Nebraska Law Review

Volume 59 | Issue 4 Article 9

1980

The Establishment Clause and Its Application in the Public Schools: *Florey v. Sioux Falls School District*, 464 F. Supp. 911 (D.S.D. 1979), *aff'd*, 619 F.2d 1311 (8th Cir. 1980)

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Note

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Florey v. Sioux Falls School District, 464 F. Supp. 911 (D.S.D. 1979), *aff'd*, 619 F.2d 1311 (8th Cir. 1980).

I. INTRODUCTION

From the very inception of the United States government there has been sharp division over the proper relationship between church and state.[1] The first amendment, adopted shortly after the passage of the Constitution, was an attempt by the initial Congress to limit potential tensions between church and state by insuring that "freedom of religion" would be protected in the new republic and that a national church would never be established. However, as society has become more complex and pluralistic, American courts have interpreted these constitutional protections in ways that would not have been contemplated two hundred years ago.

The most controversial United States Supreme Court decisions interpreting the first amendment religion clauses have been those involving public education. The most notable of these cases were the Court's landmark prayer decisions[2] which held that prayer recitation and Bible reading in the public schools violated the establishment clause of the first amendment. When first announced, these decisions[3] aroused the antipathy of many persons and were condemned by several religious and political groups as anti-religious and anti-American.[4] The feelings of aversion on the part of some have remained, and attempts to establish a constitutional amendment reversing these Court decisions continue.[5] Because

1. *See* S. LIPSET, THE FIRST NEW NATION 81-83 (1963).
2. School Dist. of Abington v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).
3. Actually, the *Schempp* decision produced less public outcry than *Engel*. *See* A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 379-82 (rev. ed. 1964).
4. *See* P. BLANSHARD, RELIGION AND THE SCHOOLS: THE GREAT CONTROVERSY 50-74 (1963); Kurland, *The School Prayer Cases*, in THE WALL BETWEEN CHURCH AND STATE 142-46 (D. Oaks ed. 1963).
5. "The immediate reaction of Congress to [Engel v. Vitale] was the introduc-

these efforts have been unsuccessful, prayers and Bible reading in the public schools remain constitutionally prohibited.

Nevertheless, the precise boundaries of the establishment clause are vague,[6] especially as the clause relates to public education. This vagueness has spawned challenges to the propriety of allowing other "religious" activities in state schools. *Florey v. Sioux Falls School District*,[7] a recent well-publicized dispute in the federal courts, demonstrates the continuing vitality and expanding scope of the church/state problem. In this litigation, the parents of a public school student questioned the constitutionality of Sioux Falls, South Dakota, school board rules allowing public school celebration of holidays which have both religious and secular foundations.[8] The rules provided that music,[9] art, literature

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tion of more than 50 constitutional amendments to override the decision or to limit its impact upon a 'vital and sensitive spot' in our national life." 121 CONG. REC. 8162 (1975) (Remarks of Sen. Roth). A cursory examination of the annual indexes to the Congressional Record since the "prayer decisions" reveals that more than 400 proposals have been introduced in Congress to enact a constitutional amendment to allow prayers in public schools or to limit the appellate jurisdiction of the Supreme Court. CONG. REC. (Indexes 1963-1979). There have been a substantial number of such proposals introduced in Congress every year since 1963. *Id.* For an excellent discussion of the opposing views concerning the prayer amendment, see Rice, *The Prayer Amendment: A Justification*, 24 S.C. L. REV. 705 (1972), and Schwengel, *The Prayer Amendment: A Rebuttal*, 24 S.C. L. REV. 723 (1972). For a very recent indication that the school prayer issue remains very controversial, see 66 A.B.A. J. 436 (1980).

6. "This topic has remained more confused than any other major aspect of American public law . . . . In the handful of leading cases which have arisen from strikingly different visions of the role of religion in American Society the court has failed to demonstrate a consistent line of development." Dixon, *Religion, Schools, and The Open Society: A Socio-Constitutional Issue*, 13 J. PUB. LAW 288 (1964). "Few subjects [church-state relations] are more complex or as likely to provoke deep emotion. And there seems to be no ultimate formulations or ultimate solutions . . . . Americans are constantly changing their views about the proper province of the state." M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE at vii (1968). Part of the difficulty of the area is a result of the courts failure to establish a definition of a "religious activity." *See* Note, *Religious Holiday Observances in the Public Schools*, 48 N.Y.U. L. REV. 1116, 1123 (1973); Note, *Humanistic Values in the Public School Curriculum: Problems in Defining an Appropriate "Wall of Separation"*, 61 NW. U. L. REV. 795, 798 (1966).

7. 464 F. Supp. 911 (D.S.D. 1979), *aff'd*, 619 F.2d 1311 (8th Cir. 1980).

8. *Id.* It is not surprising after the outcome in *Engel* and *Schempp* that an establishment clause test case concerning the constitutionality of observing religious holidays in the schools arose. The issue was foreseen by a number of legal commentators shortly after the "prayer cases." *See, e.g.*, W. DOUGLAS, THE BIBLE AND THE SCHOOLS 11-12 (1966); L. PFEFFER, CHURCH, STATE AND FREEDOM 479-92 (rev. ed. 1967); A. STOKES & L. PFEFFER, *supra* note 3, at 382-84; Choper, *Religion in Public Schools*, 47 MINN. L. REV. 329, 411-13 (1963); Pfeffer, *Court, Constitution and Prayer*, 16 RUTGERS L. REV. 735, 750 (1962).

9. Although there were other issues involved in the controversy, both the dis-

and drama having religious themes or basis could be used as teaching aids during the holiday celebrations of Christmas, Easter, Passover, Hannukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving and Halloween.[10]

This note will review the decisions of the district and circuit courts and analyze several of the issues raised in this litigation. Although both courts upheld the propriety of holiday observances in dispute, it will be shown that despite the secular bases for the "religious" activities permitted by the school board rules, they may, under some foreseeable circumstances, violate constitutional principles because of their more than remote and incidential religious effect[11] on the students, and their potential for creating divisiveness in the community by excessively entangling the state with religion.[12] In order to establish a foundation for this discussion, it is first appropriate to review the history of the religion clauses and examine the Supreme Court tests currently used to protect the values embodied in the first amendment.

II. THE HISTORY AND DEVELOPMENT OF THE ESTABLISHMENT CLAUSE

The establishment clause is one of two clauses concerning religion contained in the first amendment. The relevant portion of the amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[13] The first clause is referred to as the establishment clause and the second as the free exercise clause. The establishment clause "is a prohibition of government sponsorship of religion which requires that government neither aid nor formally establish a religion."[14] The free exercise clause, on the other hand, "abso-

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trict and circuit courts focused most of their analysis on the constitutionality of students singing "religious" hymns in the public schools. The issue of singing religious hymns in the schools had been the subject of litigation in various state courts which struggled with the propriety of prayer, Bible reading and singing of such hymns in the classroom before *Engel* and *Schempp*. *See* W. GRIFFITHS, RELIGION, THE COURTS, AND THE PUBLIC SCHOOLS 1-92 (1966). A Florida court examined the hymn issue in a context similar to *Florey*. *See* Chamberlain v. Dade County Bd. of Pub. Instruction, 17 Fla. Supp. 183 (Cir. Ct. 1961), *aff'd*, 143 So. 2d 21 (Fla. 1962), *vacated*, 374 U.S. 487 (1963), *modified*, 171 So. 2d 535 (Fla. 1965).

