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Religion in the Public Schools: Past and Future

The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.[*]

Perhaps no other decisions of the Supreme Court of the United States have received more attention and resulted in more controversy in recent years than those dealing with the principle of separation of church and state. It is not surprising, however, because two of the important contributions of the American experiment in government are the establishment of the public school system and the disestablishment of a state church. Those decisions of the Court dealing with the application of the separation principle which have received the greatest notoriety have involved the sensitive area where the two have met.

The purpose of this paper is to examine the precedents, both federal and state, which have passed on the validity of Bible reading and other religious practices in the public schools and to discuss the Supreme Court's recent decision in *Engel v. Vitale*[1] which held that the daily recitation of the Regents' Prayer violated the principle of separation of church and state.

Preliminary Considerations

Of all the activities associated with the public schools that would or could be characterized as religious, Bible reading has received by far the most solicitude from our legislators and been litigated most often in our courts. According to a recent law review article, Bible reading is required by law in twelve states (and by regulation in the District of Columbia), and permitted in twelve more by statute or court decision.[2] The author estimates that twenty-one million pupils are enrolled in the public school systems of these states and the District of Columbia.

The extent of other activities, such as prayer recitation, hymn singing, baccalaureate services, and practices surrounding the observance of religious holidays are probably more widespread, but not so well documented in our law reports or statute books. According to the same author, the practice of daily recitation of the Lord's Prayer is authorized by statute in three states and in the District of Columbia by regulation, and has been upheld by the courts in four others.[3] As for baccalaureate services, two courts have upheld the practice,[4] but in a third the Commission of Education has held it unconstitutional when conducted on school property.[5] One of these decisions is now pending on appeal, on this and other issues, in the United States Supreme Court.[6] In this same case,

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[*] Justice Frankfurter in Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 231 (1948) (concurring opinion).

[1] 370 U.S. 421 (1962).

[2] Sutherland, *Establishment According to Engel*, 76 Harv. L. Rev. 25, 47 (1962).

[3] *Ibid.*

[4] Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So.2d 21 (Fla. 1962); Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952).

[5] See Pfeffer, Church, State, and Freedom 419 (1953).

[6] Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So.2d 21 (Fla. 1962), *petition for cert. filed*, 31 U.S.L. Week 3148 (U.S. Oct. 16, 1962) (No. 520).

Christmas pageants, plays, and movies, depicting the biblical account of the birth of Christ were enjoined.

One should not conclude, however, that the matter has been decided all one way. A majority of the states neither require nor specifically authorize Bible reading and prayer recitation, and in others either one or both have been found unconstitutional either by court decision[7] or by opinion of the Attorney General, as, for example, in California.[8] It is worth noting that the Attorney General of California concluded in 1955 that a prayer, with almost exactly the same wording as the Regents' Prayer, could not constitutionally be recited in our public schools.[9]

Let us turn and briefly review the history of Bible reading in the public schools.

Background

Although only one state, Massachusetts, required the practice by statute prior to the beginning of the twentieth century, it is probable that the practice has existed in Massachusetts and other states since the founding of our country.[10] It was in Massachusetts that Horace Mann fought long and tirelessly to eliminate the sectarian character of the existing public school system, and although his name has long been identified with secular education, he neither sought nor obtained the exclusion of the Bible.[11] The concept of public education divorced from denominational control was foreign to the colonial mind, and it was not until the mid-nineteenth century that the secular system started to emerge.[12] One author has suggested that secularization of public school education resulted in part from the decision of Protestantism to withdraw its religion from the schools rather than to yield to Catholic demands to inject its own dogmas or to obtain public funds for the support of its own school system.[13] In any event, as the public schools emerged into secular institutions, Bible reading and prayer recitation remained as vestiges of Protestant influence. These practices were faced with a stormy future.

The attempts of Catholics to exclude the Protestant Bible occasionally ended in violence, as in Philadelphia in 1843-44.[14] The dispute contributed to the formation of political parties who actively espoused Bible reading in their plat-

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[7] People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 92 N.E. 251 (1910); Herold v. Parish Bd. of School Directors, 136 La. 1034, 68 So. 116 (1915); State *ex rel.* Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902); State *ex rel.* Conway v. District Board, 162 Wis. 482, 156 N.W. 477 (1916) (dicta); State *ex rel.* Fenger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929). See also Schempp v. School Dist. of Abington Township, 177 F. Supp. 398 (E.D. Pa. 1959).

[8] 25 OPS. CAL. ATT'Y GEN. 316 (1955); OPS. MICH. ATT'Y GEN. 3596 (March 15, 1961); NEV. ATT'Y GEN. REP. 69 (1948-1950). In Engel v. Vitale, 18 Misc.2d 659, 191 N.Y.S.2d 453 (1959), the lower New York court found that the box score was ten states upholding the combined practice and seven against. Since then three cases and one state attorney general have passed on the question. Two state courts upheld, but a federal court and an attorney general invalidated.

[9] OPS. CAL. ATT'Y GEN. 316 (1955). The word "parents" in the Regents' Prayer is changed to "homes" in California version. The opinion found use of the Bible "for religious purposes" was proscribed.

[10] Engel v. Vitale, 18 Misc.2d 659, 675, 191 N.Y.S.2d 453, 472 (1959).

[11] PFEFFER, *op. cit. supra* note 5, at 382.

[12] *Id.* at 274.

[13] *Id.* at 287.

