1-1-1970

Comments

Jesse Choper
Berkeley Law

Kenneth L. Karst

It is impossible to state the magnitude of the Court's impact in very precise terms because the evidence itself is primarily post-decisional and because there are no yardsticks. Daily devotional practices very probably were widespread in Ohio schools prior to the decisions and such practices are reported as continuing by a large minority of Ohio teachers and principals. On the further assumption that any error in the incidence of these activities is on the side of underreporting rather than overreporting them, I would conclude that the Court's impact in Ohio as measured by pure compliance has not been great. Compliance is, of course, not the only measure of impact. It may be that formally unintended consequences or completely unintended consequences of decisions are as significant as those intended. It seems fair to say that in both Wisconsin and Ohio the decisions on devotional practices have produced some reevaluation of other practices, such as holiday observances.

The changes that have occurred, in very large part, have been changes in practices rather than changes in formal policy. In Ohio schools, where the potential impact of the decisions was high, the burden of the decision about classroom practices and the interpretation of the mood of the community apparently have been left in most cases to the classroom teacher. Given that pattern of decision making, there very probably will be a history of compliance following the school-prayer decisions similar to that for the released-time decisions. I would suppose that, as in the case of released time, a study of school prayer in Ohio 17 years after the decisions would show a noticeable level of non-compliance. I also would expect that level to be higher than for released-time because the decisions about religious practices apparently are being made by individual teachers rather than by school systems, as they are for released-time programs. Given the strong capacity for persistence that inheres in traditional forms of social behavior, there probably is an irreducible minimum of religious practices in the public schools. The social and political costs of achieving full compliance undoubtedly would far outweigh any benefits that might be supposed to accrue.

COMMENTS

JESSE CHOPER *

My brief comments fall under the heading of doctrinal, although perhaps impressionistic, generalizations drawn from the detailed reporting that has been presented this afternoon. These generalizations focus not on what is in fact happening in respect to the School Prayer decisions, but rather on what bearing the valuable and interesting information presented to us has on a central concern of constitutional lawyers—the role of the Supreme Court in our political system.

First, we should hesitate before generalizing too broadly from the record of compliance with the School Prayer decisions. The Court deals with a great variety of issues. The vast bulk arise in non-constitutional decisions. I would speculate with some confidence that, as a general matter, these deci-

* Professor of Law, University of California (Berkeley). Mr. Choper served as Chairman and Moderator of the special program devoted to an examination of the implementation of the School Prayer cases.

sions have a much more significant operative impact than do many of the constitutional decisions.

Decisions involving constitutional issues may be divided into two broad categories: (1) situations when the Court sustains exercises of governmental power; and (2) those in which—like the School Prayer cases—the Court invalidates exercises of governmental power. When the Court sustains (or "legitimatizes") exercises of governmental power, whether they be state or federal exertions of power, the impact of the judicial decision is quite substantial. The legislative enactment or the executive action or the administrative conduct is upheld; the political forces continue to go about the business that they have set out to do; and the Court's decision, if you will, is carried out quite effectively—although perhaps not cheerfully by all, a separate problem that I would like to refer to a bit later. Let us put aside, for the moment, that substantial segment of Supreme Court constitutional decision-making in which governmental power is upheld.

We come then to judicial invalidation of the product of the political processes. In this area, in which the School Prayer cases fall, we must be cautious in assuming that the public reaction to these cases is typical of the impact occasioned by other Supreme Court holdings of unconstitutionality. In most instances of invalidation of governmental power, the Court is taking a generally unpopular position in that it is usually representing a point of view that is held only by a minority of the people. After all, if the view were held by a majority, there would be some likelihood that we would have had legislative or executive action rendering unnecessary the Court's decision. In somewhat oversimplified terms, when the Court invalidates governmental action, the Court is saying: "No. What the people or their representatives have enacted or undertaken to do may not exist as standing law."

