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CHURCH, STATE AND THE PUBLIC SCHOOLS

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For ages men have been seeking to define the appropriate relationship between religion and the state.[1] In our own country the courts have played an important role in this continuing search. Among the most publicized decisions of the Supreme Court are those dealing with this area of constitutional law, especially those dealing with religious activities or practices in our public schools. In the last issue of the *Santa Clara Lawyer*[2] the author traced the history of litigation concerning the constitutionality of prayer recitation and Bible reading in the public schools. That article concluded with a discussion of the Supreme Court's opinion in the *Regents' Prayer* case[3] which held that the practice of opening each school day with a recitation of a "nondenominational" prayer was incompatible with the mandate of the first amendment, applicable to the states through the fourteenth amendment. Since then, on June 17, 1963, the Supreme Court decided *School District of Abington Township v. Schempp*,[4] holding that the practice of starting the school day with reading passages from the Bible is also unconstitutional. The purpose of this article is to comment on this latest decision of the Court.

Three cases came before the Supreme Court last term questioning the constitutionality of Bible reading. Two cases[5] were disposed of in one decision and the third[6] was remanded to the state

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1 See, generally, BARKER, CHURCH, STATE AND EDUCATION (1957) (Ann Arbor Paperback Edition).

2 Schumb, *Religion in the Public Schools*, 3 SANTA CLARA LAW. 135 (1963).

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

4 School District of Abington Township v. Schempp, 83 Sup. Ct. 1560 (1963).

5 School District of Abington Township v. Schempp, 83 Sup. Ct. 1560 (1963); Murray v. Curtlett, 83 Sup. Ct. 1560 (1963).

6 Chamberlain v. Dade County Board of Public Instruction, 83 Sup. Ct. 1864 (1963). This case also involved the constitutionality of a variety of religious practices other than Bible reading. Apparently the Court decided it was not appropriate to pass on these other practices which included, among others, recitation of prayers and grace,

supreme court "for further consideration in the light of" the *Schempp* decision. The two cases decided were brought by parent-taxpayers[7] and their children who were attending the public schools where the alleged religious exercises were conducted. They sought to enjoin the school districts from conducting these exercises on the ground that they violated the plaintiffs' rights under the first and fourteenth amendments.

In *Schempp* the practice was required by state law[8] and in *Murray*, by a rule of the Baltimore City School Board.[9]

FACTS

In the opinion for the Court Mr. Justice Clark describes the actual operation of exercises in the schools attended by the *Schempp* children. The students met each morning in their home rooms and the exercises were broadcast through the intercommunications system by the members of the school's radio and television workshop. The exercises were apparently conducted in a similar fashion in the *Murray* case. Mr. Justice Clark said:

> Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students.[10]

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the use of religious films and displays in connection with the observance of religious holidays, the presence of religious symbols in the classroom, a Baccalaureate program conducted in school buildings, and the use of a religious test in the employment and promotion of school employees. The Court did vacate the judgment. It should be borne in mind that all three cases were decided before the Supreme Court's opinion in *Engel v. Vitale.*

[7] In *Schempp* the parents were Unitarians and in *Murray* the parent was an "avowed atheist."

[8] 24 Pa. Stat. § 15-1516, as amended, Pub. Law 1928 (Supp. 1960) Dec. 17, 1959, requires that "At least 10 verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. *Any child shall be excused from participating in the opening from such Bible reading, or attending such Bible reading upon the written request of his parent or guardian.*" (Amendment underlined.)

[9] The rule as amended shortly before the suit was filed now reads as follows: Section 6—Opening Exercise. Each school either collectively or in classes, shall be opened by reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay verision may be used by those pupils who prefer it. Appropriate patriotic exercise should be held as a part of the general opening exercise of the school or classes. *Any child shall be excused from participating in the opening exercise upon written request of his parent or guardian.* (Amendment underlined.)

[10] School District of Abington Township v. Schempp, 83 Sup. Ct. 1560, 1563 (1963).