[14] *Id.* at 375.

forms. The Bible, or rather the version espoused by the particular religion, became a symbol for Catholics and Protestants alike.[15] Part of the evidence of all this remains in our law books, in the numerous disputes that ended in litigation. In Maine, for example, a Catholic pupil was expelled from a public school for refusing to read the King James version of the Bible. Her father sued unsuccessfully for reinstatement and this case, in 1854, became the first reported decision attacking the practice.[16] A similar incident is reported from Massachusetts.[17] In Cincinnati, in 1869, after a long and bitter fight, the school board by a vote of 22 to 15 finally decided to eliminate Bible reading from the public schools, only to be faced with a lawsuit brought by disappointed Protestants. This case eventually reached the Supreme Court of Ohio which upheld the board.[18]

The early attack against Bible reading, as the foregoing indicates, was based primarily on the lack of agreement between Protestantism and Catholicism over the use of the King James version, which was accepted by most Protestants and invariably adopted for use in the public schools. The Catholics accepted only the Douay edition. There were, moreover, differences other than authorship.[19] The Jewish faith accepts neither version because both contain the New Testament which is "offensive to Jewish tradition," and parts of which, according to one Rabbi, bring the Jewish people "into ridicule and scorn."[20] The Gideon Bible, which is composed of the New Testament and part of the Old is also unacceptable to the Jewish faith.[21] Even on the Lord's Prayer there is no agreement among Catholics and Protestants as to the wording, and the Jews disagree with the idea that any human being should be given the name of "Lord."[22] It seems evident, therefore, that there are vast differences among the "three great religions," to say nothing about the large group of persons who are members of other religions or have no church affiliation.[23] How can a secular judiciary weigh these differences, if indeed it should try at all?

In 1910, the Supreme Court of Illinois answered this question in the following manner:

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[15] Engel v. Vitale, 18 Misc.2d 659, 676, 191 N.Y.S.2d 453, 473 (1959). As Justice Jackson said in Board of Education v. Barnette, 319 U.S. 624, 632 (1943), "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."

[16] Donahue v. Richards, 38 Me. 376 (1854).

[17] Commonwealth v. Cooke, 7 Amer. L. Reg. 417 (1859).

[18] Board of Education of Cincinnati v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233 (1872). The court's language was very board: "Legal Christianity is a solecism, a contradition of terms. When Christianity asks the aid of government beyond mere impartial protection, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. . . . United with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both." *Id.* at 248, 13 Am. Rep. at 245.

[19] See People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 92 N.E. 251 (1910) which discusses the differences in some detail.

[20] Schempp v. School Dist. of Abington Township, 177 F. Supp. 398, 401 (E.D. Pa. 1959).

[21] Tudor v. Board of Education, 14 N.J.2d 31, 100 A.2d 857 (1953). It was on this basis that the Gideon Bible was found sectarian and its distribution in the public schools on a voluntary basis has been enjoined. *Accord,* Brown v. Orange County Bd. of Public Instruction, 128 So.2d 181 (Fla. App. 1960), *cert. denied per curiam,* 129 So.2d 141 (Fla. 1961). See also 25 OPS. CAL. ATT'Y GEN. 316 (1955).

[22] PFEFFER, *op. cit. supra* note 5, at 395.

[23] *Id.* at 298. According to Mr. Pfeffer over half of the population of this country is not affiliated with any church group.

> Differences of religious doctrine may seem immaterial to some, while to others they seem vitally important. Sectarian aversions, bitter animosities, and religious persecutions have had their origins in apparently slender distinctions. . . . With such differences, whether important or unimportant, courts or governments have no right to interfere. It is not a question to be determined by a court in a country of religious freedom what religion or what sect is right. That is not a judicial question. . . . Whatever may be the view of the majority of the people, the court has no right, and the majority has no right, to force that view upon the minority, however small. It is precisely for the protection of the minority that constitutional limitations exist. Majorities need no such protection—they can take care of themselves.[24]

State Constitutions and Cases

Before attempting to summarize the opinions of the courts on this subject, it should be pointed out that most of the case law was developed by the state courts under state constitutional provisions. The reason for this is that the Federal Bill of Rights, including, of course, the first amendment, was early held not applicable to the states.[25] The fourteenth amendment was not adopted until 1868 and it was not until well into the twentieth century that the Supreme Court held that the first through the fourteenth amendments applied to the states.[26] In 1943 the free exercise clause of the first amendment, for the first time, was used to excuse a pupil on religious grounds from participating in an otherwise valid school regulation.[27] And it was not until 1948, that the establishment clause was employed to invalidate a school board regulation.[28] Both are now applicable equally to the states and federal government. Thus, from 1854 to 1938, eighty-four years, this kind of litigation was waged almost exclusively in the state courts and under state constitutional provisions.

Of course, all state constitutions contain some provisions with respect to this relationship. Most contain more specific language than the general terminology of the first amendment.[29] The first California constitution contained only one provision which guaranteed the right of free exercise of religion without preference or discrimination.[30] In the present constitution, adopted in 1879, however, we find two additional provisions which in general proscribe the legislature, any municipality, or school district from appropriating or paying from any public funds "or grant anything to or in aid of any religious sect, church, creed or sectarian purpose."[31] It proscribes the teaching of any "sectarian or denominational doctrine" in the "common schools."[32] The provisions of the California

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[24] People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 337, 92 N.E. 251, 254 (1910).

[25] Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589 (1845).

[26] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[27] Board of Education v. Barnette, 319 U.S. 624 (1943).

[28] Illinois *ex rel.* McCollum v. Board of Education, 343 U.S. 306 (1948).

[29] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U. S. Const. amend. I.

[30] Cal. Const. art. I, § 4 (1849).

[31] Cal. Const. art. IV, § 30.

