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CONSTITUTIONAL LAW—FIRST AMENDMENT—FREE EXERCISE CLAUSE—ESTABLISHMENT CLAUSE—SCHOOLS AND SCHOOL DISTRICTS—The Supreme Court of Pennsylvania has held that inclusion of an invocation and benediction at a public high school commencement, at which attendance was voluntary, violated neither the free exercise clause nor the establishment clause of the first amendment of the United States Constitution nor that section of the Pennsylvania Constitution governing free exercise and establishment of religion.

Wiest v. Mt. Lebanon School District, 457 Pa. 166, 320 A.2d 362, *cert. denied*, 419 U.S. 967 (1974).

Fifty-four plaintiffs, including students, parents and taxpayers, brought an action[1] to enjoin the Mt. Lebanon School District[2] from implementing a resolution adopted by the board of directors which provided for an invocation and benediction at commencement exercises.[3] Plaintiffs alleged that pronouncement of an invocation[4] and benediction[5] at a public high school commencement would be a religious ceremony[6] which would impair free exercise of religion and

1. Wiest v. Mt. Lebanon School Dist., Civil No. 892 (C.P. Allegh. Co., April 26, 1973).

2. Mt. Lebanon School District is established pursuant to the Public School Code of 1949, PA. STAT. ANN. tit. 24, §§ 1-101 to 27-2702 (1962), and provides public education within Mt. Lebanon Township, Allegheny County, Pennsylvania.

3. The Mt. Lebanon High School Commencement Program Committee had proposed a 12-point graduation program. The board of directors of the school district voted unanimously to accept the proposed commencement program with one amendment: "an audible invocation and benediction" was substituted for a "moment of silence." Mt. Lebanon School District Board Minutes, April 16, 1973.

The graduation program of Mt. Lebanon School District has, since the first graduation in 1914, included an invocation and benediction, normally conducted by a clergyman. In 1966, the school district eliminated baccalaureate ceremonies, which were primarily religious; the commencement exercises, including invocation and benediction, were retained.

4. WEBSTER'S NEW WORLD DICTIONARY 742 (2d college ed. 1970) reads:

> *invocation* . . . 1. the act of calling on God, a god, a saint, the Muses, etc. for blessing, help, inspiration, support, or the like 2. *a*) a formal prayer used in invoking, as at the beginning of a church service . . . .

Id. at 742.

5. Benediction has been defined as follows:

> *benediction* . . . to hallow, bless . . . 1. a blessing 2. an invocation of divine blessing, esp. at the end of a religious service 3. blessedness . . . .

Id. at 131.

6. The plaintiffs' claim that the invocation and benediction would be religious was linked to the fact that the commencement program's invocation or benediction, or both, would be delivered by a clergyman. Brief for Appellants at 3a, Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974).

constitute an establishment of religion in violation of both the first amendment to the United States Constitution[7] and that provision of the Pennsylvania Constitution governing free exercise and establishment of religion.[8] The lower court dismissed the complaint.[9] On appeal,[10] the Supreme Court of Pennsylvania held that inclusion of an invocation and benediction at a public high school commencement, at which attendance was voluntary, violated neither the first amendment[11] nor the analogous section of the Pennsylvania Constitution.[12]

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7. U.S. CONST. amend. I reads in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court held that first amendment restrictions apply to the states through the fourteenth amendment to the United States Constitution. This protection extends not only against the state itself but also against "all of its creatures—Boards of Education not excepted." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

8. PA. CONST. art. I, § 3 reads:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

9. The decision is unreported. A similar case was brought by a graduating senior and her parents against the same school district in federal district court one year prior to the instant case, in which plaintiffs claimed that an invocation and benediction as part of the graduation ceremony amounted to an establishment of religion, impairment of freedom of religion, and improper use of tax monies. Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293 (W.D. Pa. 1972). The district court dismissed the complaint, holding that the court had no jurisdiction to hear the case. On alternative grounds, however, the court discussed the merits, determining, *inter alia*, that "graduation ceremonies . . . are ceremonial and are in fact not a part of the formal, day-to-day routine of the school curriculum to which is attached compulsory attendance." *Id.* at 1294.

10. Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974).

11. The *Wiest* decision stands as the highest level adjudication of the issue on the merits in any state. Of the four cases dealing with the issue of the constitutionality of an invocation and benediction, three have upheld the practice: Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974); Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293 (W.D. Pa. 1972); Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362, *cert. denied*, 419 U.S. 967 (1974). The fourth case, Matthews v. Board of Educ., Civil No. 74-625 (D.C.N.J. 1974), had not been decided at the time of this writing.

