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First Amendment - Passive Accommodation: An Attempt at Demarcation

is that it may be unable to avoid segregation in new schools still in the planning stage.

The United States Supreme Court can do much to clarify exactly what rights and duties are involved in the area of *de facto* segregation. As in all cases where a standard of reasonableness is employed, no hard and fast rules can be drawn. The educational authorities and the courts should be flexible in their approach to this problem. They must always weigh the slight disadvantages to a particular group against the greater benefits to society that may be gained by any new proposal. Even if the Supreme Court finds that there is no affirmative duty to integrate *de facto* segregated schools, it should permit school authorities to voluntarily integrate their schools through rezoning. This is especially so when, as in the instant case, such integration does not impinge upon the rights of white children by causing them more than minimal inconvenience. When educational authorities believe that they can work out an equitable solution, the courts should not impede them in their efforts.

Recent Decision:
First Amendment —
Passive Accommodation:
An Attempt at Demarcation

The defendant Board of Education of Hartsdale, New York, authorized a group of Hartsdale School District taxpayers to erect a Nativity scene on a portion of its school grounds during the Christmas recess when classes would not be in session. Public funds and school district personnel were not employed in any manner. A number of parents whose children attended the school brought suit for a declaration that the school board had neither legal nor constitutional authority to permit the display. The complaint alleged that the school board's action constituted an establishment of religion within the meaning of the first amendment. The Court, denying plaintiffs' motion for summary judgment, distinguished this fact situation from the Bible[1] and School Prayer[2] cases and *held* that the school board's action was, at most, a passive accommodation of religion and, hence, was not violative of the "establishment clause" of the first amendment. *Lawrence v. Buchmueller,* 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup. Ct. 1963).

For nearly 160 years the interpretation of the "establishment clause" was left, for the most part, to constitutional commentators who tended to give it a relatively narrow interpretation.[3] The Supreme Court, when it eventually considered the clause, gave it a far broader meaning than had been given it by the commentators. For our purposes, it will suffice to examine only the most recent and expansive meanings given the clause.

In the celebrated case of *Engel v. Vitale,*[4] a non-denominational prayer[5] recom-

[1] School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

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

[3] See COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 224-25 (3d ed. 1898).

[4] 370 U.S. 421 (1962). For an examination of the cases prior to *Engel v. Vitale,* see 9 CATHOLIC LAW. 244-47 (1963).

[5] The following prayer was recited each morning:

mended by the New York State Board of Regents was adopted by a school district and was recited in its schools as part of the morning exercises. Daily recitation of the prayer by the students was on a voluntary basis.[6] The Supreme Court concluded that the recitation of an official state prayer in the public schools, even though voluntary, was violative of the first[7] and fourteenth[8] amendments. Mr. Justice Black, writing for the Court, stated that the framers of the Constitution intended the first amendment to "stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say...."[9] Mr. Justice Douglas' concurring opinion was based on the proposition that a government may not, directly or indirectly, render financial aid to religion.[10]

Only one year later the Supreme Court was again called upon to apply the provisions of the first amendment in *School Dist. of Abington Township v. Schempp*.[11] In that case, ten verses of the Bible[12] were read, without prefatory statement or comment, at the opening of each school day pursuant to a Pennsylvania statute.[13] The students were advised that they could absent themselves from the classroom. If they desired to remain, they were not required to participate in the exercise. Mr. Schempp testified that he had considered having his children excused from the exercise but had decided against it, fearing that they would be "labeled as odd balls" by their teachers and classmates.[14]

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country." In support of the position that non-denominational prayer is per se impossible, see Cahn, *On Government and Prayer*, 37 N.Y.U.L. REV. 981, 991-94 (1962).

[6] The prayer was voluntary in that, with parental consent, a child could refrain from recitation, or, if he wished, leave the room.

[7] Many writers disagree with the Supreme Court's interpretation of the first amendment. They argue that it was intended only to prevent government from establishing one sect in preference to others, and does not prevent general support by government for religion on a non-discriminatory basis. See COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 259 (4th ed. 1931); Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROB. 3, 10 (1949); Murray, *Law Or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23, 23-25 (1949). *Contra*, BUTTS, THE AMERICAN TRADITION ON RELIGION & EDUCATION 210 (1950); Pfeffer, *Church And State — Something Less Than Separation*, 19 U. OF CHI. L. REV. 1, 14-15, 28-29 (1951).

[8] Prior to the adoption of the fourteenth amendment the several states were the sole protectors of religious freedom in the public schools, Permoli v. First Municipality, 44 U.S. (3 How.) 589 (1845). Nearly one hundred years later the Court held that the due process clause of the fourteenth amendment had made the free exercise and establishment clause of the first amendment applicable to the states. Cantwell v. Connecticut, 310 U.S. 296 (1940). See Corwin, *The Supreme Court As National School Board*, *supra* note 7, at 19, who argues that "the Fourteenth Amendment does not authorize the Court to substitute the word 'state' for 'Congress' in the ban imposed by the First Amendment of 'law respecting an establishment of religion.' So far as the Fourteenth Amendment is concerned, states are entirely free to establish religions, provided they do not deprive anybody of religious liberty."

[9] Engel v. Vitale, *supra* note 2, at 429.

[10] *Id.* at 441.

[11] 374 U.S. 203 (1963).

