause. Citing Abington v. Schempp and Chamberlin v. Dade County Bd. of Public Instruction, supra, the Justices indicated that the proposal "sanctions and encourages a religious exercise to be conducted by teachers in the public schools and would therefore be in violation of the First Amendment..." 228 A. 2d at 164.

DeSpain v. DeKalb County School District, 384 F. 2d 836 (1967), cert. den. 390 U.S. 906 (1968)

Kindergarten children in a public school in DeKalb, Illinois, were required to recite the following poem before their morning snack:

> We thank you for the flowers so sweet;
> We thank you for the food we eat;
> We thank you for the birds that sing;
> We thank you for everything.

Parents of one of the pupils filed suit in federal district court to enjoin this recitation on the grounds that it was a prayer and therefore prohibited under the rule announced in Engel v. Vitale. At an evidentiary hearing witnesses for both sides were heard. Witnesses for the plaintiff included two Protestant ministers, both professors of theology, who testified that in their opinion the poem in question was a prayer in form and intention. Witnesses for the defendant thought the poem was not a prayer. The teacher of the class testified that the verse was used as part of her program of good citizenship, and was intended to teach social manners. The district court decided the verse was not a prayer, relying, in large part, on the teacher's testimony, and dismissed the plaintiff's complaint for failure to state a cause of action.[20/] In passing, the district judge stated that he thought the case was de minimis (too small or trifling for the law to take notice of).

20/ DeSpain v. DeKalb County School District, 255 F. Supp. 655 (1966).

On appeal, the United States Court of Appeals for the Seventh Circuit reversed, citing Engel v. Vitale and Stein v. Oshinsky. Noting with approval the trial judge's characterization of the case as de minimis, the court said:

> Certainly, this verse was as innocuous as could be insofar as constituting an imposition of religious tenets upon nonbelievers. The plaintiffs have forced the constitutional issue to its outer limits.

However, the court cited with approval the statement in Everson v. Board of Education, 330 U.S. 1, 18 (1947):

> The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. Quoted in 384 F. 2d at 840.

Accordingly, the defendant school authorities were permanently enjoined from allowing the recitation of the verse.

American Civil Liberties Union v. Albert Gallatin Area School District, 307 F. Supp. 637 (1969), aff'd 438 F. 2d 1194 (1971)

Six years after the Supreme Court ruled as unconstitutional required religious devotions in public schools, the Albert Gallatin Area School Board sought to test that decision by defiance, and acted in March, 1969, to "install Bible reading and some nondenominational mass prayer in the classrooms." The defiance was halted December 18, 1969, after the American Civil Liberties Union, acting in behalf of the Edwin J. Mangold family, obtained an injunction against the practice by the rural southwestern Pennsylvania school district. In his opinion, Judge Rosenberg pointedly said that "I make no ruling on what effect, if any, the free actions of children, meeting on their own time, and of their own volition, even though on school premises, would have."[21/] The crucial flaw in the

21/ American Civil Liberties Union v. Albert Gallatin Area School District, 307 F. Supp. 637, 642 (1969).

school system's religious practices, the judge said, and the activity that made its programs vulnerable to injunction under the Supreme Court's school prayer rulings of 1962[22/] and 1963,[23/] was that the school board had moved formally to install Bible reading and nondenominational prayer in the classroom. This, Judge Rosenberg said, amounted to an "establishment of religion" by an agency of the government,an act forbidden by the First Amendment to the Constitution.

State Board of Education v. Board of Education of Netcong, New Jersey, 108 N.J. Super. 564, 262 A. 2d 21, aff'd 270 A. 2d 412 (1970), cert. den. 401 U.S. 1013 (1971)

To evade the Supreme Court's pronouncements banning compulsory school prayers, the Netcong School in Netcong, New Jersey, instituted a daily period for "free exercise of religion" at which time a pupil volunteer read from the Congressional Record the remarks of the chaplain of either the United States Senate or House of Representatives. This period was conducted on a voluntary basis each day at 7:55 a.m. in the high school gymnasium and pupils who did not wish to participate in the program were permitted either to enter the building and go to their homerooms or to postpone their arrival at school until the conclusion of the program.

The state Commissioner of Education, Carl L. Marburger, requested an opinion on the constitutionality of the practice from New Jersey Attorney General, Arthur J. Sills. In his opinion, Sills found "...no rational distinction between prayer and Bible passages from the Congressional Record," and decided that such practices violated the Constitution.[24/] Subsequent to the Attorney General's opinion, the Office of the State Commissioner of Education ordered the Netcong

22/ Engel v. Vitale, 370 U.S. 421 (1962).
23/ Abington School District v. Schempp, 374 U.S. 203 (1963).
24/ Opinion of New Jersey Attorney General, Formal Opinion 1969--No.3p. 9 (November 24, 1969).

school to abandon the program. This the school refused to do until such time as the constitutionality of the program had been judicially determined.

In a suit brought by the State Board of Education against the Board of Education of Netcong, New Jersey, Superior Court Judge Joseph H. Stamler ordered the school to cease immediately the daily classroom reading of prayers from the Congressional Record. Noting that the Board defended the practice as the reading of inspirational "remarks" the judge said:

> To call some of the beautiful prayers in the Congressional Record 'remarks' for a deceptive purpose is to peddle religion in a very cheap manner under an assumed name. This type of subterfuge is degrading to all religions. 108 N.J. Super. 564, 583.

In granting the injunction which ended the Netcong school prayer-reading programs, Judge Stamler held that the program violated the Establish ment Clause of the First Amendment and rejected the argument of the school board that it was defending the free exercise of religious belief as well as religious non-belief.

On November 9, 1970, the Supreme Court of New Jersey affirmed the lower court ruling in a per curiam opinion. 25/

Sullivan v. School Committee of the Town of Leyden, 267 N.E. 2d 226 (1971), cert. den. 404 U S. 849 (1971)

The small town of Leyden in western Massachusetts ignored the Supreme Court ban on religious exercises in public schools and reinstated Bible readings and recitation of the Lord's Prayer in the classrooms of the town's elementary school.

On August 21, 1969, members of the Leyden School Committee passed a resolution which stated:

25/ State Board of Education v. Board of Education of Netcong, N.J., 270 A. 2d 413 (1970).

> On each school day before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by our United States Constitution.
>
> This freedom of religion shall not be expressed in any way that will interfere with another's rights.
>
> Participation may be total or partial, regular or occasional, or not at all.
>
> Non-participation shall not be considered evidence of non-religion nor shall participation be considered evidence of recognizing an establishment of religion.
>
> The purpose of this motion is not to favor one religion over another, nor to favor religion over non-religion, but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility to contribute to the general welfare of the community and to preserve the values that constitute our American heritage.

In a formal opinion, Attorney General Robert H. Quinn ruled the practice unconstitutional under the First Amendment to the United States Constitution because the committee's motion had as its purpose, "the advancement of religion." [Report of the Attorney General 57 (1970)]. He argued that the practices in Leyden were primarily religious in nature and advanced religion in violation of the rule formulated by the Supreme Court in Abington School District v. Schempp and Murray v. Curlett, supra, which stated:

> The test may be stated as follows, what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say, 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. 374 U.S. 222.

