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THE SCHOOL PRAYER CASE:

Part II

WHAT COURSE FOR THE FUTURE?†

WILLIAM B. BALL*

ENGEL V. VITALE¹ is now being discussed as an issue rather than as a decision which resolved an issue. The variety of resolutions to the issue now being widely suggested testifies to much dissatisfaction with the decision. While it is to be noted that this dissatisfaction is by no means universal, it must at the same time be recognized that acceptance of the decision upon the part of many has been based upon an understanding that the decision concerned merely official school prayers composed by government.

Considering the decision to be one of wider scope,² there is perhaps some profit to be derived from briefly examining courses now being suggested whereby difficulties created by the decision may be resolved. As has been noted, the principal difficulty concerns the requirement that all forms of religious practice and religious indoctrination in the public schools must now cease, these including all inculcations of Secular Humanist values and principles.³

Overruling

One possible course would consist in an express overruling—at least in part—of the decision. An implied overruling of the decision, considering the broad premises upon which *Engel* is constructed and which give it its meaning, will prove difficult and could result in further confusion. While disregard in this instance for the principle of *stare decisis* will entail criticism of the Justices, there would also undoubtedly be a sub-

† Part I of this article appeared in 8 CATHOLIC LAWYER 182 (1962).

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¹ 370 U.S. 421 (1962).

² See Part I of this article, 8 CATHOLIC LAWYER 182 (1962).

³ *Id.* at 191-96.

stantial opposite reaction.⁴

What portions of the *Engel* decision should be reached in such overruling? Undoubtedly, the peculiar doctrine of "suing to stand"⁵ expressed in the majority opinion should be reached in most explicit fashion. Going beyond the question of standing, if a subsequent decision were to overrule *Engel* so far — but only so far — as that decision pertained to official prayers composed by government, such result would be at total odds with the broad premises stated in *Engel*⁶ and would moreover obviously result in further serious public difficulty. If an overruling decision were to validate, in effect, all "official praying," the abandonment of those premises would clearly be required. The door would then appear to have been opened to all manner of non-compulsory religious exercises and practices in the public schools. Certainly it would not be logical to say that children in public schools might constitutionally

recite the Lord's Prayer but that they might not constitutionally commemorate the Lord's birth. Such a subsequent decision would, in effect, restore the state of the law to that existing immediately prior to *Engel*, there remaining the reservation of the *McCullum*⁷ decision respecting formal, on-the-premises religious instruction. The *McCullum* reservation raises, however, considerable difficulty when close attention is paid to the question of what constitutes instruction. This difficulty is greatly compounded when concepts respecting "orthodoxies," derived from the *Barnette*⁸ case, and "religion," derived from the *Torcaso*⁹ case, are introduced.¹⁰

If, however, the Court were to overrule the *Engel* decision and restore the constitutional *status quo ante* of religious programs in the public schools, a twofold limiting principle should be expressed: (1) that the religious program should be one which reflects a consensus¹¹ in the district from which the students are drawn (2) that no coercion should be exerted upon any person whose beliefs are contradicted or offended by the program or who for any other reason does not desire to participate. Such a principle, upon its face, would seem to avoid the dilemma to which the Court has now brought us: that the educating

⁴ The warning of Justice Frankfurter is, of course, to be noted: "Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors." *United States v. Rabinowitz*, 339 U.S. 56, 86 (1950). Likewise, however, should be weighed in the balance the observation of Justice Reed in *Smith v. Allwright*, that "In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." 321 U.S. 649, 665 (1944).

⁵ For critical comment see Part I of this article, *supra* note 2, at 189-91.

⁶ See discussion, *id.* at 184. Particularly in Supreme Court decisions upon constitutional questions must the decisional premises be considered inseparable from the practical decisional result.

⁷ *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

⁸ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁹ *Torcaso v. Watkins*, 367 U.S. 488 (1961).

¹⁰ This subject is briefly discussed in 8 CATHOLIC LAWYER 182, 191-96 (1962).

¹¹ Not necessarily unanimity. It should also be recalled that majorities as well as minorities are made up of individuals, and the mandate of the first amendment is violated when an individual is coerced in belief or practice regardless of whether he belongs to a minority or to the majority.

process necessarily involves orthodoxies but that the Constitution necessarily excludes orthodoxies. Scope would appear to be given to majority beliefs while protection would be afforded to minority rights.

