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# Recent Decision: Bible Reading in the Public Schools - Neutrality v. Realism

This analysis of New York's civil rights legislation does not decisively answer the question of whether the courts are more effective than the streets. One thing is certain: the legislative and judicial processes move more slowly than the picketing and sit-in demonstrations. But another aspect is also evident: they are peaceful and, perhaps, more certain.

**Recent Decision: Bible Reading in the Public Schools— *Neutrality v. Realism***

"The breach of neutrality that is today a trickling stream may all too soon become a raging torrent. . . ."[1] With these words the Supreme Court summarized what it hoped to prevent in its role as protector of the religious liberties guaranteed by the first amendment.

In two separate cases, parents and students, who conscientiously object to the tenets of the Bible, notwithstanding the exemption from participation granted students upon written excuse, challenged the practices of Maryland and Pennsylvania which required their public school systems to have daily reading of Biblical verses without comment. The Supreme Court of the United States in deciding both cases simultaneously *held* that such required reading was a use of public facilities and faculty for primarily religious purposes thus violating the rule of governmental neutrality dictated by the first amendment. *School Dist. of Abington Township v. Schempp,* 31 U.S.L. WEEK 4683 (U.S. June 17, 1963).

While the issue of required Bible reading, as such, had never before been squarely decided by the Supreme Court,[2] it had been the frequent cause of litigation in the state courts. Most of the courts, in deciding whether this practice exceeded the allowance of the first amendment, had applied the "non-sectarian" test, *i.e.*, if the religious exercise was nondiscriminatory and favored no religious sect, the religious freedoms would not be violated.[3] Many courts dismissed the complaints of those discriminated against as being incidental to the secular purpose of infusing morality into secular school teachings.[4] Other jurisdictions have held that the Bible does not teach the dogmas of any sect unless it is accompanied by some comment or interpretation.[5] In fact, one court declared that

[1] School Dist. of Abington Township v. Schempp, 31 U.S.L. WEEK 4683, 4689 (U.S. June 17, 1963).

[2] This case was the first of its kind to be decided in the federal court system. Harrison, *The Bible, the Constitution and Public Education,* 29 TENN. L. REV. 363 (1962). In Doremus v. Board of Educ., 343 U.S. 429 (1952), the Court was faced with the issue of Bible reading in public schools, but dismissed the case on procedural grounds.

[3] People v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); Kaplan v. Independent School Dist., 171 Minn. 142, 214 N.W. 18 (1927).

[4] *E.g.,* Spiller v. Woburn, 94 Mass. (12 Allen) 127 (1866); Wall v. Cooke, 7 Am. L. Reg. 417 (Mass. 1859); compare Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908).

[5] Hackett v. Brooksdale, 120 Ky. 608, 87 S.W. 792 (1905); Lewis v. Board of Educ., 157 Misc. 520, 285 N.Y. Supp. 164 (Sup. Ct. 1935), *modified on other grounds,* 247 App. Div. 106, 286 N.Y. Supp. 174 (1st Dep't 1936), *appeal dismissed,* 276 N.Y. 490, 12 N.E.2d 172 (1937).

the Bible was non-sectarian on the ground that our nation is founded on Christianity and hence, the Bible was actually the foundation of our laws, customs and institutions.[6] On the other hand, the Bible reading requirements of certain school districts have been declared unconstitutional with far more consistency.[7]

In *Herold v. Parish Bd. of School Directors,*[8] the reading of the New Testament as the Word of God was declared to be discriminatory against the Jewish people. Despite a clause excusing religious dissenters, the law was declared unconstitutional because it tended either to force the pupil to participate against the dictates of his religion or to subject him to a religious stigma in being placed in a class by himself. Bible reading practices have also been declared unconstitutional at the instance of Catholics who have objected to the use of the King James version or have objected to the reading of the Bible without, what they felt was, the proper interpretation.[9]

The Supreme Court first exercised its influence in this area in the case of *Cantwell v. Connecticut,*[10] holding that the liberties protected by the due process clause of the fourteenth amendment include the freedoms and liberties of religion established by the first amendment. Prior to that decision the states were generally free through the regulation of public education to substantially influence religious matters. The Court had interfered with the states only when the states' infringement on religious rights was coupled with an infringement upon property without due process of law.[11] In the *Cantwell* case as well as in many subsequent decisions the Court was concerned with either the states' prevention of the free exercise of religion or with the free exercise of speech in religious matters.[12] In *Cantwell* the Court specifically declared unconstitutional a law under which two Jehovah Witnesses were convicted for soliciting funds without a permit. The Court found that although the states have

[6] Stevenson v. Hanyon, 7 Pa. Dist. 585, 590 (1898).

