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Constitutional Law—Regent's Prayer Held Constitutional

Patricia A. Leary

However, no full faith and credit requirement attaches to a judgment rendered in a foreign court.[52] While noting the likelihood that the decree would find acceptance under New York rules of comity,[53] the Court held that inasmuch as it was not entitled to full faith and credit, plaintiff could not be granted an injunction.

Bd.

CONSTITUTIONAL LAW

REGENT'S PRAYER HELD CONSTITUTIONAL

The Board of Education of New Hyde Park, New York, required the recitation of this prayer as a daily procedure in the public schools: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." This recitation by the students was generally led by a teacher or another student. However, no student was compelled to utter the prayer, and no penalty attached for nonparticipation. Petitioners, taxpayers in the school district and parents of children attending the public schools, brought the present proceeding, *Engel v. Vitale*,[1] to compel discontinuance of the recitation. They alleged that the prayer was contrary to the religious beliefs of Jews, Unitarians, Ethical Culturists, and non-believers and thus violated the First Amendment to the Constitution of the United States[2] and Section 3 of Article 1 of the New York State Constitution.[3] The Supreme Court, Special Term,[4] and the Appellate Division[5] upheld the constitutionality of the prayer. The Court of Appeals, in a five to two decision, held that the non-compulsory recitation of this prayer violated neither the Federal nor State Constitutions.

The state constitutional guarantee of freedom of religion must be at least as broad as the guarantees of the First Amendment to the Federal Constitution which is incorporated into the Fourteenth Amendment, and is therefore applicable as a restraint on state governmental action.[6] Thus, a state may not violate either the "free exercise" clause nor the "establishment" clause of the First Amendment.

The Court of Appeals held that the "free exercise" clause was not violated by the recitation of this prayer because students were free to refrain from participating in the prayer if they so desired. The more difficult question for the Court to determine was whether the prayer violated the "establishment" clause.

52. Rosenbaum v. Rosenbaum, supra note 50.
53. Cf. Gould v. Gould, 235 N.Y. 14, 25-26, 138 N.E. 490, 493 (1923).

1. 10 N.Y.2d 174, 218 N.Y.S.2d 659 (1961).
2. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .
3. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind.
4. 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959).
5. 11 A.D.2d 340, 206 N.Y.S.2d 183 (2d Dep't 1960).
6. Cantwell v. Connecticut, 310 U.S. 296 (1940).

The Supreme Court of the United States has interpreted the "establishment" clause to require complete separation of church and state.[7] The majority of the Court of Appeals decided that the recitation of the prayer does not constitute a break in this wall of separation because the prayer does not constitute religious education, because it is non-sectarian, and because the intention of the drafters of the First Amendment was not to prohibit a mere profession of belief in God as evidenced by our history, culture, traditions and institutions which are replete with belief in a Supreme Being.

The present decision distinguishes between a prayer which promotes the belief of any particular religious sect, and a prayer which expresses belief in God and dependence upon Him. The former would constitute an establishment of religion,[8] but the latter does not,[9] even though the prayer may not be in accord with the beliefs of all religions.[10]

The writer believes that this case presents serious constitutional questions difficult to resolve in light of the scope of the "establishment" clause as proscribed by the United States Supreme Court.

The majority concedes that religious education is not permissible in the public schools.[11] The Court summarily held that this prayer did not constitute religious education, but this conclusion is questionable. A prayer is of necessity religious. The prayer also constitutes education. The purpose of school is to educate children and everything that is accomplished during school hours bears or should bear in some manner on this education. Are children to discriminate and decide that this prayer is not part of their education but that the remainder of their activities in school is part of their education? Judge Dye in his dissenting opinion indicates that the avowed purpose of the Board of Regents, in recommending the use of the prayer, was to teach children that God is their creator and to supplement the training of the home. No matter how regrettable parental neglect of religious education may be, it is not for the state to supply such education. If the prayer does not constitute education, then it does not belong in the school activities. If it does constitute such education, then the practice is unconstitutional.