10. The controversy in *Florey* concerns rules one, three and four of the Sioux Falls School District's Citizens Committee, charged with the responsibility of establishing guidelines relative to Christmas observances by the public schools. *See* notes 47-54 & accompanying text *infra*.
11. *See* notes 93-118 & accompanying text *infra*.
12. *See* notes 119-30 & accompanying text *infra*.
13. U.S. CONST. amend. I.
14. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 850 (1978).

lutely prohibits the proscription of any religious belief by the government. Additionally, it requires that the government make some accommodation for the practice of religious beliefs when it pursues ends which incidentally burden religious practices."[15] A further difference between the two clauses is that: "The Establishment Clause, unlike the Free Exercise Clause, does not depend on any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[16] There is also "a natural antagonism between a command not to establish religion and a command not to inhibit its practice . . . . leav[ing] the Court with having to choose between competing values in religion cases. The general guide here is the concept of 'neutrality.' "[17]

Students of constitutional history recognize that at least three different philosophies influenced those who ratified the first amendment's religion clauses. Some viewed them as a barrier of protection against "the dread of worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained."[18] Since the Bill of Rights, when passed, only applied against actions taken by the federal government,[19] several states hoped that the amendment would protect their established religions from federal interference.[20] Those with close religious ties would apparently not have objected to "federal government

15. *Id.* at 871.
16. Engel v. Vitale, 370 U.S. 421, 430 (1962). *See also* School Dist. of Abington v. Schempp, 374 U.S. 203, 223 (1963).
17. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 14, at 849.
18. M. HOWE, THE GARDEN AND THE WILDERNESS 6 (1965). This view was espoused by Roger Williams.
19. It was not until 150 years after the ratification of the Bill of Rights that the religion clauses of the first amendment were made applicable to the states through the fourteenth amendment's due process clause. Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause applied to the states); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause applied to the states).
20. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 14, at 850.

> The amendment was proposed by James Madison on June 8, 1789, in the House of Representatives. It then read, in part:
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> > The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. (Emphasis added.) I Annals of Congress 434.
>
> We are told that Madison added the word 'national' to meet the scruples of states which then had an established church.

McGowen v. Maryland, 366 U.S. 420, 440 (1960). However:

> [T]he First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion.* Thus, this Court has given the

aid to all religions on an equal basis."[21] Others, sharing the views of Jefferson, saw the amendment's purpose as political. In effect, the amendment protected the state against any encroachment which might be made upon it by organized religion.[22] "Jefferson's total concern obviously included a deep anxiety that the liberties of individuals would be endangered if a wall of separation did not stand between them and the state."[23] A third view of the amendment's intended impact was held by Madison, the drafter of the amendment. He envisioned that its impact would be to protect both church and government from encroachment by the other.[24]

Determining the application of the first amendment to modern circumstances is therefore made very difficult because the motivations behind its passage were so varied.[25] Additionally, the ratifiers themselves could not have foreseen the range of difficult questions raised under the first amendment today.[26]

Interpretation of the establishment clause by the United States Supreme Court did not begin until the twentieth century.[27] Despite the diverse philosophical underpinnings of the amendment, the Supreme Court has often attempted to justify its decisions by emphasizing the Jeffersonion notion of separatism and the prevention of religious encroachment on the government.[28] Most of its

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> Amendment a 'broad interpretation . . . in light of its history and the evils it was designed forever to suppress. . . .'

Id. at 441-42 (*quoting* Everson v. Board of Educ., 330 U.S. 1, 14-15 (1946)).

21. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 14, at 850.
22. M. HOWE, *supra* note 18, at 7.
23. *Id.* at 6.
24. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 817 (1978).
25. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 14, at 849-50.
26. We live in a much more complex and pluralistic society than that of our constitutional fathers. The Supreme Court has recognized that the changing values of society often impact on the way in which constitutional provisions are interpreted. *See, e.g.*, Harper v. Virginia Bd. of Election, 383 U.S. 663, 669 (1961). *Florey* is an example of a controversy which would not have been anticipated by the drafters of the first amendment. Since that time, however, the Supreme Court has attempted to adapt what it perceives as the establishment clause values to changing societal mores.
27. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 14, at 851.
28. *See* M. HOWE, *supra* note 18, at 10-15. Howe has criticized the Supreme Court's attempt to evaluate the meaning of the first amendment from the perspective of only one of the philosophies used to justify it at the time of its ratification. He noted that the Court

> has failed sufficiently to recognize, I think, that the rule of separation was no less a postulate of faith than it was an axiom of doubt. If one is to respect the realities of history in formulating rules of constitutional law, it is not as easy as the Court has pretended it to be to cast out the theology of the First Amendment.

Id. at 10. He also asserted that "the Supreme Court, by pretending that the American principle of separation is predominantly Jeffersonian and by purporting to outlaw even those aids to religion which do not affect religious lib-

decisions concerning this clause have involved education and fall within one of two general categories.[29] The first line of Supreme Court cases involves the validity of certain types of aid to religious institutions by the state. A second group concerns the propriety of certain activities in the public schools, such as prayer or Bible reading. The Court has developed a three-tier test to determine whether such conduct or aid violates the establishment clause. "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.' "[30]

The first two tiers of the test were employed in *McGowen v. Maryland*,[31] and later refined in *School District of Abington v. Schempp*.[32] In *McGowen*, the Court held that state legislation imposing Sunday closing did not violate the establishment clause even though it was originally enacted because of religious motivations: "[T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose *reason* or *effect* merely happens to coincide or harmonize with the tenets of some or all religions."[33] The Court found the law valid since the "present purpose and effect of . . . [Sunday closing laws] . . . is to provide a uniform day of rest

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erties, seems to have endorsed a govenmental policy aimed at the elimination of *de facto* establishments." *Id.* at 12. Another commentator on the origins of the first amendment has argued that a state day of fasting and prayer which was proposed and enacted in Virginia by Jefferson in 1774 and by Madison in 1785 would not pass the current Supreme Court test regarding violations of the establishment clause even though its authors apparently did not consider such an action by a "state" government to be contrary to the values subsequently advanced by the first amendment. He noted that the "wall of separation" metaphor articulated later by Jefferson was meant to limit only the federal government. He also has pointed out that "Jefferson planned to include religious teachings in the University of Virginia's curriculum in a way calculated to encourage morality and a belief in God while at the same time avoiding a preferential establishment of one sect's belief over those of another." Comment, *Jefferson and The Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645, 669. The author maintained that such actions taken by Jefferson and Madison demonstrate that the establishment clause was not intended to completely separate religion and religious values from the public sector. He also argued that "incorporation of the establishment clause through the fourteenth amendment . . . [is perhaps not historically justified since] . . . the original intent of the clause seems to have been to deny federal authority over state-level establishment-of-religion questions." *Id.* at 673 n.127.

29. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973).
30. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted).
31. 366 U.S. 420 (1961).
32. 374 U.S. 203 (1963).
33. 366 U.S. at 442 (emphasis added).

for all citizens."[34]

Prior to *Schempp*, the Court in *Engel v. Vitale*[35] had held that the use of non-denominational prayers written by school officials violated the establishment clause. But the *Engel* Court failed to enunciate a clear standard of what constituted an establishment clause violation.[36] In *Schempp* the issue was whether recitation of the Lord's Prayer or other Bible readings in public schools violated the establishment clause. Mr. Justice Clark, writing for the Court, stated that in order 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."[37] In effect, the government must remain neutral and refrain from any involvement with religion, or its actions will be invalidated. Thus, the Court held that since prayer recitation and Bible reading in the schools are examples of exercises intended as religious activities

34. *Id.* at 445.

35. 370 U.S. 421 (1962). In *Engel*, the Court held that government "is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." *Id.* at 430. Justice Black, writing for the majority, characterized the motivations of those who enacted the first amendment as an unwillingness "to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box." *Id.* at 429. However, the Court did recognize that certain manifestations of belief in God are not proscribed by the first amendment, such as:

> reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the [s]tate . . . has sponsored in this instance.

Id. at 435 n. 21.

36. Before *Schempp* and *McGowen*, the Supreme Court had not established a specific test for determining the validity of governmental action challenged under the establishment clause. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 14, at 850-71. In Everson v. Board of Educ., 330 U.S. 1 (1947), the Court upheld a public school program which reimbursed parents of children attending both public and sectarian schools for the amount of money they spent on the transportation of their child to and from school. This governmental action was not viewed as constituting aid to religion because it was given to public and non-public students alike, without regard to religion. In McCollum v. Board of Educ., 333 U.S. 203 (1948), the Court held that religious instruction in public schools which was conducted on public property and during the regular school day by religious instructors not salaried by the school district was unconstitutional because it aided religious groups. However, a release time program in which students were released from their regular school program to attend religious instruction off public property was held to be constitutional just four years later in Zorach v. Clauson, 343 U.S. 306 (1952).

37. 374 U.S. at 222 (citations omitted).

and which advance religion, they offend the principles of the establishment clause.[38]

The fact that participating in the prayers and Bible reading was voluntary was held to be no bar to a holding of unconstitutionality. In addition, the Court noted that

> it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment of our liberties.'[39]

The Court also rejected the argument that its decision would result in establishing a "religion of secularism." It noted that objective teaching about religion in the public classroom would not be affected:

> [O]ne'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. But the exercises here do not fall into those categories. They are religion exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.[40]

The three-tiered test was first fully articulated by the Court in *Lemon v. Kurtzman*,[41] when the purpose and effect tiers were combined with an excessive entanglement test. *Lemon* involved a state attempt to subsidize parochial schools by supplementing the salaries of teachers who taught secular subjects. Although the Court accepted the argument that the *purpose* of the program was secular,[42] it did not specifically rule on whether or not its *effect* was secular.[43] Instead, it held that the program was unconstitutional because it fostered an "excessive entanglement" between the state and religion. The factors used by the Court to determine that there was an excessive entanglement were: (1) The character and purpose of institution benefited (a church sponsored school);[44] (2) the nature of the aid (economic support to teachers under supervision of religious authorities);[45] and (3) the resulting relationship

38. *Id.* at 223.
39. *Id.* at 225.
40. *Id.*
41. 403 U.S. 602 (1971). The "excessive entanglement" approach to resolving questions arising under the first amendment was first enunciated in Walz v. Tax Commission, 397 U.S. 664 (1970).
42. 403 U.S. at 613-14.
43. *Id.*
44. *Id.* at 615.
45. *Id.* at 616-17. This type of aid was distinguished from secular subject textbooks, whose "content is ascertainable, but a teacher's handling of a subject

between government and religious authorities (continuing state surveillance to insure that teachers "segregate their religious belief from their secular educational responsibilities").[46]

Since *Lemon*, all disputes involving establishment clause challenges have been evaluated under the three-tiered test of purpose, effect, and excessive entanglement. Each of the three tests must be satisfied in order for the challenged conduct to survive a constitutional attack. *Florey* presented the federal courts a further opportunity to probe the limits of the establishment clause in public education.

III. THE FACTS OF *FLOREY*

During the 1977 Christmas season, the Sioux Falls School District received a complaint from a student's parents stating that Christmas programs performed by two kindergarten classes in the district were "replete with religious content."[47] In response the Superintendent of Schools "set up a citizen's committee to study the issue of church and state in relationship to school district functions."[48] The committee formulated a policy statement and rules concerning the celebration of religious holidays which were approved by the school board in December, 1978.[49]

The policy adopted by the school board clearly stated that "no

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is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education." *Id.* at 617.

46. *Id.* at 619-20.
47. Florey v. Sioux Falls School Dist., 464 F. Supp. 911, 912 (D.S.D. 1979).
48. *Id.* at 913.
49. *Id.* The complete text of the challenged rules were:
    1. The several holidays throughout the year which have a religious and a secular basis may be observed in the public schools.
    2. The historical and contemporary values and the origin of religious holidays may be explained in an unbiased and objective manner without sectarian indoctrination.
    3. 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.
    4. The use of religious symbols such as a cross, menorah, crescent, Star of David, creche, symbols of Native American religions or other symbols that are a part of a religious holiday 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. Among these holidays are included Christmas, Easter, Passover, Hannukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving and Halloween.
    5. The school district's calendar should be prepared so as to minimize conflicts with religious holidays of all faiths.

    Id. at 918.

religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged."[50] The purpose of the rules was the advancement of the "students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization."[51] The most controversial rules permitted the celebration of holidays with both a secular and religious basis by the objective presentation of music, art, literature, and drama having religious themes, and the display of religious symbols on a temporary basis.[52] Dissatisfied with the results of the committee's deliberations, the original complainant and others filed suit in federal district court on November 30, 1978, for declaratory and injunctive relief.[53] The plaintiffs alleged that the policy and rules formulated by the citizens' committee and adopted by the school board violated the establishment clause of the first amendment of the United States Constitution. The court denied a motion for a preliminary injunction and the trial did not take place until after the Christmas season, during which the new policy and rules were applied by the school district.[54]

IV. THE DISTRICT COURT OPINION

The district court evaluated the rules concerning the presentation of music, art, literature, and drama (rule 3), and the use of religious symbols (rule 4), under the established three-tiered test. The court observed that since the rule stating which holidays may be celebrated in school (rule 1) "appears to distinguish between holidays with a purely religious significance, . . . and those holidays . . . with both a religious and secular basis, . . . [p]laintiff's argument that Rule 1 is unconstitutionally overbroad need not be considered."[55]

Regarding the purpose of rule 3, the court asserted that even though some Christmas hymns do have religious origins, the school board's purpose for including them in school-sponsored programs is not necessarily to advance religion.[56] The court noted that:

> much of our artistic tradition has a religious origin. . . . [but] has acquired a significance which is no longer confined to the religious sphere of

50. *Id.*
51. *Id.*
52. *See* note 49 *supra.*
53. 464 F. Supp. at 911.
54. *Id.* at 913-14.
55. *Id.* at 915.
56. *Id.* at 916. The Court cited supporting dicta for this from a concurring opinion in McCollum v. Board of Educ., 333 U.S. 203 (1948), in which Justice Jackson noted the educational value of sacred music.

