THE NEW YORK PRAYER DECISION: ITS EFFECT ON ARIZONA SCHOOL PRACTICES

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Few decisions in recent years have brought the clamor, both pro and con, as has *Engel v. Vitale*[1] which declared a prayer prescribed by a local New York school board to be violative of the first and fourteenth amendments. The board had instituted the recitation of a non-denominational prayer[2] which followed the pledge of allegiance during each morning's opening exercises. The petitioners[3] sought to compel the board to discontinue the use of this prayer on the grounds that it violated their religious beliefs and practices, and those of their children. On its way to the Supreme Court, three New York courts[4] upheld the prayer as constitutional and limited the board only by directing that participation be completely voluntary.

History and Rationale

The Supreme Court, speaking through Mr. Justice Black, stated that prayer is a religious activity[5] and then traced the evolution[6] of the establishment clause of the first amendment.[7] In England the Common Book of Prayer was changed with the accession of each new sovereign to the throne. Influential religious groups were able to have the book amended to include their particular prayers and religious rituals while some of the less influential citizenry came to America to escape such religious intolerance.

The religious liberty which the immigrants so ardently sought was short lived. The colonists began almost immediately to set up their

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[1] 82 Sup. Ct. 1261 (1962).

[2] "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." *Id.* at 1262.

[3] The petitioners were members of the Jewish and Unitarian faiths, Society of Ethnic Culture, and one non-believer. Engel v. Vitale, 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959).

[4] Engel v. Vitale, *supra* note 3, *aff'd*, 11 App. Div. 2d 340, 206 N.Y.S.2d 183 (App. Div. 1960), *aff'd*, 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961).

[5] Engel v. Vitale, 82 Sup. Ct. 1261, 1264 (1962).

[6] *Id.* at 1264-68.

[7] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

own various religions as the churches of state. At the time of the Revolutionary War there were eight of the former colonies which had established *churches, i.e.,* declared to be the official state church; and four of the other five former colonies had established *religions, i.e.,* they received financial aid from the government.[8]

There was a widespread awareness of the dangers of the union of church and state at the time of the framing of the Constitution. Most leaders felt that the chief danger to personal religious freedom was for the state to give its blessing to a particular religion. "The first amendment was added to the Constitution to stand as a guarantee that neither the power nor prestige of the federal government would be used to control, support, or influence the kind of prayers the American people can say."[9]

The New York prayer, though non-denominational and voluntary, is an instance in which the "power and prestige" of the state government is put behind the beliefs set forth in the prayer. The Court notes[10] that although this prayer is a far cry from an established church, it is the first step in that direction and should therefore be struck down.

Arizona Practices

The Supreme Court follows a policy of limiting its decisions to the facts in the particular case presented.[11] It is clear then that the *Engel* decision outlaws only prescribed prayers, those written or sanctioned by the school, as opposed to permissive prayers, those tolerated and permitted by the schools though not officially written out or sanctioned.

A survey of school districts in Phoenix and Tucson[12] discloses that none of the districts are using prescribed prayers. Yet every district contacted indicated that some prayers were being said. For the most part the use of prayer is left to the discretion of the principal of each school. Some schools reported that a simple grace before the noon lunch is recited in unison by first graders. All re-

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[8] The *Engel* case gives a list of the states and their churches at 82 Sup. Ct. 1265.
[9] *Id.* at 1266.
[10] *Id.* at 1269-70.
[11] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). Mr. Justice Brandeis' statement of rules of policy taken from the *Ashwander* case, 297 U.S. at 347, includes the following: "The Court will not formulate a rule of constitutional law broader than is required by the precise fact to which it is to be applied."
[12] Inasmuch as a majority of the districts interviewed desired to remain anonymous, the districts surveyed will not be revealed.

ported that prayers were used on special occasions, such as baccalaureate and commencement, and that both ministers and students participated. With regard to a collateral issue, all districts reported that school was dismissed for Thanksgiving, Christmas, and Easter, with one district indicating that Hanukkah was explained in the classes.[13] No Bible reading was reported.

