

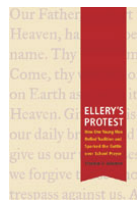
# Law and Politics Book Review

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## ELLERY'S PROTEST: HOW ONE YOUNG MAN DEFIED TRADITION AND SPARKED THE BATTLE OVER SCHOOL PRAYER



by Stephen D. Solomon. Ann Arbor: University of Michigan Press, 2009 (paper). 432pp. Cloth. \$29.95. ISBN: 9780472108374. Paper. \$24.95. ISBN: 9780472033454.

Reviewed by Brian K. Pinaire, Department of Political Science, Lehigh University.  
Email: bkp2 [at] lehigh.edu.

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At a certain point the mind goes numb to the full and complete names of parties to even the most famous Supreme Court cases. One attempts to remember the holdings, the significance, the logical (in)consistencies, but I must confess that, even as a teacher of High Court opinions, sometimes I fail to reflect sufficiently on the “real world” origins, individuals, and implications of even canonical cases. What’s more, as the initiated are well aware, we generally shorten case names to the name of one party – though not necessarily the “winner.” I have succumbed to this tendency over time, but admittedly have never really understood the “rules,” if you will. (Why, in other words, is WEST VIRGINIA v. BARNETTE simply BARNETTE? How did BUCKLEY v. VALEO end up “BUCKLEY,” instead of “VALEO”? And what led “FERGUSON” to lose out to “PLESSY” in the historical record?) Clearly, names get the nod over localities, but what of CITY OF PHILADELPHIA v. NEW JERSEY?

The point of such ruminations is this: I agreed to review ELLERY’S PROTEST knowing only that it was a book about an important Supreme Court case dealing with school prayer. That said, even as a teacher of civil liberties, seeing the name “Ellery” did not clue me in to the identity of the party or even the particular case it would consider. It was not until I read the second paragraph of the Acknowledgements – where the author, Stephen D. Solomon (Department of Journalism, New York University) thanks “Ellery Schempp” for his assistance – that things began to come into focus. Aha! Of course, this book was about prayer in the schools and the landmark case of ABINGTON v. SCHEMPP and – wait, I live there! I mean here.

Indeed, I am sitting here, right now, in Abington Township, Pennsylvania, writing a review of a book about a case that implicated the Abington public schools. Cue the eerie music. (I must assume the esteemed editor of the REVIEW researches such connections before soliciting essays.) But it is not just that I pay my taxes to this municipality; I actually live within two miles

of Ellery Schempp's childhood home on Susquehanna Road. I have gone jogging by that residence hundreds of times. I know exactly the route he walked to school. Indeed, my kids will soon be going to school within that district. For me, the case had become simply "SCHEMPP" – like the related "EVERSON," "McCOLLUM," and "ENGEL" of establishment law fame – but in its full glory, of course, it is ABINGTON SCHOOL DISTRICT v. SCHEMPP. Its central character is [\*356] Ellery Frank Schempp. And this book is the story of his "protest."

Solomon's account begins by explaining that, on this November morning in 1956, Schempp was "not in the mood to conform" (p.3) and thus, when the King James Bible verses began to be read over the public address system, he opened up the Koran he had borrowed from a friend's father and began reading silently. But as we see from the outset, this case was very much a family affair for the Schempps. In discussing the impetus for this action within the generally conformist 1950s, Solomon portrays a home environment where religion was not, in fact, disfavored, feared, or eschewed (the family regularly attended Unitarian Universalist meetings). Raised as a Lutheran, Ellery's father, Ed, knew the Bible well and would later argue at trial that this familiarity with the text, and particularly its more violent episodes, was what led him to resist even more the compulsory reading of Bible verses in the schools. Importantly then, the Schempps were not the Murrays – that is, the family of Madilyn Murray (O'Hair), discussed in detail in this book – who challenged similar practices in the Baltimore public schools, whose case became a "companion" case to SCHEMPP, and who were hounded and harassed virulently for their professed atheism.

In-depth interviews with Ellery Schempp, among many others, afforded Solomon a window into the upbringing of the Schempp children and stressed, as much as their religious contemplations, the encouragement from their parents that led them to stay abreast of current events (Ellery read THE NEW REPUBLIC magazine regularly), and the expectation that they "care about First Amendment freedoms" (p.17) – even as 1950s teenagers who might otherwise have been consumed of rock 'n' roll and bubble gum. Such an understanding of the plaintiffs gives the reader an important framework for assessing what is to come as the complaint is initially filed, as various backers line up (or pull away), as interested and ideologically sympathetic parties (e.g. Leo Pfeffer) express their reticence about challenging the Pennsylvania law, and as a confluence of cases reaches the U.S. Supreme Court at the dawn of "history's Warren Court" (p.207), as the legal scholar Lucas Powe has referred to it in his examination of the period.

Even with relatively little case law at the federal level, for many it was clear that the school district was violating the Establishment Clause of the federal Constitution. The Employees' Handbook and Administrative Guide instructed school district employees to "Comply with the state regulation in reading at least ten verses of Scripture each morning without comment," and then went beyond the statute in additionally calling upon school officials to follow this with the Lord's Prayer (p.22). As district officials stressed during the trial in U.S. district court, the reading of the verses and prayer were to provide some sort of moral foundation for students in this environment, even though "comment" – i.e., elaboration or explication – was not allowed. For a student such as Ellery, again one who had been taught to question and probe and who was reading Thoreau's "Civil Disobedience" at that time in his English class (p.21), the need for resistance – a [\*357] "protest" – could not have been more obvious.

