United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 104th CONGRESS, SECOND SESSION

Vol. 142 WASHINGTON, WEDNESDAY, JULY 17, 1996 *No. 105*

Senate

The Senate met at 9:30 a.m., and was called to order by the President pro tempore [Mr. THURMOND].

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Almighty God, You have wonderfully preserved and guided our Nation through the years and given us a position of leadership in the world. Now we ask You to bless the Senators and all who assist them in their high calling. Stir up our patriotism for our Nation and our passion for the work of Government. When we get weary, refresh us with new vision for the importance of our work. Give us a new burst of enthusiasm for our assignments by reminding us that we really report to You and are working for Your glory. Help us to remember that we are Your agents in shaping our society. Purge from us any vestige of selfish ambition or combative competition that would hinder teamwork. In a time of history when our Nation needs greater trust in You, we commit ourselves to be leaders who unashamedly live their faith and seek to keep our Nation deeply rooted in You, Your Commandments, and Your vision for us, through our Lord and Savior. Amen.

RECOGNITION OF THE MAJORITY LEADER

The PRESIDENT pro tempore. The able majority leader, Senator LOTT, is recognized.

Mr. LOTT. I thank the Chair.

SCHEDULE

Mr. LOTT. This morning there will be a period for morning business until 11 a.m. Following morning business, the Senate will resume consideration of the Department of Defense appropriations bill. We are attempting to reach agreement to limit amendments on that bill. However, if we are unable to reach an agreement, there will be a cloture vote on the Defense bill during today's session.

There has been good cooperation on both sides of the aisle on trying to identify and limit the amendments. While we still have a lengthy list, it seems to be that we can cut them down to a reasonable number, and I would like for us to make every effort to complete this Department of Defense appropriations bill today.

Senators can expect rollcall votes throughout the day and evening in order to make progress and, again, to possibly complete action on the bill tonight.

I remind my colleagues that a number of appropriations bills now have become available for consideration. I think there are five pending counting the Defense appropriations bill. So we have a lot of work to do, and I hope to move forward on those the first part of next week. We need cooperation of all our Members in allowing us to consider and complete these bills in a timely manner. I call on our colleagues on both sides of the aisle to stick with germane amendments and try to limit them so that we can get this work done.

Also, in accordance with last night's agreement, the Senate will vote on the motion to invoke cloture on S. 1936, the Nuclear Waste Policy Act, on Thursday of next week. That is July 25.

MEASURES PLACED ON CALENDAR—S. 1954 AND H.R. 3396

Mr. LOTT. Mr. President, I understand there are two bills at the desk that are now due for their second reading, and I ask that they be read consecutively.

The PRESIDING OFFICER (Mr. INHOFE). Without objection, it is so ordered. The clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 1954) to establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment.

A bill (H.R. 3396) to define and protect the institution of marriage.

Mr. LOTT. Mr. President, I object to further consideration of these matters at this time.

The PRESIDING OFFICER. The bills will be placed on the calendar.

Mr. LOTT. Mr. President, I yield the floor.

MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will now be a period for the transaction of morning business not to extend beyond the hour of 11 a.m., with Senators permitted to speak therein for up to 5 minutes each.

The Senator from Arizona, [Mr. KYL], is recognized to speak for up to 10 minutes under the previous order.

Mr. KYL. I thank the Chair.

RELIGIOUS UPBRINGING OF CHILDREN

Mr. KYL. Mr. President, while the Supreme Court has issued decisions protecting the rights of parents to direct the religious upbringing of their children, the lower courts have narrowly interpreted these decisions to give them almost no value as precedent. As a result, public school officials have been permitted to abuse their authority and compel students—at the objection of their parents—to participate in activities violative of deeply held religious beliefs. This must be of concern at a time when we are all seeking ways to strengthen families and inculcate values in our children.

One case, which a respected Federal court judge brought to my attention,

not only demonstrates the courts' unwillingness to respect the constitutional rights of parents to direct the religious upbringing of their children, it illustrates a bizarre dichotomy that has developed between the first amendment religious clauses: the establishment clause, which prohibits an official religion in the United States, and the free-exercise clause, which ensures every American's freedom of conscience. It is my sincere hope that this discussion will prod the Congress into considering ways we can assure that the Constitution will be applied to protect the rights of parents committed to firm moral guidance of their children, and in the process repair the glaring inconsistency that now exists regarding enforcement of these religious clauses in our Constitution.