The participation in the exercises is voluntary according to Justice Clark. The student reading the verses may choose the version and passages of the Bible to be read. In fact, several religious texts had been used for the ceremonies; the King James, Douay and Revised Standard Editions, as well as the Jewish Holy Scriptures. In further description of the morning exercises, Justice Clark said:

> There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.[11]

Mr. and Mrs. Schempp testified that certain doctrines of the Bible were contrary to their beliefs. Expert testimony was introduced to prove that there are marked differences between various versions of the Bible, that no version is acceptable to all religious groups, and that some passages are offensive to members of certain religions. The Schempps testified that, even though the Bible did contain beliefs contrary to their own, they did not seek to obtain permission to excuse their children from participating in the exercises because they felt that it would adversely affect the relationship of their children with their classmates and teachers. Specifically, they claimed that if their children were excused they would tend to be labeled "odd balls" and be considered as "Un-American" or immoral. They contended, furthermore, that their children would miss the general announcements which were customarily made immediately after the morning exercises if they left their classroom to avoid participation. Finally, they argued that the children would have to stand outside their classrooms in the hall and suffer the imputation of punishment for bad conduct.

In the *Murray* case the plaintiff's son was excused from participation pursuant to her request. Nevertheless, the plaintiffs alleged that the continuance of the practice violated their rights "in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby rendering sinister, alien and suspect the beliefs and ideals of . . . . Petitioners, promoting doubt and question of their morality, good citizenship and good faith."[12]

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[11] *Ibid.*
[12] *Ibid.*

LOWER COURT OPINIONS

In the *Schempp* case, a three judge district court initially found that the statute and the exercises violated both the free exercise clause and the establishment clause of the first amendment.[13] The case was decided before the Pennsylvania legislature amended the statute to permit nonparticipation.

The district court found that the Bible was a "book of worship" and that the use of the Bible in this fashion amounted to religious instruction, which in these circumstances constituted a violation of the establishment clause. The violation of the free exercise clause was predicated on the mandatory feature of participation. The case was taken to the Supreme Court but was remanded after the statute was amended in order that the Court could consider what, if any, effect should be given the amendment.[14] Subsequently the district court reaffirmed its earlier decision on the establishment clause, but found no infringement on the plaintiffs' free exercise of religion because of the excusal provision.[15] The district court relied heavily on the Supreme Court's opinion in *McCollum v. Board of Education*[16] which struck down a released time program conducted on school premises during the regular school day with the active participation of school district personnel.

In *Murray* the Supreme Court of Maryland by a divided court upheld the school board regulation.[17] The trial court sustained a demurrer to the complaint and this ruling was upheld on appeal. A majority of the Maryland Supreme Court conceded that the Supreme Court of the United States had not passed on the issues raised in this case, but thought that the Court's decision in *Zorach v. Clauson*,[18] which upheld a released time program conducted off school premises, was controlling.[19] The Court pointed out that the "use of school time and the expenditure of public funds is negligible" and that these exercises are analogous to the opening prayer

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[13] 177 F. Supp. 398 (E.D. Pa. 1959). The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The clause preceding the conjunctive is referred to as "the Establishment Clause" and the clause following as "the Free Exercise Clause."

[14] School District of Abington Township v. Schempp, 364 U.S. 298 (1961).

[15] Schempp v. School District of Abington Township, 201 F. Supp. 815 (E.D. Pa. 1962).

[16] 333 U.S. 203 (1948).

[17] Murray v. Curlett, 228 Md. 239, 179 A.2d 698 (1962).

[18] 343 U.S. 306 (1952).

[19] Murray v. Curlett, 228 Md. 239, 250, 179 A.2d 698, 704 (1962), the Court said: "Inasmuch as the Supreme Court has not yet spoken with respect to the Bible reading and Prayer recitation ceremonies at school opening exercises, we think we are bound by what we understand is the effect on *McCollum* as it is explained and expanded in *Zorach* until such time as the Court speaks further in this uncertain area."

ceremonies in Congress. The majority also thought it significant that the Supreme Court had remanded the *Schempp* case to consider the effect of the statutory amendment permitting nonparticipation. The dissenting opinion relied on the Supreme Court's opinion in *McCollum* and *Torcaso v. Watkins*.[20] In the latter decision, the Court invalidated a state constitutional provision requiring an affirmation of belief in the existence of God as a condition of holding public office. The dissenters rejected the majority view that participation was "voluntary," in spite of the school board's rule permitting nonparticipation. They felt that unconstitutional coercion existed because affirmative action was required to seek exemption. Furthermore, they thought that in these circumstances a nonparticipating pupil would be subjected to suspicion and "lose caste" with his peers if he failed to participate in the exercises. Finally, they treated the exemption provision as if it required the pupil to declare his nonbelief as a condition of the exemption and concluded that under *Torcaso* a state cannot do this. It appears that the dissenters felt that both clauses of the first amendment were violated, although the opinion rests largely on the establishment violation.