[7] "[I]n our opinion the reading of the Bible and repeating of the Lord's Prayer without comment in opening exercises is necessarily devotional. . . . The cases sustaining Bible reading in school exercises consistently evade or ignore this fact and thereby fall into error." State *ex rel.* Finger v. Weedman, 55 S.D. 343, 351, 226 N.W. 348, 352 (1929); "The only means of preventing sectarian instruction in the school is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise. The Bible is not read in the public schools as mere literature or mere history. It cannot be separated from its character as an inspired book of religion." People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 348, 92 N.E. 251, 255 (1910); "[T]he Bible contains numerous doctrinal passages upon some of which the peculiar creed of almost every religious sect is based. . . ." State *ex rel.* Weiss v. District Bd. of School Dist. No. 8 of Edgerton, 76 Wis. 177, 194, 44 N.W. 967, 973 (1890); State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 376, 173 Pac. 35, 37 (1918); *cf.* State *ex rel.* Freeman v. Schive, 65 Neb. 853, 91 N.W. 846 (1902), *modified,* 65 Neb. 876, 93 N.W. 169 (1903); State *ex rel.* Clithers v. Showalter, 159 Wash. 519, 293 Pac. 1000 (1930).

[8] 136 La. 1034, 68 So. 116 (1915).

[9] People *ex rel.* Ring v. Board of Educ., *supra* note 7; State v. District Bd. of School Dist. No. 8 of Edgerton, *supra* note 7. *Contra,* Kaplan v. Independent School Dist., *supra* note 3.

[10] 310 U.S. 296 (1940).

[11] *E.g.,* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[12] *E.g.,* Torcaso v. Watkins, 367 U.S. 488 (1961); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); see Virginia Bd. of Educ. v. Barnett, 319 U.S. 624 (1943), where the Court, in striking down a statute requiring the expulsion of any student who refused to recite the pledge of allegiance, stated that the purpose of the first amendment is to preserve religious rights from *all* official control.

a right to protect citizens by regulating solicitations of money, Connecticut should have chosen one of the available means which did not tend to place a prior restraint on free speech in religious matters.[13] The Court recognized, however, an important distinction between freedom to believe and freedom to act, holding the former to be absolute but the latter subject to regulation.[14]

In *Everson v. Board of Educ.*,[15] the Court allowed state reimbursement of citizens who expended money for bus fares by sending their students to private schools. Mr. Justice Black, writing for the majority, stated that:

> We must be careful in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.[16]

He was, however, careful to distinguish between the expenditures of tax money for the purpose of supporting religious activities (which he thought would be unconstitutional) and the expenditure of tax money for the general welfare of all children of school age regardless of the school they attended. He held the latter to be constitutional notwithstanding the fact that such expenditures might indirectly assist some church by encouraging a parent to send his child to a more distant religious institution.[17]

This principle of indirect aid was also applied by the Supreme Court in affirming the validity of Sunday Closing Laws.[18] The Court was careful to point out that the questioned laws were designed to accomplished a necessary secular purpose, namely to provide a respite from work, and that these laws were only incidentally beneficial or discriminatory toward certain religions.[19]

In *Engel v. Vitale*,[20] the highly celebrated *School Prayer Case*, the Court struck down the non-sectarian Regents Prayer as being a violation of the "establishment clause." The Court stated that this religious exercise, sponsored by a governmental body, tended to coerce religious minorities to conform to the prevailing religious beliefs.[21] Mr. Justice Douglas, in a concurring opinion, stated that the Regents Prayer amounted to a use of public facilities for a religious exercise. He felt that any use of public facilities for

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[13] The Supreme Court in what amounted to a corollary to the *Cantwell* decision held unconstitutional a law requiring a license to sell religious papers. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[14] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[15] 330 U.S. 1 (1947).

[16] *Id.* at 16.

[17] In Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), the majority stated that sending religious educators into public schools was beyond doubt a utilization of the tax supported public school system as an aid to religious groups in spreading their faiths and hence unconstitutional. However, in Zorach v. Clauson, 343 U.S. 306 (1952), the Court held that released time instructions did not violate the first amendment.