One Senator who has responded to this challenge is Senator GRASSLEY, who has introduced an important bill, the Parental Rights and Responsibilities Act, which would forbid Federal, State, and local governments from interfering with ''the right of a parent to direct the upbringing of the child of the parent.'' This could resuscitate the Supreme Court's pro-parental rights decisions. Senator GRASSLEY cited the case I am going to discuss as an example of why his legislation deserves serious consideration.

II. THE CASE

On March 4, the U.S. Supreme Court declined to hear *Brown* v. *Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), cert. denied, U.S. (1996), in which the district court ruled, and the circuit court upheld, that it is constitutional for a public school to compel students—some as young as 14—without notifying parents, to sit through an explicit AIDS awareness presentation. A ruling that permits public school officials to force students—over the objections of their parents—to participate in activities that violate deeply held religious beliefs should be of concern to us all.

School officials at Chelmsford High School in Chelmsford, MA, knew full well what they were getting when they hired Suzi Landolphi, the owner of a company called Hot, Sexy, and Safer, to give presentations at two 90-minute assemblies at the school. They viewed a promotional videotape of the organization's past presentations as well as promotional brochures and articles. The superintendent and the assistant superintendent attended the presentation. The principal introduced the presenter to the students.

While school officials were busy securing what the principal described as ''a very special program,'' no effort was made to alert parents about the assembly, and students were compelled to attend it. Some argue that public school officials cannot keep parents apprised of every detail of their children's education. But Landolphi's presentation was not a calculus exposition. It was a highly charged event, unrelated to subjects traditionally taught to high school students.

A videotape of the program reveals that the presenter concentrated on personal matters and used language so graphic that it would make former Surgeon General Jocelyn Elders blush.

Abstinence was never discussed as an option to avoid contracting AIDS. The assemblies were, however, filled with lewd demonstrations of crude sexual acts. Landolphi kicked off her presentation to 9th and 10th grade students by saying, ''This is amaz[ing]—I can't believe how many people came here to listen to someone talk about sex, instead of staying home and having it yourself.'' This may have been the high water mark for the show.

During the program, the presenter told the students that they were going to have a ''group sexual experience, with audience participation''; told a minor he was not ''having enough orgasms''; commented about a minor's ''nice butt''; characterized the loose pants worn by a student as ''erection wear''; and had a male student lick an oversized prophylactic, after which she had a female student pull it over the male's head.

Landolphi was also philosophical: ''When we are younger, we know about our private parts. We're less embarrassed. Why is that? With all of us sitting in this room right now—I mean, have you ever really sat down and thought about your private parts? Did you ever think about them?''

She concluded her presentation by instructing the students to ''Become sexually proud and confident people. Know how you work. Tell your parents about sex.''

Not only was Ms. Landolphi's program salacious, it was astonishingly inaccurate. Example: ''When you find out someone you love has this virus, you tell them they can fight this virus, and they might fight it so well that they may never get ill. That's a fact.'' She informed these students that those infected with HIV could avoid AIDS by getting rid of drugs, alcohol, tobacco, and stress. And what, according to Landolphi, relieves stress? ''Sex, of course.''

For school officials to hold such a controversial—to put it mildly—event without parental notification suggests these officials may have deliberately sidestepped the parents. Even if, on the other hand, this heedlessness was inadvertent, it begs a broader question: Have some public school officials become so arrogant that they do not even give thought to the views of the people they serve—the community—when planning school events?

Some Chelmsford parents believed that their constitutional right to direct the upbringing of their children was violated. A Federal district court judge and a court of appeals, however, ruled against the parents.

The district court judge, in granting the defendant's motion to dismiss, opined: ''Parents who send their children to public schools * * * daily risk their children's exposure, both inside and outside the classroom, to ideas and values that the parents and the children find offensive.'' Memorandum and Order, *Brown* v. *Hot, Sexy and Safer Productions*, No. 93–11842, slip op. at 10 (D. Mass. January 19, 1995). The effect of this brush off is to treat a convinced Christian, Jew, Muslim, or parent of other religious faith as insufficiently enlightened, deserving of exclusion from the educational process along with other narrow-minded and ignorant people. The erosion of our values that this kind of indiscriminate reasoning represents is truly breathtaking.

III. CONSTITUTIONAL PROTECTION FOR PARENTAL RIGHTS

The liberty clause of the 14th amendment, and the free exercise clause of the first amendment, should protect parents from overreaching public school officials. The 14th amendment claim is stronger, but there is also precedent for the first amendment to protect a religious person from neutral government action hostile to his or her beliefs.