When the Leyden School Committee refused to discontinue the daily periods of religious devotion, the Commonwealth's Commissioner of Education, Neil V. Sullivan, brought an action in the Superior Court of Suffolk County to have the practice enjoined. In that action Justice Rutledge found the religious exercises conducted at Leyden school lawful and valid insofar as participation by students alone is concerned but constitutionally objectionable insofar as participation by teachers with the students is concerned:

> The fact that during the five minutes immediately prior to the 8:45 a.m. bell (the designated official commencement of the school day) "some form of prayer or spiritual expression takes place in each of the classrooms" does not offend against the establishment clause of the First Amendment to the Constitution as applied to the states by the Fourteenth Amendment. The fact that during said period one of the children takes the initiative to read from a Bible, an anthology or other spiritual text or, on occasion, that prayers, traditional or innovative, are said or read aloud, does not in the Court's view offend against the United States Constitution.
>
> The authorization of participation by the teachers in the aforementioned "exercise of religion" by the vote of the respondents does, however, in the Court's opinion, violate the First Amendment. It is unrealistic to suggest that teachers are in the school buildings immediately before the start of the school day in their capacity as private citizens rather than as school teachers hired by the town. It also is unrealistic to suppose that the teachers, if they participate, would not tend to direct the activities which take place in the five minute period. Sullivan v. School Committee of the Town of Leyden at 11.

The Commissioner of Education appealed the Superior Court's decision finding that some of the practices allowed by the School Committee were permissible. The School Committee's position in the appeal was that since there was no requirement of student or teacher participation, and no prescribed form for the

exercises, and since the voluntary exercises were wholly under student control, the practices were not within the prohibition of the Abington case. Despite these facts, the court found that because the exercises were held on school property with school committee permission granted by resolution, the Establishment Clause would not permit either students or teachers to participate in the religious observances. The court felt controlled by the Supreme Court decisions.

> The Supreme Court thus far has not limited the broad language with which (as in the Schempp case) it has held invalid substantially nondenominational and neutral religious observances on public school property. Until and unless such a limitation takes place (even if there is minimal State encouragement of only insubstantial school religious exercises), it would serve no useful purpose to attempt to draw any fine distinction between those observances which have hitherto been proscribed by the Supreme Court and the Leyden practices now presented for our scrutiny... 267 N.E. 2d at 228.

Hunt v. Board of Education of County of Kanawha, 321 F. Supp. 1263 (1971)

Six students at a high school in Kanawha County brought suit to enjoin the Board of Education from prohibiting them from meeting voluntarily on the premises of the school before classes began for the purpose of engaging in group prayer and to obtain a declaratory judgment that these acts were violative of their rights as guaranteed under the First and Fourteenth Amendments.

The meetings in question were initiated without the knowledge or permission of the faculty and the principal of the High School, and were not sponsored or supervised by any member of the faculty. Once having learned of the prayer meetings, the principal prohibited the participating students from using the school premises for these purposes.

Prior to the time that the meetings began, rules formulated by the

Board of Education had provided that requests for the use of school buildings for religious purposes should not be granted by school authorities, and that no student should be in a school building without the supervision of a teacher.

The court determined that two questions were raised by the case: (1) whether the Board of Education had the authority to prohibit the use of school facilities for any religious purpose, and (2) whether such prohibition was constitutionally permissible.

The county Board of Education, as a corporation created by the state legislature, was dependent upon the legislature for its powers. The court construed the relevant state statutes so as to find that the Board of Education did not have any authority to permit the use of its school facilities for the conduct of any meeting of a religious nature. And even if the Board had the authority, it could exercise its administrative discretion legitimately to prohibit all religious activities on the school premises.

Finally, in ordering a summary judgment in favor of the Board of Education, the court found that to deny the use of the school premises for a religious activity would not violate any provisions of the Constitution. The First Amendment guarantees did not promise that the individual could gather at any public place at any time to exercise his religious beliefs. The action of the principal in this case was consistent with the separation of Church and State enunciated in the Establishment Clause. And, as Justice Frankfurter wrote in McCollum v. Board of Education, 333 U.S. 203 at 231 (1949):

> In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.

Alabama Civil Liberties Union v. Wallace, 331 F. Supp. 966 (1971), aff'd 456 F. 2d 1069 (1972)

Title 52 of the Code of Alabama (§§542, 543, and 544) required each public school in the state to provide daily readings from the Holy Bible. Teachers were to indicate their compliance with this requirement when making their monthly reports and city school superintendents were to certify that each teacher under his supervision had so complied. Public schools in the state were forbidden from drawing public funds unless they fulfilled these statutory obligations.

Suit was brought by the Alabama Civil Liberties Union, a nonprofit organization incorporated under Alabama state law, and the parent and natural guardian of minors enrolled in the public schools in Montgomery County, Alabama. Named as defendants were George C. Wallace, Governor of Alabama and an ex-officio member of the State Board of Education, and other state educational officials.

The U. S. District Judge had little difficulty in concluding that the Alabama statute violated the Establishment Clause of the First Amendment, as made applicable to the state through the Fourteenth Amendment, and that its enforcement should be enjoined.

> The Supreme Court has clearly, regularly, and often pronounced its prohibition of laws such as these now before this Court based upon bitter lessons learned in England and in the early history of this nation. Religion must be relieved of the possibility of political pressure and, to that end, the decisions of the Supreme Court are both illuminating and binding. It is, therefore, the opinion of this Court that Code of Alabama, Title 52, Sections 542, 543, and 544 are repugnant to the First Amendment of the Constitution and are void and that enforcement of said statutes. . . should be permanently enjoined. 331 F. Supp. at 969.

Opinion at the Justices, 307 A. 2d 558 (1973)

The New Hampshire Senate propounded several questions to the State Supreme Court concerning the constitutional validity of proposed bills. The Justices found that the proposal to authorize and encourage recitation of the Lord's Prayer in the public schools would be unconstitutional since it was subject to the same constitutional infirmities as an earlier legislative proposal authorizing public school teachers to use the Lord's Prayer and other religious readings as part of morning exercises. See Opinion of the Justices, 228 A. 2d 161 (1967), supra.

(B) Other Activities Deemed Religiously Non-Neutral

(1) Bible Distribution

Tudor v. Board of Education, 100 A. 2d 857 (1953), cert. den. 348 U.S. 816 (1959)

The issue of what may constitute a religious exercise in the context of the public schools was raised directly by Tudor v. Board of Education, 100 A. 2d 857 (1953), cert. den. 348 U.S. 816 (1954). The Board of Education passed a proposal permitting the Gideons International to furnish copies of the King James version of the Bible to students who requested them. The request forms had to be signed by a parent or guardian of the pupil. Evidence was introduced which indicated that the religious sensibilities of certain religious groups were offended by the King James version. Once it was determined that the Bible was a sectarian work, the Court was able to find that by permitting the distribution of the Gideon Bible, the Board of Education had "established" one religious sect in preference to another. The Board's proposal thus was struck down as a violation of the Establishment Clause of the First Amendment.[26/]

26/ The New Jersey Constitution was also found to invalidate the proposal. For a more recent case on distribution of Bibles in the public schools, see Brown v. Orange County Board of Public Instruction, 128 So. 2d 181, aff'd 155 So. 2d 371 (1963).

(2) Anti-Evolution Laws

Epperson v. State of Arkansas, 393 U.S. 97 (1968).

Suit was brought by a tenth grade biology teacher challenging the constitutionality of Arkansas' anti-evolution statute which forbade any teacher in any state-supported school or university to teach or to use a textbook that teaches "that mankind ascended or descended from a lower order of animals." Those found guilty of violating the statute were subject to a criminal fine of $500 and dismissal from their teaching position.

In assessing the constitutional validity of the Arkansas statute, the U.S. Supreme Court, in an opinion by Justice Fortas, indicated that there was "no doubt that Arkansas sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man." 393 U.S. at 107. Moreover, the Court noted that Arkansas had not attempted to defend its law on any secular basis and that "fundamentalist sectarian conviction was and is the law's reason for existence." Id., at 107-108.