[32] Cal. Const. art. IX, § 8. When the Committee on Revision and Adjustment returned art. IX to the convention, the word "common" was deleted. This amendment was defeated without debate, primarily because a similar amendment was made in § 6 which, if it had passed, the convention thought, would have permitted the funds established by that section to be used for other than elementary schools, a subject much debated by the convention. 3 Proceedings, Cal. Const. Conv. 1501 (1878-79). It does not necessarily follow that the convention actually intended to restrict the

constitution are representative of those found in other state constitutions. Although in some instances the more detailed provisions of state constitutions have been held to impose greater limitations on state action than the federal constitution,[33] this has not been true in the case of Bible reading.

There are so many state cases which have dealt with the problem that it would be impossible to review them all here. It is safe to say, however, that a large majority have upheld the practice of Bible reading. Because of the language of many state constitutions, some of the early opinions hinge on whether the Bible is "sectarian," for most provisions are usually phrased in terms of prohibiting the use of public funds for a "sectarian" purpose, "sectarian" teaching, or "sectarian" books. In concluding that the Bible is nonsectarian the courts usually point to its wide acceptance and literary character.[34] It has also been said that the book itself is not sectarian, it is only the interpretations placed on it by particular sects that make it so.[35] Accordingly, if no comment or interpretation is made, the use is held not to be for a sectarian purpose.[36] Some of the courts reaching the opposite result have found that the Bible is a "book of worship" and is "essentially religious" in character, and one court recently said that to deny this would be "unrealistic."[37]

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scope of § 8 to elementary schools as distinguished from high schools. See, however: Note, *The Bible in School Libraries*, 11 CALIF. L. REV. 183 (1923). The California Supreme Court did not make this distinction in Evans v. Selma Union High School Dist., 193 Cal. 54, 222 Pac. 801 (1924). Nor has the California Attorney General. See 25 OPS. CAL. ATT'Y GEN. 316 (1955). On October 14, 1878, during the convention, Mr. Wickler introduced a bill that read as follows: "The standard of moral instruction in our public schools shall be that set forth in the Bible, precluding sectarianism." 1 PROCEEDINGS, CAL. CONST. CONV. 146 (1878-79). In addition, numerous petitions were signed by citizens who "perceived persevering attempts which are made to prohibit the reading of the Bible in our public schools," and who sought therefore to place "explicit evidence" in the constitution to defeat these attempts. *Id.* at 89. None of these proposals materialized. On the other hand, attempts were made to specifically exclude "religious books" (*Id.* at 85) or "sectarian books" (*Id.* at 104) from the schools, but the convention settled on the language of art. IX, § 8, prohibiting sectarian or denominational teaching.

[33] For example, several state courts have held unconstitutional statutes authorizing or directing the use of public funds to pay for nonpublic school pupil bus transportation, even though the Supreme Court upheld a New Jersey statute of this kind. State v. Nusbaum, 17 Wis.2d 172, 115 N.W.2d 761 (1961); Visser v. Nooksack Valley School Dist., 33 Wash.2d 699, 207 P.2d 198 (1949).

[34] The Maine Supreme Court has said, "But reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmance of the Pagan Creeds." Donahue v. Richards, 38 Me. 376 (1854).

The Kentucky Supreme Court reached the same conclusion, saying, "There is, perhaps, no book that is so widely used and so highly respected as the Bible; no other . . . has had such marked influence upon the habits and life of the world." Hackett v. Brooksville School Dist., 120 Ky. 608, 87 S.W. 792 (1905).

To be "sectarian," the Supreme Court of California said the book must be "strongly partisan" in tone and treatment. Finding the Bible was not such a book, the court concluded that if the mere differences between religions or sects made the book sectarian then "any known version or text [of the Bible] is sectarian." Evans v. Selma Union High School Dist., 193 Cal. 54, 222 Pac. 801 (1924). Actually the California Supreme Court was concerned with interpreting a statute, not the constitution.

[35] Hackett v. Brooksville School Dist., *supra* note 34.

[36] Garden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956).

[37] Schempp v. School Dist. of Abington Township, 177 F. Supp. 398, 401 n. 7 (E.D. Pa. 1959). And the Illinois Supreme Court has stated, "What is the Bible? All sects agree that it is a book of divine instruction as to the creation of man, his relation to, dependence on, and accountability to, God. The historical and literary features of the Bible are of the greatest value, but its distinctive feature is its claim to teach a system of religion revealed by direct inspiration from God. The Bible in its entirety, is a sectarian book as to the Jew and every believer in any religion other than the Christian religion, and to those who are heretical or who hold beliefs that are not regarded as orthodox. Whether it may be called sectarian or not, its use in the schools necessarily results in sectarian instruction." People *el rel.* Ring v. Board of Education, 245 Ill. 334, 336, 92 N.E. 251, 255 (1910).

Where the specific constitutional language proscribes sectarian teaching rather than sectarian books, an examination of the use made of the book becomes crucial. Thus the use of the Bible as a library reference book[38] or "properly presented" in classes in art, music, literature and history is permissible.[39] However, the practice usually followed under statute or local board regulation requires daily reading of the Bible at the opening of the school day. It may or may not be accompanied by a prayer and a hymn. Many cases involve all three. Generally, the pupils are required to assume an attitude of reverence, or "devotional" repose, and may be required to stand with heads bowed and hands folded.[40] It is sometimes difficult to determine whether a court in upholding the practice is saying that it is not religious or rather that it is not "too religious." One court said, for example, that it was not "a form of worship," merely a "short period of reverence" and "a simple act of spiritual devotion."[41] It is probably more accurate to treat the courts as holding that it is a form of religious exercise, but that it is consistent with the principle of separation because the school is responsible, at least in part, for providing for the moral education of our youth and, furthermore, the practice itself is analogous to those followed by our state and federal governments in acknowledging the existence and dependence on a Supreme Being.[42] In other words, insofar as the principle of separation is concerned, what is permissible in other areas of government should not be excluded from our schools.[43] Underlying this point of view is the concept that the principle of separation of church and state only prohibits governmental preference to one religion over another and not preference to all religions equally.