A. FOURTEENTH AMENDMENT

The Supreme Court firmly recognizes that certain practices are ''so rooted in the traditions and conscience of our people as to be ranked as fundamental'' and therefore merit protection under the 14th amendment. *Palko* v. *State of Connecticut*, 302 U.S. 319 (1937). I can think of few rights as fundamental as the right of a parent to control the religious upbringing of his or her children.

A troika of Supreme Court decisions have encouraged us to see this route as potentially fruitful. In *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), the Court ruled that the liberty clause of the 14th amendment protects the fundamental right of parents to bring up children. The right of the parents to have their children instructed in a foreign language was, according to the Court, ''within the liberty of the amendment.'' Id. at 400.

The Court reaffirmed this right in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). In Pierce the Court declared unconstitutional a State statute that required public school education of children aged 8 to 16. The Court reasoned that the statute ''unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control * * * The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.'' Id. at 534, 535.

While decided primarily on free exercise grounds, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), a decision upholding the right of Amish parents to remove their children from public schools, acknowledged the liberty interest of parents to control the upbringing of their children. ''The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.

This primary role of the parents in the upbringing of their children is now established beyond debate.'' Id. at 232.

In the Chelmsford case, the circuit court arrogantly dismissed the 14th amendment claim of the parents, commenting that ''the Meyer and Pierce cases were decided well before the current 'right to privacy' jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny.'' Hot, Sexy and Safer 68 F.3d at 533. For the Court to suggest that decisions regarding fundamental rights, including, for example, the right to marry, are preempted until reanalyzed under the Supreme Court's constitutionally suspect privacy decisions is, if not novel, absurd. But again, when cases involve religion, the courts all too often come up with imaginative reasons to avoid following good case law.

B. FIRST AMENDMENT

At first blush, the first amendment's free exercise clause seems like a weak instrument for those who seek relief from neutral State action that inhibits the practice of religion. It was, after all, Justice Scalia who wrote the decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 879 (1990), which announced that a ''neutral, generally applicable'' law does not violate the free-exercise clause even when it prohibits religious exercise in effect.

The free exercise claim advanced by the Chelmsford parents would have the same problem, if Smith were to be our guide. While the school officials at Chelmsford High School certainly offended religious children by offering the AIDS presentation, it does not seem that they intended to single out religious individuals for the offensive show. Indeed, they were equal opportunity offenders.

But for those ready to close the door on free exercise claims when government, by application of a neutral mandate, coerces individuals to violate their own religious practices, such as in the Chelmsford case, the matter is not set. Relevant to Chelmsford, the Yoder Court held that when a 14th amendment-based claim to protect the fundamental right to control the religious upbringing of their children is combined with a free-exercise claim—a ''hybrid'' situation—the first amendment claim is enhanced. Yoder, 406 U.S. at 233. Smith acknowledges Yoder hybrid claims. Smith, 494 U.S. at 881.

Also relevant to the Chelmsford case, Justice Scalia, in a useful concurrence in *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 559 (1993), questioned whether the rule he authored in Smith, which garnered five votes on the Court, and was the subject of a spirited attack by Justice O'Connor, merits adherence. Justice Scalia suggests that Smith is deficient in resolving free-exercise claims when ''Neutral, generally applicable' laws, drafted as they are from the perspective of the nonadherent, have the unavoidable potential of putting the believer to a choice between God and government.'' Id. at 577. In chronicling the tensions in free exercise jurisprudence—the mechanistic approach of Smith, versus the more nuanced approach of Yoder—the Justices concludes that neither line of cases is controlling: ''Our cases now present competing answers to the question when Government, while pursuing secular ends, may compel disobedience to what one believes religion commands.'' Id. at 559.

If the Court does reevaluate the free-exercise clause, and decides that a more expansive reading is warranted—as it has already done with gusto for the other first amendment religious clause, the establishment clause—Justice Scalia offers some preliminary thoughts on a revitalized free exercise clause more sympathetic to the plaintiffs in coercion cases, such as that of Chelmsford, and a persuasive rationale for why the Court should resolve this conundrum:

> A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or *requiring something that religion forbids*. A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religious and nonbelievers, disproportionality burdening the practice of, say, Catholicism or Judaism.'' Id. at 560 (emphasis added).

What the Chelmsford school officials did, with the District Court's backing, was require something that was against the religion of some of the students. Thus this legal framework could provide relief for such compulsion situations.

