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Public School Prayer and the First Amendment: Reconciling Constitutional Claims

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Comments

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I. Introduction

"A grave responsibility confronts the Court whenever in the course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test."[1] With these portentous words, Mr. Justice Frankfurter, in 1940, began the majority opinion in a zealously argued case that augured well for producing a landmark decision.[2] But the very same judicial dilemma in which he found himself has apparently confronted the Supreme Court of the United States whenever it has been called on to evaluate any government action in light of the religion clauses of the first amendment, which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[3] In analyzing the commands of these clauses in the light of Justice Frankfurter's statement, it should be clear that "liberty of conscience" is precisely the value that both the establishment clause and the free exercise clause seek to protect. When this liberty comes into conflict with authority of any kind, whether it be "authority to safeguard the nation's fellowship" or any other government interest, the stage has inevitably been set for a case of constitutional dimensions.[4]

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1. Minersville School Dist. v. Gobitis, 310 U.S. 586, 591 (1940) (Frankfurter, J., for the Court).

2. The Supreme Court in *Gobitis* held that a public school district may, consistently with the Constitution, require all pupils under its control to participate in a flag-saluting ceremony, even those pupils whose religious convictions are thereby violated. The case was overruled three years later by West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) in which Justice Frankfurter dissented.

3. U.S. Const., amend. I.

4. Significantly, the religion clauses were not the subject of much litigation in the Supreme Court until the middle of the twentieth century, apparently because neither of the

While many facets of public life and government action have been exposed to judicial scrutiny under these clauses, few have plagued federal courts as persistently as has that of religious activity in publicly supported schools.[5] While this issue has at times been neatly categorized as that of school prayer, it is more accurately viewed as a large area involving devotional exercises and other types of quasi-religious activity in public elementary and secondary schools, and occasionally at tax-supported colleges and universities.[6] This comment will seek to clarify the decisions which the Supreme Court has already handed down in this sensitive area, and which have been followed and expanded by other federal courts.[7] It will then explore the specific issues which the Court has not yet decided, but on which an eventual ruling is inevitable, concluding that the outcome of these cases will hinge on which of two currently existing lines of cases the Court chooses to follow.

II. The Scope of the Religion Clauses

The applicability of the establishment and free exercise clauses to the states, as a result of which such state action as statutes requiring or authorizing school prayer would eventually be challenged, was settled in *Cantwell v. Connecticut*.[8] Justice Roberts, writing for the Court, stated: "The First Amendment declares that

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clauses was held to be binding on the states until Cantwell v. Connecticut, 310 U.S. 296 (1940). But once it was established through *Cantwell*, and clarified further through Everson v. Board of Educ., 330 U.S. 1 (1947), that the states and the federal government would be held to the same standard of scrutiny when invasion of religious freedom is involved, the Court eventually found itself confronted with numerous instances of state action to which to apply that standard.

5. *See, e.g.*, Justice Brennan's historical analysis in Abington School Dist. v. Schempp, 374 U.S. 203, 230-304 (1963). (Brennan, J., concurring). For a discussion of *Schempp*, *see infra* notes 43-70 and accompanying text.

6. The pervasive and significant role played by public education in the United States, and the symbolism traditionally attached to it as a melting pot or a citadel of democracy, have perhaps been the major causes of the amount of constitutional litigation involving public school activities. Courts have been aware of these factors. *See, e.g.*, Brandon v. Board of Educ., 635 F.2d 971, 973 (2d Cir. 1980). Publicly supported institutions of higher learning are also, though less frequently, involved. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981). *See also infra* text accompanying note 83. However, the standards for such institutions are different from those for elementary and secondary schools. *See infra* note 86 and accompanying text.

7. The fact that most plaintiffs have chosen to litigate this federal issue in a federal forum has kept the dockets of state courts relatively free of these cases, although the applicable federal precedents are frequently cited in state court opinions. *See, e.g.*, Johnson v. Huntington Beach School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977) and Trietley v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S. 2d 912 (1978).