Both *Murray* and *Schempp* were granted review and argued together, and the Supreme Court issued one opinion for both cases. There was no majority opinion. Mr. Justice Clark wrote for the Court, but only three other Justices joined with him.[21] Four Justices concurred in three separate opinions, while Mr. Justice Stewart dissented.[22]

Despite the plurality of opinions, there was unanimous agreement on several propositions. All members of the Court adhered to the view that both first amendment religious clauses apply with equal vigor to the states and the national government, and that the first amendment prohibits government from preferring religion against nonreligion as well as one religion over another.

All members of the Court were also agreed that these cases were indistinguishable from *Engel v. Vitale* and no one, except Mr. Justice Stewart who also dissented in that case indicated that that decision should be overruled. Since the cases were not distinguished from *Engel v. Vitale*,[23] it is somewhat surprising that the Court felt obliged to write an extended opinion. One explanation may be found in the failure of the Court in *Engel v. Vitale* to discuss or even cite any of its prior first amendment decisions, which

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20 367 U.S. 488 (1961).

21 The Chief Justice and Justices Black and White.

22 Justices Douglas and Brennan concurred separately. Justice Goldberg, with whom Justice Harlan joined, also concurred separately.

23 BARKER, *supra* note 1, at 149.

were obviously relevant to the decision.[24] If *Schempp* gives us nothing else, at least Mr. Justice Clark has explained why the Court in *Engel v. Vitale* believed no citation was necessary. He says, after discussing these earlier cases and the principles they announced, that "Finally, in *Engel v. Vitale*, only last year, these principles were so universally recognized that the Court without the citation of a single case and over the sole dissent of Mr. Justice Stewart reaffirmed them."[25]

As is frequently the case in evaluating Supreme Court opinions, they raise more questions than they answer; however, the Court does partially lift the "veil of silence" which shrouded *Engel v. Vitale*.

OPINION OF THE COURT

To Mr. Justice Clark the guiding standard of church and state relations is "neutrality." After a brief examination of prior decisions, he professes to find that the Court has always recognized this. *Zorach* is summarily distinguished. After stating that these exercises are a prescribed part of the curricular conducted in school buildings by school personnel, he concludes "None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach v. Clauson*."[26] The Court's analysis here is simple. Once it is established that the exercises are "a religious ceremony and intended to be so by the state," it follows that "the exercises and the law requiring them are in violation of the Establishment Clause."[27] Although there was no similar finding in *Murray* because the case was decided on the pleadings, Mr. Justice Clark reaches the same conclusion. Since the complaint alleged that the exercise was sectarian, "The short answer, therefore, is that the religious character of the exercise was admitted by the State."[28] The State's contention that the purpose of the exercises was to promote moral values, a legitimate secular purpose, was also summarily rejected because the Bible is "an instrument of religion." This fact the state cannot deny, because it authorizes the use of the different versions of the Bible and permits objecting pupils to absent themselves. "The conclusion follows that in both cases the

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[24] Except a reference to the history of the first amendment contained in *Everson v. Board of Education*, 330 U.S. 1 (1947). This patent omission has not gone unobserved. See Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, signifying . . . ."* 1962 SUPREME COURT REVIEW 1, 13.

[25] School District of Abington Township v. Schempp, 83 Sup. Ct. 1560, 1570 (1963).

[26] *Id.* at 1572.

[27] *Ibid.*

[28] *Ibid.*

laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners."[29] By way of explaining just what rights have been infringed, he adds in a footnote:

> It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. McGowan v. Maryland, supra, 366 U.S. at 429-430, 81 S. Ct. 1106-1107, 6 L. Ed. 2d 393. The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain. See Engel v. Vitale, supra. Cf. McCollum v. Board of Education, supra; Everson v. Board of Education, supra. Compare Doremus v. Board of Education, 342 U.S. 429, 72 Sup. Ct. 394, 96 L. Ed. 475 (1952), which involved the same substantive issues presented here. The appeal was there dismissed upon the graduation of the school child involved and because of the appellants' failure to establish standing as taxpayers.[30]