The circuit court in Chelmsford dismissed the free-exercise claim under the Yoder scheme on two grounds: First, the free-exercise challenge was not ''conjoined with an independently protected constitutional protection,'' and Second, the free-exercise claim was distinguishable because the parents did not ''allege that the one-time compulsory attendance at the Program threatened their entire way of life.'' Hot, Sexy, and Safer, 68 F.3d at 539. Neither rationale is persuasive. As mentioned above, the Supreme Court has firmly recognized that parents enjoy certain constitutional protections in directing the upbringing of their children. And the hybrid situation developed in Yoder, and noted in Smith, does not require that an individual's entire way of life be threatened for there to be constitutional recourse.

IV. DICHOTOMY IN FIRST AMENDMENT RELIGIOUS CLAUSES

While the courts have taken great pains not to disturb neutrally drafted laws when considering free-exercise claims, and even Justices sympathetic to religious freedom, such as Justice Scalia, have agonized over these decisions, the courts are aggressive in restricting religious activities under the establishment clause. The result: an extreme dichotomy in religious clauses jurisprudence.

Contrast the federal courts' refusal to recognize free-exercise claims with their zeal in banning prayers at school ceremonies under the establishment clause. In the same year the AIDS presentation at Chelmsford High School occurred, the U.S. Supreme Court ruled in *Lee* v. *Weisman*, 505 U.S. 577 (1992) that a prayer given by a rabbi during a middle school commencement program violated this clause. Let's take a look at a part of the offending prayer:

> God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. . . . May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. Id. at 581,582.

In his opinion for the majority, Justice Kennedy reasoned that ''heightened concerns [exist] when protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.'' Id. at 592.

But where is the concern for the subtle coercive pressure of a mandatory AIDS assembly, whose graphic details and panderingly hip attitude toward human sexuality, offend the core values of believers in the great religions of the world? Consider that if one agrees with Justice Kennedy that students should not be coerced to listen to prayer, it is hard to understand why one wouldn't agree that the free-exercise clause should protect a school from coercing a student to participate in an activity which violates that students's religion. But a double-standard has emerged that the Chelmsford case perfectly illustrates.

The offending prayer delivered by the rabbi in Weisman was less than 2 minutes long, compared to the 90-minute presentation which took place at Chelmsford High School. The Court in Weisman did not require that the student's life lie in ruin when invalidating a benign commencement prayer. Also consider that the prayer in Weisman is a religious statement that is well within the tradition of benedictions at graduation ceremonies, and that parents accompanied the students and had notice that the rabbi was speaking.

We remove prayer because it's offensive to 1 out of 100, but don't remove—or at least make optional—material highly offensive to a student of faith. I believe that most Americans would agree that something is corrupt within our jurisprudence when an indecent presentation directed at minors is constitutional while a short commencement prayer delivered by a member of the clergy is unconstitutional.

V. CONCLUSION

When a public school presents controversial subjects, out of courtesy, it should notify parents, and give them

the opportunity to have their children opt out. This isn't burdensome; it's the morally right thing to do. If public school officials exercised this courtesy in the first place, the Chelmsford controversy could have been avoided.

I believe the courts should return to the spirit of the Supreme Court decisions on parental rights, and recognize and protect the right of parents to direct the religious upbringing of their children. The U.S. Constitution requires no less. Meanwhile, Congress should consider legislation, such as Senator GRASSLEY's parental rights bill, to prod the courts to respect one of the most basic, and important fundamental rights.

The PRESIDING OFFICER. The Senator from West Virginia [Mr. ROCKEFELLER], is recognized to speak for up to 15 minutes under the previous order.

Mr. ROCKEFELLER. I thank the Chair.

(The remarks of Mr. ROCKEFELLER pertaining to the introduction of S. 1963 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

Mr. ROCKEFELLER. I thank the Presiding Officer and yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. INHOFE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER [Mr. BROWN]. Without objection, it is so ordered.

NATIONAL MISSILE DEFENSE

Mr. INHOFE. Mr. President, I have been presiding, and I know that we are going to be continuing with the defense appropriations bill later on. I noticed something that I read just in the last couple days that was in the Wall Street Journal under the title of ''Do We Need a Missile Defense?'' This has been a debate in this body for quite some time during the Defense authorization bill. It is so obvious on its face, that virtually every strategist, in terms of strategic defense in the country, agrees that we are under probably a greater threat today than we have been maybe in the history of this country in that we no longer are in a cold-war posture where there are two superpowers and you can identify who the other one is, as it was in the case of the cold war.