In light of these findings the Court was unable to conclude that Arkansas' anti-evolution statute was religiously neutral. As the Court explained--

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion 393 U.S. at 103-104.
>
> * * *
>
> There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any

religious sect or dogma. Id., at 106.[27]

Wright v. Houston Independent School District, 366 F. Supp. 1208 (1972), aff'd 486 F. 2d 137 (1973), petition for certiorari filed Brown v. Houston Independent School District, No. 73-1620, 42 L.W. 3622 (1974)

A suit which seems to test the limits of the Supreme Court's rationale in Epperson v. Arkansas, supra, was brought to enjoin the local school district and the Texas State Board of Education from permitting the teaching of the theory of evolution as part of the public school academic curriculum and from using textbooks which present this theory. Here, it was alleged that the Defendants were officially supporting a "religion of secularism" in contravention of the First Amendment by restricting the study of human origins to an uncritical assessment of the theory of evolution.

The district court, however, distinguished Epperson v. Arkansas, upon which the plaintiffs relied, and dismissed their suit for failing to state a claim upon which relief could be granted.

> ...whereas Arkansas labelled as a criminal offense the mere reference to an entire body of scientific opinion, neither the State of Texas nor the Houston Independent School District has given legislative expression to any view of the subject of evolution. /The State, at most has a general policy of approving textbooks which present the theory of evolution in a favorable light./ No position regarding human origins is even indirectly proscribed by State or District. Furthermore, Plaintiffs have failed to assert the suppression of opposing ideas. Clearly Defendants "policy" (or lack thereof) regarding the theory of evolution is far removed from Arkansas' blanket censorship. 366 F. Supp. at 1210.

27 Epperson was followed by the Supreme Court of Mississippi two years later when Mississippi's anti-evolution law was invalidated. See Smith v. State of Mississippi, 242 So. 2d 692 (1970). See also Moore v. Gaston County Board of Education, 357 F. Supp. 1037 (1973), holding that discharge of student teacher without warning for responding favorably to Darwinian theory in answer to student questions violated Establishment Clause.

The plaintiffs suggested that the school district should be compelled to allow "equal time" for all theories concerning human origins. The district court rejected this approach as impractical since there were many alternate theories to the Darwinian theory and the court was not qualified to select among them for the benefit of a public school biology curriculum. The court also suggested that under the Texas Education Code (§21.104) the plaintiffs could be excused from instruction which conflicted with their religious beliefs.

On appeal to the U.S. Court of Appeals (5th Cir.), the district court's opinion was affirmed. The Court of Appeals added that--

> ...the Federal courts cannot by judicial decree do that which the Supreme Court has declared the state legislatures powerless to do, ie. prevent teaching the theory of evolution in public school for religious reasons [citing Epperson v. Arkansas]. \To require the teaching of every theory of human origin, as alternatively suggested by plaintiffs, would be an unwarranted intrusion into the authority of public school systems to control the academic curriculum\[citing Epperson v. Arkansas and other cases]. 486 F. 2d at 138.

(C) Activities Deemed Religiously Neutral

(1) National Anthem

Sheldon v. Fannin, 221 F. Supp. 766 (1963)

The parents of public school children in Arizona sued members of the Arizona state board of education and others alleging that their children had been unlawfully suspended from school for failure to stand and sing the National Anthem. The district court held that the supension of the students was a violation of the Free Exercise Clause of the First Amendment since the refusal of the students to stand for the singing of the National Anthem was based on their religious beliefs. The court rejected, however, the argument that the singing of the National Anthem in public schools was also a violation of the Establishment Clause of the First Amendment.

> ...Relying upon the recent "school prayer" decisions [Abington v. Schempp and Engel v. Vitale, supra] the plaintiffs first argue that the National Anthem contains words of prayer, adoration, and reverence for the Deity, and that a State's prescription of participation therein amounts to a prohibited "establishment of religion." This contention must be rejected. The singing of the National Anthem is not a religious but a patriotic ceremony, intended to inspire devotion to and love of country. Any religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation. [citing Engel v. Vitale, 370 U.S. 421, at 435, n. 21 (1962)]. The Star Spangled Banner may be fully sung in the public schools, without fear of having the ceremony characterized as an "establishment of religion" which violates the First Amendment. 221 F. Supp. at 774.

(2) Pledge of Allegiance

Smith v. Denny, 280 F. Supp. 651 (1968), app. dis. 417 F. 2d 614 (1969)

Section 5211 of the Code of Education of the State of California requires every secondary public school to start the school day with appropriate patriotic exercises, and indicates that the recitation of the pledge to the Flag of the United States satisfies the requirement. Pursuant to this law Enterprise High School in Redding, California, adopted regulations requiring daily recitation of the pledge of allegiance, in the form which includes the words..."one nation, under God, indivisible..." (emphasis added). The plaintiffs, students at the high school, filed a complaint in federal district court, alleging that the statute and its supplemental regulations violated the First and Fourteenth Amendments by requiring the inclusion of the words "under God," and requested a three-judge court to hear the case and order the deletion of the disputed phrase.

The Chief Judge for the Eastern District of California dismissed the suit, holding the California law was neither an establishment of religion

nor a deprivation of the right of free exercise of religion.[28] The court distinguished patriotic exercises from religious ones, and quoted with approval from Mr. Justice Goldberg's concurrence in the Schempp case:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow. [29]

(3) National Motto

Opinion Of The Justices, 228 A. 2d 161 (1967)

One of the questions propounded by the New Hampshire legislature concerned the constitutionality of requiring each public school classroom to have a plaque bearing the words "In God We Trust." The Justices of the Supreme Court of New Hampshire advised that "[t]he words 'In God We Trust' as a national motto appear on all coins and currency, on public buildings, and in our national anthem, and the appearance of these words as a motto on plaques in the public schools need not offend the Establishment Clause of the First Amendment." 228 A 2d at 164.

28/ For a similar case see Lewis v. Allen, 159 N.Y.S. 2d 807, aff'd 207 N.Y.S. 2d 862, aff'd 200 N.E. 2d 767, cert. den. 379 U.S. 923 (1964).

29/ Abington School District v. Schempp, 374 U.S. 203, 308 (1963). See also Reed v. Van Hoven, 237 F. Supp. 48, 56 (1965), and Opinion Of The Justices, 307 A. 2d 558, 560 (1973).

(4) Sex Education And Other Curricula

Cornwell v. State Board of Education, 314 F. Supp. 340 (1969), aff'd 428 F. 2d 471 (1970).

Baltimore County taxpayers sued the Maryland State Board of Education to enjoin the implementation of a program of sex education in the Baltimore County Schools. The plaintiffs specifically challenged a bylaw of the State Board of Education which provided that "[i]t is the responsibility of the local school system to provide a comprehensive program of family life and sex education in every elementary and secondary school for all students as an integral part of the curriculum including a planned and sequential program of health education."

The district court rejected plaintiffs' argument that under the bylaw religious concepts would receive the sanction of the state in violation of the Establishment Clause of the First Amendment. The primary purpose and effect of the bylaw, said the court, was neither to establish religious dogma nor to involve the state in religious activities. Rather, the bylaw was simply "a public health measure" reflecting the state's legitimate interest in the health of its children. The court concluded that plaintiffs' constitutional objections were insubstantial.

Hopkins v. Hamden Board of Education, 289 A. 2d 914 (1971)

In an action brought by Connecticut parents of public school children against the State Board of Education, sex education and family life curricula were sustained against constitutional attack. In seeking to enjoin the teaching of a mandatory health education course, the plaintiffs alleged, inter alia, that the teaching of sex education and family life in the public schools violated the Establishment Clause of the First Amendment.