The School Prayer cases, however, may be somewhat peculiar and distinct for a combination of reasons. For example, public opinion polls immediately after the School Prayer decisions—and the information presented today by Hammond and Dolbeare and by Reich—clearly indicate that at the time of the decisions, and even five and six years afterward, their doctrine is still extremely widely opposed. The Court's verdict ran counter to deeply ingrained beliefs and practices that were held with especially forceful conviction by a large number of individuals.

Further, unlike the Court's criminal procedure cases, for example, the School Prayer decisions had a much more direct, personal and injurious impact on people's lives. It was "my son" and "my friend's daughter" that were not going to be able to say a prayer or have Bible reading take place at the beginning of their school day. Few of us in this room, in the city, in the country—no matter what we hear about the national crime problem—have been mugged. Few of us, I hope, have had our homes burglarized. And while most citizens become upset when reading of these things in the newspapers, the chain of circumstances between the Supreme Court's decision and personal impact is much different than in the school prayer matter.

The reapportionment decisions, I think, were very widely accepted because, although in a sense they upheld personal rights as against governmental action, they were of a very different genre. In those cases the Court determined that individual constitutional rights held by the majority of the cit-

izens of the country were being diluted so as to favor the minority. Although the decisions were opposed vociferously by certain political leaders, who had a vested interest in the status quo, they were greeted with approval because a majority of the people in the country were affected in a way that they thought beneficial.

In addition, in the school prayer area devices for self-regulation or self-enforcement of the Court's decisions are not terribly effective. The *Miranda* decision[1] provides an apt illustration. There has been some empiric research concerning its impact and much speculation, and there will continue to be. I have no knowledge as to how often the *Miranda* warnings are read to persons accused of crime, or how often policemen—as they are frequently accused of doing—may be less than candid in saying that they did read them. Unlike the school prayer area, these are matters of low visibility and the prevailing legal standard may be somewhat more hazy. But what I do know is that when a person, charged with a crime and faced with a prison sentence, feels his constitutional rights have been violated, he has every incentive to bring that issue before the courts. There is no comparable motivation in respect to school prayers.

The school prayer context is also distinguishable from the school segregation problem,[2] even though the latter did not involve criminal prosecutions. There, black children were specifically forbidden from attending school with white children. By contrast, in virtually all jurisdictions sponsoring or permitting school prayers and various public school religious practices, there were excusal provisions. Such provisions were part of the programs in all of the cases adjudicated by the Supreme Court, including the two released-time cases. Thus, the issue was not, "You must say that prayer." Rather, the issue was, "The prayer shall or may be held in the public school and we will—at least, we say we will—do everything we can to excuse you from the program and see to it that your sensibilities are not offended." The official prayer program did not have the same direct application to the individual as there was in the school segregation decisions, or in most other civil rights decisions. No person was being sent to jail or denied employment, as in the Communist cases. No Sabbatarian was being denied unemployment compensation because of particular religious beliefs, as in the *Sherbert* case.[3] Nonparticipating children were simply asked to step outside of the classroom, or in some way fashion their schedules to avoid the prayer or Bible reading exercises.

Finally—and this matter has been adverted to by several speakers—note must be taken of the tremendous social pressures deterring parents and children from initiating a change in the prayer policy at the local level after the Court's decisions were handed down, the embarrassing ostracism that would be imposed on those hardy enough to throw the entire school system into a litigative posture in an effort to eliminate these emotion-laden programs.

In many quarters, the school prayer matter was largely perceived as presenting a free-exercise issue. The doctrinal significance of this perception of the issue is the notion that, unless someone complains, there is no

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] E. g., Brown v. Board of Education, 347 U.S. 483 (1954).

[3] Sherbert v. Verner, 374 U.S. 398 (1963).

constitutional violation. In my view, the Court was correct, albeit somewhat misunderstood, when it grounded the prohibition against school prayers and Bible reading on the establishment clause, which meant that these practices were interdicted irrespective of whether anyone objects. This was the wiser course for the very reason mentioned—that there may well be many complainors in fact, but who are unwilling to come forward and seek excusal, much less to object to the prayer exercises in a vocal fashion; and they would be all the more reticent to engage in any form of litigation. This is especially true because a parent who seeks to eliminate school prayers is not merely asking, as is a criminal defendant, that his child be exempted from government sanction. He is asking that these school prayers be forbidden to everybody within the jurisdiction—a peculiar aspect of an establishment clause invalidation.

