Educational Considerations

Volume 8 | Number 4 Article 5

10-1-1981

A church-state compromise

Stephen B. Thomas

Educators, school board members and parents are often caught between conflicting objectives.

A church-state compromise

By Stephen B. Thomas

Justice Holmes once observed that a "page of history is worth a volume of logic."[1] It would then follow that if the true nature of the Constitution (as it relates to the church/state issue) is to be determined, one would have to reevaluate the early writings of men such as Madison and Jefferson. Although this may seem rudimentary, synthesis and application of their works is far more complex than one might presume. Indeed, Supreme Court justices appear almost at extremes in their interpretations of the same works.

For example, in discussing the papers of Jefferson, Justice Frankfurter wrote that,

> Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation' not a fine line easily overstepped . . . We renew our conviction that we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion. If nowhere else, in the relation between church and state 'good fences make good neighbors.'[2]

Nevertheless, Justice Reed, in a dissenting opinion of the same case, did not place the same degree of significance on Jefferson's comments as did his colleague and noted that "the difference between the generality of his (Jefferson's) statements and the specificity of his conclusions on education are considerable; a rule of law should not be drawn from a figure of speech."[3]

Stephen B. Thomas is an associate professor at St. Johns University of New York.

In regard to Madison's work, including the First Amendment, confusion is again present. Justice Rutledge observed that Madison opposed every form and degree of official relation between religion and civil authority and sought to tear government out of religion by "root and branch," and "bar its return forever." The principle, accordingly, was as much to prevent the interference of law in religion as to restrain religious intervention in political matters.[4] However, as suggested before, a consensus does not exist in regard to interpreting Madison's work as well. Douglas, following a discussion of the religious nature of the American populous, observed that First Amendment, church/state issues, like most in constitutional law, are merely ones of degree.[5]

Although disagreement exists concerning the degree of the church/state relationship, most historians would concede the sincerity of both men in their quest for religious liberty. Jefferson in "An Act for Establishing Religious Freedom" and Madison in "Memorial and Remonstrance Against Religious Assessments" were straightforward in their appeal for personal freedom in religious matters. Accordingly, Madison wrote:

> All men should enjoy the fullest toleration in the exercise of religion . . . no man or class of men ought, on account of religion, be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, unless, under color of religion, the preservation of equal liberty and the existence of the state be manifestly endangered.[6]

Although little specific guidance is provided from these early statesmen, general directions were identified. First, an individual should have the right to freely exercise his religious liberties; second, government should not establish or otherwise require support for any religion—nor provide for all religions; and third, only when a significant state interest is involved will religious liberties be compromised.

Practice/Precedent/Possible Alternatives

In practice it is often difficult for school authorities to draw the "fine line" between church and state, free exercise vs. establishment. In the following sections of this paper, common "grey" areas will be identified as will legal precedent. Current practices will be reviewed, while practical, constitutional solutions will be provided where applicable.

Prayer and Bible Reading

Following the landmark **Engel vs. Vitale** and **Abington Township vs. Schempp,** cases,[7] the plea for prayer and Bible reading in public schools appears to have increased in diversity. The only common theme in such requests is their unconstitutional nature. Nonsectarian prayers, the Lord's prayer, a board of regents prayer, student lead prayer, and voluntary prayer have been held impermissible. A moment of silent prayer and a moment of silent meditation may well represent the "fine line." Although moments of meditation were at one time viewed with favor, at least one recent case proposed that a course in the "Science of Creative Intelligence/Transcendental Meditation" is a religious activity.[8] Therefore, implications may exist for prayer as well.