8. 310 U.S. 296 (1940).

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."[9] He then went on to clarify the distinction between the two clauses and the standard that must be used in evaluating legislation under either of them:

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.[10]

Seven years later in *Everson v. Board of Education*,[11] the Court gave an expansive interpretation to the establishment clause, the historical soundness of which has sometimes been questioned, but from the parameters of which the Court has not retreated. Justice Black, speaking for a bare majority of the Court, said:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the 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 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 non-attendance. No tax in any amount, 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."[12]

A year later in *Illinois ex rel. McCollum v. Board of Education*,[13] the Court was urged to disregard, as dicta, a large portion of this analysis, particularly the theory that the establishment clause

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9. *Id.* at 303.
10. *Id.* at 303-04.
11. 330 U.S. 1 (1947).
12. *Id.* at 15-16. *Everson* upheld a program of reimbursement of the public transportation costs of non-public school students. *Id.*
13. 333 U.S. 203 (1948). *McCollum* invalidated a program of religious instruction conducted by members of the clergy in public schools. *Id.*

forbids government aid to all religions indiscriminately.[14] However, the Court declined to do so, and reaffirmed its earlier holding that the establishment clause binds the states.[15] Since then the Court has adhered to this doctrine in all establishment cases, although the Jeffersonian "wall of separation" language has not risen to the level of an official judicial gloss on the first amendment, and has been held not to state an absolute constitutional value.[16]

In evaluating legislation under the establishment clause, the Supreme Court has evolved a three-pronged test, each part of which must be satisfied for a statute to be upheld. This test, which other federal courts have followed, was enunciated most clearly in *Lemon v. Kurtzman*[17] in which the Court, through Chief Justice Burger, stated: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion and . . . finally, the statute must not foster 'an excessive government entanglement with religion.' "[18] The Court in *Lemon* asserted that these criteria were derived from the earlier cases of *Board of Education v. Allen*[19] and *Walz v. Tax Commission.*[20]

III. The Establishment Clause and State-Sponsored School Prayer

A. *The Emergence of an Issue: The Regents' Prayer Case*

The development of the establishment doctrine in cases such as *Everson* and *McCollum* set the stage for the subsequent rulings on religious exercises in public schools.[21] In 1962, the Supreme Court first considered the merits of such a practice in *Engle v. Vitale.*[22]

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14. *Id.* at 211.

15. *Id.*

16. Zorach v. Clauson, 343 U.S. 306 (1952) (upholding religious instruction given off public school premises but as part of the school day). "The First Amendment, however, does not say that in every and all respects there shall be a separation of church and state." *Id.* at 312 (Douglas, J., for the Court).

17. 403 U.S. 602 (1971). *Lemon* struck down statutes in Pennsylvania and Rhode Island providing financial assistance to non-public schools in teaching secular subjects. *See infra* note 76.

18. 403 U.S. at 612-13.

19. 392 U.S. 236 (1968). *Allen* upheld the lending of secular textbooks by the state to students in non-public schools.

20. 397 U.S. 664 (1970). *Walz* upheld the exemption of church-owned property from a property tax.

21. *See supra* note 6 for the significance of public schools in constitutional cases.

22. 370 U.S. 421(1962). Earlier, the Court had dismissed, on grounds of mootness, an appeal from a state court decision upholding the constitutionality of devotional exercises in

The plaintiffs in *Engel* challenged the practice adopted by a Long Island school district[23] of requiring the use of a non-denominational prayer as part of opening exercises at the start of each school day. The prescribed prayer[24] had been composed by the New York Board of Regents in consultation with clergy of different faiths (hence its popular designation as the Regents' Prayer); its use was mandatory in each classroom, although no individual student could be required to say it.[25]

