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Church and State: Prayer in Public Schools

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RECENT DECISIONS

Church and State: Prayer in Public Schools—The State Board of Regents of New York recommended that the following prayer be said aloud by each public school class in the presence of a teacher at the start of every school day:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.

The Board of Education of New Hyde Park, New York, adopted this suggested procedure, and the parents of ten pupils challenged its constitutionality on the ground that this governmental encouragement of prayer violates the First Amendment's command that "Congress shall make no law respecting an establishment of religion," this having been made applicable to the State of New York by the Fourteenth Amendment.

Both the trial court[1] and the New York Court of Appeals[2] upheld the power of New York to install the Regents' prayer as part of the daily procedure in the public schools, as long as it remained wholly voluntary. All students were given the option of either joining in, absenting themselves from, or remaining silent during, the recitation of this prayer. In addition, the parents were advised of the nature of the prayer and of the privilege of having their children excused.

The United States Supreme Court, having granted certiorari, held, in an opinion written by Mr. Justice Black, that New York's use of this prayer was inconsistent with the Establishment of Religion Clause of the First Amendment, *Engel v. Vitale.*[3] Justice Black discarded the arguments involving the Free Exercise Clause and based his opinion solely on an interpretation and application of the Establishment Clause:

> Neither the fact that the prayer may be denominationally neutral, nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause of the First Amendment. . . .[4]

It is, therefore, only necessary for us to examine the Court's application of the Establishment Clause to this fact situation.

While Justice Black's brief review of the history of the Establishment Clause is quite accurate, this does not justify his conclusions:

> The New York laws officially prescribing the Regents' prayer are inconsistent with both the purposes of the Establishment Clause and with the Establishment Clause itself.[5]

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[1] Engel v. Vitale, 18 Misc. 2d 659, 191 N.Y.S. 2d 453 (1959).
[2] Engel v. Vitale, 10 N.Y. 2d 174, 176 N.E. 2d 579 (1960).
[3] Engel v. Vitale, 82 S. Ct. 1261 (1961).
[4] *Ibid.* at 1263.

No doubt Justice Black is correct in asserting that the Framers were opposed to and outlawed the establishment of a tax-supported church similar to the Church of England. It is also obvious that they clearly denied *all* governments the power to originate anything comparable to the Book of Common Prayer.[6] These facts in no way indicate that the Framers also opposed and intended to prohibit, through the First Amendment, nondenominational and non-compulsory prayers such as the Regents' prayer. The intense opposition to the practice of establishing *a* religion by law which culminated in the enactment by our founders of the Virginia Bill for Religious Liberty also sheds no light on this case. That document merely placed all religious groups "on equal footing so far as the State was concerned,"[7] and in no way indicates opposition to *nondenominational* prayer. Finally, none of the fears against which Justice Black felt the Framers leveled at the First Amendment have been realized by New York's use of the Regents' prayer (e.g. "government *program* to further certain religious beliefs"; "Government's placing its official stamp of approval upon *one particular* kind of prayer or one particular form of religious services"; "the same authority which can establish Christianity, in exclusion of all other Religions, may . . . establish any *particular* sect"[8]).

The Court holds that "New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer," but the opinion fails to logically reconcile this with many other governmental practices accepted as part of our spiritual traditions.[9] Why do not the invocations before court sessions, daily prayers in Congress, student singing of our National Anthem, student recitation of the Pledge of Allegiance (containing the words "one Nation under God . . ."), Presidential proclamations of a National Day of Prayer, and the impression of the words "In God We Trust" on our coins, officially establish the religious beliefs imbodied therein? The court fails to distinguish these and many other such examples when it claims that the Regents' prayer, as used by New York's school system, establishes a state religion. Justice Black has misinterpreted these few words of acknowledgment of our Creator as being "religious education."

> But it is not "religious education" nor is it the practice of or establishment of religion in any reasonable meaning of those phrases. Say this simple prayer may be, according to the broadest

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[5] *Supra* note 3, at 1268.
[6] This was a denominational book, enacted by Parliament which contained the form and content of prayer and other religious ceremonies to be used in the State Church.
[7] *Supra* note 3, at 1266.
[8] *Supra* note 3.
[9] The Court does, in footnote 22, simply state, without any further explanation, that other manifestations of belief in God in our public life are perfectly proper.

> possible dictionary definition, an act of "religion," but when the Founding Fathers prohibited an "establishment of religion," they were referring to official adoption of, or favor to, one or more sects.[10]

In seeking to ascertain the meaning of any constitutional provision, the *intent* of the framers must be considered. The proper interpretation of the Establishment Clause is only possible through an examination of the religious beliefs, attitudes toward public prayer, educational practices, and governmental practices common when the First Amendment was adopted. That is to say, we must interpret the Clause in light of our knowledge, obtained from objective historical facts, of the kind of men who wrote and adopted it. In examining the available historical data, our purpose is to discover the *concepts* which lay behind the actual wording used by the framers. Certainly, this purpose is not to be achieved by the often used technical or grammatical[11] analyzation of the wording of the constitutional provision, but rather by looking to the thought behind it.