[18] Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

[19] "[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." Braunfeld v. Brown, *supra* note 18, at 607.

[20] 370 U.S. 421 (1962).

[21] *Id.* at 430. "[F]reedom of worship . . . may not be submitted to a vote . . . "West Virginia Bd. of Educ. v. Barnette, *supra* note 12, at 638.

such a purpose would be unconstitutional.[22]

In retrospect, the entire line of Supreme Court decisions prior to the newly decided Bible case indicated that the Court would be most unwilling to accept as constitutional any use of public facilities, personnel, or funds exclusively or primarily for the teaching of religion. Lower courts, for the most part, have held prescribed Bible reading to be violative of the first amendment. In the light of such background, the Court's decision in the Bible case is neither surprising nor unprecedented, but rather, the next step in a logical progression of decision aimed at religious neutrality.

In the principal case, the first fact situation concerned the Schempp children who attended the local high school. They were Unitarians and, therefore, not in accord with the teachings of the Bible. Each morning in accordance with a Pennsylvania statute,[23] the school conducted a salute to the flag followed by a reading of ten verses from the Bible and concluded by a recitation of the Lord's Prayer. Although the school district had supplied copies of only the King James version, other versions could be used. There were no prefatory statements and no comments on the verses chosen. The children were informed that they could absent themselves from the service. Their father testified that although he had considered having the children excused from the service he declined to do so, fearing that the "children's relationships with their teachers and classmates could be adversely affected."[24] A religious expert testified that if portions of the Bible were read without explanations it could be psychologically harmful to children of various sects. The district court granted the injunction sought by the Schempp family and the Abington School District appealed to the Supreme Court.[25]

The second set of facts discussed by the principal decision concerned a mother and son, both professed atheists. In 1905 the Board of School Commissioners of Baltimore adopted a rule providing for the reading of a chapter of the Bible without comment as an opening exercise in the schools.[26] Although the son had been excused from the exercise, petitioners brought a writ of mandamus claiming that the practice discriminated against them by placing a "premium on belief as against nonbelief and subjects this freedom of conscience to the rule of the majority."[27] The Court of Appeals of Maryland denied the relief sought and an appeal was taken to the Supreme Court.[28]

Mr. Justice Clark, writing for the majority, concluded that the federal government can neither favor a given religion nor "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[29] The Court held that the government must remain neutral not only to prevent a breach of the "establishment clause" but also to avoid violations of the "free exercise clause"

[22] *Id.* at 441.

[23] PA. STAT. tit. 24, §15-1516 (Supp. 1960).

[24] School Dist. of Abington Township v. Schempp, 31 U.S.L. WEEK 4683, 4684 (U.S. June 17, 1963).

[25] Schempp v. School Dist. of Abington Township, 177 F. Supp. 398 (E.D. Pa. 1959), *appeal vacated and remanded,* 364 U.S. 298 (1960), 201 F. Supp. 815 (E.D. Pa. 1962), *prob. juris. noted,* 371 U.S. 807 (1962); 30 FORD L. REV. 801 (1962); 28 GEO WASH. L. REV. 519 (1960).

[26] MD. ANN. CODE art. 77, §202 (1957).

[27] School Dist. of Abington Township v. Schempp, *supra* note 24, at 4685.

[28] Murray v. Curlett, 228 Md. 239, 179 A.2d 698, *cert. granted,* 371 U.S. 809 (1962).

[29] School Dist. of Abington Township v. Schempp, *supra* note 24, at 4689.

which guarantees the right of free choice of worship without compulsion. The opinion, in establishing the test for determining violations of the first amendment, found the determinative factors to be the primary purpose and the primary effect of the legislation. To avoid the strictures of the "establishment clause," the primary purpose of the legislation must be secular while at the same time it may neither advance nor inhibit religion. To avoid the restraints of the "free exercise clause" the legislation must not act coercively to the detriment of an individual in the practice of his religion. The latter would require definite proof of the harm to the complainant whereas the former would not.[30]

Having thus established the test, the Court applied it to the statutes at issue and found that such prescribed reading of the Bible was unquestionably religious in nature and that it tended to be coercive since one must either participate or be religiously stigmatized. Although the Court never specified which clause (establishment or free exercise) had been violated, it concluded that this use of public funds, facilities and faculty to teach religion was a violation of governmental neutrality.[31]