Shortly after the adoption of the Regents' Prayer by the school district, a suit to enjoin it was brought in the Supreme Court for Nassau County, New York. That court determined that the use of the prayer as a prescribed school exercise did not violate the establishment clause.[26] Justice Meyer noted with significance that the traditional concept embraced by the clause had not generally been deemed to exclude devotional practices from the classroom:

> If we turn then from constitutional history to the history of the times, we find that by 1868, when the Fourteenth Amendment was ratified, "the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation," but that such separation did not extend to the exclusion of prayer or the reading of the Bible from public school routines.[27]

The court went on to find that the use of the prayer was more akin to an accommodation of religion under *Zorach v. Clauson*[28] than to a promotion of religion, and went on to reject the argument that a dissenter from the religious practice under challenge should be able to prevent anyone else form taking part in it.[29] The

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public schools. *See* Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed*, 342 U.S. 429 (1952).

23. The resolution of the school board was adopted in 1958, pursuant to the authorization of the state Board of Regents in 1951. 370 U.S. at 422.

24. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." *Id.*

25. *Id.* at 430. The voluntary nature of the prayer was ruled immaterial to the establishment issue. *See infra* note 38 and accompanying text.

26. Engel v. Vitale, 18 Misc.2d 659, 191 N.Y.S.2d 452 (1959).

27. *Id.* at 674-75, 191 N.Y.S.2d at 472 (quoting Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 217 (1948)).

28. 343 U.S. 306 (1952). *See supra* note 16. *Zorach* has been relied on by government bodies in nearly every establishment case since it was decided, and has frequently been used successfully. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981), Walz v. Tax Commission, 397 U.S. 664 (1970), Board of Educ. v. Allen, 392 U.S. 236 (1968). *See also supra* notes 6, 19 and 20 on those cases. The most recent successful use of *Zorach* was in Marsh v. Chambers, 103 S. Ct. 3320 (1983) (upholding payment of legislative chaplain with public funds).

29. "Every individual has a constitutional right personally to be free from religion, but that right is a shield, not a sword, and may not be used to compel others to adopt the same

trial court also held that the alleged "subtle pressure" placed on non-conforming students by the public prayer did not render it unconstitutional,[30] and observed significantly that a state-composed prayer was the only alternative to a sectarian prayer.[31]

This decision was affirmed by the Appellate Division of the New York Supreme Court.[32] Justice Beldock wrote a concurrence which elaborated on the rationale of the trial court's opinion.

> 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 its 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.[33]

Finally, with essentially the same rationale, the New York Court of Appeals affirmed,[34] whereupon the plaintiffs sought review in the United States Supreme Court, which reversed by a 6-1 vote, with two Justices not participating.[35]

Significantly, there was no contention before the Supreme Court that the prayer was anything but a religious exercise.[36] As such, it was found to be clearly an establishment of religion. Speaking for the Court, Justice Black stated: "[I]n this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[37] He went on to reject both the non-sectarian character of the prayer and the lack of compulsion of individual students to recite it as safeguards against first amend-

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attitude." 18 Misc.2d at 688, 191 N.Y.S.2d at 487.

30. *Id.* at 695-96, 191 N.Y.S.2d at 492.

31. *Id.* at 699, 191 N.Y.S.2d at 495.

32. Engel v. Vitale, 11 A.D.2d 340, 206 N.Y.S.2d 183 (1960).

33. *Id.* at 345, 206 N.Y.S.2d at 188 (Beldock, J., concurring) (emphasis in original).

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

35. Engel v. Vitale, 370 U.S. 421 (1962). Justice Stewart dissented. Justice Frankfurter, on the verge of retirement from the Court, and Justice White, the newest appointee, did not participate. *Id.* at 436.

36. Compare and contrast this with *Schempp*, 374 U.S. 203 (1963) decided a year later, in which the claim was made that the challenged exercise was not primarily religious in nature. *See infra* note 43 and accompanying text. Arguments of this type have also been made in more recent establishment cases, and are usually rejected. *See, e.g.*, Donnelly v. Lynch, 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *cert. granted*, 103 S. Ct. 1766 (1983) (erection by city government of nativity scene as part of Christmas display held unconstitutional, rejecting contention that creche is not a primarily religious symbol).