> life. It has become integrated into our national culture and heritage. To allow students *only* to study and *not* to perform such works when they have developed an independent secular and artistic significance would give students a truncated view of our culture.[57]

The court also found that "[t]he purpose of the policy and rules is to expose and involve the student in the full spectrum of our Western musical tradition. Music is selected for its inherent musical value. Performance is an intrinsic part of a musical education."[58]

Concerning the "effect" of singing Christmas hymns in the public schools, the court noted that since "Christmas music with religious content has been assimilated into our culture, . . . the performance of Christmas music with religious content does not constitute a religious activity *per se*."[59] The court pointed out that even though particular students may have religious experiences during the presentation of Christmas hymns sung at school programs, rule 3 does not necessarily fail the effect test since "if materials with religious content were presented to these same individuals in the classroom in a totally secular manner, they would still attach a similar religious meaning to them."[60]

The court evaluated rules 3 and 4 together under the excessive entanglement test, using the same three factors considered in *Lemon*.[61] Relative to the nature of the aid and the institution benefited, the court indicated that:

> It is highly speculative to assert that benefit will accrue to any religious institution or religion through the policy and rules adopted by the Sioux Falls Board of Education and the programs presented in conformance with those rules.
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> . . . [T]his Court cannot find that the school system provides any aid to religion or to any religious institution through its policy and rules. Any aid which the school system provides to religion through the implementation of its policy and rules could also easily be provided by objective study of religion and religious art in the classroom.[62]

The court also found that "the policy, rules and implementation thereof do not result in *any* particular relationship between the school and any religious authority."[63] As a result, the court could find no excessive entanglement between the Sioux Falls School District and religion.

The court also held that rule 4, concerning the use of religious symbols, did not violate the establishment clause: The purpose of the rule is educational because the religious symbols could only be

57. 464 F. Supp. at 915-16 (emphasis in the original).
58. *Id.* at 916.
59. *Id.* (emphasis in the original).
60. *Id.*
61. *See* notes 44-46 & accompanying text *supra*.
62. 464 F. Supp. at 917.
63. *Id.* at 918 (emphasis in the original).

displayed temporarily "to show examples of the religious and cultural heritage of the holiday."[64] The effect of the rule would not be to promote religion as long as the policies are carried out properly, and to hold the rule unconstitutional *ipso facto* would "have the effect of demonstrating a hostility towards religion."[65]

V. CIRCUIT COURT OPINION

The Eighth Circuit Court of Appeals affirmed the district court decision by a two-to-one majority.[66] The court analyzed the claims of the appellants within the framework of the three-tiered establishment clause test in great detail. The circuit court also found that the rule permitting the observance of "religious" holidays does not have a religious purpose since it "limits observation of holidays to those that have both a religious *and* a secular basis."[67] The court contrasted the use of music, art, literature, drama and religious symbols with the use of prayers and Bible reading in the schools. It noted that the activities would be permitted under the School District rules only if " 'presented in a prudent and objective manner and as a traditional part of the particular holiday'. . . . as 'a teaching aid or resource,' "[68] whereas prayer is "by its very nature . . . a religious exercise."[69] The court also found that the rules do not have the "effect" of advancing or inhibiting religion. It believed that the effect of the rules was educational rather than religious.[70] Furthermore, the appellate court specifically approved the district court's finding that "much of the art, literature and music associated with traditional holidays, particularly Christmas, has 'acquired a significance which is no longer confined to the religious sphere of life.' "[71] Thus, although the rules might have some religious effect, the majority felt that the "*principal* or *primary* effect" would be secular.[72]

The circuit court felt that the excessive entanglement prong had very little application to the facts of *Florey*. It noted that "the Supreme Court cases cited by the appellants in support of the 'entanglement' test deal with governmental aid to sectarian institutions, not with the permissible scope of activity in the public schools."[73] According to the court, the difference between those

64. *Id.* at 916.
65. *Id.* at 917.
66. Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980).
67. *Id.* at 1314 (emphasis in the original).
68. *Id.*
69. *Id.*
70. *Id.* at 1316.
71. *Id.*
72. *Id.* at 1317 (emphasis in original).
73. *Id.* at 1318.

cases and this case, is "a situation in which the state is involving itself with a concededly religious activity or institution . . . [and one in which] the school district is called upon to determine whether a given activity is religious."[74] The court concluded that the rules did not entangle the schools in religion, but "provide the means to ensure that the district steers clear of religious exercises."[75]

VI. ANALYSIS

Although Sioux Falls School District's rules regarding the celebration of religious holidays were held to be constitutional, both courts recognized that the issues involved in the case were difficult to resolve.[76] Furthermore, the appellate court limited its decision "to the constitutionality of the rules on their face."[77] Thus, it is likely that holiday celebrations in public schools will remain a highly controversial subject resulting in further litigation. Despite the difficulties and uncertainties which linger after *Florey*, an analysis of the case provides a sharper focus on the competing interests and values advocated by both sides in the controversy.

A. Purpose Test

As previously noted, the purpose test requires that each rule have a secular purpose. This standard is leniently applied because "if a purpose were to be classified as non-secular simply because it coincided with the beliefs of one religion or took its origin from another, virtually nothing that government does would be acceptable."[78] Thus, "the Court will usually find in the statutory language or elsewhere a secular purpose for a challenged law, and will then move on to consideration of the remaining two criteria."[79] Thus, the district court and the circuit court in *Florey* both referred to the rules' language in discussing the secular purpose of education

74. *Id.*
75. *Id.* The court also held that the rules did not violate the free exercise clause. This issue was not addressed in the trial or in the district court opinion. *Id.* at 1318 n.7.
76. The district court noted that *Florey* was "an extremely close question of law." 464 F. Supp. at 914. The Circuit Court of Appeals recognized
> that this opinion affirming the district court will not resolve for all times, places or circumstances the question of when Christmas carols, or other music or drama having religious themes, can be sung or performed by students in elementary and secondary schools without offending the First Amendment.

619 F.2d at 1319.
77. 619 F.2d at 1313.
78. L. TRIBE, *supra* note 24, at 835.
79. *Id.* at 836.

which they found to underlie the rules.[80] The circuit court dismissed the appellants' argument that the legislative history of rule 1 revealed that its purpose was contrary to the requirements of the purpose test.[81] Although the school board's rejection of an amendment which would have allowed only the observance of the secular aspects of holidays does seem suspicious, the court was probably correct in disregarding this fact without more evidence that the rules were intended to promote religion, especially in light of the school board's statement of policy that the purpose of the rules was "to advance the students' knowledge and appreciation of the role that our religious heritage has played . . . ."[82] However, the dissent viewed "the school board's rejection of the proposed 'secular aspects only' amendment as indicative of a purpose to permit more than the study (including performance when appropriate) of religion, subjects with religious content or significance and religious traditions."[83] The dissenting judge also stated that "[t]o the extent the policy and rules focus only on religious holidays, I would find the policy and rules unconstitutionally operate as a preference of religion."[84]

If it is true, as the school board claims, that the rules were not enacted for religious purposes, but were "intended to insure that only holidays with secular purposes be observed in the public school,"[85] then it might be asked what the board defined as a secular basis.[86] It is questionable whether some of the holidays allowed to be observed, such as Hanukah and Passover, have both religious and secular bases.[87] Without a secular basis, it is doubt-

80. 464 F. Supp. at 915-16; 619 F.2d at 1314.

