Christmas Carols in School Assemblies May be Constitutional

In *Florey v. Sioux Falls School District 49-5*,[1] a school board's policy and rules covering Christmas assemblies were upheld against a constitutional attack. The district court held that the policy and rules regulating the religious content of assemblies did not violate the establishment clause of the first amendment.[2]

In 1977 a Christmas assembly program was presented by two Sioux Falls kindergarten classes. The children presented the following responsive quiz:

> Teacher: Of whom did heav'nly angels sing,
> And news about his birthday bring?
> Class: Jesus.
> Teacher: Now, can you name the little town
> Where they the Baby Jesus found?
> Class: Bethlehem.
> Teacher: Where had they made a little bed
> For Christ, the blessed Savior's head?
> Class: In a manger in a cattle stall.
> Teacher: What is the day we celebrate
> As birthday of this One so great?
> Class: Christmas.[3]

Upon receiving complaints from plaintiffs and others, the Superintendent of Schools and the Sioux Falls School Board established "a citizen's committee to study the issue of church and state in relationship to school district functions."[4] The school board, following public hearings, adopted a proposal by the committee on December 4, 1978.[5]

Plaintiffs filed suit prior to the final adoption of the policy and rules by the board, asking for declaratory and injunctive relief. Alleging that the policy and rules adopted were unconstitutional under the establishment clause, plaintiffs asked that the court "enjoin the Defendants from enforcing the policy and from failing to instruct all public school officials in Sioux Falls that all Christmas assemblies must be absolutely and irrevocably secular."[6] A motion for preliminary injunction was denied by the court after a hearing on the evidence. The court held that there was a greater potential of hardship to defendants if the motion were granted than to

1. 464 F. Supp. 911 (D. S.D. 1979).
2. U.S. CONST. amend. I.
3. 464 F. Supp. at 912.
4. *Id.* at 913.
5. *Id.* The policy and rules are set out at 464 F. Supp. 918-19. *See also* note 60 *infra*.
6. 464 F. Supp. at 913.

plaintiffs if it were denied; defendants had prepared their 1978 Christmas assemblies under the proposed policy and rules, and to grant the motion during the Christmas season would not be justified.[7] On the merits of the case, the court held that the policy and rules were constitutional under the establishment clause of the first amendment.[8]

The establishment clause of the first amendment was originally held to be applicable to the states in *Cantwell v. Connecticut.*[9] In *Cantwell,* defendant, a Jehovah's Witness minister, was arrested for a violation of a Connecticut statute which provided for regulation of solicitation for religious, charitable, and philanthropic causes.[10] The United States Supreme Court held the statute unconstitutional because the first amendment's proscription against an establishment of religion had been extended to the states by the fourteenth amendment.[11]

The history and justifications for the establishment clause were extensively discussed in *Everson v. Board of Education,*[12] where the first test of the establishment clause was developed. In *Everson,* a New Jersey statute,[13] which allowed local school districts to reimburse parents the portions of money spent on public transportation of children to school, regardless of whether the school was public or private, was attacked for allegedly violating the establishment clause. Justice Black, writing for the majority, found the reimbursement plan a valid program "to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[14] According to Justice Black, the standard for review of a statute allegedly violating the establishment clause was whether the state was neutral towards religion, that is, neither hostile nor supportive.[15] Applying that standard, the Court found that the New Jersey statute was

7. *Id.* at 913-14.
8. *Id.* at 918.
9. 310 U.S. 296 (1940).
10. The statute provided:
> No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council . . . . Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both. 310 U.S. at 301-02 (citation to statute omitted).

11. *Id.* at 303.
12. 330 U.S. 1 (1947).
13. N.J. STAT. ANN. § 18A:39-1 (Supp. 1979) provides in part: "Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school . . . ."
14. 330 U.S. at 18.
15. *Id.*

not in violation of the establishment clause. Since the state money went directly to the parents, and not to the religious schools, any benefit received by the religious schools was indirect and incidental.[16]

In *McCollum v. Board of Education,*[17] public school buildings were used by private religious teachers during school hours to teach religion. The pupils were required to have written parental consent in order to attend the classes.[18] Using the neutrality concept of the establishment clause as developed in *Everson,* Justice Black, again writing for the Court, held that the policy violated the separation of church and state.[19] The Court held that the state had not remained neutral, but had afforded "sectarian groups an invaluable aid in that it help[ed] to provide pupils for their religious classes through use of the State's compulsory school machinery."[20]

A program in New York City, similar to the program in *McCollum,* was challenged as unconstitutional in *Zorach v. Clauson.*[21] The difference in the New York City program was that the students with written parental consent would leave the school to attend religious classes.[22] Justice Douglas, writing for the Court, followed *McCollum* by using the neutrality test of the establishment clause as set out in *Everson.*[23] Finding factual distinctions from *McCollum,* the Court refused to find the program unconstitutional.