Justice Clark also rejects the contention that the invalidity is cured by the excusal provision. His answer to the claim that these practices are "relatively minor encroachments on the First Amendment" is that "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent."[31] He rejects in one sentence the claim that by this decision the Court is fostering an establishment of a religion of secularism. "While the Free Exercise clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the state to practice its beliefs."[32] He cites with approval Justice Jackson's often quoted statement from *West Virginia Board of Education v. Barnette,*

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[33]

Finally, Mr. Justice Clark attempts to formulate the standard of permissible state action under the establishment clause, which the Court declined to do in *Engel v. Vitale.* He states the standard as follows:

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29 *Ibid.*
30 *Id.* note 9.
31 *Id.* at 1573.
32 *Ibid.*
33 *Ibid.*

> [W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[34]

CONCURRING OPINIONS

Mr. Justice Douglas believes that both religious clauses of the first amendment serve to protect the single goal of individual religious freedom. Since he finds that plaintiffs have failed to prove any coercion, he concludes there can be no violation of the free exercise clause. But he believes there is a violation of the establishment clause, which in his view prohibits all "arrangements" by which the state lends "its assistance to a church's effort to gain and help adherents."[35]

In these cases the state violates the constitution, directly by conducting religious exercises and indirectly by employing its facilities and funds to aid and support religion. The most effective way, he says, to aid or to "establish" a religion is to finance it and any amount of financial support, no matter how small, is illegal. These "regimes," as he calls the exercises, therefore violate the doctrine of "neutrality" and must fall.

Mr. Justice Brennan exhaustively examines the prior decisions of the Court involving the principle of separation and the plethora of state court decisions dealing with Bible reading. The question, as he formulates it, is whether these exercises "are involvements of religion in the public institutions of a kind which offend the First and Fourteenth Amendments."[36] He finds that they are. He amplifies his position by adding that:

> [T]he fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion. Equally, the Constitution enjoins those involvements of religious (sic) with secular institutions which (a) serve the essentially religious activities or religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice.[37]

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[34] *Id.* at 1571.
[35] *Id.* at 1574.
[36] *Id.* at 1576.
[37] *Ibid.*

He finds that the exercises are essentially religious activities, which employ the "organs of government" for religious purposes. He believes that secular means would adequately serve whatever secular purpose the exercises may have, *i.e.*, to foster discipline and tolerance. He also rejects the contentions that the exercises are saved because of the excusal provision. He finds that this "simply has no relevance to the establishment question,"[38] but it does to the free exercise problem. He believes that "the excusal procedure itself operates in such a way as to infringe the rights of free exercise of those children who wish to be excused" and that a state cannot "constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention."[39] In reaching this conclusion, he relies on two prior decisions of the Court,[40] but more significantly on his conception of the function and role of the public schools in our society. He believes that every parent has the right to send his child to a public school for a secular education free of sectarian influences. He states, "the public schools . . . serve a uniquely *public* function; the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort. . . ."[41] If a parent wishes to provide a sectarian education for his child, he has the right to do so. But the choice should be made by the parent, not the majority of voters of the state or school district. The establishment clause prohibits the state from inhibiting this choice by diminishing the attractiveness of either alternative.

Justice Brennan observes that the Court held that a parent-taxpayer has standing to attack school practices which infringe the right of free exercise. He believes that a parent should have the same standing even if "the gravamen of the lawsuit were exclusively

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[38] *Id.* at 1606.

[39] *Ibid.*

[40] Mr. Justice Brennan relies on *Torcaso v. Watkins*, 367 U.S. 488 (1961) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). In *Torcaso*, the Court said no state may force a person "to profess a belief or disbelief in any religion." *Torcaso*, however, did not involve a profession of "disbelief." It is arguable that a request for permission not to participate in Bible reading exercises constitutes a profession of "disbelief." On the other hand, immature pupils are more likely to equate the fact of nonparticipation with "disbelief" than are adults. In *Barnette*, the Court denied the state the power to compel a student to pledge allegiance to the national flag over his objection that to do so would violate his religious beliefs. The Court pointed out that plaintiffs did not seek to compel the cessation of the exercise, and nothing in the opinion indicates that the Court thought they would be entitled to such relief. It has been suggested that a flag salute exercise achieves a secular purpose and this is within the power of the state, while Bible reading achieves no "primary secular purpose" and is not within the scope of state power. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963).