The Court of Common Pleas of New Haven County, Connecticut, in ruling on plaintiffs' motion for a temporary injunction, rejected this argument indicating that unless the plaintiffs could show that these programs were "a form

of religion," there must be proof that "the teaching of the curriculum will in fact establish any religious concept or philosophy in the school system." 289 A. 2d at 922. See also Madeiros v. Kiyosaki, 478 P. 2d 314, 318 (1970).

Todd v. Rochester Community Schools, 200 N.W. 2d 90 (1972)

Suit was brought by the parent of a public high school student to compel the school district to cease using the novel Slaughterhouse-Five as part of an elective course in "Current Literature." It was contended that since the novel contained references to religious matters, its use in the public school system was forbidden by the Establishment Clause of the First Amendment.

The Michigan Court of Appeals refused to accept this argument explaining that the mere reference to religious matters in a novel used in public schools was insufficient to constitute a violation of the First Amendment. There was no evidence that the school was trying to take action derogatory to religion or preferring one religion over another. Nor was there any proof that the novel was being taught subjectively with the teacher espousing the particular religious or anti-religious views of the author.

In sustaining the use of the Slaughterhouse-Five against constitutional attack, the court further noted that the novel was an anti-war allegory concerned with the effects of the Allied fire-bombing of Dresden during the Second World War and that religious matter contained in the work was ancillary and used purely for literary reasons. The far-reaching consequences of plaintiff's contention, that because of its religious references the novel should be prohibited from use in the public schools, were suggested by the Michigan court as follows:

> If plaintiff's contention was correct, then public school students could no longer marvel at Sir Galahad's saintly quest for the Holy Grail, nor be introduced to the dangers of Hitler's Mein Kampf nor read the mellifluous poetry of John Milton and

> John Dunne. Unhappily, Robin Hood would be forced to forage without Friar Tuck and Shakespeare would have to delete Skylock from The Merchant of Venice. Is this to be the state of our law? Our Constitution does not command ignorance; on the contrary, it assures the people that the state may not relegate them to such a status and guarantees to all the precious and unfettered freedom of pursuing one's own intellectual pleasures in one's own personal way. 200 N.W. 2d at 93-94.

(5) Graduation Ceremonial Benediction

Wood v. Mt. Lebanon Township School District, 342 F. Supp. 1293 (1972)

Mt. Lebanon Township School District was planning its high school graduation ceremonies to include a benediction and invocation by a local clergyman. A civil rights action was brought to stop this activity from occurring on the ground that the intended invocation and benediction, to be given by a clergyman on public school property, would offend the Establishment Clause of the First Amendment. The court concluded that it was without jurisdiction to grant plaintiffs relief under the civil rights statute [28 U.S.C. §1343 (3)] and that, at any event, the giving of an invocation and benediction would be consistent with First Amendment requirements. The court noted several factors in supporting its constitutional determination.

First, the graduation ceremony itself was "completely separate and apart from all formal requirements of the school district for graduation." This meant that all instruction, examinations, and the like would be completed prior to the ceremony.

Second, and most significantly in the court's view, the graduation ceremony was voluntary. Thus, attendance at the ceremony would not be necessary in order to receive a diploma and there would be no basis for saying that those

persons choosing not to participate would forfeit any rights or privileges enjoyed by other graduates.

Third, there was no evidence indicating governmental sponsorship of an official prayer as in Engel. Indeed, the district court noted that the content of the invocation and benediction would not be known until the graduation ceremonies were actually held. Moreover, "such customary remarks are commonplace in our society" as is evident, for example, in the reference to the Deity at the opening of the Supreme Court and in the United States Senate and House of Representatives.

Fourth, the court acknowledged that the Establishment Clause may be violated even in the absence of direct governmental compulsion, but added that--

> ...the fact that the graduation ceremony is not compulsory strips the function of any semblance of governmental establishment or even condonation. In the view of this Court, having a member of the clergy, who is in no way compensated by the defendant, pronounce an invocation or benediction at graduation ceremonies which are totally separate from the school routine, does not violate any of plaintiffs' First Amendment rights. Any use of public tax monies in connection with the invocation and benediction appears to be de minimis. In short, plaintiffs would not be harmed monetarily by the brief moments consumed by the invocation and benediction [citing O'Hair v. Paine, infra]. 342 F. Supp. at 1295.

Finally, the court concluded that on the basis of these facts the primary purpose of having the invocation and benediction was secular, rather than religious, and that its primary effect was neither to advance nor to inhibit religion.[30/]

30 The Supreme Court of Pennsylvania recently sustained the inclusion of an invocation and benediction in public high school graduation ceremonies in Weist v. Mt. Lebanon School District, 42 L.W. 2633 (1974). Compare Lemke v. Black, 42 L.W. 2627 (1974), holding that the use of a Catholic church for a public high school graduation ceremony, in the absence of a compelling secular need, violates the First Amendment rights of those graduates who claim that it would violate their conscience to attend the ceremony in the Catholic church, even though attendance at the ceremony was voluntary.

(6) Period of Silent Prayer or Meditation

Reed v. Van Hoven, 237 F. Supp. 48 (1965)

As part of its overall plan to accommodate the requirements of the Establishment Clause, discussed supra, the federal district court approved silent prayer during the school lunch period but carefully limited its exercise to the "few moments of silence set aside for private meditation at the start of that period." 237 F. Supp. at 55. Moreover, the court indicated that "the period of silent prayer before lunch affords the students an opportunity to say their own denominational prayer, and all would be privileged to say any prayer which their own denomination may have taught them. Those who do not share the prayer would be free to contemplate anything which they desired." Id., at 56.[31/]

(D) Released Time and Dismissed Time Programs

Both "released time" and "dismissed time" are methods by which educators have allowed formal sectarian exercises during school hours. In "released time" programs the religious activities are conducted within the school building by representatives of the various faiths. State courts had reached divergent opinions on the constitutionality of the programs, when in 1948 the United States Supreme Court granted review in a case involving the Illinois practice. In Illinois ex rel McCollum v. Board of Education, 333 U.S. 203 (1948), eight justices joined in ruling that the use of tax-supported property for religious instruction together with the close cooperation between public and religious officials constituted an establishment of religion. Most recently, in another "released time" program, the court in Vaughn v. Reed, 313 F. Supp. 431 (1970) held that

31/ See also Justice Brennan's concurring opinion in Abington v. Schempp, supra, where he suggests that a "moment of reverent silence at the opening of class" would be consistent with the Establishment Clause. 374 U.S. at 281. Accord, Opinion Of The Justices, 228 A. 2d 161 (1967) and Id., 307 A. 2d 558 (1973).

the fact that state schools were being used by teachers paid and controlled by a religious group suggested that the state was aiding religion in violation of the Establishment Clause.

Three years after McCollum, the Supreme Court addressed itself to the problem of the constitutionality of the "dismissed time" program. Zorach v. Clauson, 343 U.S. 306 (1952), involved a challenge to a New York City program which released children during the school day so they could leave the school premises and go to religious centers for sectarian programs if they so desired. Emphasizing the distinctions between this and the McCollum situation, namely, non-involvement of tax-supported property or expenditure of public funds, the Court, dividing 6-to-3, sustained the constitutionality of the program. See also Moore v. Board of Education, 212 N.E. 2d 833 (1965).

Part II

Religious Activities In Public Universities

Calvary Bible Presbyterian Church v. University of Washington, 436 P. 2d 189 (1967), cert. den. 393 U.S. 960 (1968).