> In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCollum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.[24]

In *McGowan v. Maryland,*[25] the defendants had been arrested and convicted for violating the Sunday closing laws.[26] The defendants appealed,

16. *Id.* at 17-18.
17. 333 U.S. 203 (1948).
18. *Id.* at 206.
19. *Id.* at 212.
20. *Id.*
21. 343 U.S. 306 (1952).
22. N.Y. EDUC. LAW § 3210(1)(b) (McKinney 1970) provides: "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."
23. 343 U.S. at 314.
24. *Id.* at 315.
25. 366 U.S. 420 (1961).
26. MD. CRIM. LAW CODE ANN. art. 27, § 492 (Supp. 1979) provides in part: "No person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday

attacking the statutes as laws respecting an establishment of religion. The Court upheld the convictions, reasoning that although the laws were originally for religious purposes, they had "become part and parcel of this great governmental concern wholly apart from their original purposes or connotations."[27] Although following the neutrality test of *Everson*, the Court modified the test slightly by using the absence of hostility as the standard for neutrality. According to the Court, to declare the statutes unconstitutional would be to show hostility to religion,[28] rather than the neutrality required by *Everson*.

The next case decided by the United States Supreme Court involving the establishment clause was *Engel v. Vitale*.[29] The importance of *Engel* is not the test applied, but the characterization by the Court of the activity challenged. In *Engel*, the New York State Board of Regents composed a prayer[30] which it recommended be said each morning in school.[31] The Court held that the prayer was necessarily a religious activity.[32] Since it was a religious activity of the schools, it violated the establishment clause of the first amendment, and the fact that it was non-denominational would not correct it.[33]

The characterization used in *Engel* was very important in the next case where Pennsylvania, by statute,[34] required daily Bible reading in public schools. In *School District of Abington Township v. Schempp*,[35] plaintiffs attacked the statute for allegedly violating their rights under the first and fourteenth amendments.[36] In *Schempp*, the Supreme Court re-examined and redefined the neutrality concept of the establishment clause. Holding that the Pennsylvania statute was unconstitutional, the Court restated the neutrality test as two questions: First, does the statute have a secular purpose and second, is the primary effect of the statute one which "neither advances nor inhibits religion."[37] Under these principles the Bible readings were found to have a sectarian purpose because the readings were religious exercises,[38] therefore the statute was held unconstitutional.

. . . . (works of necessity or charity always excepted)."

27. 366 U.S. at 445.

28. *Id.*

29. 370 U.S. 421 (1962).

30. The prayer was: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

31. *Id.* at 422-23.

32. *Id.* at 424.

33. *Id.* at 430.

34. PA. STAT. ANN. tit. 24, § 15-1516 (Purdon 1962) provides: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

35. 374 U.S. 203 (1963).

36. *Id.* at 205.

37. *Id.* at 222.

38. *Id.* at 223.

Another dimension was added to the neutrality test in *Walz v. Tax Commission.*[39] In *Walz,* a New York property owner sought an injunction to prevent the Tax Commission from giving property tax exemptions to religious organizations.[40] Chief Justice Burger restated the purpose of the establishment clause as a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[41] Chief Justice Burger augmented the two part test with another test of "excessive government entanglement with religion."[42] The Court upheld the tax exemptions, realizing that excessive entanglement between church and state would be a matter of degree, to be decided case by case.[43] In the Court's opinion, the granting of property tax exemptions to religious organizations would be a lesser degree of entanglement than taxing the organizations.[44]

The current standards for testing the validity of a statute under the establishment clause were articulated by Chief Justice Burger in *Lemon v. Kurtzman.*[45] In *Lemon,* Rhode Island[46] and Pennsylvania[47] statutes gave state aid to teachers in nonpublic schools by a method of salary supplementation.[48] Plaintiffs attacked these statutory supplements, which went almost exclusively to parochial school teachers,[49] as an unconstitutional state support of religion. Chief Justice Burger, after reviewing the major cases interpreting the establishment clause, combined the *Waltz* and *Schempp* standards. The result was a three pronged test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . . finally, the statute must not foster 'an excessive government entanglement with religion.'"[50]

Applying this three pronged test, the Court found that there was a secular legislative purpose to improve the quality of education in Rhode Island.[51] Although the legislature placed substantial restrictions on the teachers and schools to guarantee that no public money went to support