37. 370 U.S. at 425.

ment attack.[38] At length he concluded:

> 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.[39]

The only dissenter was Justice Stewart, who attached significance to the voluntary nature of individual participation, which, in his view, preserved the exercise from constitutional attack.[40]

B. *Expansion of the Ban: The Abington and Murray Cases*

While the *Engel* decision might have been read narrowly as banning only state-composed prayers,[41] an equally potent controversy had been developing in lower courts regarding the prescribed use in public schools of prayers and religious exercises derived from other sources.[42] Only one Term after *Engel,* two such cases reached the Supreme Court and were combined in *Abington School District v. Schempp.*[43]

The lead case originated in a Pennsylvania township in which a

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38. "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, of the First Amendment . . . ." *Id.* at 430 (Black, J., for the Court).

39. *Id.* at 435.

40. *Id.* at 444 (Stewart, J., dissenting).

> I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.

Id. at 445. Justice Stewart continued in the same vein. "[W]e deal here not with the establishment of a state church, which would, of course, be constitutionally impermissible, but with whether school children who want to begin their day by joining in prayer must be prohibited from doing so." *Id.*

The *Engel* decision provoked a generally adverse reaction from legislators and the public. *See, e.g.,* proposals for a constitutional amendment mentioned in Sutherland, *Establishment According to Engel,* 76 HARV. L. REV. 25, 50 (1962), as well as thoughtful comment from legal scholars who were uncertain as to where the Court would go next. *See e.g.,* Kauper, *Prayer, Public Schools, and the Supreme Court,* 61 MICH. L. REV. 1031 (1963).

41. Such a narrow interpretation was, in fact, not necessary in light of the statement in *Engel* that "government . . . should stay out of the business of writing *or sanctioning* official prayers." 370 U.S. at 435 (emphasis added). *See supra* text accompanying note 39.

42. Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950), had, for example, involved the mandatory reading from the Old Testament in New Jersey schools. *See supra* note 22.

43. 374 U.S. 203 (1963). *Schempp* affirmed a lower federal court in Pennsylvania. (201 F. Supp. 815 (E.D. Pa. 1962)). Its companion case, Murray v. Curlett, 374 U.S. 203 (1963) reversed the Maryland Court of Appeals (228 Md. 239, 179 A.2d 698 (1962)).

local high school, pursuant to a 1949 state statute requiring the reading, without comment, of at least ten verses of the Bible at the start of each school day, conducted a morning exercise consisting of the reading of Scripture and the saying of the Lord's Prayer. Plaintiffs, a Unitarian family who, as they testified, rejected a literal interpretation of the Bible, sued in federal district court to enjoin the practice which they claimed fostered such a view.[44] The district court found that the purpose of the statute was to introduce a religious ceremony into the schools, and that as such it was unconstitutional.[45] Later, the statute was amended to allow pupils to be excused during the exercises,[46] and a second trial was held where, once again, an injunction issued.[47] The school district appealed to the Supreme Court.[48]

Murray v. Curlett,[49] challenged the practice in the Baltimore public schools of conducting devotional exercises pursuant to a 1905 Maryland statute which directed the use of either Bible readings or the Lord's Prayer as a part of the official school day. A student and his mother, both atheists, sought mandamus to compel the Baltimore school board to rescind the regulation prescribing the exercise.[50] The board, acting on an opinion by the Attorney General of Maryland, had allowed individual students to be excused, but although the student plaintiff availed himself of this option, he and his mother continued to allege that the prayer exercises nonetheless caused them harm inasmuch as they amounted to

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44. Schempp v. School Dist. of Abington Township, 177 F. Supp. 398 (E.D. Pa. 1959). Because of the subsequent amendment of the statute to allow excusal of pupils, the judgment striking it down was vacated, 364 U.S. 298 (1960), and on remand the statute as amended was also found unconstitutional. 201 F. Supp. 815 (E.D. Pa. 1962).