Arguments Relating to Permissive Prayers

Judge Dye, in his dissent to the New York Appellate Court's ruling on *Engel v. Vitale*,[14] made a strong argument to the effect that due to the desires of young children to conform to the group, any use of prayer in schools would be unconstitutional. If a child were a nonbeliever, he would be socially coerced to participate against his beliefs, for even though partitcipation in the prayer be voluntary, a small child's desire to conform would outweigh his desire not to participate. Mr. Justice Frankfurter in his concurring opinion in *McCollum v. Board of Educ.*[15] stated it in this way:

> That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is obvious pressure upon children. . . .[16]

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[13] The constitutionality of school dismissal for holidays, such as Christmas and Easter, depends upon the treatment given them by the schools. Where the holidays are devotionally or religiously oriented they transgress the prohibition of the first and fourteenth amendments. However, if class lectures are aimed at the historical and cultural aspects of the holidays, and the classes are dismissed under the community need for a period of rest, then they encounter no constitutional objection. Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 572-73 (1961).

Similar problems arise in the question of Sunday closing laws where the argument is propounded that such laws establish the religion of those believing in Sunday as a holy day. The Court recently dealt with four such cases and determined that where Sunday closing laws were passed pursuant to the state's police power and were based on man's need of a day of rest and quiet, as opposed to respect for a religious day, they did not violate the Constitution. Gallagher v. Crown Kosher Super Mkt., Inc., 366 U.S. 617 (1961); Braunfield v. Brown, 366 U.S. 599 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

[14] 10 N.Y.2d 174, 176 N.E.2d 579, 587, 218 N.Y.S.2d 659, 669 (1961).

[15] 333 U.S. 203, 227 (1948).

[16] See also Rosenfield, *supra* note 13, at 581-85, which indicates that the voluntary nature of the religious activity is often asserted as a defense to religious practices in school. He concludes, however, that because of the conformist nature of children, the voluntariness of the act does not rid them of their violation of the first amendment. *But see* Cutler, *Engel v. Vitale: An Appraisal*, 14 SYRACUSE L. REV. 48, 49 (1962), which maintains that there is freedom of participation by students in this situation.

Mr. Rosenfield, in a recent article[17] reviews the Supreme Court's religion decisions[18] and concludes, *inter alia,* that:

> The Constitution proscribes the use of public school funds, facilities, personnel, time, sponsorship, auspices, or authority for religious instruction, practice, or ritual, or for any other religious or religiously orientated purpose, direct or indirect.

Mr. Justice Douglas in his concurring opinion in the principal case[19] indicates that no religious activity should take place in any governmentally financed institution and declares that all such activities are unconstitutional. He cites, as examples, income tax deductions for contributions to churches, compulsory chapel at the military academies, and "In God We Trust" on coins.[20]

This latter argument seems to overlook the fact that often the purposes of government and churches are the same. The welfare of the government on occasion requires that it put money into religious functions. We see servicemen away from home who miss their religious activities; to keep up morale the government has furnished chaplains to fill this religious need. In such a case, the general welfare of the country, through the morale of its soldiers, outweighs the constitutional prohibition of non-establishment.[21]

The question of permissive prayer, as permitted in the surveyed Arizona schools, seems to boil down to whether or not a prayer permitted to be said in a public school is state action, as opposed to private action. The first amendment guarantees of non-establishment and free exercise of religion apply to the state governments through the fourteenth amendment,[22] and will prevent such state action if it is found. It is clear from the *Engel* decision that a school board's prescribing of a prayer is state action within the purview of the fourteenth amendment. Is it state action for a school board to knowingly *permit* prayers in schools? Or for the principal or teachers to permit prayers? Under the view that teachers and principals are

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[17] Rosenfield, *supra* note 13, at 570.

[18] Citing among others: Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947).

[19] Engel v. Vitale, 82 Sup. Ct. 1261, 1270 (1962).

[20] *Id.* at 1270 n.1 (1962).

[21] Kauper, *Church and State: Cooperative Separatism,* 60 MICH. L. REV. 1, 26 (1961).

[22] The following cases indicate that the first amendment guarantees are applicable to the states through the fourteenth amendment: Engel v. Vitale, 82 Sup. Ct. 1261 (1962); Everson v. Board of Educ., 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940).

state employees and the government has thereby financed the activity, an affirmative answer would be indicated. The defense that the prayers are voluntary would seem to be dissipated by the child's desire to conform. The majority, via dictum, states that "the government . . . should stay out of the business of writing or sanctioning official prayers and leave that function to the people. . . ."[23] This would indicate that even permissive prayers might fall under the ban of the establishment clause where they were sanctioned by school personnel.