[41] School District of Abington Township v. Schempp, 83 Sup. Ct. 1560, 1582 (1963).

one of establishment," because the parent is the "person most directly and immediately concerned about and affected by the challenged establishment."[42]

Justice Brennan attempts to reconcile prior decisions of the Court to support his thesis that the first amendment prohibits those involvements of religion with secular institutions discussed above. He starts with *Everson v. Board of Education*, an action brought to enjoin a school district from reimbursing the parents of Catholic school pupils for the cost of transportation on public buses to and from parochial school. The statute by its terms applied to all pupils who attend any public or private school, except private schools operated for profit. The Supreme Court upheld the statute and the payments. Mr. Justice Brennan conceded that the reimbursement of transportation expense may have "indirectly" fostered the operation of Catholic schools, and thus ultimately served a religious goal, but he concluded that "this form of governmental assistance was difficult to distinguish from myriad other incidental if not insignificant governmental benefits enjoyed by religious institutions—fire and police protection, tax exemptions, and the pavement of streets and sidewalks, for example."[43] In attempting to reconcile *Zorach v. Clausen* with *McCollum v. Board of Education*, he finds the "deeper significance" is that in *McCollum* "the religious instructor" was placed in the public school classroom. Thus the aura of authority and respect ordinarily given to the secular teacher was transferred to the religious instructor, improperly enhancing the position of religion.

Mr. Justice Brennan seeks to lay to rest the argument that, if Bible reading is not permissible, then "every vestige, however slight" of cooperation and accommodation between religion and government must also be invalid. He devotes several pages of his opinion to answering this argument. He believes the support and maintenance of military and prison chaplains is probably permissible because no coercion is present. The circumstances of the soldier and prisoner often place them in situations where they would have no opportunity to exercise their religious beliefs unless the government specifically provided for it. Similarly the practice of invocational prayers in Congress involves no coercion or overt proselytizing. Tax exemption is valid because, when granted to religious organizations, it is not because they are religious, but because government uses this device to encourage educational, charitable, and eleemosynary activities. Nor are the references to

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[42] *Id.* at 1594 note 30.
[43] *Id.* at 1592.

God prohibited on our coins, documents, public buildings, and in patriotic songs and exercises. These references are so "interwoven . . . into the fabric of our civil polity that its present use may well not present the type of involvement which the First Amendment prohibits."[44]

Mr. Justice Goldberg, with whom Mr. Justice Harlan joined in concurring, found the considerations which led the Court "to interdict the clearly religious practices presented in these cases . . . to (be) . . . wholly compelling; . . ."[45] He believes that the free exercise and establishment clauses should be read together in the light of the single end which they are designed to serve, which is "to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end."[46] He says that if "true religious liberty" is to be obtained, the government must refrain from engaging in or compelling religious practices, or favoring one religion over another, or religion over nonreligion. Although he agrees that government must be neutral in its attitude toward religion, its actions must not be hostile to religion. Nor can the state or the Court ignore the significance of religion as it affects our people. There must be an accommodation "without undue involvement of one in the concerns and practices of the other"; but there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the unpermissible."[47] The practices here, do not fall within "any sensible or acceptable concept of compelled or permitted accommodation and involve the state so significantly and directly in the realm of the sectarian as to give rise to those very diversive influences and inhibitions of freedom which both religious clauses of the First Amendment preclude."[48] He points to the "pervasive religiousity" and the "direct governmental involvement," *i.e.*, use of the prestige, power, and influence of school staff and authority on impressionable children whose attendance is compelled during a regular school day. He is careful to point out that he does not mean that all "incidents of government which import of religion" are barred by the first amendment.

Dissenting Opinion

Mr. Justice Stewart filed a dissenting opinion. He thought that the cases should be remanded for the purpose of taking additional

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[44] *Id.* at 1614.
[45] *Id.* at 1615.
[46] *Ibid.*
[47] *Ibid.*
[48] *Id.* at 1616.

evidence. He said that "there is no evidence in either case as to whether there would exist any coercion of any kind upon a student who did not want to participate."[49] Of course there was no evidence in *Murray* because the case was decided on the pleadings. In *Schempp* there was a trial, but Stewart said "the record shows no more than subjective prophecy by a parent of what he thought would happen"[50] if his child were excused from participation. He believed that the school authorities could administer the system without "official coercion." But, he warns, if the timing caused the non-participating pupils to miss morning announcements or, if the excusal provision was administered in such a way "as to carry overtones of social inferiority, then impermissible coercion would clearly exist."[51]