12. As a threshold issue, the court noted that although the appellants' standing was not questioned below, the only persons having standing to complain were members of the 1973 graduating class, either individually or as represented by a next friend. Although the issues raised by appellants were technically moot since they had already graduated, the Pennsylvania Supreme Court, *citing* Roe v. Wade, 410 U.S. 113 (1973), did not dismiss the appeal on that basis, since it recognized that the short interval between announcement of the com-

Every analysis in this sensitive area of first amendment adjudication must take into consideration the decisions of the United States Supreme Court delineating the constitutionally permissible relationship between religion and government in education.[13] The free exercise clause guarantees every citizen the right to the free exercise of his religion without interference by the state. To prove a violation of the free exercise clause, it is necessary to show the coercive effect of a state activity as it operates against a person in the practice of his religion.[14] Voluntary attendance[15] at commencement prevented the plaintiffs from claiming overt coercion. Plaintiffs' argument of psychological coercion[16] failed to allege or show[17] that inclusion of an invocation and benediction would have a coercive effect upon them

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mencement program and the commencement exercises would otherwise effectively deny appellate review. 457 Pa. at 169 n.1, 320 A.2d at 364 n.1.

13. Among the religion-education cases, two categories are identifiable. The first category includes those cases dealing with religious activities within the public schools. *See* School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible reading and Lord's Prayer in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (prayer recitation in public schools); Zorach v. Clauson, 343 U.S. 306 (1952) (released time from public education for religious education); McCollum v. Board of Educ., 333 U.S. 203 (1948) (released time).

The second category includes those cases involving public aid in varying forms to sectarian educational institutions. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (nonpublic school tuition reimbursement, maintenance and repair grants); Lemon v. Kurtzman, 403 U.S. 602 (1971) (teachers' salaries, textbooks, facilities); Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks); Everson v. Board of Educ., 330 U.S. 1 (1947) (bus transportation).

14. *See* School Dist. v. Schempp, 374 U.S. 203, 223 (1963).

15. Students had the option of attending the Mt. Lebanon High School commencement. Those choosing not to attend could obtain their diplomas at the high school principal's office any time after the day of commencement. Brief for Appellants at 3a, Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974). Approximately 10 per cent of the students normally do not attend commencement each year. *Id.* at 12.

16. Plaintiffs' claim was based upon Justice Frankfurter's concurring opinion in McCollum v. Board of Educ., 333 U.S. 203 (1948), in which he stated:

> That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.

Id. at 227.

17. Plaintiffs argued that when most students participate in a graduation ceremony, there is great pressure upon those who do not wish to conform because to do so might infringe on their religious convictions. The facts presented indicated only that the students who exercised the option of nonattendance would not be present at the last ceremonial gathering of their class. Plaintiffs' contention that the students' exercise of their option to not attend the ceremony would reduce them to second class citizens was an equal protection argument rather than an establishment clause argument and was not developed by plaintiffs.

in the practice of *their* religion.[18] Failure to establish the element of coercion forced plaintiffs to rely principally on the establishment clause in challenging the school board resolution. Hence the crux of the decision turned on the establishment clause issue.

While voluntariness of a religious exercise serves to free it from prohibitions of the free exercise clause,[19] this is not true of the establishment clause.[20] The establishment clause prohibits any attempt to advance religion and does not depend on a showing of direct governmental compulsion. To reach the constitutional issue in *Wiest* under the establishment clause, however, a preliminary issue had to be resolved: was the pronouncement of an invocation and benediction a religious exercise? If the preliminary issue were answered negatively, then no establishment clause problem would be presented.

The court was not unanimous[21] in its method of analysis. The majority did not specifically confront the preliminary issue; rather, it stated only that the voluntary nature of a "religious exercise" would not free it from limitations of the establishment clause.[22] Thus, it must be inferred that the majority viewed the giving of an invocation and benediction as a religious exercise. Justice Pomeroy, concurring,[23] employed a somewhat different rationale. Since an

18. In effect, the plaintiffs had alleged not that their freedom *of* religion had been abridged but rather that their freedom *from* religion had been abridged. *Cf.* O'Hair v. Paine, 312 F. Supp. 434, 436 (W.D. Tex. 1969), *aff'd*, 432 F.2d 66 (5th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971) (plaintiffs' claimed right to not be exposed to religion during the televising of the Apollo 8 space flight did not amount to a showing of coercion). *See also* Tilton v. Richardson, 403 U.S. 672, 689 (1971) (appellants were "unable to identify any coercion directed at the practice or exercise of their religious beliefs").