81. 619 F.2d at 1315. The appellants noted that during the initial drafting of the rules a committee member requested that rule 1 include the following language: "Such observances shall be limited to the secular aspects of the holidays." Brief for Appellants at 5, Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980). Since the committee rejected this proposal, the appellants argued that the purpose of "its enactment was motivated by religious considerations" and thus violates the purpose test. *Id.* at 26.

82. 464 F. Supp. at 918.

83. 619 F.2d at 1323 (McMillian, J., dissenting).

84. *Id.* at 1324.

85. Brief for Appellees at 14, Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir. 1980).

86. The dissenting judge also asked this question and then noted that: "Secular basis presumably refers to something other than religiously neutral symbols (i.e. snowmen and jingle bells instead of Nativity scenes and the Star of Bethlehem), association with majoritarian (Christian) cultural traditions, commercialization, or observance contemporaneous with Christian religious holidays." Florey v. Sioux Falls School Dist., 619 F.2d at 1325 (McMillian, J., dissenting).

87. In an attempt to achieve a means of balance, some schools schedule Hanukkah music and celebrations together with their Christmas programs, and have declared participation in either or both programs

ful under *Schempp* that the school should be sponsoring programs to promote their observance because such observation would come perilously close to a religious activity. Similarly, the observation of the religious portion of holidays with both secular and religious bases, such as Christmas and Easter, would offend the *Schempp* standard if the program is intended to promote a religious dogma. Whether school activities observing Hanukah or Christmas should be characterized as religious or educational depends at least to some extent on whether they are meant to achieve educational goals.

The dissent did not "understand how the *observance* of religious holidays promotes these secular goals,"[88] since the holidays observed are those with which a majority of the students already have a religious affiliation. He argued that "observance of the holidays of religions less familiar to most American public school children than either Christian or Jewish holidays would seem more likely to increase student knowledge and promote religious tolerance."[89]

At first blush, the propriety of using religious symbols seems to fit neatly within the *Schempp* dicta which allows objective education about religion in the classroom. The restriction of the symbols to temporary display during the relevant holiday season seems to support the school board's contention that the purpose of their display is not religious but, instead, an effort to "objectively . . . explain the meaning imparted to a religious symbol by the relevant sect."[90] However, one might question how realistic such a purpose is when implemented in a classroom of kindergarteners who arguably have a difficult time distinguishing between a religious feel-

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voluntary. This solution ignores the basic problem—the unconstitutionality of any religious activity in the school—and further overlooks the rights of nonreligious children to be free from the pressures of voluntary participation.

Note, N.Y.U. L. REV. *supra* note 6, at 1126. *See also* A. STOKES & L. PFEFFER, *supra* note 3, at 383; L. PFEFFER, *supra* note 8, at 493-96. Pfeffer noted that "[f]or a while the joint holiday observance proposal was popular among Jewish organizations. More recently, however, practically all the major Jewish organizations have changed their views and today oppose such programs." *Id.* at 494.

88. 619 F.2d at 1324 (McMillian, J., dissenting) (emphasis in original).

89. *Id.* at 1324. *But see* note 115 & accompanying text *infra*. The dissent in *Florey* also noted that

> [t]he school district can advance student knowledge and tolerance of religious diversity as effectively by *non* religious means, that is, through the study of comparative religions or as part of the history or social studies curriculum. In any case, the observance of religious holidays as a means of accomplishing the secular goals of knowledge and tolerance clearly discriminates against non-belief.

619 F.2d at 1324 (McMillian, J., dissenting) (emphasis in original).

90. Brief for Appellees at 32.

ing and the secular meaning of the symbols.[91] The appellants argued that the "defendants know a student who sits next to a creche for three days during the Christmas season is likely to be affected by the sacred message inherent in that symbol."[92] The difficulty of proving such an assertion of motive is one of the reasons why governmental actions will, as noted, usually pass the purpose test as long as they have "some" secular purpose.

B. Effect Test

The effect test requires that "if the essential *effect* of the government's action is to influence—either positively or negatively—the pursuit of a religious tradition or the expression of a religious belief, it should be struck down as violative . . . of the establishment clause if positive."[93] The Supreme Court has been particularly sensitive to religious effect in schools,[94] both public and parochial. In relation to public schools the Court has eliminated prayers,[95] Bible reading,[96] and religious classes on the school premises.[97] Similarly, the Court has refused to uphold programs which provide government aid to parochial schools which might result in additional religious instruction.[98] Thus schools are seen "as laboratories for the shaping of values."[99]

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91. "The identification of the public schools with these religiously oriented mottoes, constantly in view of immature students with malleable minds and highest regard for the public school institution is likely to result in influencing or compromising their religious beliefs." Choper, *supra* note 8, at 409. In contrast, the symbols in *Florey* would not be "constantly in view" but only temporarily during the relevant holiday.
92. Brief for Appellants at 50.
93. L. TRIBE, *supra* note 24, at 839.
94. Given these principal cases [*McCollum, Engel,* and *Schempp*], it is interesting to note that the Supreme Court has frequently expressed the view that the establishment clause is *not* offended by opening prayers in Congress, by inclusion of such mottos as "In God We Trust" on United States coins or by the persistence of the ceremony opening the Supreme Court's sessions with a phrase 'which invokes the grace of God.' . . . This may reflect the judgement that, because of their central and delicate role in American life, public schools must be insulated from religious ceremony under the aegis of the establishment clause even where no coercion can be shown, whereas in other public forums free exercise values permit some accomodation of religious beliefs through brief, voluntary ceremonies.

Id. at 841 n.9.
95. School Dist. of Abington v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).
96. School Dist. of Abington v. Schempp, 374 U.S. 203 (1963).
97. McCollum v. Board of Educ., 333 U.S. 203 (1948).
98. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Board of Educ. v. Allen, 392 U.S. 236 (1968).
99. L. TRIBE, *supra* note 24, at 844.