In further support of such a principle it could be argued that there is no essential evil — philosophic or otherwise — in majorities and majority views. Some comments favoring *Engel* have come near to expressing an assumption that majority theistic beliefs are actually synonymous with impositions. But it is undeniably important, in a democratic society, that scope not be unreasonably denied the expression, through public institutions, of majority beliefs. Doubtless it is also important that a court, when entertaining a challenge to the constitutionality of a “values” program in the schools, most carefully regard the fact of a public consensus supporting such program, just as it is entirely improper that a court should manifest a compulsion to disregard such consensus, especially upon the basis of the assertion by a few that such program offends them only derivatively — *i.e.*, through offending the Constitution.

So far as the principle concerns coercion, there would be some logic in scrapping the strained view of coercion (or “injury”) which apparently obtained in *McCullum*.¹² Certainly, as Justice Jackson in that case suggested, legal compulsion should be required to be shown rather than mere subjective embarrassment attendant upon a decision not to participate in a program.¹³

The principle, however simple in statement, may involve much difficulty in practical application due to its requirement of a consensus. The Court, it should be noted, has utilized the concept of a consensus in first amendment cases — notably with respect to the determination, in criminal cases, of what constitutes obscenity.¹⁴ Here guilt or innocence will turn upon the question of “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”¹⁵ Little comment has thus far appeared in the obscenity cases respecting how the “community standard” is determined.¹⁶ Assuming that a school district might be designated as the geographical area in which it would be sought to ascertain whether a consensus existed, the difficulty would at once be encountered that in many district it would be obvious that no consensus — in the sense that an overwhelming majority belonged to a single sect — existed. And it would need to be recalled that, whereas in some communities a consensual common core of religious expression has been arrived at through interfaith negotiation, in other communities this has proved impossible, due often to the vigorous efforts of believers in Secular Humanism who insist, not that the public schools shall be neutral (*i.e.*, giving some scope to the religious aspirations of all) but that they shall be promoters of Secular Humanist sectarianism.

¹² *Illinois ex rel. McCollum v. Board of Educ.*, *supra* note 7, at 233.

¹³ Such embarrassment was not found in *Zorach v. Clauson*, 343 U.S. 306 (1952). As Professor Kauper has perceptively noted, there appeared no difference, so far as coercive element is concerned, between the situations with which each

decision dealt. KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY*, 120-25 (1956).

¹⁴ *Roth v. United States*, 354 U.S. 476 (1957).

¹⁵ *Id.* at 489.

¹⁶ Or indeed what geographical subdivision may be said to constitute the “community” in a particular case.

The consensus principle poses other serious difficulties. A most exacting test of community sentiment would be required. In view of the mobility of population in the United States today, frequent retesting of such sentiment would be needed in many areas. An ultimate effect of orienting the schools according to a community consensus might also be the retarding of population movement, due to the fact that, for example, a family might not desire to move into a particular community where a given theistic or nontheistic program of value-expression was offered in that community's public schools. This would be a problem of particular significance if most church-related schools in the United States were forced by economic pressure to close.

Again, the technique for ascertainment of such sentiment would not be easy to define, and a special obstacle is encountered in the fact that ascertainment would have to be made not merely of the rather readily definable views of Catholics, Lutherans, Orthodox Jews and other theistic religious groups, but also of expressions of nontheistic belief. In contemporary America, where there is a widespread lack of an awareness of philosophy, this becomes a formidable obstacle indeed.

Amendment

It is being urged that, since the Court has now declared that the no establishment clause requires that no official religious exercises or practices exist in the public schools, the Constitution should be amended. The plea for amendment rests, in part, upon the assumption that the *Engel* decision ousts only theistic religion from the public schools. Thus, of necessity, it helps divert attention from the dilemma (described in the first part of this article)

at which the Court in *Engle* has arrived. In view of that dilemma, it might seem somewhat extravagant to seek resolution through a fundamental exertion of the whole people when judicial means (already discussed herein) might provide a solution of some utility.

In the event that an amendment is sought, serious questions are presented as to what it should provide. Clearly, amendment merely making provision for official prayers would be inadequate.¹⁷ Unaffected then would be the larger, more significant area of the role of religion in the public life of the nation. An amendment simultaneously reflecting the real intent of the framers of the first amendment as well as the undoubted consensus of the people today would prohibit, in terms, congressional establishment of a *state religion*, give recognition to governmental accommodation of religion in American life and ban governmental *preferment* of particular religions or religious groups.¹⁸ Undoubtedly any such amendment would leave some questions outstanding. If the term, "Congress", were employed afresh in a redrafting of the first amendment, would this not signify the intent of the people that the revised first amendment should not have application, through the fourteenth amendment, to states? If the term "Congress" were not employed but instead it were stated that

¹⁷ A resolution proposed by Senator Glenn Beall provides the following amendatory language:

"Nothing contained in this Constitution shall be construed to prohibit the administrator of any school, school system, or educational institution supported in whole or in part from any public funds from providing for the voluntary participation by the students thereof in regularly scheduled periods of nonsectarian prayer." S.J. Res. 205, 87th Cong., 1962.

