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THE PROPOSED PRAYER AND BIBLE-READING AMENDMENTS: CONTRASTING VIEWS†

I. WILLIAM J. KENEALY, S.J.*

GENTLEMEN: previous testimony at this hearing, as reported in the press, prompts me to preface my remarks by stating that I am neither an atheist, nor an agnostic, nor a secularist, nor a Communist. I am a priest of the Roman Catholic Church, a member of the Jesuit Order, a lawyer and professor in the Boston College Law School. However, I do not speak for the Catholic Church, or for the Society of Jesus, or for Boston College. I speak for myself alone. With the exception of three years in the United States Navy in World War II, I have been continually and closely involved in education, as a student or as a teacher, for fifty-four years; and for the past twenty-five years I have taught various law courses, with a particular interest in constitutional law, especially in the field of civil rights.

From this background, I believe that it would be a grave mistake to change the Constitution by an amendment authorizing, in the public schools of the country, those prayers or bible readings which were outlawed by the Supreme Court in *Engel v. Vitale* and *Abington School District v. Schempp*. I do not subscribe, by any means, to all that was said in the opinions expressed in *Engel* and in *Schempp,* but I do agree with the results. I do not subscribe to what seems to me the Court's uncritical invocation of the "wall of separation" metaphor, nor to its simplistic interpretation of the "establishment of religion" clause of the first amendment, nor to its mechanistic incorporation of that clause into the "due process" clause of the fourteenth amendment. But I do believe that the prayers and bible readings condemned by *Engel* and *Schempp* were violative of the fundamental constitutional and personal right of the "free exercise" of religion, expressly protected against federal action by the first amendment, and properly protected against state action by the "due process" clause of the fourteenth amendment.

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† Two statements on the proposed prayer and bible-reading amendments delivered before the House Committee on the Judiciary on May 8, 1964 and May 14, 1964, respectively.

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Wherefore, prescinding from the disputes about the "establishment" clause which have divided constitutional scholars since 1947, I oppose any constitutional amendment which would nullify the results of *Engel* and *Schempp* precisely because any such amendment would seriously abridge the constitutional "free exercise" of religion, which is beyond all dispute a fundamental personal right implicit in the concept of ordered liberty and essential to our pluralistic and democratic society.

For we are a pluralistic society whose members adhere to many religions and to none. We are a democratic society whose members, regardless of religious faith or lack thereof, stand equal before the law. Therefore the constitutional *free exercise* of religion means, not merely freedom *of* religion, but also freedom *from* religion as far as state coercion or pressure is concerned. Suppose a state should enact a statute requiring all persons within its jurisdiction to join some church of the person's choice – any church, Protestant, Jewish, Catholic, Buddhist, or any other – but *some* church. This would be freedom *of* religion in a restricted and Pickwickian sense, but it would obviously not be the constitutional *free exercise* of religion, precisely because it would not be freedom *from* religion as far as state coercion or pressure is concerned.

So too, and for exactly the same reason, a state enactment which would require the profession of any religious belief, the performance of any religious ritual, the recitation of any religious prayer, the devotional reading of (or listening to) any religious scripture, would obviously violate the constitutional *free exercise* of religion. But the *free exercise* of religion is a fundamental *personal* right of each and every individual, independent of political controversies, subject to no primaries or elections, above popular passions and majority votes, beyond the power of state officials and local school boards, guaranteed by our Constitution and entrusted by it to the protection of our courts. I would not abridge it. I would keep it intact, for the sake of ordered liberty, civic equality, and personal dignity, in our pluralistic and democratic society.

The free exercise of religion is such a fundamental personal right that, long before the Supreme Court of the United States had occasion in 1940 to hold it applicable to the states via the "due process" clause of the fourteenth amendment, the supreme courts of half a dozen states found compulsory religious exercises in the public schools in violation of their respective state constitutions: Wisconsin in 1890, Illinois in 1910, Louisiana in 1915, Washington in 1918, South Dakota in 1929, and Washington in 1930. Compulsion is incompatible with freedom.

