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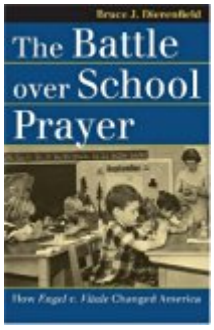
Bruce J. Dierenfield. *Battle over School Prayer: How Engel v. Vitale Changed America.* Landmark Law Cases and American Society Series. Lawrence: University Press of Kansas, 2007. 240 pp. $15.95 (paper), ISBN 978-0-7006-1526-1.



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Divided over Devotion: The History of the Struggle over Prayer in Schools and Where We Go from Here

Bruce J. Dierenfield's *Battle over School Prayer* traces the origins and consequences of the heated battle over prayer in public schools. The book focuses on *Engel v. Vitale* (1962), the ruling that declared the New York Regents Prayer, and similar prayers in eleven states, to be "wholly inconsistent with the establishment clause" of the First Amendment to the U.S. Constitution (p. 129). Setting this pivotal case in the larger historical context of church and state issues, Dierenfield traces the debate over religion in public schools from the colonial period to the present. In so doing, he provides his readers with a compelling historical narrative about the ongoing tensions surrounding the First Amendment and religious expression in public schools.

The first part of Dierenfield's narrative investigates the legal and judicial tradition leading up to *Engel*. Fearing that formal ties between religion and government would inevitably corrupt religion, persecute minorities, and obstruct individual freedoms, the founding fathers adopted what Dierenfield describes as the "first secular government ... [which] recognized religious liberty but banned religious establishment" (p. 11). Within the constitutional principle of antiestablishment was a hope to constrain governmental and especially legislative power while not limiting churches or depriving government of the moral influence of Christianity. He writes that the founding fathers regarded religion as an "indispensable aid to moral behavior and republican self-government" (p. 10). Their outlooks were anticlerical and anti-ecclesiastical but not antireligion.

Since the First Amendment applied only to the federal government, the battleground for church and state issues was handled at the state level until 1940. All state constitutions had free exercise clauses and most had or eventually adopted some type of antiestablishment protection. Still, there was no mechanism for protecting religious liberty against state or local governments. Each state negotiated these issues on the basis of its religious traditions and constituencies, and often within each state. Therefore, wide variations of church-state policy existed. Amid this long and complicated process of disestablishment there existed an unspoken establishment of Protestantism that often acted as a force of cultural cohesion and social change. In fact, for much of the nineteenth century, the educational program of Protestant churches dominated the U.S. educational ideal. Following the American Civil War, the power and hegemony of the Protestant majority was exposed to serious challenge and erosion by the influx of immigrants. Dierenfield argues that during this period, keeping religion in public schools was often motivated by heightened expectations of Protestant intellectual independence by religionists seeking a conforming impulse for U.S. citizenship. Many schools used anti-Roman Catholic textbooks in the classroom, and teachers forced students to read the King James Bible.

The federal Constitution finally became applicable

to issues of religion and education in 1940 in *Cantwell v. Connecticut* when the U.S. Supreme Court ruled that states were bound by the First Amendment. Dierenfield examines the three major Supreme Court cases dealing with religion and schools that preceded *Engel*, two of which were written by Hugo Black, the justice who authored the majority opinion for *Engel.* In *Everson v. Board of Education* (1947), Black upheld a New Jersey law that provided public payment for the bus transportation of all children to attend all schools, whether public or private. In his majority opinion, Black invoked former President Thomas Jefferson's metaphor regarding the need for a "high and impregnable wall of separation" between church and state (p. 49). In so doing, a legal precedent was set that neither the state nor federal government could pass laws that "aid one religion, aid all religions, or prefer one religion over another" (p. 48). Dierenfield claims that by resuscitating and essentially redefining the First Amendment's establishment clause–and in the process morphing into the high Court's "civil-libertarian conscience"–Black established a "revolutionary interpretation" of the First Amendment, one that "failed to recognize the extent of religious establishment that existed throughout U.S. history and overshadowed the equally important guarantee of the free exercise of religion" (p. 49).