Perhaps the most interesting statement made by Justice Stewart is that he found a serious free exercise argument "on the part of those who affirmatively desire to have their children's school day open with the readings of passages from the Bible."[52] The Court's denial of the majority's wish to utilize the public schools to foster their own religious beliefs places their religion "at an artificial and state-created disadvantage." Proscription of these exercises results in an "establishment of a religion of secularism." In answer to Justice Brennan's assertion that those who desire sectarian instruction may have it, but only if they send their children to private or parochial schools, he replies, "But the consideration which renders this contention too facile to be determinative has already been recognized by the Court: 'Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.' *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105."[53] Justice Stewart unfortunately does not amplify his position. Does he mean that parents whose religion imposes a duty to send their children to a church-sponsored school, but who are financially unable to do so, have a constitutional right to demand governmental financial support? The Supreme Court has not yet decided if direct governmental financial support of religious education is even constitutionally permissible. The reverse of this proposition, *i.e.*, such support is a constitutional mandate, is indeed novel. It does not appear to be an overstatement to say that, if his view were accepted, the concept of separation of church and state would become an anachronism. As noted above, Mr. Justice

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49 *Id.* at 1622.
50 *Ibid.*
51 *Id.* note 8.
52 *Id.* at 1618.
53 *Id.* at 1619.

Clark rejected Stewart's view. Whether Stewart himself would extend his view to its logical conclusion is doubtful, since he cites *McCollum* with approval and adds that the state may not support the "proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets."[54] He believes, however, that the state is not doing so here.

The nub of Stewart's opinion is that the exercises coupled with the excusal provision do not by themselves involve any coercion and he does not believe that the Court should assume otherwise. In addition, he believes that "each local community and its school board" and not the Court should decide whether or not the benefits of a noncoercive religious exercise are commensurate with "the administrative problems they would create."[55] Of course, if the exercise were found to be unconstitutional, the fact that it is held by direction of a local school board rather than the state legislature would not save it. The Court has previously held that the action of a local school board is "state action" for the purposes of the fourteenth amendment.[56] Furthermore, Mr. Justice Stewart seems to overlook the fact that in the *Schempp* case, at least, the local school board had no alternative but to conduct the exercises which were required by state statute.[57]

ZORACH V. CLAUSON

A good deal of the differences found in the state court opinions prior to *Engel v. Vitale* stemmed from the confusion created by the decision and the dicta in *Zorach v. Clauson*.[58] In *Zorach* Mr. Justice Douglas indicated that "accommodation" not "neutrality" is the proper attitude of government toward religion.[59] Justice Clark's reaffirmance of the principle of "neutrality" certainly is consistent with the Court's opinions in *Engel* and *Torcaso*, but his failure to discuss its relevance to *Zorach* illustrates the difficulty.

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[54] *Ibid.*

[55] *Id.* at 1621. Justice Stewart is not alone in holding this view. Dean Griswold said as much in a speech attacking the Court's decision in *Engel v. Vitale*. The Dean expressed his views as follows: "[T]here are some matters which are essentially local in nature, important matters, but nonetheless matters to be worked out by the people themselves in their own communities, when no basic rights of others are impaired." Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167, 173 (1963).

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

[57] Whether Dean Griswold would make a distinction between *Schempp* and *Engel v. Vitale* is not clear. In the latter case, the adoption of the *Regents' Prayer* was within the discretion of the local school board.

[58] As we have already seen, this was one of the principal differences between the two opinions in *Murray*.

[59] KURLAND, *supra* note 24, at 27.

In addition Justice Clark refuses to analyze *Zorach* in terms of the "test" which he formulates in *Schempp*. If there must be a "secular legislative purpose and primary effect that neither advances nor inhibits religion," it is difficult to see how released time programs, upheld in *Zorach*, can stand. Granted that the words "purpose" and "primary effect" leave some leeway, it is still difficult to imagine what secular purpose a release time program serves.[60] It has been suggested that *Engel v. Vitale* may have presaged the eventual overturn of *Zorach* and the invalidation of release time programs.[61] The difficulty here is that the Court formulates a test but then fails to apply it.