The department of English at the University of Washington offers a course entitled "The Bible as Literature." Two churches in Tacoma brought suit to enjoin the course on the theory that the choice of texts and the methods of presentation would of necessity involve the University of Washington, an agency of the State, in religious or theological decisions, contrary to the Establishment Clause of the First Amendment. At the conclusion of the trial, devoted largely to hearing testimony on the way the course was conducted, the trial judge dismissed the complaint. The plaintiffs appealed the case to the Supreme Court of Washington. After reviewing the evidence, the court said:

> Telescoping the testimony of competent scholars, educators, professors, ministers, theologians, and students who had taken the course, we find that it was taught in a completely objective manner; had no effect on religious beliefs; was not slanted toward any particular theological or religious point of view; did not indoctrinate anyone; did not enter into the realm of belief or faith; and was not taught from a religious point of view.

Lacking these elements, the court found that the course was not constitutionally prohibited, and concluded that to forbid it because its contents were repugnant to certain persons of a particular religious persuasion might in fact be sectarian control of the educational system. Appellant's petition for review by the United States Supreme Court was denied November 25, 1968, thereby leaving untouched the judgment of the Washington Supreme Court.

Matter of Panarella v. Birenbaum, 302 N.Y.S. 2d 427 (1969), rev'd 327 N.Y.S. 2d 755, aff'd 343 N.Y.S. 2d 333, 296 N.E. 2d 238 (1973)

Plaintiff, a student at a division of the City College of New York, sought an order directing the school to adopt and enforce regulations prohibiting derogatory attacks on religion in student publications. An article in the student newspaper had attacked the Roman Catholic Church. The school is a tax-supported public institution, the publication has a faculty member as an advisor, and has office space on campus.

The trial court argued that the Establishment Clause of the First Amendment erected an unbreachable wall separating Church and State. This neutrality required the government neither to favor religion nor to show hostility toward religion. The court felt that because the property, facilities, and employees of the State and City of New York were used for an attack on religion, there was a violation of the absolute neutrality required under the Establishment Clause. Therefore, the school authorities were directed to prevent publications of such articles in the future.

On appeal to the Appellate Division, the trial court's ruling was overturned. The Court of Appeals of New York affirmed, indicating that there was no violation of the Establishment Clause because the college was merely providing a "neutral forum" within which freedom of the press was permitted to operate. There was no evidence that college officials intended to promote or inhibit religion through the student newspaper. Nor was there any showing by the plaintiffs that the college was supporting systematic attacks on religion over a period of time in the student press. Indeed, letters to the editor of the newspaper which were critical of the antireligious articles had been printed. According to the court, the constitutional test "is not the appearance of derogatory or critical material, but whether government, and government schools,

maintain neutrality in the sense of permitting all sides of any religious controversy to be raised and never permit one side or another to be favored directly or indirectly." 343 N.Y.S. 2d at 339.

Part III

Religious Activities in Service Academies

Anderson v. Laird, 316 F. Supp. 1081 (1970), rev'd 466 F. 2d 283 (1972), cert. den. 409 U.S. 1076 (1972)

Two cadets of the U.S. Military Academy and nine midshipmen of the U.S. Naval Academy brought a suit as a class action, claiming that the regulations of the Academies compelling Sunday attendance at Catholic, Protestant, or Jewish chapel services violated the Establishment/Free Exercise Clauses of the First Amendment and constituted a "religious" test in violation of Art. VI of the Constitution. They sought a declaratory judgment that compulsory church or chapel attendance violated these provisions of the Constitution and a permanent injunction forbidding the Academies from enforcing the regulations.

The court denied the motion for a declaratory judgment and for a permanent injunction. The reasoning of the court was that (1) the purpose and primary effect of compulsory attendance could not be said either to substantially advance or to inhibit religion, since the effect of attendance is no different than the effect of other regulations which aim towards the complete training of a military leader. Thus, although the incidental effect might advance religion, the dominant effect is secular; (2) the Free Exercise Clause is not violated, since there is no coercive effect which operated against the individual in the practice of his religion. Under the compulsory attendance regulation, the individual could choose which service to attend, and whether to participate and worship or not. For sincerely held reasons, the individual could be excused from attendance; (3) since the regulation did not violate the Establishment Clause, it necessarily follows that it could not violate Art. VI, which provides that "No religious test shall ever be required as a qualification

to any office or public trust under the United States."

On appeal to the Circuit Court of Appeals (D.C. Cir.), the district court was reversed. Chief Judge Bazelon explained that "freedom from governmental imposition of religious activity is a core value protected by the Establishment Clause, and that...a government may not require an individual to engage in religious practices or be present at religious exercises." 466 F. 2d at 291.

Judge Bazelon did not see any compelling military necessity underlying the Academies' regulations which would justify the interference with the First Amendment. In a concurring opinion, Judge Leventhal agreed and noted that "the concept of government necessity is undercut by the fact that approximately 95% of the Service officers do not graduate from the Academies, and have never been subject to this compulsory chapel requirement." 466 F. 2d at 303.

The court also rejected the argument that the regulations could be sustained because certain individuals who were conscientiously opposed to chapel attendance might be excused. Quoting from Engel v. Vitale, 370 U.S. at 430-431, the court stated that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." 466 F. 2d at 293.

Part IV

## Religious Activities on Publicly Owned Property

### (A) Holiday Displays

Lawrence v. Buchmueller, 40 Misc. 2d 300, 243 N.Y.S. 2d 87 (1963).

This action was instituted by a number of parents whose children attend public schools under the jurisdiction of the Board of Education of Union Free School District No. 7 to have the court declare that the board had no legal or constitutional authority to permit the erection or display on school premises of any symbol or any deity belonging to any religion. The Board had authorized a group of taxpayers to erect a creche or nativity scene on the grounds of one of the public schools within the district during the period of the Christmas holiday. School was not in session at the time, the school's personnel was not involved, and the activity did not cause any expense to the school district.

The court held that the resolution of the school board permitting the erection of the creche under the circumstances was not violative of any constitutional provision. The state legislature had directed the school boards within the state to "foster in the children of the state moral and intellectual qualities." To prohibit the school board from granting permission to private citizens to erect a creche would, according to the court, thwart the school board's efforts to instill "moral qualities" by denying that religion had played any role in the development of the moral standards of the community. The court approvingly quoted from Justice Goldberg's concurring opinion in Abington School District v. Schempp, 374 U.S. 203, 306 (1963):

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.

Distinguishing Abington and Engel, supra, from the present case, the court felt that those cases concerned active involvement by government in religious exercises, whereas the present case was a passive accommodation of religion.

Paul v. Dade County, 202 So. 2d 833 (1967), cert. den. 390 U.S. 1041 (1968)

For approximately twenty years an illuminated cross has been placed atop the Dade County, Florida, Courthouse at Christmas time. In 1966, as in prior years, tax money was appropriated to finance the installation. In August, 1966, a Dade County taxpayer brought suit for injunctive relief, demanding that tax money not be spent for the installation and that the cross not be installed in any case. Before the trial the county announced that the installation of the cross would be financed by private donation. Consequently, at the trial, the only issue was whether the Establishment Clause forbids such a display. Conflicting testimony was introduced as to whether the cross was actually a religious symbol. The trial court decided that the cross was not a religious symbol and denied relief. The District Court of Appeal of Florida affirmed the decision, and both the Florida Supreme Court and the United States Supreme Court declined to review the matter.

Lowe v. City of Eugene, 459 P. 2d 222 (1969), cert. den. 397 U.S. 1042 (1970)

The Supreme Court of Oregon ruled on October 1, 1969, that a 51-foot electrically lighted cross, a symbol of Christianity, must be removed from a hilltop public park in Eugene, Oregon. The cross had been erected in 1964 at the expense of a group of private citizens to replace a wooden cross which had been installed in the same place since 1936. The City Council granted the required building and electrical permits but the cross was held to violate both United States and Oregon constitutional provisions barring aid to religion. The Oregon Court said that government had no more right to place a public park at the disposal of the majority for a popular religious display than it would have, in response to a referendum vote, to put the lighted cross on the city hall steeple. The whole point of separation of church and state in a pluralistic society is to keep the majority from using the coercive power to obtain governmental aid for or against sectarian religious observances.