Two other matters deserve brief attention. They concern, in a somewhat more general fashion, the role of the Court, criticism of the Court, and the relevance to these topics of the information presented to us today.

Stress was placed in both papers on the fact that effective communication by the Court is an extremely significant element in determining what the impact of the Court's decision will be; while in the prayer decisions significant misconceptions existed concerning the scope of the Supreme Court's rulings. This situation poses a frequent dilemma that the Court faces when fashioning its opinions: How broadly—or how narrowly—should the Court present its ruling and rationale?

In deciding the *Regents' Prayer* case[4] in 1962, the Court chose to write very narrowly, giving very little indication as to the validity of other then-existing public school religious practices. The core of the opinion by Mr. Justice Black—and perhaps the limit of its rationale—was the statement that it is no part of the business of government to compose official prayers for people to recite as part of a government-sponsored program. In this fashion, quite plainly, the Court left the Bible-reading issue open. A year later, in the *Bible Reading* decisions,[5] the Court quite clearly left unresolved the whole practice of religious holiday observances in the public schools. Thus, it is no wonder that a great many such observances continue, given all of the pressures and incentives in their behalf—and the Court never speaking to the issue.

On the one hand, therefore, the Court opens itself to rebuke for not making clear the full thrust of its rulings. On the other hand, when the Court, early in its *Miranda* opinion, clearly set forth a series of "rules" to be followed during custodial interrogations, its critics charged the Court for engaging in legislation: "Why don't they just decide the case in front of them?" Thus the Court faces a dilemma.

Another aspect of this dilemma is the question of "craftsmanship." To what audience ought the Court address its opinion? Ought it to draft its opinion to satisfy the group of assembled scholars, attempting to explain the intricacies and the variations and consistencies or inconsistencies with precedent, in general, or even in the narrow area in which the case before it

[4] Engel v. Vitale, 370 U.S. 421 (1962).

[5] School District of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

arises? Or ought the Court to draft its opinion, knowing that it is going to be read—as I once heard a Supreme Court Justice mention—from the pulpits of every church in the country? Or, at least, by many parents and school board members or every school district counsel? No matter how intelligent church-goers or parents may be, a decision must be written substantially differently if its aim is to persuade these groups of people rather than if its purpose is to persuade legal scholars interested in doctrinal, analytic, and rational consistency.

My final observation—a rather fundamental one that I believe is widely and soundly held—is that public respect for the Court generally, and feelings of the Court's legitimacy as an institution, play a very considerable role in determining the impact of its decisions in the sense of the extent to which they will either be obeyed, evaded, or disregarded. This poses the question, in the specific context of today's discussion, how best may the Court insure that the School Prayer decisions, and others like them, will be carried out?

An important element of assurance would be for the Court to be cautious to conserve what has been called institutional credit, or institutional energy, or institutional prestige. This may be accomplished by hesitancy on the Court's part in exercising its power of validation or invalidation of the product of the political processes too often.

Adequate consideration of this notion would take us well beyond today's topic. It would take us back, at least, to Marbury v. Madison.[6] But perhaps there is some value in broadly speculating that there may be distinguishable classes of cases in which the Court ought or ought not to exercise its power of judicial review cautiously. Perhaps the Supreme Court would gain greater acceptance of individual rights decisions—say, for Negro citizens in the South—if it less freely engaged in what Professor Charles Black has called the Court's "legitimating" function, for example, in upholding the exercise of Congressional power in a case like South Carolina v. Katzenbach[7] under the Voting Rights Act of 1965. In cases like that, in which a federal statute is challenged only on the ground that it violates states' rights, not on the ground that it violates anyone's individual constitutional rights, the Court could refuse to pass on the constitutional question by saying: "The Congress has acted on this matter. The Congress, with some thought, has made a decision that states' rights are not abused in this particular context. Therefore, we have no business reviewing this exercise of Congressional power. The question is one for the political process where the states have adequate voice." Perhaps it is true that frequent acts of judicial "legitimation" bring the Court more enemies than friends, despite the fact that legitimation means upholding power exercised through the political processes. Perhaps some acts of legitimation—in some classes of cases—should be avoided.