There is another consideration either express or implicit that the minority should not be able to use the principle of separation to force the majority "to give up religion." They are sufficiently protected, it is argued, by not being compelled to participate.[44] Although all of the state courts have permitted dissident parents to challenge the constitutionality of these practices, it seems that this approach is closely related to the concept of standing to sue. In other words, if a parent does not want his child exposed to Bible reading, he can obtain permission to excuse the child.[45] How then, ask the courts, can he claim any violation of his constitutional rights? Some courts find he cannot.[46]

On the other hand, those courts finding the practice invalid have said that compulsion exists because the child is compelled to attend public school and

[38] Evans v. Selma Union High School Dist., 193 Cal. 54, 222 Pac. 801 (1925); State *ex rel.* Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902), *rehearing denied*, 65 Neb. 876, 93 N.W. 169 (1903). People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927) recognized its use for other than religious purposes.

[39] 25 OPS. CAL. ATT'Y GEN. 316, 325 (1955).

[40] People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 92 N.E. 251 (1910).

[41] Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956).

[42] This seems to be the rationale of some of the recent cases. See Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So.2d 21 (Fla. 1962); Murray v. Curlett, 228 Md. 239, 179 A.2d 698, *cert. granted*, 83 Sup. Ct. 21 (1962).

[43] Doremus v. Board of Education, 342 U.S. 429 (1952).

[44] In Murray v. Curlett, 228 Md. 239, 179 A.2d 698, *cert. granted*, 83 Sup. Ct. 21 (1962).

[45] And the judiciary, if not the legislative and administrative branches, have recognized that no child could be compelled to participate in such exercises if they were against his beliefs or those of his parents. In fact, it was on this basis that the practice has generally been upheld.

[46] Engel v. Vitale, 370 U.S. 421 (1962). See also Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So.2d 21 (Fla. 1962); Carden v. Bland, 19 Tenn. 665, 288 S.W.2d 718 (1956).

the practice is conducted by the teacher who represents, in the eye of the pupil, state authority.[47] The segregation that would necessarily result from excusing pupils itself creates a "potential pressure"[48] and opens the door to the divisive influences which the principle of separation was designed in part to keep out of the public schools.[49] It has even been suggested that the segregation for this reason constitutes denial of equal protection of the laws.[50]

UNITED STATES SUPREME COURT

Let us turn now to the decisions of the Supreme Court of the United States. Although it has never passed on the question of Bible reading, prior to *Engel* there were several cases that are relevant to the subject matter.[51]

In *Everson v. Board of Education*,[52] the Court in a 5-4 decision held that New Jersey could constitutionally provide reimbursement to the parents of non-public school pupils for the cost of transportation to and from school under general legislation providing similar benefits to all school children, public or non-public.

After rejecting the argument that the expenditure of public funds was for a private purpose, Justice Black reviewed the struggle for religious freedom in this country. He then formulated the scope of the establishment clause in the following language:

> The "establishment of religion" . . . means at least this: Neither a state nor a federal government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount,

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[47] Schempp v. School Dist. of Abington Township, 177 F. Supp. 398, 401 (E.D. Pa. 1959).

[48] Engel v. Vitale, 11 App.Div.2d 340, 348, 206 N.Y.S.2d 183, 191 (1960) (separate opinion of Beldock, J.).

[49] "In one part of the state the King James version of the Bible may be read in the public schools, in another the Douay Bible, while in those school districts where the sects are somewhat evenly divided, a religious contest may be expected at each election of a school director to determine which sect shall prevail in the school. Our Constitution has wisely provided against any such contest by excluding sectarian instruction altogether from the school." People *ex rel.* Ring v. Board of Education, 245 Ill. 334, 336, 92 N.E. 251, 255 (1910).

[50] 25 OPS. CAL. ATT'Y GEN. 316, 322 (1955).

[51] There are several others that deserve passing comment. One of the most frequently cited Supreme Court decisions is Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) in which the Court held that a federal statute designed to prohibit the importation of manual laborers did not apply to a clergyman. It is the dictum, however, and not the holding that is often cited in cases dealing with this problem. "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people." *Id.* at 465.

Two other cases which are often cited are decisions in which the scope of the first amendment was never considered. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court upheld the right of parents to send their children to a private or parochial school, a principle as applicable to the military academy as to the parochial school. The other decision is Cochran v. Board of Education, 281 U.S. 370 (1930). The Court there held (not upon the ground of the first amendment, because no challenge was made on that ground) that the fourteenth amendment did not prohibit the utilization of public funds for private uses; namely, the purchase of school books for children attending private or parochial schools. This is not to say that either holding is without significance. Without the decision in the *Pierce* case, the parochial school system would have been dealt a deadly blow. And *Cochran* may have encouraged the development of the "child benefit" theory that the Supreme Court has at least partly accepted in Everson v. Board of Education, 330 U.S. 1 (1947).

[52] 330 U.S. 1 (1947).

> large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[53]

The importance of this language for our purposes is that Justice Black defined "establishment" in the broad sense. It prohibited more than mere preference among religions, it proscribed any preference at all.

