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California Three Rs

Rights, Responsibility, and Respect

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Abington Township v. Schempp: The First Amendment in Public Schools 50 Years Later

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In March of this year, the governor of Mississippi signed into law a new policy on prayer at public school events. As of July 1, school districts must allow a "limited public forum" at events such as football games, or even during morning homeroom announcements, which would allow student expression of religious sentiments.

On its face, the Mississippi law implicates the First Amendment's establishment clause, which states that "Congress shall make no law respecting the establishment of religion...." As a result, the ACLU has taken a position opposed to the law. Conversely, Liberty Counsel has pledged to provide free legal service to Mississippi schools and districts in defense of the law. One case that will almost surely find its way into the legal briefs on both sides is *Abington Township v. Schempp*, the U.S. Supreme Court's 1963 decision involving challenges to prescribed Bible readings in public schools.

In *Abington Township School District of Pennsylvania*, a law required that "at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day." Exceptions were allowed for any child whose parent or guardian wrote a request for the child to be excused.

Ellery Schempp was a junior in high school in Abington Township in 1956. At his school, selected students broadcast the daily reading of 10 Bible verses, the Lord's Prayer, and the Pledge of Allegiance over the school's intercom system. In classes, students were asked to stand and join in the recitation of the Lord's Prayer and the Pledge. General school announcements followed. One day, however, Schempp did not stand for the Lord's Prayer in his homeroom class and instead read silently from the Qur'an.

What prompted his silent protest? Schempp and his family were members of the Unitarian church, a traditionally liberal Christian denomination. He and his parents felt that the readings "without comment" reflected a literal understanding of Scripture that stood against their liberal religious convictions. By 1956, 16-year-old Schempp had increasingly felt that the reading of the Bible and the Lord's Prayer was offensive to his Jewish classmates. He had also read Thoreau.

When other sympathetic students opted not to risk the repercussions of a protest, however, Schempp devised his own plan to read a holy book that was not the Bible. In a 2007 interview on NPR, Schempp said he chose the Qur'an "purely by accident because it was available [in his father's library]."

Schempp spent the remainder of the year's homeroom periods in the guidance counselor's office, and his parents sued the school district to enjoin further Bible readings. At trial, Edward Schempp, Ellery's father, testified that he opted not to excuse Ellery from the Bible readings because it would mean Ellery (and later his siblings) would be "labeled as odd balls."

The trial featured expert testimony on both sides. Dr. Solomon Grayzel, rabbi and author of *A History of the Jews*, testified for the plaintiffs that readings from the New Testament “without comment” are psychologically harmful to Jewish children and generally cause divisiveness in schools. Dr. Luther A. Weigle, a Lutheran minister and co-founder of the National Council of Churches, testified for the defendants that the Bible itself is non-sectarian, but that “exclusion of the New Testament would be a sectarian practice.”

A three-judge panel in federal district court agreed with the Schempps and held that the Pennsylvania law violated the establishment clause as applied through the 14th Amendment. Abington Township appealed. The Schempp children then became targets of harassment in school, and the family received some 15,000 letters, many of which were hostile and even threatening.

In the meantime, a second case had made its way through the courts in Maryland. Baltimore City schools adopted a similar rule under state law that provided for daily Bible readings “without comment.” William J. Murray III was a junior-high student in Baltimore in 1960 when he, like Ellery Schempp, took a dislike to the Bible readings. Unlike Schempp, however, Murray was an atheist, and his protest took the form of standing up while his teacher read from the Bible in order to call the reading “ridiculous.”

William was the son of Madalyn Murray O’Hair, an outspoken atheist who would later found the activist organization American Atheists. O’Hair gained notoriety by petitioning the Baltimore school authorities to stop the daily Bible readings. The petition stated that the Bible reading policy placed “a premium on belief as against non-belief and subjects [the O’Hairs’] freedom of conscience to the rule of the majority.”

Unlike the Schempp case, the O’Hairs’ petition resulted in an unfavorable state trial court ruling and appellate affirmation that the Bible readings were not unconstitutional. For their activist-atheist stance, the O’Hairs’ home was firebombed, and outraged students physically abused William and his younger brother.

The U.S. Supreme Court consolidated the O’Hairs’ case with that of the Schempps. During oral arguments, Philip H. Ward, the attorney for Abington Township, argued primarily that the Pennsylvania law’s purpose was to teach morality, not religion. “[T]he people of Pennsylvania have wanted to do this ... wanted to bring these lessons of morality to the children,” he said. “So what did they do? They picked a common source of morality, the Bible.” For the Schempps, attorney Henry W. Sawyer countered, “You cannot separate the moral leaven from the religious leaven in the Bible.”