¹⁸ See Cusack, *The Prayer Case—First Amendment Revision*, appearing in this issue at p. 281.

"neither the federal government nor any state government shall make any law (etc.) . . .", then would such substituted language place upon the states a duty to accommodate or encourage religion, if the revised first amendment also contained language providing for such accommodation or recognition? Further, if language providing for accommodation or encouragement of religion were employed, what would this mean in view of the fact that the Court has stated that nontheistic religions, such as Secular Humanism, constitute "religion" under the first amendment?¹⁹ Doubtless also, questions would be raised respecting the meaning of an "accommodation" or "encouragement" concept. It is believed, however, that such questions would be resolved by an express limitation prohibiting preference to given religions or religious groups. Settled beyond argument, for example, would be the question of the power of government to provide chaplaincies for the armed forces, as well as many another practice appearing in Justice Douglas' lengthy index of forbidden practices catalogued in his concurring opinion in *Engel v. Vitale*.²⁰

A more substantial difficulty, however, is posed by resort to amendment. Likely, it would work harm to the Supreme Court as an institution. It cannot be doubted that the prestige of the Court would be seriously blighted through the adoption of an amendment correcting its decision. The amending process, if successful, would require the fullest use of political processes in the fifty states,²¹ and in the political effort to achieve amendment a translation

of the legal issues into a popular "people-versus-Court" psychology would be inevitable. In answer to this it would doubtless be said by many that the Justices, by virtue of *Engel*, had courted these consequences and perhaps even that an institution of nine men who pronounce the law for 180 million citizens needs an occasional reminder of the popular will.²² Yet, upon balance, amendment to correct Court action would appear to be undesirable policy unless other alternatives were unavailable. With respect to the "religion in the schools" question, other alternatives may be possible in aid of achieving the objectives which amendatory action would accomplish. One such alternative, as has been herein noted, would be corrective action by the Court itself. Such action, however, would need to involve as its chief feature an objective, balanced and historically accurate statement of the intentment of the "religion" clauses of the first amendment, along with abandonment of the baseless position that one religion, namely, Secular Humanism, enjoys a preferred posi-

¹⁹ *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

²⁰ *Engel v. Vitale*, 370 U.S. 421, 437 (1962).

²¹ U.S. Const. art. V.

²² Amendment to correct Supreme Court action was resorted to in the adoption of the eleventh amendment (1795), to overcome the effect of the Court's action in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), whereby it accepted jurisdiction of a suit against a state by a citizen of another state. A prime motive for adoption of the fourteenth amendment, in 1868, was the decision of the Court in *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (the *Dred Scott Case*), wherein the Court had held that Negroes were ineligible to attain United States citizenship either from a state or by virtue of birth in the United States. Ratification of the sixteenth amendment, in 1913, was the direct consequence of the decision by the Court in 1895, whereby the attempt of Congress to place a tax uniformly upon incomes in the United States was held unconstitutional. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

tion in the American scheme. As has also been noted, the result upon the public schools of such corrective decision would be to permit only such religion to be offered in the public schools of a district as could be determined by mediative processes in the community in question.²³

Religion as Culture

Widely discussed in preceding years²⁴ has been the utilization of programs by public schools which acquaint pupils with religion as a part of general culture. As stated by one study, such programs are to be characterized by a

deliberate aim and definite plan to deal directly and factually with religion wherever and whenever it is intrinsic to learning experience in social studies, literature, art, music, and other fields. The aims of such study are to develop religious literacy, intelligent understanding of the role of religion in human affairs, and a sense of obligation to explore the resources that have been found in religion for achieving durable convictions and personal commitments. These aims arise from the requirements of general education which, to be effective, must view culture, human life and personality whole.²⁵

To many, the chief shortcoming of pro-

grams of "teaching about" religion is that they fail to satisfy the need to learn religious doctrine in detail and depth and to give religion its place in the communal life of the school through prayer and the celebration of holy days. To others, undoubtedly, "teaching about" religion may readily become a teaching *of* religion.²⁶ It is obvious that in references to religion, or in the comparing of religions, a constant attitude of neutrality will be impossible for some teachers and difficult for many. More difficult still will be the achieving of an appearance of neutrality such as to satisfy large numbers of pupils possessing strong beliefs respecting religion. If "teaching about" religion is to be chosen as the way out of the problems posed by *Engel*, and as the means for satisfying the widespread demand of the public for religion in the schools, it may prove that a well-nigh intolerable burden of responsibility will have been placed upon the shoulders of public school teachers. For they will now need a deep and accurate knowledge of a wide variety of religious beliefs, history and practices, along with consummate skill in presentation, in order that they may avoid both the Scylla of indoctrination and the Charybdis of misstatement.

