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## THE SCHOOL PRAYER DECISIONS

*William P. Marshall\**

Shortly after the school prayer decisions,<sup>1</sup> the crime rate escalated and the counter-culture blossomed. This is not, I have been told, a simple coincidence. After all, how could anybody mug a pedestrian, smoke marijuana, or enjoy promiscuous sex after starting each school day with "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."<sup>2</sup> No school prayer—no moral fiber.<sup>3</sup> It's that simple.<sup>4</sup> The causal relationship is so obvious and those asserting the relationship should not be expected to advance empirical proof.<sup>5</sup>

Okay. So, in accord with this Symposium's purpose in determining the effects of obliterating a constitutional event, the first thing we can establish is that the '60s would not have happened if the Supreme Court had not abolished school prayer in *Engel v. Vitale*<sup>6</sup> and *Abington School District v. Schempp*.<sup>7</sup>

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1. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

2. This is the verbatim of the prayer that was struck down in *Engel*, 370 U.S. at 422.

3. See Stephen B. Presser, *Recapturing the Constitution: Race, Religion, and Abortion Reconsidered* 168-69 (Regnery Publishing, 1994).

4. M.G. "Pat" Robertson, *Religion in the Classroom*, 4 Wm. & Mary Bill Rts. J. 595, 596 (1995) ("After a forty year assault on religious faith in our schools . . . America leads the world in the use of illegal drugs. America leads the world in pregnancies to unwed teenagers. America leads the world in abortion. America leads the world in violent crime."). But see *Blackboard Jungle* (Metro-Goldwyn-Mayer, 1955) (depicting a high school environment that had serious social problems such as teen violence and substance abuse even before 1962).

5. Anecdotal evidence suggests that the relationship may also be true in reverse. Criminality may, at times, lead to religious conversion. See, e.g., Charles W. Colson, *Born Again* (Chosen Books, 1976).

6. 370 U.S. 421 (1962).

Neither would a lot of post-'60s nonsense that has been done in the name of those cases. Without *Engel* and *Schempp*, a hapless and clueless bureaucrat would not have even entertained the thought that kids should be prevented from privately praying on the school bus or in the lunch room. This would have been good for the child and great for the bureaucrat but disastrous for the anti-politically correct crowd whose favorite ploy is to use these one or two scattered instances to fault public education (and the Supreme Court) as godless. Never mind that the school prayer decisions did not mandate, or even condone, the bureaucrats' decisions.

So along with the '60s, also gone is a lot of right wing rhetoric. Your neighbors may not be around either. Most folks who support prayer in school generally support only one kind of prayer—that of their own denomination. Many persons have objections to their children being subject to the prayers of other religions, and for some this objection is based on religious compulsion—it is a sin in some traditions to be exposed to another's prayer. So those who are in the religious minority in one community may move to another community where they can be in the majority.<sup>8</sup> But that's okay, a little balkanization never hurt anybody (except the Balkans) and, besides, the coalescing of homogeneous groups occurs naturally anyway.

But how would upholding school prayer have affected religion? Some might say not very much. Justice Douglas's 1952 assertion that "[w]e are a religious people,"<sup>9</sup> is still true today. Religion in America, according to reliable reports, is flourishing.<sup>10</sup> Moreover, as a matter of common sense, one would think that there can be very little, if any, real spirituality in the rote presentation of 25 or so words at the beginning of the school day. The prayer in *Engel*, after all, was described quite accu-

7. 374 U.S. 203 (1963).

8. See *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring) (noting how Protestant school prayer in public schools in the nineteenth century led to Catholics establishing their own system of parochial education).

9. As Justice Douglas stated, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). It is not clear whether reading this excerpt of Justice Douglas's *Zorach* opinion at the outset of each day in the public schools would violate *Engel* and *Schempp*. Surprisingly, no school district has tried this tactic . . . as far as I know.

10. Frank McCourt, *God in America; When You Think of God What Do You See*, Life 60, 63 (Dec. 1998) (96% of Americans believe in God). See also Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 Const. Comm. 395, 397 (1991) cited in Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1993 Sup. Ct. Rev. 123, 143 ("83 percent of the American people feel 'close to God.'").

rately as being little more than “a pathetically vacuous assertion of piety.”<sup>11</sup> Indeed, some might argue that if school prayer were to have any effect on religion at all, that effect would be negative. Since the days of Roger Williams, religious leaders have contended that no greater harm can come to religion than when it is placed in the hands of the state.<sup>12</sup>

Still, we do live in an age of high speed communication and short attention spans. It may be that the American mind is so attuned to the thirty second commercial<sup>13</sup> that there can be no better way to communicate to our nation’s youth the importance of God, love, caring, humility, morality, spirituality, and sacrifice than through a brief religious out-take at the start of the school day. And if the school prayer activists believe that vacuity does not harm the religious enterprise, who am I to judge?<sup>14</sup>

Actually, where the world would really change is in politics. Can you imagine school board elections in a world where school prayer is constitutional? Hillary Clinton versus Rudolph Giuliani would be nowhere near as colorful—nor as much fun. Each school board candidate could propose his or her own prayer, pick his or her sacred text, and then accuse the opposition, with theological thunder, of being in the hip pocket of the godless, the misbegotten, and the profane. I have worked in some political campaigns before, and I can think of no more powerful message than “A Vote for Smith is a Vote for Salvation.” Except perhaps “A Vote for Harris is a Vote for Heresy.” (Negative ads are generally more effective than are positive messages.)<sup>15</sup>

Of course, the downside is that Washington is unlikely to allow only local officials to have all the fun. Big government liberal types will inherently be disposed to join the festivities. But conservatives will probably be inclined to jump in as well, despite their always principled objections to the expansion of federal power. Although conservatives have fought long and hard to keep Washington out of local affairs (except with respect to

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11. Louis H. Pollak, *The Supreme Court 1962 Term — Foreword: Public Prayers in Public Schools*, 77 Harv. L. Rev. 62, 63 (1963).

12. Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B. U. L. Rev. 455 (1991); Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (U. of Chicago Press, 1965).

13. See Neil Postman, *Amusing Ourselves to Death* 130-32 (Elisabeth Sifton Books, 1984) (noting the predominance of the 30 second message in the discourse in American culture).

14. See Luke 6:37 (“Judge not, lest ye be judged.”) see also Matthew 7:1 (same).

15. Stephen Ansolabehere and Shanto Iyengar, *Going Negative: How Attack Ads Shrink and Polarize the Electorate* (Free Press, 1995).

the really important national priorities like car-jacking, mandatory sentences for juveniles, and immunity from tort liability for volunteers), they just may not be able to stay away from an issue as monumental as school prayer. After all, with scarcely a word about federalism, they supported the Equal Access Act, which imposed federal mandates on local governments requiring that public schools provide equal access to their facilities for prayer groups.<sup>16</sup>

So the next thing you know, we will have national political campaigns running on the school prayer issue. I can just see it now. After Democratic pollsters determine which prayer appeals to the greatest number of voters, Democratic candidates will coincidentally, and magically,<sup>17</sup> discover that the prayers they endorse are the ones that have polled the best. Meanwhile, the Republican party will propose a litmus test for its candidates based upon explicit acceptance of the favorite homily of James Dobson as the school prayer of choice.

Well, maybe not. We are too religiously diverse a nation, some have contended, for expressly sectarian politics to be successful.<sup>18</sup> Because of religious diversity, parties and candidates may be reluctant to engage in any activity that is too closely identified with one particular religion. To directly appeal to Baptists, for example, may cost a candidate the Catholic vote.

The problem, however, is that the candidates may not be in control. Special interest groups have increasingly become independently active in political campaigns on social issues and, with a charged issue like school prayer, the temptation may be just too much to resist.<sup>19</sup> Public schools, after all, are the logical starting point to anyone concerned with America's moral health.<sup>20</sup> Schools are perceived as the mirrors of society and play a central role in how a community defines itself and its aspirations. As Ronald Garet states, public schools embody society's "moral vision, a dream that society dreams of itself."<sup>21</sup> Indeed, it

16. 20 U.S.C.A. § 4071 (1984).

17. Or is the word 'divinely'?

18. Frederick Mark Gedicks, *The Religious, the Secular, and the Antithetical*, 20 Cap. U. L. Rev. 113, 121-22 (1991).

19. See *FEC v. National Conservative PAC*, 470 U.S. 480 (1985).

20. For this reason, it is not surprising that social conservative activists have energetically pursued elected positions on school boards. See George R. Kaplan, *Shotgun Wedding: Notes on Public Education's Encounter with the New Christian Right*, 75 Phi Delta Kappan K1 (May 1994) (Special Report).

21. Ronald R. Garet, *Community and Existence: The Rights of Groups*, 56 S. Cal. L. Rev. 1001, 1033 (1983).

is this fact that explains the endurance of school prayer's ability to galvanize. Public school prayer is an issue with real political bite.

But what about the law? Would a contrary ruling in two of the most politically charged decisions in Supreme Court history have affected the development of constitutional law? Ironically, very little if at all. *Engel* and *Schempp* did not do very much doctrinally. The actual bases of the holdings are somewhat obscure, and their precedential effect beyond school prayer-related issues is negligible.<sup>22</sup> They did not even compel the invalidation of state-sponsored prayer at legislative assemblies.<sup>23</sup> At best, the cases stand for the proposition that the government may not act with a sectarian purpose without violating the establishment clause—a proposition that has since become the first prong of the Court's three part establishment clause test.<sup>24</sup> But that prong would likely have been generated in any event in *Epperson v. Arkansas*,<sup>25</sup> the case striking down Arkansas' attempt to ban the teaching of evolution. Besides, the secular purpose prong has not exactly been a vital part of religion clause jurisprudence.<sup>26</sup> Philip Kurland was right—as a legal matter the school prayer decisions were “full sound and fury, signifying” very little.<sup>27</sup> Except, perhaps, to Elmer Gantry.

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22. See *Lee v. Weisman*, 505 U.S. 577 (1992) (holding public school convocation prayer unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down state “moment of silence” provision.).

23. *Marsh v. Chambers*, 463 U.S. 783 (1983).

24. See *Lemon v. Kurtzman*, 403 U.S. at 602 (cited in note 8). The *Lemon* test requires that, in order to survive establishment clause scrutiny, a challenged enactment must 1) have a secular purpose, 2) have a primary effect that neither advances nor inhibits religion, and 3) not foster excessive government entanglement with religion.

25. 393 U.S. 97 (1968).

26. Andrew Koppelman, *Secular Purpose* (forthcoming).

27. Philip B. Kurland, *The Regents' Prayer Case: "Full Sound and Fury, Signifying . . ."*, 1962 Sup. Ct. Rev. 1.