The *Everson* case was not unanimous on the holding, but all members of the Court seemed to agree with this broad definition of the establishment clause. On the purpose of the first amendment, Justice Jackson said:

> I agree that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. It may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. There is no answer to the proposition, more fully expounded by Mr. Justice Rutledge, that the effect of the religious freedom amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today's decision.[54]

Mr. Justice Rutledge, also dissenting, said that "not simply an established church, but any law respecting an establishment of religion is forbidden,"[55] and that the purpose of the first amendment was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[56] He concluded his opinion by saying:

> Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and

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[53] *Id.* at 15-16.
[54] *Id.* at 26-27 (dissenting opinion of Jackson, J.).
[55] *Id.* at 31 (dissenting opinion of Rutledge, J.).
[56] *Id.* at 31-32.

support of various private religious schools. . . . In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court.[57]

McCollum v. Board of Education

In *McCollum v. Board of Education*,[58] a nearly unanimous Court invalidated a "released time" program held on school property during regular school hours and under the supervision of school authorities. After rehearing the broad language in *Everson*, the Court found the program constituted a utilization of the tax-established and tax-supported public school system "to aid religious groups to spread their faith."[59] The Court specifically rejected the contention that the establishment clause was not incorporated against the states by the fourteenth amendment, and explained that historically the first amendment was only intended to forbid government preference of one religion over another, not impartial assistance to all religions. The Court said:

> Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the Everson Case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions. In addition they ask that we distinguish or overrule our holding in the Everson Case that the Fourteenth Amendment made the "establishment of religion" clause of the First Amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions.[60]

Justice Jackson concurred only in the result because he was "doubtful whether the facts of the case establish jurisdiction in this Court."[61] He said in *Everson* there was not only a measurable amount of public funds being used, but the relief asked for was only to prevent their illegal use. Referring to the prayer for relief, he said the Court is asked to enjoin all religious practices in the schools including the reading of the King James version of the Bible. He considered this a "danger signal" to the Court, a warning that the Supreme Court will become involved in "sifting out" of the public school education everything inconsistent with the doctrines of 256 separate religious bodies unless appropriate limitations are placed on jurisdictional requirements. In other words the Court will become a "super board of education" for every school district in the nation.

> While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in our schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. . . . The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated

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[57] *Id.* at 63.
[58] 333 U.S. 203 (1948). Only Justice Reed dissented.
[59] *Id.* at 209.
[60] *Id.* at 211.
[61] *Id.* at 232 (separate opinion of Jackson, J.).

> with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.[62]

Justice Jackson's doubts became a reality in *Doremus v. Board of Education*[63] in which he wrote the Court's opinion rejecting an attack on Bible reading by a taxpayer and a taxpayer-parent whose child had graduated during the course of the appeal. Finding as the state court did that neither plaintiff contended the practice was contrary to their beliefs, they concluded that neither had standing to sue. As taxpayers they could show no evidence of any measurable additional expense incurred as a result of the brief exercise. The Court did not decide, but intimated that the parent's claim might have failed even if the child was still in school because she could have been excused. Three dissenters felt that a taxpayer should have standing because of his general interest in the affairs of the district, especially where the "mismangement of the school system that is alleged is clear and plain."[64]

In *Zorach v. Clausen*,[65] six members of the Court, in an opinion by Justice Douglas, upheld a release time program which differed factually from the one considered in *McCollum* in that the religious instruction was held off school premises and there was substantially less participation and supervision by school authorities. There were three strong dissents not only over the holding but the language of the opinions as well.

In the majority opinion Justice Douglas wrote as follows:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. . . . That is the common sense of the matter. Otherwise, the state and religion would be alien to each other—hostile, suspicious, and even unfriendly. . . .
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> We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to the religious groups. That would be preferring those who believe in no religion over those who believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. . . . Government must be neutral when it comes to competition between sects. . . . But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken there. . . . We follow the McCollum case.[66]

Justice Jackson, in his dissent, characterized the majority opinion's attempt to distinguish the program in *McCollum* "as trivial," magnifying the nonessential

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[62] *Id.* at 235-36.
[63] 342 U.S. 429 (1952).
[64] *Id.* at 435.
[65] 343 U.S. 306 (1952).
[66] *Id.* at 312-15.

details and disparaging compulsion which was the underlying reason for invalidity. He concluded, "today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law."[67]

Justice Black, dissenting, stated that the Court was abandoning the broad view of the principle of separation and that this abandonment is all the more dangerous to liberty because of the Court's legal exaltation of the orthodox and its derogation of the unbelievers.[68]

State cases decided subsequent to these decisions have found them irreconcilable,[69] or have interpreted *Zorach* as a retreat from *McCollum*.[70] Two dissents,[71] however, have found that if *Zorach* was intended as a retreat, the Court has recently dispelled that idea in the case of *Torcaso v. Watkins*.[72] In this case the Court unanimously invalidated a state constitutional provision requiring an affirmation of belief in the existence of God as a condition of holding public office. It specifically stated that nothing in *Zorach* was intended to repudiate the language of *Everson*. The Court then said, "neither a State nor the Federal Government can . . . constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[73]

ENGEL V. VITALE

In 1951, the New York State Board of Regents adopted a statement of belief recommending the prayer which is now referred to as the "Regents' Prayer"[74] and suggested that "at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God."[75] Apparently, in composing the prayer, the Board of Regents was motivated in a large part by the desire to find a "truly non-sectarian prayer" that would be acceptable to all.[76] Such attempts are not new. Following the recommendation of the Board of Regents, the Board of Education of Union Free School District Number Nine, New Hyde Park, directed recital of the prayer at the commencement of each school day.

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[67] *Id.* at 325 (dissenting opinion of Jackson, J.).

[68] *Id.* at 319 (dissenting opinion of Black, J.).

[69] Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956).

[70] Engel v. Vitale, 18 Misc.2d 659, 191 N.Y.S.2d 453 (1959) (trial court opinion); Murray v. Curlett, 228 Md. 239, 179 A.2d 698, *cert. granted*, 83 Sup. Ct. 21 (1962).