45. The court found it significant, for example, that the students were held to a stricter than usual standard of deportment and attention during the Bible reading, thus suggesting that it was regarded by school authorities as akin to a worship service. This may be considered a foreshadowing of the "secular purpose-primary effect" doctrine of Lemon v. Kurtzman, 403 U.S. 602 (1971). *See supra* note 17. *See also infra* note 76.

46. *See supra* note 44. One of the student plaintiffs had earlier sought, and was denied, permission to leave the room during the devotional exercise. Schempp v. School Dist. of Abington Township, 177 F. Supp. at 401.

47. On remand, the father of the student plaintiffs testified that he felt exercise of the excusal option by his children would expose them to opprobrium before their peers. 201 F. Supp. at 818.

48. The appeal was taken pursuant to 28 U.S.C. § 1253 (1958), which authorizes a direct appeal to the Supreme Court from any judgment of a three-judge district court, such as was here convened to enjoin a state statute. Probable jurisdiction was noted, 371 U.S. 807 (1962).

49. 374 U.S. 203 (1963).

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

official government disapproval of atheism.[51] The Maryland Court of Appeals denied relief by a 4-3 vote, holding that the Constitution does not protect such plaintiffs from embarrassment.[52] The Supreme Court granted certiorari[53] and consolidated the case with *Schempp*.

The majority opinion deciding both cases[54] was an expansion of *McCollum*[55] and *Engel*.[56] Justice Clark, for the Court, wrote, "In light of the history of the First Amendment and of our cases interpreting and applying its requirement, we hold that the practices at issue and the laws requiring them are unconstitutional."[57] The Court considered significant the fact that the Abington School District provided its teachers with a particular translation of the Bible to use in the exercises,[58] and that the exercises were clearly religious in nature and so intended.[59] In applying the first amendment to these cases, the Court announced the beginning of the "secular purpose-primary effect" test that it would later apply to all religion cases.[60] Once again, the lack of compulsion of any individual student was found to be immaterial, because a violation of the establishment clause, unlike a prohibition of free exercise, requires only sponsorship rather than coercion.[61] In a brief concurring opinion, Justice Douglas dwelt on the promotion of religious values by government as constituting the chief constitutional vice of the practices under challenge.[62]

The most extensive opinion in the case was the concurrence of

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51. 374 U.S. at 207. *See* 228 Md. at 242, 179 A.2d at 699.

52. 228 Md. at 250, 179 A.2d at 704 (citing *Zorach*, 343 U.S. at 311 n.7). *See supra* note 15 for a discussion of *Zorach*.

53. 371 U.S. 809 (1962).

54. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

55. 333 U.S. 203 (1948). *See supra* note 13 and accompanying text.

56. 370 U.S. 421 (1962). *See supra* note 22 and accompanying text.

57. 374 U.S. at 205 (Clark, J., for the Court).

58. Only the King James Version was supplied by the school district. Students were, however, allowed to bring in other versions to use on their own initiative. *Id.* at 207.

59. Once again, as in *Engel*, the purpose of the practice was accorded great significance. *See supra* note 45.

60. "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 374 U.S. at 222. (Clark, J., for the Court). This would later evolve into the three-pronged test enunciated most clearly in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). *See infra* note 76 and accompanying text and *supra* note 17 and accompanying text.

61. 374 U.S. at 223. *See supra* note 38 for discussion of the same issue in *Engel*.

62. "[T]he Establishment Clause . . . forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone." 374 U.S. at 229 (Douglas, J., concurring).