19. Justice Pomeroy agreed with the majority that the voluntary nature of the commencement served to eliminate any claim that the free exercise clause of the first amendment was violated. 457 Pa. at 178 n.5, 320 A.2d at 368 n.5 (Pomeroy, J., concurring). Justice Roberts, in his separate concurring opinion, did not address the issue.

20. The Supreme Court has stated:

> Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental 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.

Engel v. Vitale, 370 U.S. 421, 430 (1962).

21. Chief Justice Jones was joined by Justices Eagen, O'Brien, and Nix in the majority opinion; Justice Pomeroy concurred in a separate opinion; Justice Roberts also filed a concurring opinion, in which Justice Manderino joined.

22. 457 Pa. at 171, 320 A.2d at 365.

23. *Id.* at 175-81, 320 A.2d at 367-70 (Pomeroy, J., concurring).

invocation and benediction are prayers,[24] and prayers are the essence of religion, then an invocation and benediction must necessarily be a religious exercise.[25]

The affirmative answer of the majority and Justice Pomeroy on the preliminary issue required further inquiry into the establishment clause and application of appropriate constitutional criteria. The criteria, collectively referred to as the *Lemon* test,[26] provide a three-pronged analysis to determine the constitutionality of a claimed violation of the establishment clause: first, the activity must have a secular purpose; second, its principal or primary effect must neither advance nor inhibit religion; and, finally, the activity must avoid any excessive entanglement with religion.[27] The *Lemon* test establishes a conjunctive requirement for the constitutionality of a challenged activity; that is, there must be a secular purpose and a primary secular effect, as well as no excessive entanglement.

In challenging the school board resolution authorizing the invocation and benediction, the burden of proof was on plaintiffs[28] to show that the purpose or primary effect of the challenged activity was religious. The stipulated facts that formed the record of the "case stated,"[29] however, were completely devoid of information regarding the purpose or primary effect of the prayer requirement.[30] The court

24. For what constitutes "prayer" under the federal constitutional prohibition of prayer in public schools see Annot., 30 A.L.R.3d 1352 (1970).

25. Justice Pomeroy's contention that the *act* of prayer, not the precise words themselves, serves as the basis for constitutional complaint was made to distinguish Justice Roberts' thesis that enjoinment of the undisclosed contents of a speech would amount to a prior restraint in violation of the freedom of speech clause of the first amendment of the United States Constitution. 457 Pa. at 175, 320 A.2d at 367 (Roberts, J., concurring). That a prayer could not be enjoined unless one had an advance copy of the text was unacceptable to Justice Pomeroy.

26. The test derives its name from Lemon v. Kurtzman, 403 U.S. 602 (1971).

27. *Id.* at 612-13. The first two parts of the test are taken from Board of Educ. v. Allen, 392 U.S. 236, 243 (1968), and the third part from Walz v. Tax Comm'r, 397 U.S. 664, 674 (1970).

28. 457 Pa. at 173, 320 A.2d at 366.

29. A "case stated" is a formal written enumeration of the facts in a case, assented to by both parties as correct and complete, and submitted to the court by their agreement, in order that a judgment may be rendered without a trial, upon the court's conclusions of law upon the facts as stated. BLACK'S LAW DICTIONARY 271 (4th ed. 1951). *See also* 6 STANDARD PA. PRACTICE ch. 23, § 36 (1960).

30. Although the school board had asserted, *dehors* the record, that the invocation and benediction were to serve secular purposes by adding dignity and solemnity to the occasion, Brief for Appellee at 10, Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974), the court in a "case stated" is confined to the facts presented to it by the parties and cannot go outside of the "case stated" for facts, nor assume them by way of inference. Common-

therefore found that the purpose and primary effect of the activity were valid, though viewing the invocation and benediction as a religious activity.

Since the facts had failed to establish either the purpose or primary effect as religious, the activity would constitute a violation only if excessive entanglement with religion were found. The resolution of this issue again gave rise to two different rationales advanced by the members of the court.

