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## The Establishment Clause and Public School Prayers

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economy its early lift in 1950. The Cold War in Southeast Asia indicates continuing heavy U.S. military expenditures and purchases in this area, a part of which we might well supply. Another point to remember is that an export potential means bigger and more efficient plants in the Philippines which, in turn, means lower prices for both the export and the local internal market.

With a demonstrated capacity to export, investors currently looking at Hong Kong and Taiwan as potential plant sites can be attracted to the Philippines, which represents a more stable and lower-risk area than the other two. All these factors produce what the economist likes to call the "multiplier effect." Simply put, it means that success breeds success. Increased industrial activity means increased income and increased income means more revenue with which to meet the objectives of the Socio-economic Program.

Over the years, everyone has remained bullish about the longer term picture for the country. It always seems, however, that the longer term is still around the bend of an endless curve. Meanwhile, 350,000 men and women are entering the labor market each year for whom employment must be found, and soon we will be facing some 600,000 pairs of hands each year seeking gainful employment.

Development of exports from existing plants and those to be built will bring about a psychological breakthrough to new vistas that will give the economy that little extra boost that enables us finally to get around the corner to an ever increasing national prosperity. We have the managerial skill, we have the plant, we have the men, we have the machines. Devaluation has given us a special new export-cost advantage. It is time to seize the opportunity and go forward.

H. KING HEDINGER

## *The Establishment Clause and Public School Prayers*

Not since the desegregation decision of 1954 has a Supreme Court ruling aroused the kind of heated debate which has been generated by the recent case of *Engel v. Vitale*. By a 6-1 vote, the United States Supreme Court, on June 25, 1962 banned as unconstitutional an optional and non-denominational 22-word prayer recommended for public school pupils by the Board of Regents of New York. The prayer read:

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

The decision was based on the Establishment Clause familiar to students of Philippine and American constitutional government.

The reaction to the decision was immediate and sharply divided. Some hailed the decision as a "resounding blow struck for liberty." They claimed, and with them the powerful American Civil Liberties Union, that the public school prayer was not in conformity with the American concept of separation of Church and State. But from the greater majority, the reaction was one of stern condemnation. The Jesuit weekly *America* branded the decision "asinine" and "stupid", "doctrinaire" and "unrealistic", and "a decision that spits in the face of our history, our tradition and our heritage as a religious people." A Southern representative cried: "They put the Negroes in the schools and now they've driven God out." Another said: "The upshot seems to be: Obscenity, yes; prayer, no", obviously referring to a decision, handed down on the same day as the *Engel* ruling, giving constitutional protection to three homo-sexual magazines. An Episcopalian minister put up a sign which read: "Congratulations, Khrushchev." President Kennedy merely counseled obedience to the decision and reminded the American people that "we can pray a good deal more at home and attend our churches with a good deal more fidelity, and we can make the true meaning of prayer much more important to the lives of all of our children." For a proper evaluation of these reactions, some of them hastily made and perhaps later retracted, a closer look at the decision is necessary.

The ruling was based on the first clause of the oft-litigated First Amendment provision: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." The Court found in the prayer no impairment of the "free exercise of religion." Pupils whose parents or who themselves objected to the prayer were not compelled to say it. Its defect was found to lie in a violation of the establishment clause.

Historically, the establishment clause arose as a ban against a monopolistic position of favor given to one religious group over any other. It was a reaction against the Established Church of England, from which colonists fled to America, and against the established churches, ironically enough, of the early American colonies. This interpretation seems supported by Story and Cooley, two classic authorities on American constitutional theory, who saw in the establishment clause only a prohibition against a recognition of a state church or at least the conferring upon one church of special favors denied to others.

Against this narrowly delimited interpretation, however, was ranged in 1802 the Jeffersonian concept of "wall of separation." This view was given judicial confirmation in 1879 by Justice Waite in the *Reynolds* case. In 1947, Justice Black reaffirmed it in a warning issued by him in the *Everson* case: "Neither [State nor Federal government] can pass laws which aid one religion, aid all religions, or prefer one

religion over another." A year later, the "released time program" whereby religious instruction for public school pupils was made possible was declared unconstitutional.