On June 17, 1963, the court issued its decision in favor of the Schempps and O’Hairs. Chief Justice Earl Warren assigned the writing of the majority opinion to Justice Tom C. Clark, a devout and churchgoing Presbyterian. In his opinion for the majority, Justice Clark concluded that the government must take a position of neutrality toward religion in order to operate within establishment-clause boundaries:

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

In reaching this decision, Justice Clark also articulated the test of a law’s neutrality, which prefigured part of the later decision in *Lemon v. Kurtzman* (1972), source of the oft-cited “Lemon test.” According to Justice Clark:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the *Establishment Clause* there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. (Emphasis in original.)

The lone dissenter on the Court was Justice Potter Stewart. One year before, he had been the lone dissenter in *Engel v. Vitale*, as well. In that case, the Court struck down a New York law authorizing a short, nondenominational prayer at the beginning of the school day. In Abington Township, Justice Stewart argued that the removal

of religion from the school setting was, in itself, an “establishment”:

For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.

Similar arguments have arisen in challenges against the teaching of evolution, such as that in *Pelozo v. Capistrano Unified School District* (1994) in which a science teacher objected to teaching what he called the religion of “evolutionism.”

In his majority opinion, Justice Clark addressed the issue as follows:

We agree of course that the State may not establish a “religion of secularism” in the sense of affirmatively opposing or showing hostility to religion.... We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Reactions against the decision were swift. The Rev. Billy Graham told the press, “Eighty percent of the American people want Bible reading and prayer in the schools. Why should a majority be so severely penalized...?” Sen. Barry Goldwater announced that the Court had “ruled against God.” In 1964, *LIFE* Magazine dubbed Madalyn Murray O'Hair the “most hated woman in America.”

The case informed the futures of the younger plaintiffs, too. Ellery Schempp remained a Unitarian Universalist and made a career as a scientist. He currently sits on the advisory board of the Secular Coalition for America, a nonprofit advocacy organization for nontheists. William J. O'Hair III, on the other hand, did not retain his youthful beliefs. He became a Baptist minister and founded the Religious Freedom Coalition, a nonprofit and self-described conservative advocacy organization.

The issue of Bible readings would only become more complex just two years after the Supreme Court's decision. In 1965, the end of the national quota system for immigration would see more immigrants from Asia entering U.S. borders, and with them, devotion using the texts of non-Western religions. Schools wanting to use the Bible for instruction would have to consider ever more pluralistic student populations.

Abington Township is a case that informs our current national discourse on religious freedom and stands as a parable of current culture wars. The arguments offered on both sides on what neutrality toward religion means are still offered today on many school-prayer issues, largely without modification. This is so even when there is no explicit mention of the Bible. When Mississippi's new law is challenged — as well as similar laws in Florida and elsewhere — the arguments of Justice Clark and Justice Stewart about neutrality will likely appear again, under different names but not in drastically different terms.

Sources

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NEW RESOURCE FROM CA 3RS PROJECT

California's Diversity: Past and Present Lessons for the Fair Education Act of 2011 (SB48) developed by Marshall Croddy, Damon Huss and Keri Doggett, Constitutional Rights Foundation.

This document consists of five lessons that address the Fair Act through the lens of the Constitution. The Lessons include: Lesson 1 Diversity in California History; Lesson 2 Discrimination and Civil Rights in California; Lesson 3 Religious Diversity in California; Lesson 4 California Heroes Presentation; Lesson 5 Schools and Bullying. All lessons are aligned to Common Core ELA Standards and use instructional strategies that model how to deal constructively with controversial issues. Access the new document in pdf format at <http://ca3rsproject.org/diversity/california-diversity-past-and-present-home.html>

COMMON GROUND RESOURCES

Finding Common Ground: A Guide to Religious Liberty in Public Schools by Charles Haynes and Oliver Thomas, Esq. First Amendment Center, 2007. This book has guidelines on how to handle a wide range of issues related to religious liberty and public schools. Download free at <http://www.firstamendment.org/publications>, scroll to "religion."

The Religious Freedom Education Project at the Newseum <http://www.religiousfreedomeducation.org> is a program at the First Amendment Center focusing on religious liberty in public life.

CA 3Rs Project Website <http://ca3rsproject.org> This site has resources for teachers and administrators, documents published by the CA 3Rs Project, calendars of religious holidays, etc.

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For information on teaching about world religions, contact:

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