In the majority's view, the commencement program did not serve to promote the kind of interdependence which constitutes excessive entanglement, against which the establishment clause was designed. Even though the invocation and benediction was a religious exercise, it did not promote interdependence between government and religion. In the context of a "public ritual,"[31] such a religious exercise was merely a technical infringement and allowable as a permissible accommodation between religion and government.[32] The court's determination that the commencement was a public ritual[33] rather than a school function was decisive in successfully meeting the requirement of the third part of the *Lemon* test.[34]

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wealth v. Howard, 149 Pa. 302, 24 A. 308 (1892); Kelly v. Urban, 136 Pa. Super. 20, 7 A.2d 12 (1939).

31. In Zorach v. Clauson, 343 U.S. 306 (1952), Justice Douglas, addressing the question of the constitutionality of religious exercises in the context of a public ritual, stated that the first amendment does not require a separation of government and religion in every respect:

> Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Id. at 312-13.

32. The concept of a permissible accommodation between church and state was enunciated in *Zorach v. Clauson*:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, 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.

Id. at 313-14.

On the topic of accommodation see P. KAUPER, RELIGION AND THE CONSTITUTION (1964); Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation*, in 1963 RELIGION AND THE PUBLIC ORDER 3, 16-28 (D. Giannella ed. 1964); Note, *Religion and the Public Schools*, 20 VAND. L. REV. 1078 (1967).

33. 457 Pa. at 173, 320 A.2d at 366.

34. The court stated that its conclusions concerning the religion clauses of the United States Constitution applied also to the final issue of whether an invocation and benediction

Justice Pomeroy reasoned that where the challenged activity was religious, even if intended to be so, it would be constitutionally permissible if it were remote from the classroom or from a required educational program.[35] Thus, the determination of excessive entanglement would depend on the setting.[36] Since commencement occurred only once a year and was not a required method of distributing diplomas[37] or a part of the school curriculum,[38] and since the prayers were not spoken by the audience,[39] the challenged activity was too remote from the classroom or any required educational program to be constitutionally impermissible even though a school function was involved. In effect, Justice Pomeroy found this was not the type of school function[40] which, coupled with a religious exercise, leads to excessive entanglement because of its setting.

After declaring the present case withstood application of the appropriate constitutional test, the majority stated that it would also satisfy Justice Brennan's suggested inquiry under the establishment

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at a public high school commencement were in derogation of PA. CONST. art. I, § 3. The court noted that the protection of rights and freedoms which this section of the Pennsylvania Constitution secured did not transcend the protection of the first amendment to the United States Constitution. Furthermore, the court did not feel that an invocation and benediction were the kinds of activities at which this section of the Pennsylvania Constitution was aimed. 457 Pa. at 174, 320 A.2d 366-67.

35. *Id.* at 181, 320 A.2d at 370 (Pomeroy, J., concurring).

36. In the only two United States Supreme Court decisions ever to deal directly with prayers in public schools, School Dist. v. Schempp, 374 U.S. 203 (1963), and Engel v. Vitale, 370 U.S. 421 (1962), prayers were held to be in violation of the establishment clause because they, respectively, were part of the curricular activities of students required by law to attend school, and were ordered to be said aloud daily.

37. Although the issuance of diplomas or certificates to each pupil satisfactorily completing the prescribed course of instruction is a required function of the board of directors of each school district in Pennsylvania, PA. STAT. ANN. tit. 24, § 16-1613 (1962), a student could choose not to receive his diploma at the commencement program and instead obtain the same from the high school principal's office on any day after commencement. Brief for Appellants at 3a, Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974). *See* note 15 *supra*.

38. All courses of study of the graduating seniors were completed prior to the commencement exercises. The last classes were held the same day as graduation. Brief for Appellants at 4a, Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974).

39. This may be contrasted with the student body's recitation of prayer in *Schempp* and *Vitale*. *See* note 36 *supra*.

40. Justice Pomeroy recognized the importance of classifying the activity as a school function, stating:

> The problem, therefore, is to determine whether these prayers, mandated by the School District to be said at an important school function conducted on school property, are in violation of the Establishment Clause of the First Amendment . . . .

457 Pa. at 177-78, 320 A.2d at 368 (Pomeroy, J., concurring).

clause.[41] Justice Brennan views the establishment clause as a prohibition solely against consequences of governmental and religious activities which result in an interdependent situation. His test for interdependence is similar to the first two branches of the *Lemon* test, that is, it examines purposes and effects; but, in addition, the Brennan test examines means of accomplishing purposes and effects. By doing so, it eliminates any necessity of applying the third branch of *Lemon*, excessive entanglement, because the interdependence question involved in excessive entanglement is necessarily answered by his "means" inquiry. A failure to meet any of Brennan's inquiries as to purpose, effect, and means requires a conclusion of interdependence.