On April 21, 1970, the Supreme Court declined to review the case.

Allen v. Hickel, 424 F. 2d 944 (1970), on rem. 333 F. Supp. 1088 (1971), rev'd Allen v. Morton, 495 F.2d 65 (1973)

Plaintiffs in this action were five taxpayers, four clergymen and an atheist, who filed suit on July 14, 1969, in the District Court for the District of Columbia challenging the erection and maintenance of a creche on federal property in Washington, D.C., as part of a Christmas Pageant for Peace.

The Pageant was co-sponsored by the National Park Service and by the Christmas Pageant For Peace, Inc. The latter organization was a non-sectarian, nonpartisan group organized and promoted by the Washington Board of Trade. The Pageant included, in addition to the creche, the national Christmas

tree, and a burning yule log. On September 30, 1969, the district court granted a motion to dismiss the case.

Reversing the district court, the Court of Appeals for the District of Columbia held first that the plaintiffs had standing to sue. The court then went on to say that the purpose of the creche was secular. The creche, it was argued, was related to a holiday season that clearly has a secular half, and it was but a part of a larger display of secular symbols of the secular aspect of Christmas. Furthermore, an official pamphlet explained that the creche was intended simply to be one of a group of objects showing how the season is celebrated. As to the actual effect of the creche, the plaintiffs claimed that its placement and size gave it a significant religious impact. The court remanded the case to the district court in order that evidence be taken on the issue of whether the effect of exhibiting the creche would constitutue a violation of the Establishment Clause.

On remand, the district court reaffirmed the secular purpose of the creche scene, explaining that the purpose of the Pageant, of which the scene was only a part, was to increase business and tourism in the Washington metropolitan area. The court noted that subsequent to the decision of the court of appeals the National Park Service had erected appropriate plaques near the display describing its secular significance.

With regard to the effect of the creche scene, the court acknowledged that the display had religious significance but concluded for several reasons that its religious effect was "far from substantial." First, the Pageant as a whole, like the Cherry Blossom Festival, the President's Cup Regatta, and other events, was a secular event having commercial sponsorship. Moreover, the religious significance of the display could only be seen in the context

of the entire Pageant which was clearly secular. Second, the commonplace display of creche scenes in commercial establishments and other places throughout the nation reduced the religious significance which the scene may have had on the public. Third, Christmas itself had largely become a secular holiday season and "[i]n the celebration of any national holiday which has an origin in religious observance, it is only natural that some of the original religious traditions should carry over in the observance." The court felt that the Establishment Clause did not require the removal of all traces of religious activity on public property.

The district court also rejected the argument that the participation of religious leaders in the planning of the Pageant constituted "excessive governmental entanglement" with religion in violation of the Establishment Clause. The court viewed such participation as "minor" and unrelated to the "original secular purpose of the Pageant." Moreover, even though religious groups had been solicited for support, their contributions had been de minimis compared to contributions from secular sources.

The court concluded that the National Park Service's use of explanatory plaques near the scene "should calm any suspicions that the Government, in participating in the Christmas Pageant of Peace has given its stamp of approval to the religious content of the presentation of the Nativity scene." 333 F. Supp. at 1097.

On appeal to the circuit court for the second time, the district court was again reversed. The circuit court found excessive governmental entanglement in the participation of government officials in the Pageant Executive and Planning Committees. Through these committees the government was

involved in approving guidelines for the Pageant, promoting the event through speeches, and determining the location and prominence of the creche scene. As stated by the court--

> Although the [government] officials involved have maintained an admirable "even keel" and desire for fairness in dealing with the sensitive matters thrust upon them, in view of the limited purpose such membership serves and the goal of minimal contacts, and considering the conflicts of the past, possibility for conflicts in the future, and inferences some may draw from Government membership, this type of activity should not be engaged in by representatives of the Government and is constitutionally prohibited by the First Amendment. 495 F. 2d at 75.

In its final order, the circuit court identified the options which were available to the government. If the creche scene were discontinued no legal question would arise. If the creche scene were continued, the government could terminate its sponsorship and appropriate plaques should be utilized as had been recognized by the district court. If the government chose to continue its support of the Pageant, such support would have to be limited to financial aid and/or technical sponsorship. In the court's view, limited assistance of this type would be primarily secular in purpose and effect and constitutionally permissible.

Anderson v. Salt Lake City Corporation, 475 F. 2d 27 (1973), cert. den. 414 U.S. 879 (1973)

The Boards of Commissioners of Salt Lake City and Salt Lake County allowed the Fraternal Order of Eagles, a nonreligious organization advocating ecclesiastical law as the temporal foundation of all law, to erect a 3x5 - foot granite monolith of the Ten Commandments on city-county courthouse grounds. Subsequently, the City Commissioners provided illumination

for the display at public expense.

The plaintiffs, who were residents and taxpayers of Salt Lake County, sued to remove the monolith and prevent its future display on public property. The district court ruled that the monolith was "clearly religious in character" and that the purpose and primary effect of the display advanced religion in violation of the Establishment Clause of the First Amendment.

On appeal to the U.S. Circuit Court (10th Cir.) the district court's determination was reversed. The circuit court indicated that in applying the primary purpose and effect test required by Abington School District v. Schempp, supra, a balance must be made "between that which is primarily religious and that which is primarily secular, albeit embodying some religious impact." The court viewed this balance as necessary in order to avoid "the absurdity of striking down insubstantial and widely accepted references to the diety in circumstances such as courtroom ceremony, oaths of public office, and on national currency and coin." 475 F. 2d at 32.

A number of factors led the court to conclude that the display of the monolith was "primarily secular." First, notwithstanding the ecclesiastical background of the Ten Commandments, the Decalogue has "substantial secular attributes." In this regard, the court noted the testimony of one of plaintiffs' lawyers that "the Ten Commandments is an affirmation of at least a precedent legal code." Second, the court thought it significant that the Fraternal Order of Eagles was not a religious organization and that its creed of the Ten Commandments as the temporal foundation of law was secular. Third, the court viewed the display as a "passive monument, involving no compulsion," which "reflect-[ed] the religious nature of an ancient era." Finally, the court concluded that--

> The wholesome neutrality guaranteed by the Establishment and Free Exercise Clause does not dictate obliteration of all our religious traditions... Although an accompanying plaque explaining the secular significance of the Ten Commandments would be appropriate in the constitutional sense, we cannot say that the monument, as it stands, is more than a depiction of a historically important monument with both secular and sectarian effects. 475 F. 2d at 34. 32/

(B) Holiday Parades

Curran v. Lee, 484 F. 2d 1348 (1973)

New Haven, Connecticut, traditionally holds a St. Patrick's Day parade on the Sunday afternoon before St. Patrick's Day. During the parade a number of the city's streets are closed to regular traffic. Moreover, the city contributes financial aid to the parade pursuant to its charter which authorizes "appppropriations for public receptions, parades, concerts, and celebrations to an amount not exceeding [$1500 annually]."

Suit was brought to enjoin the city from holding the parade on the ground that it was a "religious procession" in honor of St. Patrick, a Roman Catholic apostle. It was alleged that the use of New Haven's city streets, equipment, employees, and financial aid in connection with this activity would be a violation of the Establishment Clause of the First Amendment.