A brief look at the documents relating to the formation of the United States, as well as the surroundings and character of the framers renders it inconceivable that they would have written into their Constitution a clause purporting to eliminate *all* religious content from public institutions. The following give eloquent testimony of the religious convictions of the founding fathers and of their belief in the propriety of preserving our religious tradition in public activities. The Declaration of the Causes and Necessity of Taking Up Arms includes: ". . . [T]he divine Author of our existence . . ." and ". . . [R]everence for our great Creator."[12] The Declaration of Independence mentioned both "God-given rights" and the fact that God is the source of all human rights. The Articles of Confederation included an invocation of the "Great Governor of the World." Thomas Jefferson, the one often referred to as opposing most strenuously the union of church and state, wrote: "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are a gift of God."[13] John Adams, who represented Jefferson's political opponents, held the same views: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[14]

In attempting to determine whether James Madison and Thomas

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[10] *Supra* note 2, at 581.

[11] By "technical or grammatical," I am referring to the play on word definitions, out of context quoting of certain passages, and indiscriminate varying of literal and figurative interpretations which all result in disputes as to form rather than *intended* thought content.

[12] 1 JOURNAL OF CONGRESS I, 134-39 (1800 ed).

[13] 8 WRITINGS OF THOMAS JEFFERSON 404 (Washington ed. 1853-4).

[14] 9 THE WORKS OF JOHN ADAMS 229.

Jefferson intended, by the First Amendment, to abolish all vestiges of God from our public school system, we are faced with the fact that no such system existed during their lifetime. The closest they came to considering a public school system was Jefferson's proposed Virginia School Bill of 1817 which set up a system of free, tax-supported primary schools under local supervision in each county.[15] The Bill itself recognized and allowed for the possibility of some simple nondenominational recognition of God in the schools. It therefore seems probable that, were Jefferson alive today, he would refute any contention that the First Amendment requires a compulsory exclusion from our whole public educational system of all voluntary mention of God or of that dependence upon Him which Jefferson himself acknowledged in the Declaration of Independence.

The actions of the First Congress also indicate the feelings of the framers with respect to the proper place of religious tradition in our public institutions and in education generally. The Northwest Ordinance of 1787 states: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."[16] To hold that the purpose of the Establishment Clause was to prevent any "union of government and religion,"[17] is to say that the Congress, composed of the very men who had drafted, debated and voted on the First Amendment, immediately violated it by passing statutes such as those authorizing chaplains for the legislature which obviously prefer believers over non-believers and aid the general cause of religion.

"The prime purpose of the clause [Establishment Clause] as then [time of adoption] universally understood, was to prohibit the Congress from creating *a* national church or from giving any sect a preferred status."[18] This is made even clearer by a consideration of the original draft of the First Amendment submitted by James Madison:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner or on any pretext infringed.[19]

It is obvious that no national church or preference to a certain sect has resulted from the adoption of the Regents' prayer. This being so, the provisions of the First Amendment, interpreted according to the historical intendment of the framers, have in no way been violated.

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[15] RAY J. HONEYWELL, THE EDUCATIONAL WORK OF THOMAS JEFFERSON, 235 (Harvard Univ. Press 1931).
[16] 1 Stat. 51-52.
[17] *Supra* note 3, at 1267.
[18] Legal Dept. of the Nat'l. Catholic Welfare Conference, *"The Constitutionality of the Inclusion of Church-related Schools in Federal Aid to Education,"* 50 GEORGETOWN LAW JOURNAL 399, 413.
[19] 1 ANNALS OF CONG. 434 (1789-91).

Even the Court's previous interpretations of the First Amendment do not lead to a prohibition of New York's action here. The *McCollum* case,[20] which held unconstitutional a "released time program," is easily distinguished from this case in that the *core* of that program was formal *sectarian* instruction of public school pupils in the schools during class hours. The Regents' prayer is not sectarian instruction of any kind and is in full accord with the heritage and traditions of our people. Some may not accept that heritage as a matter of right, but they have no right to compel others to ignore or be deprived of it. "Every individual has a Constitutional right to be free from religion, but that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude."[21] The Court has here ignored its own well reasoned position expressed in the *Zorach* case:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . When the state encourages religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.[22]

New York's use of the Regents' prayer does not fall within the prohibition of the Establishment Clause as *intended* by the framers; is a proper reflection of our spiritual tradition antedating the ratification of the Constitution; and, is clearly within the area of permissible accommodation recognized in the *Zorach* case.

JAMES F. JANZ

Civil Rights: Discrimination in Private Housing—A Massachusetts statute[1] provides that no owner or managing agent of a multiple dwelling or contiguously located housing accommodations may refuse to rent or lease to any person on account of his race, creed, color or national origin. As defined by the statute, "multiple dwelling" means ". . . a dwelling which is usually occupied for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. . . ."

Complainant, a Negro, sought to rent an apartment in a large private apartment building, but was refused. No government assistance was involved. He then registered a complaint with the Massachusetts Commission Against Discrimination, the administrative agency charged with the enforcement responsibility. After a formal hearing, the commission found the respondents had engaged in unlawful discriminatory practices

[20] McCollum v. Board of Education, 333 U.S. 203 (1948).
[21] *Supra* note 2, at 487.
[22] Zorach v. Clauson, 343 U.S. 306, 312-14 (1952).