An activity under the Brennan inquiry is unconstitutional if it either (a) attains even indirect religious ends by religious means, (b) uses secular means for essentially religious purposes, or (c) uses religious means to serve secular ends where secular means would suffice.[42] Brennan's inquiry to determine if interdependence exists is a stricter test. While the *Lemon* test leaves greater discretion in the lower courts in deciding whether the activity has a solely secular purpose and a primarily non-religious effect, the Brennan test is more precise and objective, thus narrowing the court's inquiry. While the inquiry into purpose remains the same, the inquiry into effect focuses upon the means used, determining whether there is any religious effect, and, if so, whether there are any alternative secular means available to accomplish the secular effect. To be constitutional, a challenged activity must be secular in purpose with a completely non-religious effect, or, if any effect is religious, there must be no alternative secular means available.

The logical effect of the Brennan inquiry is to restrict the zone of constitutionally permissible activity which may exist under the establishment clause. An activity found constitutional under the

41. *Id.* at 173, 320 A.2d at 366. In *Schempp*, Justice Brennan formulated the inquiry thusly:

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are 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; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.

School Dist. v. Schempp, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring).

42. *See* note 41 *supra*.

stricter Brennan inquiry will necessarily be found constitutional under the *Lemon* test.

The court's failure to apply the excessive entanglement branch of the *Lemon* test and the court's reference to the Brennan test as "the more fruitful inquiry"[43] indicates a preference by the court for the Brennan inquiry.

The court's preference for the Brennan test is probably based on a dissatisfaction with the lack of concrete guidelines under the excessive entanglement or interdependence branch of *Lemon*. It indicates that in future first amendment cases involving government and religion in education, the court may choose to subject an activity to the Brennan inquiry rather than the *Lemon* test. Such a choice may well determine the result in a close case where the challenged activity has both religious and secular aspects. It will be necessary to show, if the Brennan inquiry is utilized, that the secular purpose cannot be achieved by some alternative means which do not involve religion even incidentally. Because the present case arose as a "case stated," the court did not decide if reasonable secular alternatives were available to achieve a secular effect.[44] In

43. 457 Pa. at 173, 320 A.2d at 367.

44. The *Wiest* record did not include the complete school board minutes which indicated that the original commencement program had called for a moment of silence; rather, the record referred only to the invocation and benediction. In a "case stated," all facts not set out in the case are presumed not to exist. *In re* Premises 230 South Hanson St., 117 Pa. Super. 132, 177 A. 700 (1935). Therefore, the court in *Wiest* presumed that alternative means did not exist.

Had *Wiest* not been a "case stated" and had the plaintiffs argued that a moment of silence would be a preferable secular substitute, the invocation and benediction might have been found to be violative of the establishment clause under the Brennan inquiry.

If *Wiest* had not been a "case stated" and even if the plaintiffs had not shown that a secular alternative was available, the court might have taken notice on its own of the existence of such alternative means. It is unclear whether in a case other than a "case stated" plaintiff must prove the existence of alternative means.

Silent meditation, as a secular alternative, would avoid the more obvious pitfalls of state-encouraged prayer and would be constitutionally permissible. The two United States Supreme Court prayer decisions would not appear to forbid a moment of silence. *See* School Dist. v. Schempp, 374 U.S. 203, 281 (1963) (Brennan, J., concurring); Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962). *See also* P. FREUND & R. ULICH, RELIGION AND THE PUBLIC SCHOOLS 23 (1965). The period of silence may be justified on the ground that it has a valid secular purpose. *See* Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 371 (1963). It is a useful expedient for creating an air of calmness. Any reverent attitude which would prevail during the silence would be merely incidental to the secular purpose. There is a difference between prescribing a religious exercise and allowing an opportunity for it. Thus, to give students an opportunity to meditate would not appear to constitute an advancement of religion; rather, it would appear to be a permissible accommo-

future cases the court may reach its decision by balancing the competing considerations in terms of reasonable alternatives.[45]