[71] See the dissenting opinions in authorities cited note 70 *supra*.

[72] 367 U.S. 488 (1961).

[73] *Id.* at 495.

[74] "Almighty God, we acknowledge our dependence on Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

[75] Quote is from Engel v. Vitale, 18 Misc.2d 659, 667, 191 N.Y.S.2d 453, 461, which in turn quoted from "The Regents' Statement of Moral and Spiritual Training in the Schools, adopted November 31, 1951." See the opinion of Justice Beldock in the appellate division in which after stating that he "fully subscribe[s] to the statement of principle in the Regents' Statement of Moral and Spiritual Training in the Schools . . . to wit: Belief in and dependence upon Almighty God was the very cornerstone upon which our Founding Fathers builded." Engel v. Vitale, 11 App.Div.2d 340, 342, 206 N.Y.S.2d 183, 185 (1960).

[76] For the reaction of various religious groups in the community to the adoption of the prayer, see PFEFFER, CHURCH, STATE AND FREEDOM 395-99 (1953).

The practice was attacked as unconstitutional under both state and federal constitutions by the parents of pupils attending the district's schools. They included members of the Jewish faith, of the Society for Ethical Culture, of the Unitarian Church and one nonbeliever.

The trial justice in an exhaustive opinion[77] reviewed the background of the first and fourteenth amendments and the interrelation with public education and summarized his views as follows:

> The conclusion is inevitable that in 1868, the "sense of the nation," to revert to Madison's phrase, could not be read as indicating, by ratification of the Fourteenth Amendment, the exclusion of the Bible or of prayer from the public schools.[78]
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> . . . .
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> . . . One must conclude from the debates and history, therefore, that the First Amendment's relationship to prayer was general, in the sense that there should be no compulsion to recite a prescribed form of prayer, rather than specific, in the sense that the then existing routine of prayer should be excluded from the schools.[79]

The trial court in *Engel v. Vitale* interpreted *Zorach* to constitute a retreat from both *Everson* and *McCollum.*

> Where *McCollum* invalidated an alliance between religion and the compulsory education system, *Zorach* upheld the same allegiance, for the same purpose, though in a different place.[80] The *Everson* holding, . . . was extended by *Zorach* to validate minimal use of the tax supported school system for a religious purpose, as an accommodation of the spiritual needs of our people.[81]

He said that the prayer did not constitute religious instruction. He concluded that the prayer was not prohibited as a means of teaching "spiritual values," because "traditionally, and particularly at the time of the adoption of the first and fourteenth amendments, this was the accepted practice."[82] However, because the local school board's directive was phrased as mandatory, the court felt that it was necessary to come within the accommodation theory of *Zorach,* that each child must obtain approval from parents before the district can legally expose them to the exercise. The court recognized the "subtle" pressure which existed by virtue of the school system's sponsoring of the prayer and felt that merely permitting those who signify the desire to be excused was not a sufficient protection from this pressure. The court thought, that by requiring specific parental consent, it need not consider whether the exercise was in any sense compulsory.[83]

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[77] Engel v. Vitale, 18 Misc.2d 659, 191 N.Y.S. 453 (1959).

[78] *Id.* at 677, 191 N.Y.S.2d at 474.

[79] *Id.* at 679, 191 N.Y.S.2d at 476.

[80] [The trial court rendered its decision before Torcaso v. Watkins, 367 U.S. 488 (1961). Author's footnote.—Ed.]

[81] *Id.* at 688, 191 N.Y.S.2d at 485.

[82] *Ibid.*

[83] The trial court found the petition legally sufficient and the School Board's defenses insufficient, but denied the writ of mandate as a matter of discretion, remanding the matter to the Board "for further proceedings not inconsistent" with the opinion. The matter left to the Board was to adopt a procedure to protect the dissenters. The court suggested that they might be excused from the room, be given permission to arrive a few minutes late, or attend a separate opening exercise. *Id.* at 702, 191 N.Y.S.2d at 496.

The intermediate New York court affirmed the lower court decision per curiam, with Justice Beldock concurring in the result but dissenting from the reasoning of the lower court.[84] Justice Beldock disagreed with the "accepted practice" theory. The prayer he said was nondenominational and it merely affirms "that this is a religious nation." In his opinion "such an accommodation of secular education to the voluntary prayer or confession of religious faith" is not religious teaching or religious instruction. He said, citing *Zorach*, that "It is a proper and commendable practice which is in keeping with the best traditions of this country and with the relevant provisions of the State and Federal Constitutions."[85] Conceding the authorities are in conflict, he believes that the prevailing rule does not proscribe the recitation of a nondenominational noncompulsory prayer which merely tends "to inculcate fundamental morality."[86] The nonbeliever has the right to act in accordance with his views, but he has no right to insist that others have no religion. He disapproved of the trial court's suggestion that the dissenter be sent out of the room or be permitted to arrive late. The former, because he saw "a potential pressure" might rise to the "level of compulsion or coercion."[87] The latter, because the "basic discipline of any school requires a uniform time of commencement for all students."[88] His answer was to put recitation on a "voluntary basis."

The New York Court of Appeals affirmed on the ground that the establishment clause was not intended to prohibit "mere professions of belief in God."[89] To reach the contrary result, the court said, "would be in defiance of all American custom" and would destroy a part of the essential foundation of the American governmental structure.[90] The court rejected the contention that the recitation of the prayer constituted religious education, citing the familiar instances in which "acknowledgment" to a Supreme Being has been made on our coins, in public documents, in legislative halls, in our National Anthem, and in the flag salute. Two members of the court concurred and two dissented.