The U.S. Court of Appeals (2nd Cir.) affirmed the determination of the district court that no violation of the First Amendment would be occasioned if the parade were held as scheduled. The court of appeals indicated that although the "practice of honoring St. Patrick may be rooted in religious belief,.. a parade named after him is not necessarily a religious procession." Indeed,

32/ See also Meyer v. Oklahoma City, 496 P. 2d 789 (1972), cert. den. 409 U.S. 980 (1972), sustaining under State Constitution, maintenance of 50-foot tall Latin Cross on city fair grounds.

the court suggested that the parade seemed to have become "a secular celebration by Irish-Americans and their friends."

The plaintiff was unable to provide sufficient factual information for the court to determine whether the parade would violate the requirements of the Establishment Clause. The court noted, for example, that--

> The record in this case fails to give a description of the New Haven parade. The degree of clergy or church participation is unknown. Similarly, the record fails to tell us whether the bands (if any) play religious or non-religious music, whether the floats (if any) depict religious or non-religious events, and whether the speeches made (if any) are on religious or non-religious topics. 484 F. 2d at 135.

Accordingly, the circuit court affirmed the district court's earlier dismissal of plaintiff's complaint.

(C) Invocation At Town Meetings

Lincoln v. Page and the Town of Meredith, 241 A. 2d 799 (1968)

A resident and voter in the Town of Meredith, New Hampshire, brought suit in the New Hampshire Superior Court attempting to enjoin the practice of opening town meetings with invocations by ministers of various religions. Plaintiff claimed that the practice violated the Establishment Clause of the First Amendment. The defendants filed a demurrer and the trial judge reversed and transferred all questions of law to the New Hampshire Supreme Court. The supreme court summarized the factual background as discerned from the pleadings, beliefs and arguments as follows:

> The invocation at the opening of the town meeting by a guest clergyman is not composed, selected or approved by the defendants. The invocation is not pronounced

> by a town officer, no oath is taken, and no public funds are expended for the invocation. The invocation is not a part of the agenda of the town meeting, attendance thereat is not compulsory and the persons selected to pronounce the invocation are rotated. The invocation is not required by any state statute or local ordinance.

On these facts the court concluded that "all the virtues of the First Amendment can be preserved and protected without condemning the invocation in this case as an encroachment of the First Amendment either minor, major, or incipient." 241 A. 2d at 801. The demurrer was sustained, and the case was dismissed.

(D) Anti-War Religious Services

United States v. Crowthers, 456 F. 2d 1074 (1972).

Bishop Crowthers and other participants in a "Mass for peace," held in the Pentagon concourse during November 1969 and June 1970, were arrested for violation of General Services Administration Regulations relating to disturbances and leafletting on public property. The evidence indicated that the concourse had been used by other groups for both political and religious ceremonies in the past.

In sustaining the defendants' contention that the government was preferring one religion over another in violation of the Establishment Clause, the circuit court (D.C. Cir.) remarked that--

> ...Beyond question, the government may forbid all ceremonial use of the concourse or any other portion of the Pentagon. But it may not pick and choose for the purpose of selecting expressions of viewpoint pleasing to it and suppressing those that are not favored. 456 F. 2d at 1078.

* * *

> It is established beyond all argument that the government may not favor one religion over another. It may not choose to permit an Episcopal prayer service for the health of the President and in support of the Armed Forces and deny a Quaker (or Episcopal) service to end all war or even the Vietnam War. It may no more dictate the content of a religious service than it may establish a state religion. 456 2d. at 1079.

The convictions of the defendants for violations of the regulations were reversed.

Part V

## Miscellaneous Religious Activities

### (A) Religious Exercises In Space

O'Hair v. Paine, 312 F. Supp. 434 (1969), aff'd 432 F. 2d 66 (1970), cert. den. 401 U.S. 955 (1971)

On August 5, 1969, Mrs. O'Hair and her husband, Richard F. O'Hair, individually and as founders of the Society of Separationists, Inc., a Maryland corporation doing business in Austin, Texas, filed a complaint in the U.S. District Court for the Western District of Texas seeking an order to enjoin NASA from permitting or conducting any religious activities in space. Mrs. O'Hair, et al. alleged, inter alia, that the following acts violated the First Amendment:

1) The prayer for peace radioed to the world by Colonel Frank Borman while orbiting the moon aboard the Command Module of the Apollo 8 flight on December 24, 1968.

2) The reading of the Story of Creation from Genesis, Chapter I, verses 1-10, by Major William Anders, Captain James Lovell, and Colonel Frank Borman during the Apollo 8 flight on December 24, 1968.

3) The special arrangements necessitated by the carrying of four Bibles aboard Apollo 8 as well as religious medals and artifacts which were later presented to the Pope.

4) The placing on the surface of the moon on July 20, 1969, by Colonel Edwin Aldrin Jr. and Neil Armstrong, of a small disc which contained a prayer by Pope Paul and Psalm 8.

5) The transportation to the moon of certain other religious paraphernalia during the Apollo 11 flight.

The government filed motion to dismiss the complaint for failure to state a cause of action for which relief can be granted. The district court granted this motion rejecting both the Free Exercise and Establishment Clause claims of Mrs. O'Hair. With regard to the latter, the court noted that 1) the religious statements of the astronauts were made by the astronauts in their individual capacity rather than as representatives of the United States government, 2) the personal religious items carried on board the space craft was conduct protected by the Free Exercise of religion rights of the astronauts, 3) whatever expense NASA incurred in accommodating the astronauts was incidental and for the purpose of insuring the greater peace of mind of the astronauts for the mission, and 4) the placing of religious objects on the moon was similar to other public ceremonies having some reference to God and which have been held constitutional.

(B) National Motto On Currency

Aronow v. United States, 432 F. 2d 242 (1970).

Suit was brought by a taxpayer challenging the constitutionality of federal statutes which require the inscription "In God We Trust" on all United States currency and coins (31 U.S.C. §324a) and which declare this slogan to be the national motto of the United States (36 U.S.C. §186).

The U.S. Court of Appeals (9th Cir.) viewed plaintiff's allegations that these statutes were contrary to the Establishment Clause of the First Amendment as insubstantial. Indicating that the use of this slogan was largely "patriotic or ceremonial" and bore "no true resemblance to a governmental sponsorship of a religious exercise," the court concluded that there was no violation of the Establishment Clause. In support of its ruling the

court noted 1) the legislative history of the two federal statutes, which cited the spiritual, psychological, and inspirational significance of the inscription, and 2) the following language from Engel v. Vitale, supra:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance. 370 U.S. 421, at 435 n. 21 (1962), quoted in 432 F. 2d at 243.

(C) White House Prayer Breakfasts And Congressional Ceremonial Prayers.

O'Hair v. Nixon, No. 410-73 (D.C.D.C. 1973)

On March 2, 1973, suit was brought against the President of the United States, the Chaplain of the U.S. Senate, the Chaplain of the U.S. House, the Sergeant-at-Arms of the U.S. Senate, the Sergeant-at-Arms of the U.S. House, and the Treasurer of the United States. The plaintiff, an avowed atheist opposed to all religion, alleged that the above named defendants had either authorized or allowed the holding of religious services on United States property. Specifically, plaintiff challenged the constitutionality of the White House Prayer Breakfasts, the saying of Congressional ceremonial prayers at the beginning of each day, and the expenditure of public funds for the support of such activities including the payment of salaries for certain of the named defendants.

By an order of March 21, 1973, the district court approved the U.S. Attorney's "Suggestion For Dismissal" and directed the U.S. Marshal to withhold service of summons and complaint upon the President, quashed process as to the President, and dismissed the action. The court's order did not reach the constitutional issues raised by the plaintiff.

(D) Religious Painting On Postage Stamp

Protestants and Other Americans United For Separation of Church and State v. O'Brien 272 F. Supp. 712 (1967), rev'd on other grounds 407 F. 2d 1264 (1968)

Suit was brought to enjoin the Postmaster General of the United States from issuing a five-cent commemorative Christmas postage stamp containing a miniature reproduction of Hans Memling's painting of "Madonna and Child with Angels." It was alleged that the issuance of such a stamp would involve the expenditure of public funds in support of a particular religion since the symbol of the Madonna was usually associated with the Roman Catholic Church.