Justice Brennan, who examined the issues in terms of a detailed history of the first amendment and of American public education. He observed: "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom."[63] He noted that in the interval between the adoption of the first amendment and the present day, the nature of American education had changed by becoming more government-controlled, and the country had become religiously more pluralistic.[64] He also saw fit to answer the contention that the purpose of the establishment clause was to prevent Congress from disestablishing the state churches of the eighteenth century, by observing that all such churches had already been disestablished by the states at the time the fourteenth amendment was ratified,[65] and that *Cantwell,* of course, held that amendment to impose the requirements of the first amendment on the states.[66] He also examined the history of state court decisions that had reached similar results on the subject of school Bible reading,[67] and suggested that the only school exercises of this type that would pass constitutional muster might be a moment of silence.[68]

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63. *Id.* at 230 (Brennan, J., concurring).

64. *Id.* at 238-41 (Brennan, J., concurring).

65. *Id.* at 255 (Brennan, J., concurring).

66. *Id.* at 253-54 (Brennan, J., concurring).

67. *Id.* at 275 (Brennan, J., concurring). Such cases included People *ex rel.* Ring v. Board of Educ., 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.* Finger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929); State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918); State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890), all of which were decided on state constitutional grounds. Significantly, although Justice Brennan acknowledged his indebtedness for these cases to J. Harrison, *The Bible, the Constitution, and Public Education,* 20 TENN. L. REV. 363 (1962) he failed to mention the contrary decisions mentioned in the same article, such as People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 P. 610 (1927); Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1922); Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884); Billard v. Board of Educ., 69 Kan. 53, 76 P. 422 (1904); Donahoe v. Richards, 38 Me. 376 (1854); Pfeiffer v. Board of Educ. of Detroit, 118 Mich. 560, 77 N.W. 250 (1898). In these cases school Bible reading was upheld, generally on the now discredited theory that the Bible is not a sectarian document.

68. 374 U.S. at 281 (Brennan, J., concurring). The Supreme Court has not yet addressed the precise question, but a legislatively prescribed period of silence at the start of the school day was upheld in Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976). Such provisions have, however, been struck down in Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982) and Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983), on findings that the legislative history manifests an intent to promote a religious activity and hence, under the *Lemon* test, a secular purpose is absent. No such legislative history existed in *Gaines.*

Justice Goldberg, joined by Justice Harlan, concurred but warned that a requirement of strict government neutrality in religious matters might go too far.[69] Once again, the only dissent came from Justice Stewart, who would have considered the free exercise claims of those students and parents who favored Bible reading, but suggested that religious exercises might best be held outside school hours.[70]

IV. More Recent Developments: Free Exercise and the Voluntary Prayer Issue

The immediate reaction to *Engel* and *Schempp* was a general reluctance on the part of school officials to countenance any religious activity during the school day, even when such activity was initiated by students themselves.[71] While the claim of free exercise of religion was often made, with the contention that schools were required to permit voluntary prayer, such claims were generally re-

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69. "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of . . . noninterference and noninvolvement with the religious . . . but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." 374 U.S. at 306. (Goldberg, J., concurring).

70. [A] compulsory state educational system so structures a child's life, that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.

Id. at 313 (Stewart, J., dissenting).

[T]he duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief.

Id. at 316-17 (Stewart, J., dissenting). "[R]eligious exercises are not constitutionally invalid if they simply reflect differences which exist in the society from which the school draws its pupils. They become constitutionally invalid only if their administration places the sanction of secular authority behind one or more particular religious or irreligious beliefs." *Id.* at 317-18 (Stewart, J., dissenting). "[I]f such exercises were held either before or after the official school day . . . it could hardly be contended that the exercises did anything more than to provide an opportunity for the voluntary expression of religious belief." *Id.* at 318 (Stewart, J., dissenting).