Judge Froessel said that the courts should not prevent those children who are "willing to do so" from acknowledging dependence on a Supreme Being. This, he said, is all that is done by the recitation of the prayer. It is not a violation of the separation principle because it gives no aid or support to religion, for the "perception of a Supreme Being" is a common experience of almost all men and it is "independent of any particular religion or church, and has become the foundation of virtually every recognized religious faith—indeed, the common

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[84] Engel v. Vitale, 11 App.Div.2d 340, 206 N.Y.S.2d 183 (1960).

[85] *Id.* at 347, 206 N.Y.S.2d at 190 (separate opinion of Beldock, J.).

[86] *Id.* at 344, 206 N.Y.S.2d at 187. He added, "The contention that acknowledgments of and references to Almighty God are acceptable and desirable in all other phases of our public life but not *in our public schools* is, in my judgment, an attempt to stretch far beyond the breaking point the principle of separation of Church and State and to obscure one's vision to the universally accepted tradition that ours is a nation founded and nurtured upon belief in God." *Id.* at 345, 206 N.Y.S.2d at 188. (Emphasis by the court.)

[87] *Id.* at 348, 206 N.Y.S.2d at 190.

[88] *Id.* at 348, 206 N.Y.S.2d at 191.

[89] Engel v. Vitale, 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961).

[90] *Id.* at 180, 176 N.E.2d at 581, 218 N.Y.S.2d at 661.

denominator. One may earnestly believe in God, without being attached to any particular religion or church."[91]

Judge Burke found the dissenting opinion self-contradictory. It admits, he says, that the first amendment prohibits "any kind of monism," but concludes that all children must be subjected to "a culture that is founded upon secularist dogma."[92]

Two judges, in an opinion by Judge Dye, dissented on the ground that a religious purpose motivated the Board of Regents in adopting the prayer. Judge Dye affirmed the idea that "we are a religious people" and cited the phenomenal proliferation of religious groups in our country which he attributed in large part to the principle of separation. The public schools are a "most sensitive area" which should not become the center of divisiveness. *Zorach*, he concluded, was not a retreat from *McCollum*. Two recently decided cases, one dealing with the Sunday closing laws[93] and a religious test for holding state office, prove this.[94] He concluded by saying that this prayer is a form of "State sponsored religious education" which should be left "for the family and the Church."[95]

Supreme Court Decision

With this background in mind, it has been suggested[96] that the Supreme Court of the United States could have decided *Engel v. Vitale* by applying *McCollum* to this case. Justice Black, speaking for the Court, did not do this. Instead, he turned to the history of officially composed prayer and to large extent rested the holding of the case on this basis. He neither cited nor relied upon the earlier decisions.[97] This point will be discussed later.

At the beginning of the opinion, after referring to the Board of Regents as that state agency having broad "supervisory, executive, and legislative powers over the State's public school system" and to the prayer as an "official prayer," the Court said as follows:

> We think that by using its public school system to encourage recitation of the Regents' Prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' Prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. . . . [I]t is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government.[98]

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[91] *Id.* at 182, 176 N.E.2d at 582, 218 N.Y.S.2d at 662-63. See Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) and Fellowship of Humanity v. County of Alameda, 153 Cal.App.2d 673, 315 P.2d 394 (1957) which enumerate religions practicing in this country which do not teach what generally would be considered belief in the existence of a Supreme Being.

[92] Engle v. Vitale, 10 N.Y.2d 174, 178, 176 N.E.2d 579, 583, 218 N.Y.S.2d 659, 663 (1961). He added, "There is no language [in the first amendment] which gives the slightest basis for the interpretation of a Marxist's concept that mandates a prescribed ethic." *Ibid.*

[93] McGowan v. Maryland, 366 U.S. 420 (1961).

[94] Torcaso v. Watkins, 367 U.S. 488 (1961).

[95] Engel v. Vitale, 10 N.Y.2d 174, 189, 176 N.E.2d 579, 586, 218 N.Y.S.2d 659, 668 (1961).

[96] Sutherland, *Establishment According to Engel*, 76 Harv. L. Rev. 25 (1962).

[97] The *Everson* case is mentioned in Engel v. Vitale, 370 U.S. 421, 428 n.11 (1962), but only as reference for the story of events surrounding the enactment of a Virginia statute.

[98] Engel v. Vitale, 370 U.S. 421, 424-25 (1962).

To support its position, the Court cited the history of the practice of governmentally composed prayers. The Book of Common Prayer was formulated under governmental direction and written into law in the sixteenth century. The struggle between religious groups in England which subsequently occurred over efforts to modify it and the failure of some to do so was one of the causes of emigration to America. By the time our Constitution was adopted, the Court said, "there was widespread awareness" of the danger to religious freedom of permitting the government to place "its official stamp of approval upon one kind of prayer or one particular form of religious service."[99]

The Court then turned to discuss the nondenominational character of the prayer and the issue of voluntary participation.

> Neither the fact that the prayer may be denominationally neutral, nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, . . . The Establishment Clause, unlike the Free Exercise Clause, does not depend upon the showing of direct government 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.[100]

It thus appears that two of the principal arguments advanced to uphold Bible reading have been decided the other way. If the purpose and nature of the exercise is "religious," then it runs afoul of the establishment clause, at least, if it is a regular continuing activity.[101] Nor will the contention that the prayer is nonsectarian be sufficient to withdraw it from the proscription of that clause. Of course, it was admitted by all parties (but not accepted by all of the judges reviewing the case) that the Regents' Prayer was a "religious activity" and, consequently, it is still open for a party to contend, as several courts have found, that Bible reading is not such an activity. It would seem, however, that if the Regents' nondenominational prayer is a religious activity, the practice of Bible reading as outlined above equally violates the establishment clause.