Given the above limitations on prayer in public schools, one viable alternative remains—a moment of silence. The courts will no doubt approve this practice, while many concerned parents will not feel as though they

are compromising their religious values. Those students wanting to pray will have the opportunity; those students who may be offended by such practice will have the time to reflect upon the day's activities. Nonparticipants may be required to sit in silence. Such students, however, should not be asked to stand, leave the room, or otherwise be punished.[9]

In regard to Bible reading, the court is again conclusive. From the **Schempp** case (1963) to **Meltzer vs. Board of Public Instruction of Orange County, Florida**[10] (5th Cir. 1978), the courts have, with regularity, ruled against the practice of daily Bible reading. Where then is the compromise? Although the Bible may not be employed in morning exercises (even if voluntary or with parental permission) it may be utilized by instructors in such classes as literature, history, comparative religion, and the like. It is suggested that when used as a classroom material, the Bible should be a resource book, not a primary text.

Bible/Literature Distribution

Although Bible distribution in public schools seems almost as common as a free lunch, it too is inconstitutional. Since **Tudor vs. Board of Education of Borough of Ruterford,**[11] the Gideons, and others, have not fared well in the courts. Indeed, since Justice Burger's proposed tripartite test in **Lemon vs. Kurtzman** in 1971 (secular legislative purpose; neither advance nor inhibit religion; should not foster excessive government entanglement[12]) Bible distribution has been restricted.

However, at least one court has viewed the distribution of religious literature more favorably. In the **Meltzer** decision the en banc court voted 7-7, affirming the lower court, that the distribution of religious literature in the public schools was permissible if conducted appropriately. Teachers, administrators, nor religious groups were to personally hand out the materials; they were merely to be delivered to a central location within the school and announced to classes regarding their availability. Students requesting such materials would then have access, while uninterested students would not feel pressured or coerced.

If this procedure is adopted, a word of caution should be provided. Several of the dissenting justices believed the Supreme Court would invalidate this practice based on Test 1 of **Lemon** (that is, secular legislative purpose) while several others felt that it would be more viable if other forms of literature (for example, political, historical, etc.) were also available. Therefore, the distribution center would be for literature generally, and not for religious literature specifically.

Released Time Programs

A released time program refers to the time a child spends involved in religious or moral training with religious teachers. The programs are generally once or twice a week, during school hours, but off of school grounds. If religious groups are asked to instruct on the school site, Test 2 **Lemon** (advancement of religion) would be abridged. The Supreme Court as early as 1948 in **McCollum vs. Board of Education** invalidated such a program by an 8-1 vote. The court reasoned that not only were tax-supported buildings being used for the dissemination of religious doctrine, but that the state also afforded sectarian groups of an invaluable aid in that it helped provide pupils through the compulsory education machinery. Where such a public expenditure was provided, separation of church and state did not exist. The Constitution does not propose that all religions be supported equally; it requires that no religion be supported, even in degree.[13]

Accordingly, if released time programs are to exist, they must be off of school property and privately funded; also, public school personnel can not be involved in the instruction, nor can they be disciples.[14] Children should not be pressured to attend, nor should they be responsible for janitorial or instructional duties if they remain in the classroom. Furthermore, class credit should not be provided for attendance, nor can any form of "limited aid" be given (for example, attendance forms).[15]

Shared Facilities

In situations where it is absolutely essential that private and public schools share a facility several requirements seem apparent. If the private classes are to be taught on the public school site, or if religious (or nonprofit) groups would like use of the space, the arrangement must be temporary in nature, while the costs must be paid in full. Indeed, one state supreme court concluded that rental rates must fully cover extra utility, heating, administrative, and janitorial costs. It was observed by the court that all nonprofit community groups should have equal access to the facilities where they are made available.[16] Where fees are not charged, or where the arrangement may become permanent, the courts have not been so permissive.[17] State statutes should be consulted prior to involvement in sharing facilities with private (religious) organizations.

When it is necessary for a public school to rent space from a private institution, religious insignia should be removed,[18] the classes should be taught by public school teachers, the instruction should be secular, the public school administration should have plenary control over the rented space, and the arrangement should be temporary.[19]

Religious Holidays and Programs

Typically, religious holidays and days of worship may be recognized by the public schools. Children should be permitted to attend appropriate religious services during the school day, with written permission from the parent. This does not mean, however, that each and every parent has the right to declare a religious holiday for all school children. Permitting an individual child to attend a particular religious service does not reflect a sanctioning of that religion or its doctrine. Generally, when a significant state interest is not involved, the courts have ruled in favor of parents concerning the religious, moral, and educational opportunities of their children.