CONCLUSION

The Pennsylvania Supreme Court's preference for the Brennan inquiry indicates to the lower courts of Pennsylvania that they may use the Brennan inquiry rather than the *Lemon* test. Such a choice will necessarily restrict a court's discretion in determining which activities are permissible accommodations between government and religion, sometimes referred to as "accommodation neutrality."[46] If future examinations of governmental activities involving religion are made under the Brennan inquiry, a challenged activity will be found constitutional only if it: (1) has a completely secular effect, or (2) has an unavoidable non-primary religious effect, unavoidable in that no alternative secular means are available to accomplish the secular purpose. Since, under the Brennan inquiry, accommodation exists between government and religion only if no secular alternative exists to achieve a desired secular effect, "accommodation neutrality" in Pennsylvania is now more narrowly construed. Therefore, the question of reasonable secular alternatives may prove crucial in such cases.

Consistent with this decision, governmental entities in Pennsylvania may still follow practices which reflect a sympathetic awareness of religion and its relevance to the life of the individual and the

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dation in the interest of religious liberty. *See* P. KAUPER, RELIGION AND THE CONSTITUTION 94-95 (1964).

45. Only two Justices, Roberts and Manderino, focused attention on the defendant school district's alternative contention that prohibition of an invocation and benediction would be a prior restraint of speech and result in an abridgement of the first amendment rights of freedom of speech and assembly. This indicates that litigants utilizing such an argument will encounter judicial reluctance to enter an area which would require a delicate balancing of civil rights.

That no member of the court even discussed plaintiffs' contention that tax monies, even though de minimis, were involved in the commencement exercises, Brief for Appellants at 2, 6, 15, Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974), indicates that the court will not entertain the somewhat extreme position advanced by Justice Douglas in recent United States Supreme Court decisions, where he has focused on the monetary aspect of the relation between government and religion in education. *See, e.g.*, Lemon v. Kurtzman, 411 U.S. 192, 209-12 (1973) (dissenting); Tilton v. Richardson, 403 U.S. 672, 689-97 (1971) (dissenting); Lemon v. Kurtzman, 403 U.S. 602, 625-42 (1971) (concurring); Walz v. Tax Comm'r, 397 U.S. 664, 700-16 (1970) (dissenting); Engel v. Vitale, 370 U.S. 421, 437-44 (1962) (concurring).

46. On the topic of accommodation neutrality see note 32 *supra*.

community. If alternative secular means exist, however, governmental units must use those means. The government may permit the expression of religious ideas at public rituals which are a part of local tradition[47] and which fall within the limits of "accommodation neutrality."

John C. Bates

CONSTITUTIONAL LAW—EIGHTH AMENDMENT—AVERSION THERAPY AS CRUEL AND UNUSUAL PUNISHMENT—The Court of Appeals for the Eighth Circuit has held that injection of the drug apomorphine as an agent of aversion therapy constitutes cruel and unusual punishment violative of the eighth amendment when administered to nonconsenting inmates of the Iowa Security Medical Facility.

Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973).

Mr. Knecht, plaintiff and inmate of the Iowa Security Medical Facility [ISMF], sought an injunction to prohibit defendants, institution officials, from further use of apomorphine[1] as an agent in aversion therapy.[2] Alleging officials had administered the drug

47. In Mt. Lebanon School District, for example, pronouncement of an invocation and benediction was a sixty-year-old tradition. Brief for Appellants at 3a, Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974).

1. Apomorphine is obtained by treating the morphine molecule with strong mineral acids. Its analgesic properties are diminished, but it retains the capacity to stimulate the medullary chemoreceptor trigger zone and to produce a combination of central nervous system excitation and depression. Its primary therapeutic use is in the production of emesis, particularly in cases of poisoning by orally ingested substances. The usual dose is 0.1 mg/kg, given subcutaneously; vomiting ordinarily occurs within a few minutes and is preceded by nausea and salivation. . . . Since the drug can also produce respiratory depression, it must be used with caution when there is a central nervous system depression from whatever cause.

L. GOODMAN & A. GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 251 (4th ed. 1970).

2. Aversion therapy employs punishment, most commonly electric shock or induced nausea, as its conditioning agent. Joining the punishment with an act which the person must learn to avoid, the therapist seeks to change undesirable behavior. Theoretically, after a few pairings, inappropriate behavior patterns will evoke repulsive reactions similar to those produced by the noxious stimulus. If the therapist makes the patient vomit every time the patient does something he should not, the patient, in theory, will avoid the inappropriate behavior because it will produce the same feared response in him as vomiting does. Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405, 423-35 (1970).