1. Traditional versus Untraditional Christmas Hymns

The singing of Christmas carols with a religious message seems to have been the "primary focal point of appellant's objections to the rules."[100] The district court's decision that the effect of rule 3 is primarily secular was based in part on its assumption that the songs performed at school assemblies would be works which had "developed an independant secular and artistic significance"[101] apart from their religious origin. This assumption was undermined by the appellants' revelation that much of the music presented by the kindergarten students was arguably not secular at all. They noted that many of the hymns sung in the program were not ones which could be considered secularized[102] and that their presence in the program is an indication that the singing of hymns in the schools is actually a religious activity. They argued that Christmas hymns are nothing more than prayers set to music and that when "they are presented in schools, they will have the effect that they were originally designed to have—a religious effect—unless they are presented objectively as part of a secular program of education."[103]

The circuit court did not respond specifically to this argument. It did indicate that the material allowed under the rules, "although of religious origin, has taken on an independent meaning,"[104] and that "the study of religion is not forbidden."[105] The court also noted that "public performances may be a legitimate part of secular study,"[106] and that "study" is not the same thing as "observation."[107] While it did not explain the presence of songs in the previous year's program which were not popular or traditional Christmas hymns, it is likely that the court considered the hymns to be educationally relevant to an understanding of Christmas, and

100. Florey v. Sioux Falls School Dist., 619 F.2d at 1316 n.5.
101. 464 F. Supp. at 916.
102. Reply Brief for Appellants at 7. Some of the songs which arguably have not "developed an independent secular and artistic significance" and have not been widely "assimilated into our culture" are "So My Sheep May Safely Graze," "Come Shepherds, Leave Your Flocks," "Angel Band," "The Baby Boy," "What Shall We Name Him," "Winds Through the Olive Tree," "Follow His Star," "Simple Birth" and many others. Appellants also argued that "those hymns which might be characterized as having 'wide esposure' ('Silent Night,' 'O, Come All Ye Faithful,' 'Joy to the World') were performed a total of six times. In contrast, 'So My Sheep May Safely Graze' was itself performed five times, and the other hymns listed above were performed twenty-two times." *Id.* at 8.
103. Brief for Appellants at 35.
104. 619 F.2d at 1316.
105. *Id.*
106. *Id.*
107. *Id.*

that their primary effect was therefore secular.[108]

This distinction between "traditional" and "untraditional" Christmas hymns highlights the difficulty of this controversy. It is difficult to articulate a reason why a song like "Silent Night" should be allowed, while a less popular song with the same message like "Come Shepherds Leave Your Flocks" should not. Although "Silent Night" might be more universal, it does not follow that it will have any less of a religious effect on a student of tender years than a more obscure song. Furthermore, making the choice between appropriate and inappropriate hymns could contribute toward the type of religious strife the establishment clause was intended to eliminate.[109]

2. Singing in the Classroom versus Singing in Assemblies

Although the appellants were opposed to the singing of religious hymns in school assemblies, they maintained that such songs could still be sung in the classroom for educational purposes.[110] This distinction is troublesome since the effect on the students could easily be the same whether the songs were performed for the teacher in the classroom or for the parents in the school auditorium. Additionally, it undermines the analogy between prayers and religious hymns: Prayers may not be said in the classroom even if they are nondenominational or read directly from the Bible. However, a prayer could conceivably be read and studied as part of a comparative religions course without a significant religious effect. On the other hand, a religious hymn sung in the classroom during a holiday season might have a greater religious effect on a child than would a single reading of a prayer from a textbook.[111] In addition, classroom hymns would be more likely to be sung repetitiously and thus committed to memory. Thus, the district court's opinion that if "[m]aterials with religious content were presented . . . in the classroom in a totally secular manner"[112] they would have the same religious meaning to the students as when presented in school-sponsored assembly is very persuasive.

The school board argued that the singing of holiday hymns is justified in both the classroom and at assemblies because performance in front of others is a part of one's education. However, the

108. *See id.* at 1317-18.
109. *See* note 129 & accompanying text *infra*.
110. Brief for Appellants at 29-30.
111. The position of the appellants—that singing Christmas hymns in the classroom is constitutional whereas singing the same hymns in a school assembly should be unconstitutional—is supported by several commentators. *See, e.g.*, Choper, *supra* note 8, at 413; Pfeffer, *supra* note 8, at 750.
112. 464 F. Supp. at 916.

line between education and religious indoctrination becomes very blurred when the religious songs are performed by elementary school students in observance of a holiday.

3. *The Age of the Children*

If the primary effect is educational, the establishment clause does not prohibit the public schools from teaching about religion through "religious hymns." However, these courts did not consider that the children in *Florey* were young, impressionable and, perhaps, unable to distinguish between religious teachings and secular education, especially during "religious" holidays. For such children, the *primary* effect may be the same lesson taught in Sunday School or something radically different from what is learned in the synagogue.[113] If so, singing "religious" hymns in public schools may not be a proper method of teaching about religious holidays because of the potentially significant religious effect on

113. As previously noted, the Supreme Court has interpreted the establishment clause quite literally in situations involving education, whereas in other factual settings it has been less protective. *See* note 94 *supra*. It is arguable that elementary education is especially delicate and that the court should be vigilant in rigidly applying the establishment clause to cases involving children in their first few years of public education. A different approach was articulated by the dissent in DeSpain v. DeKalb County Community School Dist., 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968). *DeSpain* involved an establishment clause challenge to a verse which was being recited by kindergarten students in Illinois before their morning snack: "We thank you for the flowers so sweet; We thank you for the food we eat; We thank you for the birds that sing; We thank you for everything." 384 F.2d at 837. The majority held that despite the school's claim that the verse was intended to create good citizenship and thankfulness, it was a prayer and held it to be unconstitutional. The court recognized that the "verse was as innocuous as could be insofar as constituting an imposition of religious tenants upon nonbelievers . . . [but that] it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment." *Id.* at 840 (quoting in part School Dist. of Abington v. Schempp, 374 U.S. at 225). However, the dissenting judge argued that:

> the verse which remained to be recited by the pupils, . . . undoubtedly reflects in their young minds the pleasant prospect of eating . . . [and is] a vocal expression of their gratitude. . . . [T]his court has no right to take on a burden . . . of establishing that a benefactor, to whom each child feels he is speaking, is a deity.
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> . . . .
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> . . . [W]e are asked as a court to prohibit, not only what these children are saying, but also what plaintiffs *think* the children are *thinking*. Certainly thought is a matter varying with each child, be he Christian, Jew, atheist or agnostic. One who seeks to convert a child's supposed thought into a violation of the constitution of the United States is placing a meaning on that historic doctrine which would have surprised the founding fathers.

384 F.2d at 841 (Schnackenberg, J., dissenting) (emphasis in original).

children.[114] Banning such songs would advance the Jeffersonian value of protecting individuals from subtle religious indoctrination by the state. Furthermore, even if participation in the holiday observations is voluntary, forcing a child to decline participation in programs containing material inimical to his family's religious beliefs may have a detrimental effect on his educational advancement.[115]

One might ask what the impact would be if religious holiday celebrations and Christmas hymns were banned from both the classroom and the school-sponsored assembly. Would the damage to the child's education be greater or less than the potentially detrimental effect of shaping the child's religious values, or the detrimental impact on children who decline to participate because of their parents' religious beliefs?[116] The younger a child is, the more reasonable it seems that education through singing Christmas hymns in public schools could be postponed to a time when a child is able to more fully appreciate the difference between the religious and secular significance of songs.

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114. The determination of whether there is a primary religious effect is not simply a balancing test to determine if the secular effect is greater than the religious effect. The Supreme Court has indicated what the proper application of the "primary effect" test is:

> Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. . . . Sunday closing laws were upheld, not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead, approval flowed from the finding, based upon a close examination of the history of such laws, *that they had only a remote and incidental effect advantageous to religious institutions.*

Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973) (emphasis added). Although holiday programs may have the primary effect of advancing education, their advance of religious devotion may be much more than remote and incidental.

115. *See* Note, N.Y.U. L. REV. *supra* note 6, at 1125.