Recognizing the impossibility of severing every contact between religion and government, the district court concluded that the issuance of the postage stamp, even if its design possessed religious significance, "cannot be deemed in any sense even remotely connected with an establishment of religion..." The court viewed plaintiffs' contention that the issuance of the stamp would constitute government preference of one religion in particular as "so remote and farfetched as to be entitled to but scant consideration." The court felt that the use of the Madonna symbol on the postage stamp was not unlike other religious references occurring in public rituals and ceremonies.

Part VI

Congressional Action: The Proposed Prayer Amendment

Congressional proposals to permit religious exercises in public places have been recently noted by Raymond J. Celada and Charles V. Dale of the American Law Division, Congressional Research Service, in a report entitled "The Proposed Prayer Amendment" (March 25, 1974) [AP199-R]. The relevant portion of this report is reproduced below.

The Proposed Prayer Amendment

* * *

The emotional and largely critical reaction that followed in the wake of the Engel and Schempp cases surpassed the reaction provoked by other, perhaps more profoundly significant decisions of the so-called Warren Court. Obviously, the "decision[s] had touched a vital and sensitive spot in the national life." A similar feeling swept the Congress where within three days of the Court's first announcement more than fifty proposed constitutional amendments to override or otherwise limit that ruling were dropped into the legislative hopper. Both the House and Senate Judiciary Committees held hearings on the issue but took no further action. Part of the steam behind the drive to amend the Constitution seemed to dissipate when the bulk of religious organizations testifying, particularly during the lengthy House hearings, came out in opposition to any action designed to make inroads upon the First Amendment.

Thereafter, the matter seemed to recede as a congressional issue until the fall of 1966 when the late Senator Dirksen took the unusual step of adding a prayer resolution to an unrelated minor bill which was then pending in the Senate.

Although his motion to add the prayer amendment carried quite handily, the vote on passage (49-37) fell short of the two-thirds majority needed for constitutional amendments. However, the prayer issue had found a forceful spokesman, and the Illinois Senator managed to keep the matter in the public eye until his death in 1969.

Once again the issue appeared to drift into the background only to surface unexpectedly during Senate debate on the "equal rights" amendment. At the height of the debate on the measure to write sexual equality into the Constitution, Tennesee's Senator Baker successfully moved to attach the language of Senator Dirksen's prayer amendment to the resolution. Encumbered by both a prayer amendment and a qualifying amendment exempting women from the draft, equal rights supporters backed off and the Senate took no further action on the proposal.

The perennial controversy occasioned by the prayer issue did not culminate in a House test until 1971. In that year, Congressman Wylie introduced H. J. R. 191 proposing an amendment similar to that introduced in 1967 by then Senate Minority Leader Dirksen which, as subsequently modified on the House floor, provided: "Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds to participate in voluntary prayer or meditation." Despite the support of a majority of the House of Representatives, the Wylie amendment failed to secure approval of the necessary two-thirds when it came to full floor vote on November 8, 1971. The vote, which saw intense grassroots lobbying efforts on both sides of the issue, was 240 to 162--the supporters fell 28 votes short of the necessary two-thirds of the 402 members voting.

The politically volatile measure had reached the floor through the extraordinary procedure of a discharge petition. Under Clause 4 of House Rule XVII, if a bill has been referred to a legislative committee for thirty days without its having been reported, it is in order for any member to file a discharge petition. After a majority (218) of the members of the House sign such a petition, the committee is discharged from consideration of the measure which can then, on approval of a motion by a majority, be brought directly to the House floor.

Congressman Wylie filed a petition to discharge H. J. R. 191 from consideration of the House Judiciary Committee to which the resolution had been referred and from which it had received no significant action. In the face of a highly organized lobbying effort led by the Prayer Campaign Committee and several other private groups with similar aims, this rarely effective tactic succeeded in bringing the school prayer resolution to the floor. In addition to this alliance of citizen's groups, there were also some signs of organized religious support for the discharge effort and subsequent passage of the resolution. A major organized religious group working for the amendment was the National Association of Evangelicals which at the time was composed of 37 evangelical denominations and some 38,000 individual persons and churches belonging to almost every Protestant group. On September 21, 1971, the discharge petition obtained the requisite 218 signatures to bring it to the floor of the House.

The rules for the discharge procedure provide that a petition, once fully signed, must wait seven days before being brought before the House. It can then be considered only on the second or fourth Mondays of the month. These requirements plus the House's Holiday schedule meant that November 8 was the earliest day on which the discharge motion could be considered.

Opposition both within the halls of Congress and beyond followed the resolution's discharge from the Judiciary Committee. On October 4, sixty-seven representatives formed a group called the Congressional Committee to Preserve Religious Freedom and circulated letters to all their colleagues urging them to oppose the resolution: "We believe that the House should not now undertake to tamper with the First Amendment...particularly where the meaning and possibly far reaching consequences of the pending resolution are far from clear." Various religious bodies and organizations also aligned themselves with the opposition-for instance, the National Council of Churches and the Baptist Joint Committee on Public Affairs. More than 300 law professors and deans released a statement on November 2 opposing the amendment, saying, "If the first clause of the Bill of Rights...should prove so easily susceptible to impairment by amendment, none of the succeeding clauses will be secure."

A discharge motion to bring the Wylie amendment to the floor for debate was approved on November 8 by a vote of 242 to 156. Thereafter, in the course of the debate, Congressman Buchanan offered an amendment to H.J.R. 191 to substitute "voluntary " for "nondenominational" in describing the type of prayer allowed and to add "meditation" as a permissible activity. These changes, it was thought, would answer the primary arguments against the amendment and would remove the danger that the state would prescribe any religious activity. The Buchanan amendment was agreed to by voice vote. The resolution itself, however, was then voted upon and, as noted above, failed to win the necessary two-thirds majority.

Undaunted by the passage of time and these various reversals, proponents of a prayer amendment have continued to work in support of their cause.

Renewed efforts in the 93d Congress have focused primarily on a pair of companion measures introduced by Senator Schweiker who has emerged as a principal spokesman for forces favoring a school prayer amendment. S. J. Res. 10 would permit voluntary participation in nondenominational prayer or meditation and S. J. Res. 84 makes similar provision but excludes the word "nondenominational." The two resolutions have a total of 33 cosponsors including the Senate Majority and Minority Leaders and hearings were held by the Senate Judiciary Committee on these and related measures on July 27, 1973. On October 30, 1973 Senator Schweiker introduced still another resolution incorporating a somewhat novel variant upon the proposals considered previously. S. J. res. 167 provides that the states shall not be prohibited from providing for "silent prayer or meditation" in the public schools or other public buildings. This latter proposal, apparently intended as a compromise, has received no further action to date.

On the House side, Congressman Wylie has reintroduced his amendment in the 93d Congress (H. J. Res. 333) as have more than 20 other members of the House.

The issues raised by the prayer amendment are varied and complex. Proponents are not in agreement as to the full import of their proposals and what they hope to accomplish. During the earlier hearings, their desire to amend the Constitution in this regard was explained as a longing to return to the state of affairs that existed prior to June 1962 when the Court handed down its initial ruling. Opponents, on the other hand, build their case not so much in defense of the result reached by the Court, but on a refusal to "tamper" with the First Amendment. The books and periodical articles cited in Part VII of this Report set forth various informed views on this important subject, and are listed for the consideration of interested readers in hopes of informing rather than persuading to the views therein expressed.

Part VII

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