Mr. Justice Stewart, in his dissenting opinion, expressed the belief that neither Supreme Court precedent nor the first amendment required the complete secularization of the public school systems.[32] In contradistinction to the concurring opinion of Mr. Justice Douglas, he claimed that there was no constitutional prohibition on the use of public facilities for religious purposes. In fact, he argued that such prohibition would place religion at "an artificial and state created disadvantage."[33] It was Justice Stewart's contention that as long as variations in the particular Bible to be used existed, no particular religion is favored; hence no religion is established. He conceded, however, that absent such tolerated variation the law in question might well be unconstitutional. Justice Stewart hence found no violation of the "establishment clause." With regard to the "free exercise clause," he claimed the majority had failed to satisfy its own requirement—proof of the harm to the complainant. In the *Schempp* case, the first set of facts with which the Court was faced, the only evidence presented was Mr. Schempp's "prophecy" that he was afraid that his children would be socially harmed; and in the second fact situation, there was no evidence introduced since the original case was tried on a demurrer. Since the "establishment clause" had not been violated and there was insufficient evidence to prove any harm to the complainant, Justice Stewart concluded that neither Bible reading statute should have been declared unconstitutional.[34]

It would appear that the principal decision is truly significant for the legal questions it leaves unanswered in its insistence on neutrality, and also for the notoriety it has created in the public mind and press. The first question usually asked when the Court strikes down a religious act long practiced in public schools concerns the possible removal of the word "God" from the

[30] *Id.* at 4688; Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 26-27 (1963).
[31] School Dist. of Abington Township v. Schempp, *supra* note 24, at 4690.
[32] *Id.* at 4715; see Costanzo, *Prayer in Public Schools*, 8 CATHOLIC LAWYER 269, 278 (1962).
[33] School Dist. of Abington Township v. Schempp, 31 U.S.L. WEEK 4683, 4716 (U.S. June 17, 1963) (dissenting opinion of Stewart).
[34] *Id.* at 4718.

pledge of allegiance, from our currency and from all public edifices. Apparently to avoid the adverse public reaction with which the *School Prayer Case* was received, the concurring opinions of Justices Goldberg and Harlan were careful to illustrate that the present decision did not extend that far. In fact, they virtually ratified such practices as being within constitutional limits. Even the majority went so far as to explain that the reading of the Bible for literary purposes or the teaching of a course in comparative religions would be constitutionally permissible in the public schools as long as no particular religion was favored.[35]

The second and far more serious question concerns the secularization of public school training.[36] When the Supreme Court in an effort to remove all religious training from public education prevents teaching about God, does it create a maintainable vacuum or does it promote another religious philospohy? Perhaps this question can best be answered by an example. Most educators will agree that an educational system must teach social values. The courses must explain, in some way, man's relationship with his country and with his fellow man. We must either choose to teach social values or we must choose not to teach them. The latter course would seem to make public education meaningless and necessarily render it valueless.[37] On the other hand, if we are to teach social values we are faced with a second choice which has been complicated by the principal decision for we must apply either a theistic or a non-theistic philosophy in explaining man's relationships. To apply a theistic philosophy would be to violate the specific dictates of this case since such an approach would not appear to be neutral. Yet to apply a non-theistic approach seems no more neutral since it would favor such non-theistic religions as the Ethical Culture Society, the American Secular Union, or the Secular Humanists. These are religions just as much as Catholicism, Judaism or Protestantism,[38] although there exists a dichotomy in basic beliefs. "The fundamental principle of Secularism is that in his whole conduct, man should be guided exclusively by considerations derived from the present life itself. This principle is in strict opposition to essential Catholic doctrines."[39]

Since the application of either philosophy to the teaching of social values would appear to favor some religion, social values may not be taught because the means of the teaching should be declared unconstitutional as a violation of the rule of strict neutrality. The essence of the problem is that

[35] *Id.* at 4689; Pfeffer, *Court, Constitution and Prayer,* 16 RUTGERS L. REV. 735, 750 (1962).

[36] "The extention of the 'secularism' concept is most evident in the history of Schempp v. Abington Township School Dist." Note, *Church-State Religious Institutions and Values,* 37 NOTRE DAME LAW. 649, 672 (1962) (discussion of district court decision).

[37] PRESTON, TEACHING SOCIAL STUDIES IN THE ELEMENTARY SCHOOL 25 (2d ed. 1961); FITZGERALD & FITZGERALD, METHODS AND CURRICULA IN ELEMENTARY EDUCATION 8-10 (2d ed. 1956); HARTLEY, PROBLEMS IN PREJUDICE (1946).