Dierenfield surmises, "almost every religion case decided by the U.S. Supreme Court in the past half-century has been affected by Black's schizophrenic decision in Everson" (p. 48). Despite ruling in favor of busing private school students at public expense, Black's use of Jefferson's wall metaphor came "to have the same hold on the American imagination as Winston Churchill's Iron Curtain reference" (p. 48). Dierenfield writes that Black's pointed definition of religious establishment set the stage for the U.S. Supreme Court to employ a dominant separationist paradigm for a "host of questions concerning religion and public education" (p. 52).[1]

It was only a matter of time before the constitutionality of devotional practices was brought to bear under *Engel v. Vitale*, in 1962. The ruling, which struck down school-led prayers, marked "the ultimate triumph of the doctrine known as separation of church and state" and helped to fuel an intense conservative opposition movement which grew in size and scope to include the majority of the religious Right against the evils of secular humanism. According to Dierenfield, Justice Black rejected the argument that a nondenominational prayer was constitutional, even if it did not involve any direct governmental compulsion. To him, the establishment clause, like the free exercise clause, did not require such compulsion for a practice to be in violation of the First Amendment. Black wrote that it "is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government." Such a union of religion and government "tends to destroy government and denigrate religion" (p. 130). Dierenfield posits that the impact of this decision inaugurated a radical new jurisprudence where schools "that had been founded to instill religious truths were now … to be inoculated from religious instruction and worship altogether" (p. 4).

From here, Dierenfield offers a careful analysis of the strong reactions that the Court's decision provoked. He observes that even though many denominational and national council religious leaders firmly supported the Court decision, there was a strong oppositional grassroots movement that found a voice through ministers like Billy Graham. This emergent uncompromising Protestant fundamentalism would, within a few years, find more dependable leadership among public pastors who loathed the high Court's separation of church and state policy. Locking on to the *Roe v. Wade* decision of 1973, Jerry Falwell and other fundamentalist leaders tapped into the anger of these disenfranchised religionists. The result was a coalescing of the religious Right and its new social agenda. As the public has trudged its way through nearly fifty years of debate over prayer in public schools, self-appointed political protectors of public morality have advanced legislation to incorporate prayer back into the classroom, in various forms.

Dierenfield's narrative is titillating and fascinating, one that contributes new insight into old battles. Dierenfield brings to life the human drama still surrounding a very heated issue and illustrates the sentiments and concerns behind the opponents whose movement burgeoned into a vendetta against pornography, abortion, divorce, drugs, and sex education. Probably for the first time ever, through personal interviews, the reader begins to appreciate the sacrifices made by those who pioneered the way in seeking freedom for their children from religious coercion. Unfortunately, the narrative glosses over many important historical and legal details. For instance, Black's jurisprudence is much more complex than Dierenfield supposes; indeed, Dierenfield's legal analysis of Black's decision in *Everson*–which he labels as schizophrenic–is overly simplistic, leading him to categorize all subsequent case law using the separation principle, as if it were an end in its own right. But as Martha Nussbaum suggests in *Liberty of Conscience* (2008), "the rhetoric of

separation, applied without a deeper theoretical analysis, wrongly suggests that the goal of the Establishment Clause is to purify the public square of all reference to religion, in effect establishing secularism as a theory of government ... [in turn] do[ing] a lot of harm to reasoned public debate."[2] Black's actual argument in Everson did not use the separation principle; his justification in *Everson*, which he consistently applied in later cases, was what Nussbaum described as the "equality/neutrality" principle. The equality principle, as Nussbaum understands it, means "equal respect ... it is the idea that people are of equal worth as citizens, and are therefore to be treated as equals by laws and institutions." Ensuring equality, therefore, requires, "not just interference ... [but also a] symbolic politics that acknowledges equality and does not create ranks and orders of citizens." When reading the legislative history, Nussbaum contends that this idea "runs like a thread throughout the cases, on the whole, explaining them well ... and [proves useful for] framing public debate about the issues."[3]

To be fair, the idea of separation did serve as a major justification for several future cases under the Warren and Burger Courts, but decisions under the more conservative Rehnquist Court and even more so under Chief Justice Roberts have moved away from employing this strict separationist paradigm. Dierenfield fails to mention more recent cases like *Selman v. Simmons-Harris* (2002), which upheld the constitutionality of school vouchers. He focuses on a series of cases striking down state actions that mix religion and education. These include *Abington School District v. Schempp* (1963), which found that daily Bible reading and recitation of the Lord's Prayer were unconstitutional, and *Lemon v. Kurtzman* (1971), which he claims set forth the primary doctrinal framework used by the Court for analyzing establishment clause issues.