Goldberg is probably unwilling to go this far because he eschews any formulation of principle and on several occasions uses the phrase "permissible accommodations" rather than "neutrality." He does not mention *Zorach* at all, nor does Justice Douglas who authored that opinion. But, if Goldberg can find a prohibited "arrangement" by which the state lends "its assistance to a church's effort to gain and help adherents" in these cases, it is difficult to see how he could uphold a released time program. Justice Brennan stated that " the distinction which the Court drew in *Zorach* between the two cases is in my view faithful to the function of the establishment clause."[62] The "crucial difference" between *Zorach* and *McCollum* he observed, was not that school facilities were used, but that a religious instructor in a secular classroom gained the status of a secular teacher. When the released time program is measured by the standard he proposes, it is difficult to avoid the conclusion that such a program is one of those "involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes . . . ."[63] Even if a released time program does serve some secular purpose and is not invalid under (a), it would seem to be a prime example of the employment of an organ of government, *i.e.*, the entire public school system, for religious purposes and thus fall under paragraph (b). Of course one might readily concede that neither Clark nor Brennan intended their "tests" to be mechanically applied. But it is troublesome to observe that neither seem willing to reconcile his own formula with a decision that has caused so much confusion.

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60 See, Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963).

61 KURLAND, *supra* note 24, at 32.

62 School District of Abington Township v. Schempp, 83 Sup. Ct. 1560, 1592 (1963).

63 *Id.* at 1576.

COERCION AND STANDING

One respected commentator has said that "[T]he factor of coercion is difficult of measurement and more difficult of evaluation in terms of the appropriate effect to be given specific excuse from the obligation of participation. . . . Despite frequent disclaimers of reliance, it is clear that the notion of coercion has played an important part in the decision-making process."[64] How much a part coercion plays is one of the problems. Another commentator predicates his proposed standard on the existence of coercion. He believes "the establishment clause . . . is violated when the state engages in what may be fairly characterized as solely religious activity that is likely to result in (1) compromising the student's religious or conscientious beliefs or (2) influencing the student's freedom of religious or conscientious choice."[65] A third commentator has denied the existence of any coercion or compulsion at all. He characterizes these exercises in the following terms:

> The child of nonconforming or minority group is, to be sure, different in his beliefs. That is what it means to be a member of a minority. Is it not desirable, and educational, for him to learn and observe this, in the atmosphere of the school—not so much that he is different, as that other children are different from him: And is it not desirable that, at the same time, he experiences and learns the fact that his difference is tolerated and accepted? No compulsion is put upon him. He need not participate.[66]

Justice Brennan is the only member of the Court who explicitly states that coercion is present in the Bible reading exercises. The significance of this statement should not be dismissed, even though he also states that coercion need not be present to prove an establishment violation. He indicates its importance when he states that governmentally sponsored military chaplains and opening prayers in Congress do not violate the establishment clause because the element of coercion is absent. Justice Clark cites approvingly from the passage in *Engel v. Vitale* which indicates the Court thought coercion was not a prerequisite for finding a violation of the establishment clause, but he otherwise does not express his views on the point. He also reserves judgment on the validity of the government support of military chaplains.[67] Justices Stewart and Douglas apparently agree with Dean Griswold that no coercion has been proved. The other two members of the Court fail to discuss this issue.

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64 KURLAND, *supra* note 24, at 30.

65 CHOPER, *supra* note 60, at 330.

66 Griswold, *supra* note 55, at 177.

67 School District of Abington Township v. Schempp, 83 Sup. Ct. 1560, 1575 (1963).

It appears that there is a close relationship between the coercion and the standing to sue. In its eagerness to hold that no coercion is necessary to prove an establishment violation, the Court either overlooks or ignores the question of whether or not coercion does in fact exist. The Court may prefer to ignore this problem because the existence of coercion is difficult to measure and its effect, if found, is difficult to determine. It does not appear that *Schempp* throws any additional light on this problem.

The issue of standing is bound up in the merits of the substantive right. In these cases, where the right alleged to have been violated rests on the Constitution, standing is indistinguishable from the right itself, for a denial of Schempp's claim on the standing issue is tantamount to a denial on the merits.[68] For this reason standing and coercion are interrelated. In *Zorach* the Court held a parent had standing to attack the released time program, even in the absence of an "expenditure of public funds." In *Engel v. Vitale* the plaintiffs alleged but did not establish any facts to show an economic loss to any plaintiff. In neither *Engel v. Vitale* nor the present cases was the issue of standing raised, and no attempt was made to discuss it fully. Justices Clark and Brennan agreed that the plaintiffs, as parents of pupils, were sufficiently affected by the practices to entitle them to have standing.[69] Justice Brennan added that he thought that the parents have "very real grievances."