[6] 5 U.S. (1 Cranch) 137 (1803).

[7] 383 U.S. 301 (1966).

COMMENTS

KENNETH L. KARST *

Since, unlike some other panelists, I have not written in the area of religion in the schools, my assignment, I suppose, is to give a kind of outsider's view, on the assumption that it would be refreshing to have someone talk about the subject who didn't know nearly so much about it as the others appearing on the program, and who would relate the school prayer issue to other issues.

The natural issue, of course, and the one that is suggested in both papers inferentially, is that of desegregation of the schools. So, in honor of our social scientists, I am going to "compare and contrast" the two areas.

We all know the history of desegregation in the South, and so all that I am going to be doing now is to give you a few reminders:

The pattern of compliance following Brown v. Board of Education,[1] of course, was of varying adequacy. In the border states and in the District of Columbia, there was substantial compliance after the 1954 decision, and even before the 1955 decision, which established the principle of "all deliberate speed." In the South, in the decade following *Brown v. Board of Education,* there was compliance in very few districts, almost universally in response to court orders, and then only on a token basis. What is the explanation for this pattern of response? There hasn't been nearly so much social science research on this question as there has on released time and school prayers, but I should like to run briefly down the analytical scheme in the paper of Professors Dolbeare and Hammond to the school desegregation area.

There is a sense, I suppose, in which "we all know" what *"the political-cultural context"* of desegregation was, and we know how it varied from, say, Topeka, Kansas, to Lowndes County, Alabama, or even to Prince Edward County, Virginia. Dean Reich's paper confirms this point about the political-cultural context, when he compares Ohio and Wisconsin in their response to the school prayer cases.

Also, *the interests of the political actors* have been very different in the various localities. Perhaps in the context of desegregation, these two points —that is, the interests of the political actors, and the political-cultural context —are not independent variables, but other ways of describing the same phenomenon. In any case, although there are large numbers of blacks in the South, for the most part they have not yet become a major political force, at least on a state-wide basis.

State and local political elites, of course, were very much involved in the desegregation situation as a staple of day-to-day politics, and this is the major difference between desegregation and school prayers. That is to say, people cared very much about desegregation. Many politicians were, in fact, encouraging open defiance of the Court.

* Professor of Law, University of California (Los Angeles).

1 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Moreover, the substance of the decision was vague indeed, permitting all kinds of perceptions about what was required, and misperceptions, too. Perhaps the decision was intentionally vague.

The *Brown* decision, at the very least, threatened a drastic reorganization of practices and institutions. The change certainly was perceived by local school boards as imposing a burden and not as allocating a benefit to them. It called for action by a great many people. While it is true that responsibility may have been centered in the local boards, we have a parallel to this diffusion of responsibility in the kind of buck-passing we are now seeing in the Northern and Western cities about the de facto segregation problem, with the superintendent talking about the school board's responsibility, and the school board saying, "Well, the superintendent hasn't come up with any plan," and so on.

Most important of all, though, in the desegregation area would be that factor relating to compliance that Professors Hammond and Dolbeare referred to as the "*institutional mechanisms and procedures for adjustment.*" Just as in the school prayer area, compliance in the desegregation area depended on a parallel process of litigation. One by one, local school boards had to be sued, with the result that in 1963, eight full years after the "all deliberate speed" formula was announced in the second *Brown* opinion,[2] only a little more than one percent of all of the black pupils in the eleven Southern states were attending school with whites.