It has been argued, however, that the proposed constitutional amendments provide, not for compulsory, but for "voluntary" prayers and bible readings; that dissenting pupils may be excused from such religious exercises; and, therefore, that religious freedom is neither denied nor abridged. But the free exercise of religion is not a sterile legal concept or an academic abstraction. It is a practical freedom in the real context of a child's life in the actual circumstances of the elementary and secondary school. The fact that some pupils, or theoretically all pupils, may be excused from the officially scheduled religious exercises does not obscure the obligatory nature of the ceremony, nor does it mitigate the serious practical pressure upon the dissenting child to conform to the official orthodoxy.

Seventy-four years ago the Supreme Court of Wisconsin, in *Weiss v. District Board,* 76 Wis. 177 (1890), put the practicalities of school life this way:

> When . . . a small minority of the pupils in the public school is excluded for any cause from a stated school exercise, particularly when such a cause is apparent hostility to the Bible which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult.

Fifty-four years ago the Supreme Court of Illinois, in *Ring v. Board of Education,* 245 Ill. 334 (1910), explained the same realities as follows:

> The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma, and places him at a disadvantage in the school, which the law never contemplated. All this because of his religious belief.

Forty-nine years ago the Supreme Court of Louisiana, in *Herold v. Board of School Directors,* 136 La. 1034 (1915), described the facts in these words:

> Excusing such children on religious grounds, although the number might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief.

And eleven years ago the Supreme Court of New Jersey, in *Tudor v. Board of Education,* 14 N.J. 31 (1953), concluded that children of minority groups, who decline to join in the religious activities of the school, will be subjected to disadvantages and pressures to conform, and that a supposition to the contrary "ignores the realities of life." In the *Tudor* case the New Jersey court had the benefit of extensive testimony by behavioral scientists concerning the effect of such practices upon the attitudes and behaviors of school children. It would seem that, as with the testimony of psychologists concerning the harmful effects of racial segregation in the *School Segregation Cases* of 1954, the formalized data of the social scientists simply strengthened the findings of informal experience and corroborated the conclusions of common sense.

Moreover, I think it important to note that the genuine religious freedom of both child and parent is involved. The primary right of education is parental. The Supreme Court of the United States in the *Oregon School Case* of 1925 decided unanimously that "due process" includes the fundamental constitutional right of parents, subject to reasonable state standards and regulations, to choose the education of their children, whether it shall be private or public, religious or non-religious. Freedom of educational philosophy, freedom *of* religion, and freedom *from* religion as far as state coercion or pressure is concerned, are constituent elements of this fundamental parental right. The state may compel a child to attend an accredited school of the parent's free choice; but the state may not deny or unreasonably restrict the freedom of that parental choice. Similarly, if the parent, for financial or other reasons, has no actual choice but to send his child to a public school, the state violates his primary parental right by coercing or pressuring his child into religious exercises against his parental will. It is wrong in principle, wrong against both parent and child, to force the child into the cruel dilemma of going along with the crowd in the classroom or of obeying his

parent and suffering the consequences at the hands of his unthinking classmates. I would respect and protect the religious freedom of both parent and child.

But what of the spiritual heritage and religious character of America? The Supreme Court itself has said, in *Zorach v. Clauson,* that "we are a religious people whose institutions presuppose a Supreme Being." Some of our religious presuppositions are set out in the Declaration of Independence, which expressly referred to God, to the Creator, to the Supreme Judge of the world, and expressly committed our young nation to His Divine Providence. Despite the cynics and the secularists, and the moral evils existing among us, we are in fact a predominantly religious people in our origins and in our traditions.

Nevertheless, the logic of our political principles and constitutional law forces us to attribute this spiritual heritage and religious character to the American people, the American community, the American *society as such,* and not to the American Constitution, the American government, the American *state as such.* The state derives its limited authority from society; within that limited authority, the state governs society; but the state is *not* society. One of the matters subtracted from state competence is religion. Although our society is religious, our state is not. Neither is it secularistic or irreligious. It is religiously neutral. It has been deliberately constituted religiously neutral, by a religious society, precisely because religious neutrality is the essential condition of religious freedom in a pluralistic society. As a result, while the state can and must protect its constitutional existence and structure, it cannot coercively protect its own religious presuppositions without violating its constitutional obligation to guarantee complete religious and ideological freedom.

The preservation and tradition of the religious heritage of America, therefore, must depend chiefly upon the non-governmental institutions and activities of American *society*: upon the church, the home, the religious school, the groups and associations which carry on study, discussion, teaching, writing and publishing on matters philosophical and theological. But the public school, as an official agent of the religiously neutral *state,* cannot, without betraying the religious neutrality of its principal, provide religious devotions or exercises of its pupils.