In 1952, however, the released time program found new life in the *Zorach* decision. Justice Douglas, writing for the majority, said: "We are a religious people whose institutions presuppose a Supreme Being." He added:

When the state encourages religious instruction or cooperates with 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. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe...

The *Engel* decision is doubly interesting because in it, first, Justice Black brings the court back to his warning in the 1947 *Everson* case and, second, Justice Douglas abandons the Justice Douglas of the 1952 *Zorach* case. A cycle is thus completed.

For Justice Black, the unconstitutionality of the New York prayer consists in the fact that the invocation of God's blessing is a "religious activity" and as such is a "practice wholly inconsistent with the Establishment Clause." It is this premise which has prompted Black's critics to say that he has thereby proscribed religion itself. The opposite view, however, which understands Black as proscribing only officially composed prayers, cites his statement to the effect that the constitutional prohibition "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government." Black avows no hostility to religion. He admits, moreover, that the New York prayer is not a total establishment of a religion. Nonetheless he says with Madison that "it is proper to take alarm at the first experiment on our liberties."

It seems clear that the only things definitely proscribed by Black are officially composed and officially proposed prayers. Justice Black has clearly chosen to limit his conclusion to the *lis mota*. But it is equally clear that Black's conclusion rests upon a premise which can embrace practices other than the New York prayer. As we shall see later, Justice Douglas' conclusions merely follow Black through. Even the footnote which some regard as a saving clause in Justice Black's opinion is in reality not a saving clause at all. It is a clarification of his premise. He would allow official encouragement of the recitation of the Declaration of Independence, a document which contains references to the Deity, or the singing of the national anthem, which contains a prayer, only because, he says, "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."

Clearly, therefore, Justice Black has set the stage for a thoroughgoing purge.

This is all the more interesting because Justice Black enunciates his premise solely on the authority of Justice Black, that is, of Justice Black interpreting Madison and interpreting the First Amendment in the context of England and the Book of Common Prayer and in the light of establishmentarianism in early American colonial history. He cites no decision in support of his position and makes no attempt to relate it to *McCullum*, *Everson* or *Zorach*. This invited a rejoinder from Justice Stewart, the lone dissenter in the case:

What is relevant to the issue here is not the history of an established church in sixteenth-century England or in eighteenth-century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government.

Holmes seems to have foreseen just such a situation when he said in 1920:

When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.

We come now to Justice Douglas whose approach to the problem is slightly different but whose conclusions are more thorough. He says: "The point for decision is whether the Government can constitutionally finance a religious exercise." His answer to this, of course, is no, and under whatever form of government financing it may take. He then finds that the teacher who leads the prayer is on the public payroll. Hence, the prayer must go. And since every form of government financing of religion must go, he proceeds to enumerate in a footnote practices which he finds constitutionally objectionable: chaplainships in both Houses of Congress and in the armed services, compulsory chapel in service academies, services in federal hospitals and prisons, Presidential religious proclamations, the motto "In God We Trust" used by the Public Treasury, Bible reading in public schools, the words "under God" in the pledge of allegiance, tax exemptions and postal privileges for religious organizations, etc. He finds that once a government finances a religious exercise it introduces a divisive influence into communities. He then suggests in another footnote that Christmas trees purchased by the taxpayers' money are a divisive influence. Proof: The tree is sometimes decorated with the words "Peace on earth, goodwill to men," but at other times other authorities prefer "Peace on earth to men of good will."

What has now happened to the Douglas of 1952 who argued for "a religious people whose institutions presuppose a Supreme Being?" He still is there and still quotes himself with approval; but now, instead of adding, as he did in 1952, that a government which shows a callous indifference to religious groups "would be preferring those who believe in no religion over those who do believe," he adds:

The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic—the non-believer—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests.

And looking back to his vote in 1947 favoring the use of government money for bus fares of parochial school pupils, he now says: "The *Everson* case seems in retrospect to be out of line with the First Amendment."

The conclusions of Justice Douglas, however, are not the majority's; at least, not for the present. But it is significant that his conclusions are embraced within the premise which prefers a government inoculated against religious influences that are not merely patriotic or ceremonial. If the conclusions raised by Douglas should become the very *lis mota* in subsequent cases, would the Court follow the Douglas lead?