In addition to a type of "excused absence" discussed above, public schools may also provide programs or assemblies that provide a religious theme. However, this should be done with great care. As a general rule, the schools should observe only those holidays that have both a religious and secular significance. Accordingly, the history and significance of these events should be explained in "an unbiased and objective manner." Music, art, literature, and drama that maintain a religious tone may also be permissible as long as they are presented as a "prudent and traditional part of the cultural and religious heritage of the religious holiday."[20]

https://newprairiepress.org/edconsiderations/vol8/iss4/5
DOI: 10.4148/0146-9282.1877

Conclusion

As educators, school board members, and parents, we are often caught between conflicting objectives. In this example, how do we provide for the opportunity to have "free exercise of religion" and yet not cross over the "fine Line" to establishment? It should not be our purpose to force specific religious beliefs on any child; at the same time, however, should we discourage voluntary, individual participation? Should we ostracize religion from public schools to the degree that children think of it as unnecessary, or even undesirable? In the opinion of this author, public schools should become neutral; they should neither encourage nor discourage participation.

The policies suggested in this writing provide for such a compromise. A moment of silence, released time programs, comparative religion classes, appropriate assemblies, and the use of the Bible in history and literature may assist in diluting the current restrictions to free exercise, yet are not so overt as to offend the Constitution.

Footnotes

1. **New York Trust Company vs. Eisner,** 256 U.S. 345 (1921).
2. **McCollum vs. Board of Education,** 333 U.S. 203 (1948).
3. Ibid, at 247.
4. **Everson vs. Board of Education**, 330 U.S. 1 (1947).
5. **Zorach vs. Clauson,** 343 U.S. 306 (1952).
6. Sydney Howard Gay, **American Statesmen: James Madison** (Boston: Houghton, Mifflin, and Company, 1898), p. 16.
7. **Engel vs. Vitale,** 82 S.Ct. 1261 (1962); **Abington Township vs. Schempp,** 83 S.Ct. 1560 (1963).
8. **Malnak vs. Yogi,** CA 3, 2/2/79.
9. Note: **State vs. Lundquist,** 278 A. 2d 263 (1971), **Bands vs. Board,** 450 F. 2d 1103 (5 Cir. 1971), and **Goetz vs. Ansell,** 477 F. 2d 636 (2 Cir. 1973), regarding flag salutes.
10. **Meltzer vs. Board of Public Instruction of Orange County, Florida,** 577 F. 2d 311 (5th Cir. 1978).
11. **Tudor vs. Board of Education of Borough of Rutherford,** 14 N.J. 31 (1953), cert. den. 75 S.Ct. 25 (1954).
12. **Lemon vs. Kurtzman** 403 U.S. 602 (1971)
13. See: **Wiley vs. Franklin,** 468 F.Supp. 133, E.D. Ten. 1979, for a further discussion of **Bible** study during school hours.
14. **Zorach vs. Clauson,** 343 U.S. 306 (1952).
15. **Lanner vs. Wimmer,** U.S. District Court, D. Utah, N.D., December 11, 1978.
16. **Resnick vs. East Brunswick Township Board of Education,** Supreme Court of New Jersey, July 11, 1978.
17. **Johnson vs. Huntington Beach Union High School District,** 137 Cal. Rptr. 43 (Cal. App. 1977).
18. See: **State ex rel. Public School District No. 6 Cedar County vs. Taylor,** 122 Neb 454 (1932).
19. See: **School District of Hartington vs. Nebraska State Board of Education,** 188 Neb. 1 (1972), cert. den. 93 S.Ct. 220 (1973).
20. **Florey vs. Sioux Falls School District, 49.5,** U.S. District Court, D. South Dakota, February 13, 1979.