But others were not so sure. While his friends agreed with him in many ways, there were obvious fears of repercussions, reprisals, withdrawn letters or offers of recommendation for college applications, and so on. But Ellery persisted and so, following his act of resistance, and the initial confusion but eventual formal administrative response that followed, he wrote to the local chapter of the American Civil Liberties Union for support. Mired as it was in the consuming battle against McCarthyism throughout the 1950s, the ACLU was initially unsure whether it could or should take the case. There were obvious resource questions to consider as well as the issue of the case's imminent mootness, at least on one front (as Ellery was presently a junior in high school). But what we learn from Solomon, as well, is the back-story and internal discussions of reluctance that one might not have expected.

For one thing, the president of the Philadelphia chapter of the ACLU, Clark Byse, was personally a supporter of the law – believing it to be a “good thing that the Bible is read to the children every day” (p.40) – and, given the need to confront McCarthyism nationally, was therefore cool to the idea of the Schempp case. He relented, however, when he saw that half of the board was in support of the challenge and then gave the action his blessing. But on another front, the case faced strong resistance from Leo Pfeffer and Shad Polier, of the American Jewish Congress, individuals who had made their mark as scholars of the First Amendment and as shrewd legal strategists. As such, they felt that the facts of the Abington situation did not present the right test case for the matter because it could be difficult to develop a deep trial record and because at this time no one was exactly sure that courts would tend to find such devotionals unconstitutional.

Indeed, Chapter 12, “The Race to the Supreme Court,” discusses in-depth Pfeffer's preferred case emanating from Miami, Florida – a “nearly perfect case” according to Solomon (p.190) – involving a “fire-and-brimstone sermon by a fundamentalist clergyman” who informed the students (many of whom were Jewish) that they “had to accept Christ” and if they did not “they would suffer damnation forever in hell” (p.189). If the Schempp case were to proceed, however, Pfeffer wanted it to be filed in Pennsylvania rather than federal court, “thus avoiding the near certainty of an eventual decision by the U.S. Supreme Court and, he thought, the likelihood of a disastrous loss” (p.58). This notwithstanding, the ACLU filed in federal court, won in front of a three-judge panel (twice), stayed with the case as it was appealed, won an historic victory at the U.S. Supreme Court, and then the matter was resolved. Right?

Among the many virtues of this book is that Solomon remains as objective as possible in tracing the steps of the litigants, in drawing the reader into the minds of the actors at decision points, and in taking seriously that famous notion from THE FEDERALIST, Number 78, stressing that the Supreme Court has neither the power of the purse nor the sword, but only the power of judgment. The book succeeds in its description of this particular case at this particular time in American history – but [\*358] it excels in its rich and immensely readable history of church-state relations (Chapters 5-8), as well as its detailed discussion of the inter- and intra-court dynamics that Solomon gleaned from careful attention to various justices' papers, materials from the national archives, interviews with Supreme Court clerks at the time, and other original bits of data. The analysis of the back-and-forth in Justice Tom Clark's drafts of the opinion for the Court (finding unconstitutional the District's policies) is particularly intriguing and will inform even the most seasoned students of establishment law (see: Chapter 18, “In Chambers”).

All of this comes together in the end, as the nod to THE FEDERALIST suggests above, to an intriguing consideration in the final two chapters, the Epilogue, and the Afterword (new to this paperback edition), wherein Solomon takes stock of where we stand on this matter as a nation, already well into the 21st century. Readers seeking a pushing of the doctrinal analysis envelope or “large N”-type investigation may find the book lacking; but those interested in a wire-to-wire study of a case, representing an issue that is with us as much today as when Ellery first protested, will enjoy and learn much from this excellent study. Ideally we would have a book like this for every such landmark case, because there is “knowing” a case, and then there is knowing the full scope of a case. ELLERY’S PROTEST gives us the complete story, in fluid prose and with original archival and interview data.

Things have changed in the Abington School District, I am happy to say as a resident and parent. Solomon notes that Abington High School inducted Ellery Schempp into its hall of fame in 2002 for his achievements as a scientist (p.348). But of course, in most communities in this country – not many, but most – majorities still support teacher-led prayer in the schools, districts (e.g. in Dover, Pennsylvania – about 80 miles down the road from Abington) still concoct plans to allow the teaching of “Intelligent Design,” and graduation ceremonies (e.g. in Georgetown, Delaware – about 130 miles in the other direction from Abington) still include pastors who state that “We pray that You direct them [the students] into the truth, and eventually the truth that comes by knowing Jesus” (p.349), leading a Jewish family to protest and eventually be driven out of the community. And so on. One can read a casebook and think that the Supreme Court has spoken – the matter is resolved. And one can read a book like this to be reminded that it is not. Indeed, in a certain sense it has just begun. There will be more “Ellerys” and more “protests” to come.

I should note in conclusion that this past Memorial Day I walked by the former Schempp home. This residence, referred to as an “atheist” and “communist” house by the peers of the Schempp children as the litigation was underway fifty years ago (p.205), had eight American flags flying in the late spring breeze. That was the most on the block. I was proud. It seemed right. I think Ellery would agree.