39. 397 U.S. 664 (1970).
40. *Id.* at 666.
41. *Id.* at 669.
42. *Id.* at 674.
43. *Id.*
44. The Court stated: "Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.* at 674.
45. 403 U.S. 602 (1971).
46. R. I. GEN. LAWS §§ 16-51-1 to 16-51-9 (Supp. 1970), *cited at* 403 U.S. at 607.
47. PA. STAT. ANN. tit. 24 §§ 5601-5609 (Supp. 1971), *cited at* 403 U.S. at 609.
48. 403 U.S. at 608-10.
49. *Id.*
50. *Id.* at 612-13 (citation omitted).
51. *Id.* at 613.

religious instruction,[52] the Court declined to decide whether the primary or principal effect of the statutory supplements was to advance religion.[53] The Court based its decision on the third prong of the test, an excessive entanglement between church and state.[54] The Court had found that the parochial schools in Rhode Island "involve substantial religious activity and purpose."[55] The statute allowed the state to pay teachers who worked for the religious schools, under religious authority, and were generally of the same faith as the religious order that operated the school.[56] Since the degree of involvement between church and state was so great, the Court found excessive entanglement.[57]

The Pennsylvania system was similar to Rhode Island's, but went one step further. Instead of paying the teachers the supplement, the state paid the money directly to the private schools.[58] The Court found that, like Rhode Island, Pennsylvania had a secular legislative purpose to improve the quality of education. The Court found also that, like the Rhode Island statute, the Pennsylvania statute caused excessive entanglement between church and state.[59] As a result of the new test, the Pennsylvania statute was unconstitutional.

It is under this *Lemon* test that the plaintiffs in *Florey* alleged that the policy and rules of the Sioux Falls School District were unconstitutionally overbroad under the establishment clause. In particular, the plaintiffs attacked rules one, three, and four for allowing the schools to engage in religious activity which would be primarily an advancement of religion.[60]

Using the three pronged test announced by Chief Justice Burger in *Lemon,* the district court examined the kindergarten program performed in 1977. The court found that it constituted religious activity, which, like prayer, is unconstitutional under the establishment clause.[61] That determination had no effect on the present policy and rules since the 1977 assem-

52. In Rhode Island, the teacher must agree in writing to teach only secular subjects. In Pennsylvania, reimbursement was limited to secular education. *Id.* at 608, 610.

53. *Id.* at 613.

54. *Id.* at 614.

55. *Id.* at 616.

56. *Id.* at 618.

57. *Id.*

58. *Id.* at 621.

59. *Id.* at 621-22. The language used by the Court was "an intimate and continuing relationship."

60. Rule 1 provides: "The several holidays throughout the year which have a religious and a secular basis may be observed in the public schools." Rule 3 provides: "Music, art, literature and drama having religious themes or basis are permitted as part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday." Rule 4 provides: "The use of religious symbols . . . is permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature." 464 F. Supp. at 918.

61. 464 F. Supp. at 914.

bly would not have been permissible under the 1978 rules.[62] The School Board's policy and rules had to be examined on their own, and not in conjunction with past assemblies.

Turning its attention to the rules, the court found the purpose of rule one was to allow schools to observe holidays that have both religious and secular significance.[63] By distinguishing holidays with only a religious significance from the holidays that had both religious and secular significance, rule one accomplished a secular purpose.[64] Without rule one, holidays that did have secular significance but also had religious significance could not be observed by the schools.

The court also found rule three to have a secular purpose. On its face rule three appears to have a sectarian purpose—to permit students to sing Christmas carols. But the court found the purpose behind rule three was to "expose and involve the students in the full spectrum of our Western musical tradition."[65] Although the music may have religious content, much of it has become a part of our culture and heritage.[66] The court said that to expose the students to music with religious content, but not allow them to perform or use the music because of its religious content "would give students a truncated view of our culture."[67]

Under the second prong of the *Lemon* test, the court examined the effects of rule three and found that it did not have a primary effect of advancing religion.[68] The court distinguished *Schempp* because the daily Bible readings were *per se* religious activities while the singing of a Christmas carol is not.[69] According to the court, the singing of a Christmas carol is not a religious activity *per se* because the music of a Christmas carol has taken on secular significance since Christmas carols have become assimilated into our heritage and culture.[70]

Rule four is quite similar to rule three. While rule three allows students to perform music, art, literature or drama with religious content, rule four allows the display of religious symbols with certain limitations.[71] The court

62. *Id.*

63. *Id.* at 915.