What then of the religious parent who wishes to send his child to a school with a religious atmosphere, in which religious exercises are allowed, in which religious instruction is available along with other subjects of desirable human education? Can he, too, enjoy the free exercise of religion as part of his parental right to choose the education of his child? He can send his child to a religious school, if he is financially able to do so—or is succored by private charity. The plight of the parent who pays his taxes, and would like to send his child to a religious school, but cannot afford to do so, is not made easier by the statement in *Murdock v. Pennsylvania* that "freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who are able to pay." We have not yet devised or enacted a means to provide practical freedom of parental choice of religious education for children. The principle of the G.I. Bill of Rights seems available within constitutional limitations, but that is another and longer topic.[1]

In the meantime, although I favor the

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[1] Kenealy, *Equal Justice Under Law—Tax Aid to Education,* 7 CATHOLIC LAW. 183 (1961).

most complete religious liberty for *all* parents and school children, believing or unbelieving, I think it would be most unfortunate to abridge the present religious liberty of *any* by the adoption of the proposed constitutional amendments concerning prayers and bible readings in the public schools. With patience and civil dialogue, we may some day realize genuine and practical religious freedom and equality for all parents and for all school children.

II. WILLIAM B. BALL*

I am William B. Ball, a member of the Pennsylvania and New York Bars. Formerly a professor of constitutional law at Villanova University Law School, I have had for several years a specialized interest in the field of church-state relationships. Presently I am General Counsel to the Pennsylvania Catholic Welfare Committee. In testifying here today I do not, however, speak for that body nor for the Catholic Church but solely as an individual deeply interested in the religious education of youth and strongly concerned for the integrity of our constitutional law. My appearance here today is based upon the assumption that while you are interested in specific arguments for or against such specific proposals as the Becker Amendment, you are also interested in certain broader matters relating to many of the proposed amendments – matters pertaining to overall constitutional policy. The focus of my remarks is simply this:

The Supreme Court of the United States, in a series of decisions interpreting the first amendment, has given the nation a formulation which—carried to its strictly logical conclusions—may be useful in resolving for our pluralist society significant problems respecting religion in education. My point today is not to defend those decisions. Even less is it to defend much of the reasoning upon which they are based. As a corollary, I shall suggest that a constitutional amendment is not *yet* plainly necessary, but that it will become so should the Supreme Court yield to those who today contest its doctrine of neutrality and who seek to bring about a total—and thus antagonistic—separation of church and state.

At the outset of my testimony, I join with many others in praise of the motives which are producing the amendment proposals and these nationally publicized hearings. The movement to bring about amendment is not —as some have alleged—a product of hysteria. The movement is a tremendously significant expression of a very deep and widespread national concern. To see it as less than this is to miss the truth of the matter. That concern—shared, indeed, by some opponents of the movement—essentially raises the question: how shall the religious education of American children best be aided in a religiously free society?

We should rejoice that this great question is at last to the fore in the minds of millions of our citizens and hundreds of legislators and civic leaders. It should lead us, however, not to tinkering with the first amendment but to a very careful look at what the Supreme Court has held the first amendment to mean in terms of religion in education.

The Court's Formulation

Essentially, the Court has said two things: in one area, that of public education,

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an area in which for more than a century it has been recognized that very little religion could be offered anyhow, it has gradually (in the *McCollum, Engel* and *Schempp* decisions) evolved a declaration that the schools must be religiously neutral. In another area, that of the church-related school, the area in which religion in education has enjoyed an astoundingly strong development, the Court has declared not only in favor of parental freedom of choice of that kind of school, but has also indicated that such option may be exercised without arbitrary economic hindrance.

Although American education began as church-related education which was aimed at a total religious formation of the child, in time it split into two sorts of education. One—represented today by the church-related school—essentially agreed with the vision of the founders of education on these shores and held to the view that, as society should be God-centered, so must be the education of its citizens. The other—represented today by the public school—long sought to cling to that selfsame view. In 1838 its great leader, Horace Mann, in fact defined education to include

> such a culture of our moral affections and religious sensibilities, as in the course of nature and Providence shall lead to a subjection and conformity of all our appetites, propensities, and sentiments to the Will of Heaven.