Justice Frankfurter (who, incidentally, did not participate in the decision) once remarked that the late Chief Justice Edward D. White imbibed from his Jesuit education logic and logical analysis, assets which played in his life "a very important, sometimes an excessive role." The point may or may not be well made against White, but this point is well made: Statutory construction is not stark logic, especially when great constitutional provisions are at stake. It was Holmes who said that the essence of American law is not logic but experience. A ruthless application of logic to the premises established by Justice Black can lead, beyond the conclusions of Douglas, to absurdities which even the exponents of secularism should regret. William Ball, writing for the *Catholic Lawyer*, shows one possible consequence of such a procedure and we shall attempt to summarize him.

Howsoever we may look at it, the heart of the *Engel* decision is its objection to government-proposed religious activities in public schools. Hence, a crucial question is: What is religion? In the *Davis v. Beacon* case of 1889 the U.S. Supreme Court understood religion in a theistic sense: It "has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." But the concept has since grown by judicial engraftment. In 1961, the same court said in *Taracasso v. Watkins* that the government cannot "aid those religions founded on a belief in God as against those religions founded on different beliefs." A footnote in the decision explains what these *non-theistic* religions are. "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."

The 1961 *Yearbook of American Churches* describes the Ethical Culture Movement thus: "A national movement of Ethical (Culture)

societies—religious and educational fellowships based on ethics, believing in the worth, dignity and fine potentialities of the individual, encouraging freedom of thought, committed to the democratic ideal and method, issuing in social action." The beliefs taught by the Ethical Culture Movement are officially promoted in schools. Pennsylvania's *Guide to Intergroup Education in Schools* reasons thus: "Is not the fundamental base of democracy the belief in the dignity and worth of each individual and equal opportunity for each to develop his maximum potential?" Yet, by virtue of the *Engel* and *Taracasso* decision, if Ethical Culture is a religion, it must also go the way of the New York prayer, and with it Secular Humanism. Mr. Ball concludes:

... if it is an unlawful injection of religion into a public school to teach that the brotherhood of man rests upon the Fatherhood of God, so must it be to teach that the brotherhood of man rests upon "democratic needs" or that it does not rest upon the Fatherhood of God. Dogma is dogma. Value-teaching is value teaching. Religion is religion. Orthodoxies are orthodoxies.

We venture to add:

Let it work;  
For 'tis the sport to have the engineer  
Hoist with his own petard.

There are indications, however, that the majority of the Justices will not be as ruthlessly logical as their critics would have them be. Thus for instance the same court and during the term of the *Engel* decision upheld the constitutionality of state tax exemption of church property. The same court has likewise decided not to dismiss but to entertain an appeal from a lower court decision which held Bible reading in public schools unconstitutional. Writers are even predicting a retreat by the present court. Others expect not a retreat but a reversal by younger men who are now preparing to take the places of Justices Douglas and Black. But while these men prepare for their role, what will come of the *Engel* decision?

The campaign for secularization has certainly been encouraged by the decision. One of its apostles has been quoted as saying: "We'll blacklist every town we can find which carries on offensive religious practices like Nativity displays. We'll find plaintiffs. We'll bring suits. We'll provide expert counsel. The national office will run the show." But such a campaign will have to brace itself for a long drawn out struggle. Voices of defiance have been heard to say: "We will not pay any attention to the Supreme Court ruling." One school did stop the Regents' prayer, but now its pupils say another prayer, an obscure stanza of the *Star Spangled Banner*:

Blest with victory and peace, may the heav'n rescued land  
Praise the Pow'r that hath made and preserved  
us a nation.

Then conquer we must, when our cause it is just,  
And this be our motto 'In God is our Trust.'

Judicial backing alone does not guarantee the success of a movement. Integration has both judicial and popular support, but its implementation has faltered and frequently failed. Secularization has no popular support. One thing, however, the *Engel* decision is doing: it is deepening the division which Justice Douglas has sought to avoid.