[12] The school district had supplied copies of the King James version but other versions could be used. While the Bible itself is not sectarian it becomes so when one particular version is read. See KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 4-5 (1962); Kurland, *The Regents Prayer Case: "Full of Sound and Fury, Signifying . . .,"* 1962 SUPREME COURT REV. 1, 33.

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

[14] School Dist. of Abington Township v. Schempp, *supra* note 1, at 208 n.3.

Mr. Justice Clark, after reviewing the decisions from *Cantwell v. Connecticut*[15] to *Engel v. Vitale,* concluded for the Court, that both the "establishment clause" and the "free exercise clause" required neutrality. Under the "establishment clause," he stated, "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[16] To avoid the strictures of the "free exercise clause" legislation must neither restrain nor coerce individuals in the pursuit of their religion.[17]

Applying the test thus established, the Court found that the exercises were sectarian in nature and therefore were violative of the commands of the first amendment, requiring the government to maintain strict neutrality. The mere fact that students could be excused did not preclude a finding of unconstitutionality under the "establishment clause."

Mr. Justice Douglas, in his concurring opinion basically reiterated his position in *Engel,* and stated that the challenged practices were unconstitutional not only because they violated the required neutrality, but for the further reason that public funds, though small in amount, were being used to promote a religious exercise.[18]

Mr. Justice Stewart, in his dissenting opinion, asserted that religion and government must of necessity interact,[19] and that prior decisions had made it clear "that there is no constitutional bar to the use of government property for religious purposes."[20]

In the principal case[21] the Court has written an opinion which leaves unanswered some important questions. It has labeled the state's permission to a group of people to construct a Nativity scene a "passive accommodation"[22] of religion, not within the prohibitions of the first amendment, but unfortunately did not attempt to define what constitutes "passive accommodation." The Court seemingly reaches a conclusion without having adequately reasoned to it. The Court stated that its decision was governed by an earlier New York case, *Baer v. Kolmorgen,*[23] which presented facts nearly identical to those in the principal case. The court in *Baer,* however, stated that it could only find the involvement unconstitutional if it actively coerced the individual in his free exercise of religion. Not finding coercion, the court concluded that the activity was merely an accommodation[24] of religion, and, hence, not violative of the first amendment.[25] In addition, the case being prior to *Abington,* the court did not consider whether an accommodation without coercion could nevertheless be violative of the standard of neutrality.

In *Abington,* the entire Court took cognizance of the fact that there are certain areas in which government and religious interaction is permissible. Mr. Justice Goldberg emphasized this permissive area by stating that "unavoidable accommoda-

[15] 310 U.S. 296 (1940).
[16] School Dist. of Abington Township v. Schempp, *supra* note 1, at 222.
[17] *Id.* at 222-23; see Sutherland, *Establishment According to Engel,* 76 HARV. L. REV. 25, 26-27 (1963).
[18] School Dist. of Abington Township v. Schempp, *supra* note 1, at 229.
[19] *Id* at 309.
[20] *Id.* at 314.
[21] The suit challenged the authority of the school board to permit the display of *any* diety or semi-diety but the Court confined its decision to the matter at issue, namely the Nativity.
[22] Lawrence v. Buchmueller, 40 Misc. 2d 300, 303, 243 N.Y.S.2d 87, 90-91 (Sup. Ct. 1963).
[23] 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. 1958).
[24] *Id.* at 1021, 181 N.Y.S.2d at 238.
[25] *Id.* at 1022, 181 N.Y.S.2d at 239.

tions"[26] were necessary, and that there was no clear yardstick by which the permissible area could be delineated from that constitutionally prohibited.[27] Mr. Justice Goldberg reasoned that "the First Amendment does not prohibit practices by which 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. . . ."[28]

The Court presented a few examples which are indicative of the intimacy which exists between religion and the federal government.[29] Oaths of office from President to alderman conclude with the humble statement "So help me God." Likewise each session of Congress is opened with a prayer provided by its chaplain. Each session of the Supreme Court is commenced by a crier, who in a short ceremony invokes the grace of God. Furthermore, chaplains are provided in our military forces for spiritual guidance.[30]

The fact situation in the principal case seems clearly to fall within the spirit of the types of activity which are not violative of the first amendment. Although the examples in *Abington* are specific, they were certainly not intended to be exhaustive. It would clearly be unreasonable not to distinguish between the recitation of a prayer or the reading of a Bible in a classroom and the authorization given to a group of people to erect a religious display on public grounds at their own expense. The significant recognition by the Court in the principal case is that some distinction must be made regardless of what the distinction is branded. The Court here has chosen to label the degrees of involvement as "active" and "passive." These labels may not necessarily be the most appropriate. The Supreme Court in subsequent cases may refuse to adopt this precise language—whether or not they do is not of major concern. The case under discussion points up at least this—whether there has been a violation of the "establishment clause" is a question of the degree of state involvement in a particular religious activity. The Supreme Court, if faced with a similar fact situation, might very well categorize the degree of involvement here present among its enumerations of sanctioned activities and might well conclude that such a determination was implicitly mandated by *Abington*.

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[26] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 305-306 (1963) (concurring opinion of Justice Goldberg).

[27] *Id.* at 306.

[28] *Id.* at 308. (Emphasis added.)

[29] *Id.* at 213.

[30] It is interesting to note that the Congress which provided for chaplains in the Houses of Congress and in the armed forces, was the same Congress that wrote the first amendment.