[38] Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957); Washington Ethical Society v. District of Columbia, 249 F.2d 129 (D.C. Cir. 1957).

[39] XIII CATHOLIC ENCYCLOPEDIA 676, 677 (1913). "The essential thesis of the Ethical Movement . . . is that morals, ethical conduct, and right living are good in themselves and for that reason must be practiced and not because of any command or sanction of any duty or Supreme Being." Fellowship of Humanity v. County of Alameda, *supra* note 38, at 403-04; see generally, Ball, *The School Prayer Case,* 8 CATHOLIC LAWYER 182, 195 (1962).

the Supreme Court attempts to select neutrality when faced with an either—or choice. The goal of neutrality is admirable, but in the area of public education it is unattainable.[40] It has long been the rule that if there is a secular goal to be achieved and its implementation indirectly leads to discrimination against some particular sect, such implementation would not be struck down as unconstitutional.[41] When we are in an area where we must favor one religious group or another, the majority should be accommodated.[42]

The teaching of social values can be compared to the area of the Sunday Closing Laws. In 1848, *Specht v. Commonwealth*[43] outlined what was to become the rationale for most Sunday Closing Law decisions. The decision indicated that periods of rest were absolutely necessary to the well being of society and further that such periods must occur at regular intervals. The Court stated that,

> one day must be selected, and . . . the week presents none which . . . might not be regarded as favoring some one of the numerous religious sects. . . . In a Christian community . . . it is not surprising that Sunday should have received legislative sanction.[44]

In teaching social values and in requiring Sunday closings the purpose is the same, namely, to prevent the breakdown of the social order—a secular purpose.[45] In both cases the implementation must favor one religion, yet in the application of these principles to like facts, the Supreme Court decisions would apparently require a different result. Sunday Closing Laws which favor religion in economic areas are declared legal but secular teaching which favors a religion in public schools is unconstitutional.

The Court's decision in the *Bible* case would appear to be more readily justifiable on the grounds that required Bible reading is a breach of the "establishment clause" rather than its being a breach of neutrality. The Bible would seem to violate the "establishment clause" because of its highly sectarian nature.[46] While the use of the Bible itself is not sectarian it becomes so when an individual reads from one particular version.[47] It would appear, therefore, that the Court has correctly decided that the required reading of the Bible is unconstitutional as a violation of the first amendment, but not for the reason given by the majority.

As Mr. Justice Stewart stated in his dissent, neutrality cannot be the goal of the Supreme Court. When the Court attempts to divorce God from lessons in the public schools, it merely favors other religious sects, the non-theists. Doesn't it appear that

[40] See Kurland, *Of Church and State and the Supreme Court*, 29 U. OF CHI. L. REV. 1, 96 (1961); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. OF CHI. L. REV. 661 (1960); Katz, *Freedom of Religion and State Neutrality*, 20 U. OF CHI. L. REV. 426, 438 (1953).

[41] Braunfeld v. Brown, 366 U.S. 599, 606 (1961); Two Guys v. McGinly, 366 U.S. 582, 595 (1961); Schneider v. State, 308 U.S. 147, 161 (1939); Pfeffer, *Court, Constitution and Prayer, supra* note 35, at 744.

[42] Costanzo, *Prayer in Public Schools*, 8 CATHOLIC LAWYER 269, 277 (1962).

[43] 8 Pa. (Barr) 312 (1848).

[44] *Id.* at 323.

[45] McGowan v. Maryland, 366 U.S. 420, 436 (1961); Soon Hing v. Crowley, 113 U.S. 703, 710 (1885).

[46] "Any instruction on any one of the subjects is necessarily sectarian, because, while it may be consistent with the doctrine of one or many of the sects, it will be inconsistent with the doctrines of one or more of them." People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 348, 92 N.E. 251, 255 (1910).

[47] KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 4-5 (1962); Kurland, *The Regents Prayer Case*, 1962 SUPREME COURT REV. 1, 33.

in its very attempt to foster neutrality, the Court has taken a side? Doesn't it appear that in attempting to accommodate all religions, the Court has favored the few? And while we need not fear a raging torrent of control by the secularists, doesn't it appear that in attempting to stop the "trickling stream of breached neutrality," the Supreme Court has actually created a *steady* stream of support for non-theistic religions?