Irving Brant, author of a six-volume work on Madison, tells us that Madison's attitude to chaplaincies in the armed services was one of toleration on the ground merely that *de minimis non curat lex*. He tells us that Madison classed such practices *cum maculis quas aut incuria fudit, aut humana parum cavet natura*. Madison was the author of the First Amendment and on his Memorial and Remonstrances Justice Black relied heavily in the *Engel* opinion. In the face of the debate and division being generated by the decision, Justice Black may well wonder whether it had been better to have followed Madison even unto toleration. This he might have done on the theory that the plaintiffs had no "standing to sue." But we shall not pursue this argument.

By way of conclusion, we may ask what the *Engel* ruling has to offer Philippine jurisprudence. Section 1(7) of the Philippine Bill of Rights reproduces the First Amendment: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof..." But the Philippine provision adds something which the First Amendment does not have: "and the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed." This, read with other provisions, shows that the Philippine Constitution is not poised against non-discriminatory religious activity. Our Constitution begins by "imploring the aid of Divine Providence." It exempts from taxation cemeteries, churches, and parsonages or convents appurtenant thereto, and all lands, buildings, and improvements used exclusively for religious purposes. (Art. VI, Sec. 22(3). It allows the appropriation of public money for the support of priests, preachers, ministers, or other religious teachers or dignitaries assigned to the armed forces or to penal or charitable institutions (Art. VI, Sec. 22(3). The Presidential oath ends with an optional "So help me God" (Art. VII, Sec. 7). Finally, optional religious instruction in public schools is allowed (Art. XIV, Sec. 5). Provisions similar to these are not to be found in the American Constitution. Suffice it therefore to say that under the Philippine Constitution religion in public schools is not merely a tolerated evil but a protected good. And if a problem similar to the *Engel* case should arise in the Philippines, the Philippine Supreme Court may be expected to show once more, as it has repeatedly done in recent Jehovah's Witnesses cases, that, even with a constitution transplanted from American soil, its politico-religious thinking is not dictated by



American courts. Philippine constitutional theory is growing under the aegis of Philippine experience.

JOAQUIN G. BERNAS

## *Pottery Heirlooms from Mindanao*

Among the many antique pottery and porcelain heirlooms from Mindanao that have eventually turned up in private collections in Manila, there is a "blue-and-white" porcelain dish delicately painted in a deep blue under the glaze. A mountain and water scene is depicted with two fishermen seated side by side under two trees in the foreground, and a "diaper pattern" border round the mouth-rim. The dish is saucer-shaped, with rounded sides and shallow foot-rim. It is a little over 11 inches in diameter, covered with a smooth glaze of bluish cast. Its glazed base bears six greyish spur-marks and a four-character reign-mark in underglaze blue.

This reign-mark occasioned not a few uncertainties which were somewhat dispelled when a certain Mr. Takeyama identified the first two characters as *Man Reki*, the Japanese term for Wan-Li whose reign (1573-1619) is considered in Chinese ceramic history as the last of the three periods of the Ming dynasty that were noted for the vast output and quality of all types of porcelains previously manufactured.

Reign-marks should however not be taken as the sole criterion for identifying porcelains. Many a convincing copy of a Ming piece has led an optimistic collector to initial joy and subsequent disappointment; and this disappointment could very well have been ours had we taken the Wan-Li mark at the back of this dish at face value.

A closer examination of the dish's features tends to show that it would be more appropriately classified as a probable Arita copy of a Wan-Li original. A free-style translation of Daisy Lion-Goldschmidt's description of Arita copies of Wan-Li "blue-and-white" wares follows:

The 'blue-and-white' wares of the Wan-Li period were strictly copied at Arita in the seventeenth century, but these copies are distinguished from the originals by the more diligently applied minute details of the designs, and perhaps by a fancy touch that conveys the peculiar vision of the Japanese artist. Moreover, and this remark serves [as basis] for all the comparisons one could possibly bring about, the bodies of Japanese porcelain wares are greyer and less fine than those of the Chinese. The glaze [of the Japanese porcelains] being less clear and more greyish, causes the decoration to show through milky and hazy depths that Hobson had compared to 'mousseline'. The foot-rims are in general, shallow. In fact, many of these porcelains bear spur-marks that do not exist in Chinese porcelains.<sup>1</sup>

Earlier in the same book, the author states that Ming and Ch'ing porcelains, unlike Japanese porcelains, never bear spur-marks.

<sup>1</sup> *Les poteries et porcelaines chinoises*, p. 143.