The recital of a sectarian prayer in the public schools would violate the

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7. McCollum v. Board of Education, 333 U.S. 203 (1947).

8. See Zorach v. Clauson, 343 U.S. 306 (1952); Everson v. Board of Education, 330 U.S. 1 (1947); Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576 (1938); Smith v. Donahue, 202 App. Div. 656, 195 N.Y. Supp. 715 (3d Dep't 1922); O'Conner v. Hendrick, 109 App. Div. 361, 96 N.Y. Supp. 161 (4th Dep't 1905), aff'd, 184 N.Y. 421, 77 N.E.2d 612 (1906).

9. See Lewis v. Board of Education, 157 Misc. 520, 285 N.Y. Supp. 164 (Sup. Ct. 1935), aff'd, 247 App. Div. 106, 286 N.Y. Supp. 175 (1st Dep't 1936); Lewis v. Allen, 5 Misc. 2d 68, 159 N.Y.S.2d 807 (Sup. Ct. 1957), aff'd, 11 A.D.2d 447, 207 N.Y.S.2d 862 (3d Dep't 1960).

10. Among the religions in this country which do not teach belief in God are Buddhism, Taoism, Ethical Culture, Secular Humanism. See Torcaso v. Watkins, 367 U.S. 488 (1961).

11. Zorach v. Clauson, supra note 8; McCollum v. Board of Education, supra note 7.

"establishment" clause of the First Amendment.[12] However, the Court decided that the prayer is non-sectarian. To reach this conclusion, the Court had to determine which are the "recognized" religions, and that the common denominator of these religions is belief in God. The Court is over-stepping its authority when it delves into the intricacies of religious beliefs. Furthermore, the Court's decision is of necessity limited to the wording of this particular twenty-two word prayer. If the wording of the prayer should be changed, or a different prayer used, the courts might again be asked to determine whether this new prayer is sectarian. Thus, the court, an arm of the state, becomes the final arbiter in matters of religious orthodoxy. Such a situation is contrary to the provisions of the First Amendment which renders each person's religious opinion as valid and weighty as that of any other person or institution.

The fact that the tenets of most of the religions existing in the United States include belief in a Supreme Being does not justify this decision. Although the majority generally prevails over the minority in a democracy, this principal does not apply in the area of religion. The "establishment" clause of the First Amendment sought to prevent majority rule over the minority in religious matters by insuring governmental neutrality toward religion. The United States Supreme Court has stated that "neither [a state nor the Federal Government] can pass laws which aid one religion, aid all religions. . . ."[13] The Supreme Court has also said that "neither [a state nor the Federal Government] can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[14] The Constitution guarantees freedom of religion; not just freedom of religion if you believe in God. The effect of the Court's decision is to sanction the establishment in the public schools of those religions that believe in a Supreme Being.

The danger of this decision lies in the direction in which it leads. Judge Dye expressed it as "the gradual erosion of the mighty bulwark erected by the First Amendment."

P. A. L.

A NEW DEFINITION OF OBSCENITY

The United States Constitution, in the First and Fourteenth Amendments, guarantees freedom of speech and of the press.[15] That which is obscene is not entitled to these constitutional protections.[16] Thus, the federal[17] and state

12. Supra note 8.
13. Everson v. Board of Education, supra note 8 at 15.
14. Torcaso v. Watkins, supra note 10 at 495.
15. Roth v. United States, Alberts v. California, 354 U.S. 476, 479 (1957). The freedoms of speech and the press expressed in the First Amendment are included in the liberties protected from state action by the "Due Process Clause" of the Fourteenth Amendment.
16. Id. at 481.
17. Censorship has traditionally been regarded as one of the powers reserved to the states under the Tenth Amendment. Federal censorship arises in cases where there is use of the mails, Sunshine Book Co. v. Summerfield, 249 F.2d 114 (3d Cir. 1957); or there in an attempt to import obscene literature, United States v. 42000 Copies International Journal, 134 F. Supp. 490 (E.D.N.D. 1955).