116. An example of this type of detrimental impact was related by Seymour Graubard to the committee which considered one of the many proposed prayer amendments in Congress. He testified that

> my wife who went to public school . . . has told me of how in her elementary schools she was one of two Jewish children in her class, of how it was generally the case that Christmas would be a time of religious ceremony in the class. She felt out of sorts, out of place, and felt separated from the rest of her students by the need that she felt of not participating in an out-and-out religious ceremony.

W. DOUGLAS, *supra* note 8, at 12. *See also* Choper, *supra* note 8, at 412; Note, N.Y.U. L. REV. *supra* note 6, at 1125; note 114 *supra.*

4. Alternatives

Even if the singing of religious hymns in the public schools does have an important educational effect, in close cases where there is also a potentially significant religious effect, a public school should be required to minimize the religious impact. In his dissenting opinion, Judge McMillian pointed out that:

> Viewed in context, I do not think Christmas assemblies can accurately be described as merely art festivals or choral concerts. These assemblies contain material that is unmistakably Christmas-oriented and are held only during the Christmas season, not in October and April. . . . Christmas carols presented as a *music form* could be performed at any time during the school year, not just at Christmas.[117]

If the educational benefits of singing Christmas hymns are significant enough to warrant retaining them despite the potential religious effects, school boards would be prudent to program these "educational" assemblies in April or October. If there is something compelling about having the assemblies during the holiday season itself, the argument that the assemblies are actually observances intended to celebrate and have a religious effect becomes more persuasive. Certainly the educational goals of the holiday programs could be achieved at anytime during the year. Holding them "off season" would arguably be less likely to produce a primary religious effect. Instead of singing songs during the celebration of a holiday season, students would be taught about a particular holiday or even about all religious holidays in one unit. Such a practice would not preclude the celebration of the purely secular aspects of each holiday at the time of its normal observance, *i.e.*, Santa Claus in December and the Easter Bunny in April.

Although this would probably not be a significant change for those children who would fully participate anyway, it could have an impact on those students who in the past have felt compelled to decline participation. If all religious hymns were sung in one unit, it is less likely that any one student—whether Jewish, Christian, atheist or agnostic—would feel alienated. Even if he did not participate in all of the songs, he would most likely participate in some of them. If a student felt that he could not participate in any of the songs, his alienation would be limited to the unit on religious hymns and would not extend throughout the year to every celebration allowed under the rules. In addition, it is also less likely that the school would be seen as advocating a particular religious belief in the eyes of the children.

117. Florey v. Sioux Falls School Dist., 619 F.2d at 1327 (McMillian, J., dissenting) (emphasis in original).

5. Religious Symbols

The propriety of rule 4, which allowed the display of religious symbols, also depends on one's notion of whether their effect would be primarily religious or educational.[118] Both the age of the children and the time allowed for their display are crucial factors. Since the rule does not require both a religious and secular element to the symbols, the possibility for a religious effect may be just as great with symbols as it is with the songs. On the other hand, the viewing of a symbol may be a less emotional experience than the singing of a song, especially for young children. The fact that the symbols do not become permanent fixtures in the classroom also seems to strengthen the school board's argument that their effect is primarily educational. Again, when there is a potential for a significant religious effect on children it is arguably preferable to minimize this effect by displaying the symbols at a time other than the applicable holiday. It is doubtful that any educational benefit would be lost by so doing.

As with all the rules, the propriety of displaying religious symbols in the classroom will depend on the proper implementation of the rules. Since supervision of some sort is presumably necessary to insure that the rules are carried out the danger of excessive entanglement is raised.

C. Excessive Entanglement Test

"Some members of the [Supreme] Court have criticized the anti-entanglement requirement as a superfluous statement of the secular effect rule, which requires an examination of much the

118. Although there is some case law holding that the placement of religious symbols on public property is unconstitutional, *see, e.g.*, Lowe v. City of Eugene, 254 Or. 518, 451 P.2d 117 (1969), *cert. denied*, 397 U.S. 1042 (1970), many courts have allowed the permanent display of crosses and other religious monuments. Decisions allowing the display of religious symbols are cited in Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976), in which the court held that the display of a cross on public property as a war memorial did not violate the establishment clause. *See* Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973); Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973); Paul v. Dade County, 202 So. 2d 833 (Fla. Dist. Ct. App.), *cert. denied*, 207 So. 2d 690 (Fla. 1967), *cert. denied*, 390 U.S. 1041 (1968); Singlemann v. Morrison, 57 So. 2d 238 (La. Ct. App.), *cert. denied*, 57 So. 2d 238 (La. 1952); Opinions of the Justices, 108 N.H. 97, 228 A.2d 161 (1967); Lawrence v. Buchmueller, 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup. Ct. Westchester County 1963); Baer v. Komorgan, 14 Misc. 2d 1015, 181 N.Y.S. 2d 230 (Sup. Ct. Westchester County 1958); Meyer v. Oklahoma City, 496 P.2d 789 (Okla.), *cert. denied*, 409 U.S. 980 (1972). *Lawrence, Baer* and *Opinions of the Justices* involve religious symbols placed in public schools. This issue has never been resolved by the United States Supreme Court. *Florey* is different from all of these cases in that the religious symbols in question are only temporarily placed in the classroom.

same body of facts through a different lens."[119] It seems to involve the "Madisonian concern that secular and religious authorities not interfere excessively with one another's respective spheres of choice and influence, lest both government and religion be corrupted."[120] The Supreme Court has argued that excessive government involvement with religion should be avoided because of the " 'potential for political divisiveness related to religious belief and practice.' "[121] One commentator has suggested that the value protected by eliminating divisiveness which might result from entanglement is a "fundamental personal right not to be a part of a community whose official organs endorse religious views that might be fundamentally inimical to one's deepest beliefs."[122]

In its opinion, the majority cast doubt on the applicability of this test in *Florey*, since it normally has been applied in situations involving state aid to parochial schools.[123] Even so, the facts of

119. L. TRIBE, *supra* note 24, at 865 (footnotes omitted). *But see* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1684 (1969); Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 1, 172-73 (1971).

120. L. TRIBE, *supra* note 24, at 865. In *Lemon*, the Court held that "we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion clauses." Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).

121. L. TRIBE, *supra* note 24, at 868. The D.C. Circuit Court of Appeals noted that

> *Lemon* also recognized a second branch of the entanglement test, the possibility that such Governmental action will result in intensified '[p]olitical fragmentation and divisiveness on religious lines' because of 'the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.' . . . The entanglement test is thus concerned with both administrative and political ramifications of Government involvement, and is geared to minimize interference, monitoring, and any divisive impact among the people.

Allen v. Morton, 495 F.2d 65, 74 (D.C. Cir. 1973) (citation omitted). In addition Justice Douglas has noted that "[t]he First Amendment . . . [was] designed to keep religion from being a devisive force . . . . Separation of Church and State is necessary for a pluralistic society." W. DOUGLAS, *supra* note 8, at 49, 51-52.