64. *Id.*

65. *Id.* at 916. While the rule says music, art, literature or drama, the court focused on music, in particular Christmas carols.

66. *Id.*

67. *Id.* The court also quoted Justice Jackson's concurring opinion in *McCollum:* "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, *even from a secular point of view." Id. quoting* 333 U.S. at 236 (emphasis added by court).

68. *Id.* at 916.

69. *Id.*

70. *Id.*

71. *Id.* at 918. Under rule four, religious symbols were allowed as "a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature."

held that rule four was constitutional under the first two prongs of the *Lemon* test.[72] According to the court, rule four had a secular purpose of educating the students, not promoting any religion.[73] Citing *Zorach v. Clauson*,[74] the court found that rule four neither advanced nor inhibited religion, and to declare it unconstitutional would be to demonstrate a hostility towards religion.[75]

In applying the excessive entanglement test of *Lemon*, the court examined the policy and rules of the school board as a whole, rather than examining the rules individually. The court concluded that the entanglement test consisted of three factors: the character and purpose of any benefitted institution, the nature of any aid, and the resulting relationship between church and state.[76] The court first held that it would be speculation to find that any religion or religious institution would benefit under the rules.[77] Second, under the rules there would not be any aid flowing directly from the school system to any religion.[78] Finally, the court held that there would not be any relationship between church and state that could be attributed to the policy and rules.[79] Since none of the component parts of the entanglement test were violated, the court refused to hold the policy and rules unconstitutional under the establishment clause.[80]

The decision in *Florey* is correct under the holdings of the cases concerning the establishment clause decided by the Supreme Court. The major factor in *Florey* was whether the activities permitted by the policy and rules could be characterized as religious activity *per se*.[81] Characterization as a religious activity *per se* has always resulted in a determination that a statute is unconstitutional.[82] The reason that this characterization is so important is that the second prong of the *Lemon* test examines whether an activity has the primary effect of promoting (or inhibiting) a religion. When the Supreme Court has found an activity to be a religious activity, such as prayer and Bible reading, the Court has also found the primary effect of the activity to be the promotion of religion.

The question therefore becomes, where should a line be drawn between what is and what is not a religious exercise. Singing a Christmas carol may

72. *Id.* at 916-17.
73. *Id.*
74. *Id.* at 917. Justice Douglas stated in *Zorach* that "[w]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." 343 U.S. at 314.
75. 464 F. Supp. at 917.
76. *Id., citing* 403 U.S. at 615.
77. 464 F. Supp. at 917.
78. *Id.*
79. *Id.* at 918.
80. *Id.*
81. *Id.* at 914.
82. *See, e.g.*, School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

be a religious exercise when it is performed in a religious context. However, when a Christmas carol is presented under the policy and rules of the Sioux Falls School Board, it is not being performed in a religious setting, because under the policy and rules, a Christmas carol must be presented prudently and objectively, and must be presented as a demonstration of our cultural and religious heritage.[83]

The Supreme Court made the decision drawing the line of characterization as religious activity in *McGowan*. The Court held in *McGowan* that while Sunday closing laws had their genesis in religion, the common day of rest had become a part of our heritage apart from its religious significance.[84] Christmas carols, like Sunday closing laws, had their genesis in religion. Also like Sunday closing laws, Christmas carols have become a part of our heritage and culture apart from their religious significance.

Other parts of our cultural heritage such as art, literature, drama, and architecture have had strong religious influence. It would be impossible (and undesirable) to remove all traces of religion from our culture, and so the characterization of an activity is necessary. It is for this reason that the second prong of the *Lemon* test asks whether any activity primarily promotes religion. The court in *Florey* correctly chracterized the activities that the policy and rules permitted as not being religious activity *per se*. The characterization may well have been different if the policy and rules had not been so specific about activities being presented in a non-religious context. According to the district court, public schools may now sponsor Christmas programs without fear that they will be enjoined as violations of the establishment clause as long as the programs are presented within proper guidelines set by school boards. In drafting these proper guidelines, school boards will have to insure that religious materials may be presented only in a neutral and objective manner, and in a non-religious context. The guidelines will need to stress that religious material may be used only for a comprehensive study of our heritage, and not as a religious exercise. And, after adopting proper guidelines, school boards must be careful to insure that programs conducted under proper guidelines are conducted within those guidelines.[85]

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83. 464 F. Supp. at 918.

84. 366 U.S. at 445.

85. In *Florey*, the court stated that even under the new rules, which it found constitutional, the 1977 Christmas program could not have been presented. 464 F. Supp. at 913.