The comparable figure, five years later, for the 1968–1969 school year was twenty percent. What made the difference in five years? What made the difference, of course, was federal legislation. The Civil Rights Act of 1964 did two crucial things with respect to school desegregation: *First*, the Attorney General was authorized to bring desegregation actions, and he was authorized to intervene in private desegregation litigation. That still required lawsuits, but it did bring the resources of the Department of Justice to bear on the problem. *Second*, and more important, Title VI of the 1964 Act conditioned the granting of federal funds to state and local agencies on desegregation of the activities which those agencies were operating, and that included schools. This provision made available an executive agency, the Department of Health, Education and Welfare, to supervise the desegregation process, in the process of administering federal funds.

The comparative effectiveness of these two remedies—that is, the provision of the Attorney General as a potential litigant and the conditioning of federal funds on desegregation—can be seen in these figures for the 1968–69 school year: In school districts affected by court orders—where litigation was the order of the day and the means of securing compliance—11.5 percent of the black pupils were attending schools with whites. In districts affected by Title VI, by the cut-off of federal funds or the potential cut-off, the figure was 25.6 percent of all black pupils who were attending schools with whites. So the institutional mechanism that has worked most effectively in this area has been administrative supervision and the power of the purse, and not litigation.

Coming back to the school prayer issue, I think some implications may perhaps be drawn:

First, I suppose that future administrative enforcement in this area is very close to a zero probability. Just imagine proposing something like a

[2] Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).

Title VI relating to school prayers to the present Congress or to any state legislature. The result is that compliance is going to depend on litigation, and for the reasons shown in the Dolbeare-Hammond paper, litigation is not a real likelihood, except in the places where voluntary compliance by the school boards or by the superintendents is most probable—that is to say, on the Eastern Seaboard, in the cities, in the university towns, and so forth—because that is where there are substantial numbers of people who might be expected to complain.

Several years ago there was a lively discussion among academic writers, including Jesse Choper, about the legal doctrine of the *Engel*[3] and the *Schempp*[4] decisions. One of the doctrinal disputes had to do with the question of coercion. Very roughly stated, the question was whether those two decisions rested on some underlying premise that unwilling children either were being coerced to express a religious position, or perhaps were coerced into or nudged into accepting a religious position.

In doctrinal terms, the issue was discussed, first, in terms of standing—that is, why is it that parents and school children are the ones who have standing, if the issue is one under the Establishment Clause? Secondly, and perhaps just putting the same issue another way, the question was raised whether there was, in fact, not an essential free-exercise ingredient in these Establishment Clause cases.

Now we are told by the social scientists that a great many school boards and administrators have misperceived the whole nature of *Engel* and *Schempp*, treating them as if they rested, in fact, on the Free Exercise Clause. Perhaps we may ask, in view of the dynamics of compliance—that is, compliance that rests on litigation—as those dynamics have now been revealed to us, whether the effective rule, the rule that is really operating in practice, does not include an important free-exercise ingredient, since it rests on the availability of people who feel offended enough to bring a lawsuit. So perhaps those school superintendents who are assuming something about the real impact of this decision, know what they are assuming about.

Finally, Dean Reich's paper raises once again some questions that were debated in the days of William Graham Sumner about the potential influence of state-ways on folkways. President Eisenhower, a latter-day Sumner of sorts, at least in the desegregation area, expressed a view that "you cannot change the hearts of men" with legislation.

Dean Reich, however, says that the patterns of compliance with *Engel* and *Schempp* really were set by a couple of state supreme court decisions in the latter part of the nineteenth century in Ohio and Wisconsin, suggesting that perhaps those state-ways, anyway, influenced the folkways that later on came to influence other state-ways in a kind of circular, or perhaps spherical, pattern of influence.

Maybe the main lesson from all this is that we still have a great deal to learn about these questions of state-ways and folkways. Most law professors, in doing their research, do not so much stand on the shoulders of the social scientist—to use Dean Reich's figure—as clutch at his coat tails. It is a cause for some celebration that this meeting of the Association is devoted to the theme of the study of law in cooperation with the social sciences.

[3] Engel v. Vitale, 370 U.S. 421 (1962).

[4] School District of Abington Township v. Schempp, 374 U.S. 203 (1963).