On the other side of the coin, the framers of the Constitution did not intend that the establishment clause wipe out public prayer but only that it limit compulsory prayer and religious routine.[24] Judge Meyer in the first *Engel* decision[25] traces the history of the establishment clause and indicates that neither the debates nor the individual views of the framers proscribe school prayer. The establishment clause was only to prevent a state church and not to eliminate religion from schools.[26]

There is no question that schools may teach *about* religion.[27] Our national history is closely connected with that of various religious movements. Students should be taught the part that religion has played in the development of world history and if possible, given some insight into what religion purportedly can do for individuals and society as a whole.

It has already been pointed out earlier in this comment that often the end results desired by both governments and churches are the same. Many people, for example, may refrain from murdering and stealing because to do so would violate a religious commandment.[28] On the other hand all states have made these two acts crimes because they feel that society would be benefitted by their absence. Could it be that by the passage of such statutes the state is establishing a religious creed? It seems clear that it is not, since the state

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[23] Engel v. Vitale, *supra* note 22, at 1269.
[24] Engel v. Vitale, 18 Misc. 2d 659, 191 N.Y.S.2d 453, 468-77 (Sup. Ct. 1959).
[25] *Ibid.*
[26] Kirven, *Freedom of Religion or Freedom From Religion*, 48 A.B.A.J. 816 (1962).
[27] It should be noted that the Court was careful to point out that nothing in the decision was to be construed to forbid reciting the Declaration of Independence, or singing the National Anthem, etc., even though they made references to Deity. "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." 82 Sup. Ct. 1261, 1265 n.10.
[28] *Exodus* 20:13, 15.

in its interest for peace among its people requires such laws. Professor Paul Kauper of Michigan thus defines the proposition:

> Legislation identifiable with religious views and practices is constitutional if it can be supported by adequate considerations of a secular or civil nature relevant to the exercise of governmental power. Otherwise it fails as an attempt to establish religion. . . .[29]

By analogy one could argue that where prayer is utilized for the purpose of broadening the students' educational and cultural background, a goal of both church and state, and not as a religious inculcation, such would be permissible.

Conclusion

It would be well to note that "to espouse the doctrine of separation of church and state is not to express hostility to religion, but rather to pursue the most effective means of its protection."[30] The Bill of Rights is one place in our democracy where majority rule does not prevail.[31] The purpose of the Constitution is not to limit our freedom to the extent that it tells us exactly what we may and may not do but rather its purpose is to preserve the freedom of all. It is incumbent upon each to see that the rights of all are preserved through protection of the rights of the minority. As the President's Committee on National Goals expresses it: "The way to preserve freedom is to live it."[32] There are, however, situations in which, in the name of the public welfare, the first amendment rights of citizens may take the back seat. Examples of this referred to above are the use of chaplains in the armed services and the need to have citizens with well rounded educations which include some idea of religion.

This writer believes that permissive prayers should not be outlawed in schools inasmuch as there may be value in such prayers if properly done at appropriate occasions. The purpose of schools is to give students a broad education which includes a peek, if nothing more, at what religion is. Prayer can serve as a vehicle for accomplishing this purpose. Some children, who come from a nonreligious environment, would otherwise never be exposed. Admittedly a prescribed, regimented religious routine is violative of the first and fourteenth amendments but there should not be a complete hiatus of religion in public schools.

The goals of religions and governments are often the same. When

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[29] Kauper, *supra* note 21, at 24.
[30] McCollum v. Board of Educ., 333 U.S. 203, 212 (1947).
[31] Rosenfield, *supra* note 13, at 562.
[32] President's Committee on National Goals, Report No. 1 (1960).

such goals concur, the practices advanced by one and desirable to the other should be allowed. Judge Meyer sums it up like this in the original New York opinion of the instant case:

> [T]he religious nature of the governed sanctions the inclusion of religion in the process of democratic life; the dividing line between permitted accommodation and proscribed compulsion is a matter of degree, to be determined anew in each new fact situation.[33]

[33] Engel v. Vitale, 18 Misc. 2d 659, 191 N.Y.S.2d 453, 486 (Sup. Ct. 1959).