Conclusions

(1) Should the Court overrule the *Engel* decision and then go on to state an interpretation of the first amendment which expressly recognized that government may accommodate or encourage religion, then the public schools would be free to provide religious programs. The principle of non-

²³ The quantum would also depend upon whether the *McCullum* decision were affected by the subsequent revisionary decision of the Court here contemplated.

²⁴ See CHATTO AND HALLIGAN, *THE STORY OF THE SPRINGFIELD PLAN* 72, 73 (1945); THAYER, *RELIGION IN PUBLIC EDUCATION* 184-91 (1947); MORAL AND SPIRITUAL VALUES IN THE PUBLIC SCHOOLS (Educational Policies Commission, National Education Association of the United States and American Association of School Administrators) 77 (1951); *THE FUNCTION OF THE PUBLIC SCHOOL IN DEALING WITH RELIGION* (American Council on Education) 11 (1953).

²⁵ *THE FUNCTION OF THE PUBLIC SCHOOL IN DEALING WITH RELIGION*, *supra* note 24.

²⁶ The *McCullum* decision declared unconstitutional the practice of giving religious instruction on public school premises. *Illinois ex rel. McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

preference would, however, dictate that in any district a consensus support such program. For most districts, this requirement would necessarily result in religious programs of a very limited sort. Such a statement by the Court is both proper and desirable. But so far as the realization of religious education as a part of public education is concerned, it must be recognized that such statement will have effects which, while good, will be most limited.

(2) A constitutional amendment declaring official school prayers not prohibited by the Constitution would be undesirable. It would involve a gigantic labor to achieve a very small result while leaving standing the more sweeping prohibitions implicit in *Engel*. The broader amendment discussed herein *supra* at page 289 would seem desirable in the absence of the judicial revision described in the preceding paragraph. Some areas of public life other than education would then be indisputably areas for governmental accommodation or encouragement of religion upon a nonpreferential basis. So far as religion in education is concerned, it is difficult to see how, by such amendment, any greater scope for religion in public education would be achieved than is described in the preceding paragraph. The place of religion in American public life would, however, be secured in explicit constitutional provision.

(3) "Teaching about" religion should be considered constitutionally permissible at present, although serious constitutional problems may be envisioned, under existing Supreme Court decisions, where "teaching about" becomes "teaching of" religion. While it is undeniable that the subject of religion forms part of the domain of secular knowledge and therefore must be taught as a part of secular knowledge, it is also

true that such "teaching about" religion is no real substitute for the religious education which many persons desire.

(4) Under existing interpretations by the Supreme Court of the first amendment, government may not coerce a child to submit to any form of religious indoctrination²⁷ or the inculcation of ideological orthodoxies.²⁸ The compulsory attendance laws bind all children. But, as has been earlier discussed in this series of articles, public education embraces nontheistic religious indoctrination and the inculcation of ideological orthodoxies. This is, however, abhorrent to the principles of nonpreference. This is in no sense to argue that, therefore, public schools must cease to be objects of public support; it is rather to point out the fact that they, too, must be regarded as a species of *sectarian*²⁹ school and that there can be no selection by government of a particular sectarian school as the sole object of its bounty. Upon the view, however, that government may appropriate public funds for the achievement of the proper public end of educating the citizenry, government must accord the various educational institutions which responsibly carry out citizen education equality of treatment. Whereas a great practical benefit then redounds to the citizen by virtue of his being economically free to select an educa-

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²⁷ Illinois *ex rel.* McCollum v. Board of Educ., *supra* note 26. Engel v. Vitale, 370 U.S. 421 (1962).

²⁸ West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

²⁹ Clearly under existing decisions the concept of "sectarian" does not depend upon the existence of a church, or institution or religious body. Everson v. Board of Educ., 330 U. S. 1 (1947).

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(Continued)

tional institution (whether theistic or otherwise) which corresponds to his conscientious choice, it is also true that, where

all schools must be regarded as sectarian, his tax contribution to education may not be directed to the support of one, among many kinds of institutions, which accomplish the common educational objective.