122. L. TRIBE, *supra* note 24, at 869.

123. 619 F.2d at 1318. The language in *Lemon* might have left some doubt as to whether the excessive entanglement clause is only applicable to religious institution cases or to all establishment clause challenges. The Court simply stated that "[e]very analysis *in this* area must begin with consideration of the cumulative criteria developed by the Court over many years [the three-prong test]." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis added). In fact, the excessive entanglement test has been applied most rigorously in situations involving the states financial support of church-related schools. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 413 U.S. 672 (1971). *Nyquist* and *Sloan* involved state attempts to reimburse parents for a portion of the tuition paid to educate their children in non-public schools. Both programs were invalidated for advancing religion since the payments—made directly to the parents—bene-

Florey demonstrate the applicability of this third test to nonparochial cases involving establishment clause challenges. Although it involves many of the same inquiries of the "effect" test, it seems to focus on the potential problems which may arise when agents of the state must determine what does and does not constitute a "religious activity".[124]

Even though there is no church school in *Florey*, the public school is involved in celebrating both religious and secular aspects of holidays.[125] The dissent found not only that the test was applicable, but also that it rendered the rules unconstitutional. Judge McMillian noted that "the rules call upon the school district to determine whether a given activity is religious."[126] As such, " '[t]he secular public school system could become the focal point for the competition of all religious beliefs [and non-belief].' "[127] When only secular subjects are taught in the public schools there is little

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fited non-public schools by making them more attractive to parents. In addition, the State was unable to guarantee that the aid would only benefit secular functions. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 14, at 855. In *Meeks*, the Supreme Court invalidated a program which involved loaning textbooks, secular instructional material and the services of public school employees to non-public schools. Although the materials were "self-policing", the Court found an impermissible degree of aid to religion. Such aid made the entire religious operation more viable. *Id.* at 856. In *Tilton*, the Supreme Court invalidated part of a federal statute which allowed buildings constructed at government expense to be used for religious purposes twenty years after construction because this was seen as having "the effect of advancing religion." Tilton v. Richardson, 413 U.S. at 683. However, the excessive entanglement clause must be applied in all establishment clause challenges. The Court has made clear that "to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973).

124. In Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973), the court noted that a case challenging (on establishment clause grounds) the government's participation in a Christmas Pageant of Peace and its maintenance of a creche pursuant thereto, "does not fit well in the pigeonholes of past decisions" relative to the excessive entanglement test. "The test . . . emanates from the principle that Government involvement with religion should be kept to a necessary minimum, and that there should be avoided not only the actual interference but also the potential for and appearance of interference with religion." *Id.* at 75.

125. The court in *Allen* noted that in a first amendment challenge, the court must consider "variables such as the degree of sectarianism in the institution *or event with which the Government is involved*, the extent of the Government's involvement, and the controls placed thereon." *Id.* at 72 (citation omitted) (emphasis added).

126. Florey v. Sioux Falls School Dist., 619 F.2d at 1327 (McMillian, J., dissenting).

127. *Id.* at 1327 (citing Meltzer v. Board of Educ., 577 F.2d 311, 319 (5th Cir. 1978) (Brown, C.J., dissenting)) (brackets in the original).

danger that a teacher will openly teach theology. However, in *Florey* and other situations involving the observances of religious holidays, there is a real possibility—even in the public schools—that teachers will either knowingly or unknowingly advance their religious beliefs.[128] It is often difficult for "believers" to separate their faith from their other beliefs. Thus, the state finds itself in *Florey* and similar situations with the responsibility to survey the teachers to insure that they "segregate their religious belief from their secular education responsibility."[129]

However, the greater potential problem with allowing holiday observances in a community made up of diverse persuasions is that the presence of the programs could precipitate a disrupting debate over what is or is not primarily religious, secular, or both. There are, in fact, case histories of communities in which there have been controversies over this issue even before the Supreme Court's prayer decisions.[130] It is not unlikely that as society becomes more diverse such controversies will proliferate and a decision like *Florey*, decided on the "facts", might have a different result.

128. Justice Douglas pointed out in his concurring opinion in *Lemon* that "[w]e deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class." Lemon v. Kurtzman, 403 U.S. 602, 635 (1971) (Douglas, J., concurring). Although Douglas' comments concerned teachers (some of whom were nuns) in a church operated school teaching secular subjects, a teacher in a public school might be just as zealous while instructing children on the meaning of Christmas.

129. Lemon v. Kurtzman, 403 U.S. at 619. This is stretching the analysis of *Lemon* from a situation in which the state would have to insure that teachers in religious schools did not use state funds to teach religious tenets to one in which the state must insure that its own teachers do not force their own or community religious beliefs on their students. Although this is admittedly a "giant leap," the presence of religious music and symbols in the classroom and the performance of religious hymns in school assemblies could, in foreseeable circumstances, have exactly the same impact on a child as education in a church-sponsored school. The statute involved in *Lemon* was in fact similar to that in *Florey*: that the courses which would receive state aid "shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." 403 U.S. at 637. (Douglas, J., concurring). Justice Douglas noted that "[t]he subtleties involved in applying this standard are obvious. It places the State astride a sectarian school and gives it power to dictate what is or is not secular, what is or is not religious." *Id.* It is arguable that the application of the standard in *Florey* ("music . . . having religious themes or basis are permitted as part of the curriculum . . . if presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday", 619 F.2d at 1316) is just as subtle.

130. *See* L. PFEFFER, *supra* note 8. Pfeffer recounts the controversies experienced in New York, Massachusetts and New Jersey over the content of Christmas programs in the schools in the late 1940s.

VII. CONCLUSION

Florey demonstrates the continuing struggle to define the proper relationship between church and state. Although the authors of the first amendment could not have foreseen the factual settings of the religion clause controversies which have arisen in the past two hundred years, they did recognize potential divisiveness and harm to both institutions resulting from too close an affiliation. This potential for conflict has become even more threatening due to increased pluralism in American society. While the elimination of Christmas hymns, traditional and untraditional, from the public schools would almost certainly fan the flames of public outcry kindled by the removal of prayer from secular institutions, such a result may ultimately be necessary to preserve the values protected by the first amendment, including the right to attend public school without being subjected to conflicting religious activities. As society grows, religious programs may encourage tension between Christians, Jews, atheists and other religious groups which today represent only a small minority of the population.[131] Hence, as communities diversify, it will become increasingly difficult to maintain that the use of Christian and Jewish hymns, literature and symbols in holiday programs do not have a religious purpose, primary effect or create an excessive entanglement with religion, particularly if a significant segment of the community objects to their use. Given the controversial nature of this dispute, it is not likely that the Supreme Court will examine this issue in the near future,[132] although *Florey* may invite further attacks on rules concerning school celebrations of religious holidays in other circuits.

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131. Justice Douglas pointed out after the prayer decisions that

> [i]n time Moslems will control some of our school boards. In time devout Moslems may want their prayers in our schools; and if Protestant sects can get their prayers past the barriers of the First Amendment, the same passage would be guaranteed for Moslems, as Islam is one of the great religions of the world.

W. DOUGLAS, *supra* note 8, at 45. Justice Douglas also noted the religious groups which have fought to keep prayer in the schools have changed depending on the century. *Id.* at 31. What is true for prayer is equally applicable to religious hymns in the schools.

132. Kurland has argued that the Court is sensitive to public opinion since its "power is totally dependent upon the esteem in which it is held by the public." Kurland, *supra* note 4, at 178. He also discusses examples of the courts yielding to public pressure in its decisions. *Id.* at 144-45.