Knowing this, is it then fair to conclude, as Dierenfield does, that the *Engel* decision marked the "end of Protestant domination of public education and the ultimate triumph of the doctrine known as separation of church and state" (p. 19)? Even if this trend did exist for a time, constitutional scholars like Phillip Hamburger (*Separation of Church and State* [2002]) and Daniel L. Dreisback (*Thomas Jefferson and the Wall of Separation between Church and State* [2002]) have called into question the notion that the authors of the First Amendment intended the establishment clause to separate church and state in the way the Court dictated in the Warren Court. Moreover, Jefferson's wall metaphor only accords with an individualistic, democratic, and private style of religion. Within this understanding, religious liberty is restricted to individuals, as the absence of external constraint, which effectively denies the importance of communal dimensions or social categories of religion. As Adam Selegman insightfully suggests, citizens' current conception of separation of church and state implies distinct Protestant notions of religious and secular dimensions of life that are mistakenly thought of as universal and value-free principles. Accepting these principles forces citizens to choose between a liberal or secular version of selfhood and society that is "not shared across the globe and across human civilizations, or an explicitly Protestant vision of human existence in the world, which is certainly not shared." By retaining these static categories, the United States has "replaced tolerance of group difference with the legal formula of individual rights ... and rights do not [necessarily] provide recognition."[4]

Winifred Sullivan observes, "We now live in a new moment, a time of undifferentiating–in which postmodern consciousness is reluctant to see sharp divisions such as those historically described as the sacred and profane."[5] In such a situation of flux and ambiguity, traditional categories will no longer suffice, especially since religion has become perhaps too amorphous to be properly defined for purposes of law. Indeed, to provide for religious freedom, the courts, unfortunately, must define religion, and, invariably, when they do so, they define it in ways that are still only perhaps compatible with Protestant ideas about individualism. Those seeking religious liberty outside the Protestant framework must inevitably adapt to it, and the idea of freedom actually enforces a sort of intolerance. In seeking a new understanding of the enculturation of everything in life, perhaps it is time for a reconsideration of the isolation of church and state as entities within impermeable boundaries and the formation of a new paradigm for understanding the relationship of religion to politics and society. In searching for this new paradigm, we, as historians, must appreciate fully the intricacies and complexities of prior attempts at negotiating what has proven to be an extremely delicate societal issue. Dierenfield's comprehensive and rich narrative adds much to a reader's understanding of this powerful story; in so doing, hopefully, it compels scholars to reassess their assumptions and strive to listen and understand each other in charting a brighter course.

Notes

[1]. The separationist and accommodationist paradigms employed by the Court derive from the difficulty of maintaining separation under the seemingly

contradictory First Amendment principles of no aid and nondiscrimination.

[2]. Martha Nussbaum, *Liberty of Conscience: In Defense of America's Religious Equality* (Philadelphia: Basic Books, 2008), 265, 283. The separate principle meant that the federal government could give no aid to faith-based schools, but Black, using the principle of equality, held that the state of New Jersey could not be forbidden from "extending its general law benefits to all citizens without regard to their religious belief." Ibid., 50.

[3]. Ibid., 283, 227, 229.

[4]. Adam Seligman, "Secularism, Liberalism, and the Problem of Tolerance," *Religion, State and Society: Jefferson's Wall of Separation in Comparative Perspective*, eds. Robert Falton and Rouhollah K. Ramazani (New York: Palgrave, Macmillan, 2009), 102

[5]. Winifred Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005), 151.