Some of us, I think, may be looking back wistfully at the days when there was a cold war and we could identify who the enemy was. I can recall that back during the Nixon administration, Richard Nixon and Dr. Kissinger put together the whole concept of the ABM Treaty, which was there are only two superpowers that have weapons of mass destruction and the missile means to deliver them, at least part way. Therefore, if we all agree not to defend ourselves, then the philosophy of mutual assured destruction would serve us all well. In other words, the Soviets fire at us, we fire at them, everybody dies and no one is happy.

That is not the situation today. I did not agree with it back in 1972. Back when we had the ratification of the START II agreement, I was the only Senator halfway through the rollcall to vote against it. Everyone else was voting for it until a few others realized that what we were doing is going back and reinstating or resurrecting that philosophy of the ABM Treaty, except now it would be with Russia as opposed to the Soviet Union since it no longer exists.

I think it is insane that we would even consider something like that. In fact, I had permission from Henry Kissinger himself to stand on the Senate floor and quote him when he said that he did agree at the time that that was a good policy for America in 1972, but he said that now some 25 nations have weapons of mass destruction, and he said, ''It is nuts to make a virtue out of our vulnerability.''

This article that I read—I will, without exceeding my time, just paraphrase a few of the comments here by some of the experts. Donald Rumsfeld was the Secretary of Defense during the Ford administration. He said:

> Only someone deep in denial can contend that the U.S. cannot be threatened by ballistic missiles. Rogue states like Iran, Iraq and North Korea have made clear their determination to acquire chemical, biological or nuclear weapons and the missiles to deliver them. China and Russia, if inclined, could threaten many countries, near and far, with nuclear missiles. Missiles are a weapon of choice for intimidation, precisely because the world knows that once a missile is launched, the U.S. is not capable of stopping it.

Henry F. Cooper was the director of the Strategic Defense Initiative during the Bush administration and the chief U.S. negotiator in the Geneva defense and space talks during the Reagan administration. He said—I will just quote this first sentence:

> America's vulnerability to ballistic missile attack is a leadership failure of potentially disastrous proportions.

Then it goes on to quote many others, including James Woolsey, who was President Clinton's former Director of the Central Intelligence Agency and now practices law in Washington. He was the one who 2 years ago said that—this was 2 years ago—we now have 22, 25 nations that have weapons of mass destruction or are in the final stages of completing those weapons and are working on the missile means of deploying them, delivering them.

I think, Mr. President, if you update his statement, as he did the other day, it is now up to some 30 nations. Look at who these nations are. When you are dealing with the Middle East mentality of Iran, Iraq, and Syria and Lebanon and Libya, and, of course, people like Saddam Hussein, who would murder his own grandchildren, we are not dealing with people that we can predict, people who think like Westerners think. Yet here we are today considering the defense appropriations bill and giving virtually no attention to our ability to defend ourselves with a national missile defense system.

So, Mr. President, I am hoping, as we keep repeating this over and over again, that we can penetrate somehow this Eastern media who would like to make people believe that the threat is not out there, this administration that keeps saying over and over again that it will be 15 years before we can be threatened by a missile attack, when in fact there are intercontinental ballistic missiles that can reach the United States from as far away as China or Russia.

We have been held hostage. We were held hostage in the Taiwan Strait when the Chinese went over and were doing their missile experimentation. One of the highest ranking Chinese officials at that time said, ''We're not concerned about the Americans coming in and defending Taipei because they would rather defend Los Angeles than they would Taipei.'' That has to be at least an indirect threat at the United States.

The threat is real. The danger is real. We are living in a time when the threat is greater than it has been at any time in this country's history. We, as a body, are trying to do something about it against the wishes of the administration, and we have to prevail in this effort for our kids' sake.

Lastly, I am from Oklahoma, and those who saw the Murrah Federal Office Building and saw the television accounts of it—you almost had to be there to get the full impact of the tragedy that was there. It was just indescribable. The power of that bomb that blew up the Murrah Federal Office Building in Oklahoma City was equal to 1 ton of TNT. The smallest nuclear warhead known to man is 1 kiloton, 1,000 times the explosive power. So the threat is there, Mr. President. We need to deal with that and do something about it. After all, is that not what Government is for? I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BENNETT. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from Utah is recognized.

THE CRISIS IN EDUCATION IN AMERICA

Mr. BENNETT. Mr. President, you and some others in this body have heard me say that the one experience that took me out of the private sector and brought me back into public life was my term as chairman of the Strategic Planning Commission for the Utah State Board of Education. I was