It has been suggested that there are some logical difficulties in permitting a parent to attack an establishment violation which involves neither public cost nor a free exercise infringement.[70] However, unless the establishment clause violation always involves a companion free exercise claim, *i.e.*, unless the scope of the two clauses is identical, then the free exercise clause will not always be available to give standing. If the limitations embodied in the establishment clause are to be judicially enforced, someone must have standing to bring the matter before a court for decision. It may be generally true "that legislatures are ultimate guardians of the liberties and welfare of the people in quite the same degree as the courts,"[71] but one rather believes that "the very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy."[72] As this

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[68] Lewis, *Constitutional Rights and the Misuse of "standing"*, 14 STAN. L. REV. 433, 439 (1962).

[69] School District of Abington Township v. Schempp, 83 Sup. Ct. 1560 (1963).

[70] Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 41 (1962).

[71] Holmes, J., in Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904).

[72] Jackson, J., in West Virginia State Board of Education v. Barnette, 319 U.S.

author indicated before[73] the interest of parents and children in the operation of the public schools seem sufficiently great to justify permitting them to raise the issue of establishment. The state courts have consistently found the parent's interest sufficient to bring actions dealing with religious exercises. Although this in itself does not satisfy federal standing requirements in every case, it should in this case.

CONCLUSION

It is appropriate to conclude by commenting on the relationship between the two religious clauses and the role of the Supreme Court in constitutional litigation. Two members of the Court and its recent decision in *Schempp* suggests the magnitude of the problems created by the double aspect of the first amendment. Justices Brennan and Stewart suggest that servicemen who are deprived of the opportunity to practice their religion because their duties take them away from home may have the right to claim a denial of the free excercise clause unless the government furnishes military chaplains.[74] This seems consistent with Justice Stewart's assertion that those who want Bible reading in the public schools may have a similar claim. The merit of this position has already been discussed. The suggestion on the part of Justice Brennan, however, seems difficult to reconcile with his formulation of the principle underlying the establishment clause. His position serves to illustrate the difficulty of reconciling the competing claims of the two clauses and the limitations of applying his formulation in other cases.

In a case decided on the same day as the Bible reading cases the Court held under the free exercise clause that South Carolina could not constitutionally deny unemployment benefits to a Seventh Day Adventist who was discharged because she would not work on Saturday because of her religious beliefs.[75] Mr. Justice Brennan who wrote the opinion, rejected the claim that the result constituted an "establishment" of religion, asserting that it merely "reflects nothing more than the governmental obligation of neutrality in face of religious differences. . . ."[76] Mr. Justice Stewart, concurring in a separate opinion, retorted that "it is the Court's

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624, 638 (1943). See Bodenheimer, *Reflections on the Rule of Law*, 8 UTAH L. REV. 1 (1962).

[73] Schumb, *Religion in the Public Schools*, 3 SANTA CLARA LAW. 135, 151 (1963).

[74] School District of Abington Township v. Schempp, 83 Sup. Ct. 1560, 1612, 1617 (1963).

[75] Sherbert v. Verner, 83 Sup. Ct. 1790 (1963).

[76] *Id.* at 1797.

duty to face up to the dilemma posed by the conflict between the Free Exercise Clause of the Constitution and the Establishment Clause as interpreted by this Court."[77]

In fairness it should be said that the task of the Court is difficult and complex, as Justice Jackson acknowledged when he said:

> [T]he task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on official dealings with the problems of the twentieth century, is one to disturb self-confidence. . . . These changed conditions often deprive precedents of reliability and cost us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions.[78]

Whatever the usefulness of metaphors like "separation of Church and State," "neutrality," "accommodation," and "involvement," they should not obscure the difficulties and complexities of the Court's task which are inherent in the judicial process. The Court must articulate the "majestic generalities" of the Constitution into workable rules of decision, if they are to be meaningful to us today and if equality and certainty are to be achieved. One might add that the Court does so in these cases in spite of an historical record which is "at best ambiguous."[79]

Viewed in the light of these considerations, one gains considerable respect for the complexities and difficulties with which the Supreme Court must deal in carrying out its role in our society.

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[77] *Id.* at 1800.

[78] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639 (1943).

[79] School District of Abington Township v. Schempp, 83 Sup. Ct. 1560, 1579 (1963).