But as a school for children of different faiths, the public school had early to wrestle with problems relating to the showing of a preference for any of these. The resulting compromise in the mid-nineteenth century—the offering of a common core of Protestant Christian instruction and practice—pointed at once to two things. First, it would not be the final compromise. Second, each successive compromise would entail a necessary reduction of the religious content of public education. As history testifies, the Protestant common core was to be the subject of many litigations by Catholics in the late nineteenth and early twentieth centuries. In our own day, Jews, and finally non-believers and atheists, have sued for the ouster of religious instruction and practice in the public schools. The Supreme Court has now, in the *McCollum, Engel* and *Schempp* decisions, pronounced that the public school must be neutral, not merely with respect to the sects, but indeed neutral as to religion itself.

Now, as the Committee should note, this neutrality is very broad. It is broad because the term "religion," as used in the first amendment, has been defined by the Court over the decades to mean almost anything which can be called a belief. It is broad because the Court, in many cases, has interdicted the use of governmental power to impose conformity upon persons subject to that power, to any philosophy, orthodoxy, ideology or theory of society.

Decisions of the Supreme Court, then, respecting religion in the public schools must be read as requiring in those schools a total respect for the individual conscience as against imposition by those schools of *any* belief or ideology. This principle must be taken to apply not merely to prayers to God or readings of the Bible. It excludes not only the inculcating of values objectionable to agnostic or atheist. It excludes with equal force the inculcating of values objectionable to the believer in God, even though these may be advertised as "communitarian" values. (I do not pretend, by the way, that the policing of this neutrality will prove any easy task, especially in the elementary schools where children are of an age at which they are extremely impressionable.)

Undoubtedly, the very nature of a religiously plural society has dictated this result. But the same religiously plural society also confirms the concept of a pluralism of schools. In 1925 this concept was denied in the state of Oregon and the effort was there made to require all children to attend the "official" government school system. The Supreme Court struck down the Oregon statute which would have required all school children to attend public schools. It declared that the Constitution barred "any general power of the state to standardize its children by forcing them to accept instruction from public school teachers only."

The Supreme Court of the United States has since built upon this concept and has today indeed rendered it, for men of all religious faiths, a live and meaningful option. Since the *Pierce* decision of 1925, the Court has indicated that it may be constitutionally permissible for government to aid secular, general, neutral and public objectives achieved by the church-related educational institutions. It recognized, in the *Cochran* case in 1935, the fact that public objectives are achieved in church-related schools. It recognized, in the *Everson* case in 1947, that although the "no establishment" clause of the first amendment dictates that no tax in any amount, large or small, may be used for the support of religion, nevertheless due to the "free exercise" clause of that same amendment children may not be barred from receiving the benefits of public welfare legislation though these benefits come to them in the church-related schooling process.

This total formulation by the Court respecting religion in public education and education in religious schools has been slow and difficult in evolving. I submit, however, that it provides a sane and workable legal basis for answering our complex question: how shall the religious education of American children best be aided in a religiously free society?

The Formulation Under Attack

But I fear that this state of our law, as pronounced by the Court, is not satisfactory to everyone. It has apparently displeased those who today are seeking bible-reading and prayer amendments. It has apparently displeased those who would make war upon religion and religious freedom through pushing for an extremist interpretation of the concept of separation of church and state.

First, as to the amenders. Does not an amendment to render permissible prayers and bible-reading in the public schools create an unfortunate implication? Does it not plainly imply that a touch of officially sponsored religion will answer the need of American children for religious education? Certainly if it *cannot* be said to answer that need, then the nation should not go through the vast exertion of changing its fundamental law in order to accomplish, through amendment, lesser and more speculative results.

Most certainly we should acknowledge the value in our public schools of some sort of reminder of God and of human dependence upon Him. But the prayer and bible-reading amendments will not assure this, nor can they assure it, consistently with the liberties of all children and all parents. The *Engel* and *Schempp* decisions did not terminate practices which were universal or even widely pursued in our public schools. Though these decisions, for some, terminated meaningful reminders and actual praying, for others they terminated nothing whatsoever. If such describes the status quo

ante, now to be restored by a constitutional amendment, it is most questionable whether that picture reflected any real concern of parents or society for the religious formation of American children. If there is sadness at the present that the option to pray has been terminated, the tears are belated indeed; but the Court should not be looked upon as their cause. Religion large and meaningful—religion intellectual and permeant—had fled the public schools decades before the Court pronounced victories for the Engel and Schempp families.