The other argument, as we have seen, is whether an unconstitutional compulsion or "coercion" existed when attendance was voluntary. The Court said the establishment clause does not require "any showing of direct governmental compulsion," but then hastily added:

> This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and degrade religion. . . . Another purpose of the Establishment Clause rested on the awareness

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[99] *Id.* at 429.

[100] *Id.* at 430.

[101] *Id.* at 435 n.21: "Patriotic or ceremonial occasions bear no resemblance to the unquestioned religious exercise . . . in this instance."

> of the historical fact that governmentally established religions and religious persecution go hand in hand.[102]

The Court said that the first amendment was added to the Constitution to guarantee that neither the power nor the prestige of government would be used to control, support, or influence the kinds of prayers Americans can say. Thus, neither the states nor the federal government may prescribe by law any particular form of prayer. This interpretation of the principle of separation of church and state, the Court said, does not result in governmental hostility to religion.

> Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of." It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.[103]

Justice Douglas concurred in a separate opinion in which he reviewed briefly the existence of similar practices which are sanctioned at both state and federal levels. He said that even though our system was "honeycombed" with them, he thought it was unconstitutional "whatever form it takes." He felt that there was an element of coercion inherent in the daily recitation of the Regents' Prayer; the same was true in other situations where prayers are recited in the course of governmental activities. Although he did not concede that the practice constituted an establishment in the "historic meaning of the words," he did find the practice was incompatible with the principle of separation because "it inserts a divisive influence into our communities." He suggested that "the Everson case seems in retrospect to be out of line with the First Amendment."[104]

Justice Stewart dissented. He rejected relevance of the Book of Common Prayer. He felt the Regents' Prayer was no different from the countless examples of similar practices elsewhere in government which recognize and follow "the deeply entrenched and highly cherished spiritual traditions of our Nation."[105]

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[102] *Id.* at 430-32.
[103] *Id.* at 434-35.
[104] *Id.* at 443.
[105] *Id.* at 450.

Conclusion

Engel v. Vitale has been roundly criticized in some quarters and approved in others, and Constitutional amendments have been introduced in Congress to overrule it. It seems unrealistic, however, to conclude that all of this is because the pupils of the New York school system may no longer recite the Regents' Prayer. Rather, it seems more likely that a substantial reason for the reaction may be that its supposed implications on the continued validity of released time programs, school bus transportation to parochial school pupils, and the explosive question of public aid to nonpublic schools. While it cannot be denied that the broad language may some day be useful to the opponents of these programs, nevertheless, it seems to this writer that the quite intentional omission of references to *Everson* and *McCollum* does not justify this fear.

Although it is hazardous to attempt to draw conclusions from what the Court did not do, it seems likely that a majority of the Court were not willing or ready to extend the broad language in *Everson* to prayer recitation. The logical extension is seen in Justice Douglas' opinion in which he finds any and all practices of this type are unconstitutional. Basing the holding on the analogy of the Book of Common Prayer, leaves the extension of the principle to other practices and other areas unresolved. Nevertheless, it seems more than likely that *Engel* points the way to the elimination of other religious practices in the schools.

It has been suggested that the future significance of the decision lies not in the invalidation of the practice of prayer recitation but rather in the Court's apparent relaxation of the requirement of standing to sue.[106] As mentioned above, the Court found that it was not necessary for plaintiff to show "direct governmental compulsion" to predicate a claim under the establishment clause. This may imply, as Professor Sutherland has suggested, that any "man-in-the-street" has standing to sue to attack religious practices in the schools; however, it is submitted that this view ignores the context of the language.

It seems that the concern expressed by the Court in these cases dealing with religion and the schools finds its roots in the nature and purpose of the public school system. If one of the broad social purposes of the public school is to provide a common meeting ground for all who wish to send their children there, and thus to aid in lending some cohesion to the divergent influences of our pluralistic society, then it seems that the principle of separation of church and state should be interpreted to eliminate the divisiveness which has long been associated with religious controversy. This in part may explain the Court's willingness to permit a parent to challenge the practice even where it is said to be voluntary. Another factor may be that although the courts have recognized the right of a student whose beliefs are offended to refrain from participating, neither

[106] Sutherland, *supra* note 96, at 25.

the legislatures nor the administrative agencies seem to have shown much concern until judicial intervention was imminent or had already occurred.[107]

While it appears that the Court has rejected the implications of the *Doremus* opinion, in that case neither plaintiff alleged that Bible reading was contrary to their beliefs. It was for that reason and because the pupil was no longer in the schools that the Court found there was no standing. In *Engel*, the plaintiffs were parents of children attending the schools. There is no case, of which this writer is aware, that has denied a parent standing to attack an allegedly religious practice in the school.

The significance of *Engel* will, of course, depend in part on how the case is viewed by subsequent decisions of the Supreme Court. Since the Court presently has three cases involving Bible reading and other practices before it, it should not be long before further explanation will be forthcoming.

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[107] In Engel v. Vitale, 370 U.S. 421 (1962), Schempp v. School Dist. of Abington Township, 177 F. Supp. 398 (E.D. Pa. 1959), and Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956), no exception was made for nonparticipation prior to suit. In Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So.2d 21 (Fla. 1962) and Murray v. Curlett, 228 Md. 239, 179 A.2d 698, *cert. denied*, 83 Sup. Ct. 21 (1962) it was not until a lawsuit was threatened that the local governing board adopted this type of rule. In *Schempp*, permission to excuse those who did not wish to participate was not provided until after the decision on the merits. The legislature of Pennsylvania then amended the statute accordingly. It was to determine the effect of this amendment that the Supreme Court of the United States remanded the case to the district court.