At this point, let us note the testimony of those who say that the Justices, in the *Schempp* case, threw open doors to promising vistas for religion in the public educational processes. One of these, so it is said, consists of courses in comparative religion, or in teaching "about" various religions. Another looks to the permissible introduction of religion through courses in the humanities, history and so forth. But it is the feeling of many persons that these possibly permissible introductions of religion will share one striking feature in common with the impermissible bible and prayer practices: they will be of little value in terms of providing the kind of religious formation which many people wish their children to have. They may indeed help create understanding between children—and that will be all to the good—but it cannot be assured that they will create an understanding of religion. It is clear that the public school must tread most lightly in this respect. Under existing Supreme Court prescriptions, while conceivably it may compare religions, it may not compare one adversely to others or all favorably to none. Nor dare it, in teaching "about" religion, move from a base of the most delicately poised neutrality. Use of the humanities to bring in God and religions is, of course, nothing new, nor is it in any way compensatory for a deemed loss of religion resulting from the banns of *Engel-Schempp*.

What I have suggested, therefore, is that it may be vain to look to our public schools for religion in the sense that many seriously religious parents conceive that term. This is true whether it appears through the "teach about" technique, through the humanities or through subliminal shots of bible-text.

Perhaps, however, the trauma experienced by many from the Supreme Court decisions will spur strong new home-and-church efforts in religious education. We must certainly hope so. Perhaps the widespread experimentation now contemplated for bringing appreciation of religion and the religious into the public schools will yield greater results than now appears likely. Certainly all good efforts to aid our public schools in their immense undertaking should receive sympathetic encouragement.

We must note, however, that already ultra-separationism is at work attacking the Court's formulation which, with all of the difficulties it raises, is probably the best legal resolution achievable. Wall-eyed separationists, mesmerized by their own relentless logic, now seek to oust every vestige of religion from relationship with the public order. Their campaign is directed not only at the church-related school but indeed promises still more difficulties for the public school. Unhappily, occasional expressions in some Supreme Court opinions give the ultra-separationists toehold premises from which to proceed. For example, there is the expression in the *Schempp* opinions that religion is a matter for home and altar and that it impliedly has no proper role in the public order. Yet when the specific *holdings* of the Court are examined, it is seen that they give no real support for the extreme positions

claimed.

Instead of more litigating or more amendment-seeking, we ought to try for a while to live with the formulation which the Court has given us and seek to work out the details of its principles which, it must be remembered, are of neutrality—not antagonism—toward religion.

LET US PRAY

(Continued)

recipients of government subsidies some constitutional restrictions incumbent upon the subsidizing government, it could occur that parochial schools receiving general government subsidies would be as fully bound by the secularizing mandate of the first amendment as are the public schools.[16]

Moreover, to imply that Catholics are not directly and greatly concerned about the quality of the public school system is to imply that the Catholic commitment to parochial schools involves a partial abdication of civic responsibility. Also, the Catholic who considers himself only lightly affected by the public prayer controversy does so in disregard of the fact that there is involved an issue that goes much deeper than the condition of any or all schools, and that is the issue of whether the state shall recognize that there is a God, a standard of right and wrong higher than the state itself. This is an issue that concerns all citizens of whatever religious persuasion. The times require a realization by all Catholics, including the Catholic attorney, that some causes are more important even than the pursuit of a federal subsidy.

[16] See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), holding that a tenant operating a restaurant on state-owned property is bound by the fourteenth amendment in the same way as the state and cannot discriminate racially in its service of customers; in Moses H. Cone Memorial Hosp. v. Simkins, 376 U.S. 938 (1964), *reversing* 323 F.2d 959 (4th Cir. 1963), the Supreme Court denied certiorari in a case in which the Fourth Circuit Court of Appeals had held that a private hospital receiving funds under the Hill-Burton Act is bound by the fifth and fourteenth amendments, because of, among other things, the "massive use of public funds and extensive state-federal sharing in the common plan . . ."; bills are pending in Congress, such as H.R. 4586, introduced by Representative William F. Ryan, of New York City, which would deny federal aid to any educational institution which discriminates against any student or prospective student "on account of such individual's race, *religion,* color, ancestry, or national origin." (Emphasis added.)