71. *See infra* notes 72-73. Proposals were also introduced in Congress to overrule *Engel* by constitutional amendment, and even to rewrite the first amendment. *See* Sutherland, *supra* note 40, at 50.

jected by federal courts.[72] At first, the prayers were sought to be said in the classroom, and hence would be part of the official school program,[73] but later the question of student-initiated prayer meetings arose, and these were also found impermissible by both federal and state courts.[74]

Two recent federal court cases may be considered illustrative of this trend. In *Collins v. Chandler Unified School District*,[75] a student council sought permission to open school assemblies with Bible readings. Although the practice was student-initiated, a federal court found that an assembly was nevertheless a school function and that authorization of these practices was tantamount to establishment of religion. Affirming this decision, the court of appeals considered an assembly with prayers incorporated into it to be a state function with no secular purpose under the rationale of *Lemon v. Kurtzman*.[76] It also found that the subtle pressure placed on students to conform served to undermine their autonomy.[77] Curiously, the lower court, in enjoining the prayers at the student assemblies, went to the point of maintaining that any public prayer in a public school would be unconstitutional,[78] citing to this effect *Stein v. Oshinsky*,[79] which deals only with the extent of

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72. *See e.g.*, Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 952 (1965) (state not required by free exercise clause to allow voluntary prayers). *See also* Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *infra* note 81.

73. *See, e.g.*, Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965). More recently, on the subject of voluntary but officially encouraged classroom prayer *see* Jaffree v. Board of School Commissioners, 554 F. Supp. 1104 (S.D. Ala. 1983), *rev'd sub nom*, Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983).

74. Generally, the findings were based on the grounds of "excessive entanglement," the third prong of the *Lemon* test. *See infra* note 76. Decisions reaching such results include Hunt v. Board of Educ., 321 F. Supp. 1263 (S.D. W.Va. 1971) (school board forbade use of school for prayer meeting, held not a denial of free exercise); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App.3d 1, 137 Cal. Rptr. 43 (1977), *cert. denied*, 434 U.S. 877 (1977) (school district, acting on legal advice, denied school facilities for Bible study club. The court held that denial was required by the establishment clause and does not violate free exercise.) (A lengthy dissent was authored by McDaniel, J.); Trietley v. Board. of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978) (school board may and must, under first amendment, deny formation of high school Bible clubs).

75. 470 F. Supp. 959 (D. Ariz. 1979), *aff'd in part, rev'd in part*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981).

76. 403 U.S. 602 (1971). *See supra* notes 17-20 and accompanying text.

77. 644 F.2d at 761, *citing with approval*, Goodwin v. Cross County School Dist. No. 7, 394 F. Supp. 417 (E.D. Ark. 1973).

78. 470 F. Supp. at 963.

79. 348 F.2d 999 (2d Cir. 1965) (students sought, and were denied, permission to say grace at meals in school; on suit by parents to compel such authorization, denial affirmed). *See supra* note 72.

administrative discretion in curbing such practices.[80]

Perhaps the ultimate result was reached in *Brandon v. Board of Education*,[81] in which a group of students sought to conduct voluntary prayer meetings in a classroom at the start of the school day. The district court held that the establishment clause forbids making school facilities available to students for this purpose, and dismissed their free exercise and free expression claims on the grounds that a school is not a public forum which must be open to the expression of all views. Also considered significant (and stressed on appeal) was the fact that although the proposed prayer meetings would take place before the beginning of class periods, they would occur at a time when the building was open and pupils were starting to arrive, and was therefore part of the official school day.[82]

V. Conclusion

At the present, it would seem that the trend in this area of constitutional law is toward discouraging, if not banning altogether, any public display of religious devotion as such, as part of the official educational activity of a public school. Whenever both establishment and free exercise claims are advanced in the same case, the former always appear to prevail. But there does not appear to be an intrinsic need for such a priority, and in fact there are signs that it may be eroding. In the 1981 case of *Widmar v. Vincent*,[83] the Supreme Court held, on free exercise grounds, that a religious group may not be denied equal access to the facilities of a public university such as is granted to other student groups.[84] While the Court has made a distinction between colleges and lower schools on the basis of, among other things, lack of compulsion to attend the former,[85] it is significant that, in this context, the free exercise

80. *Stein* is correctly cited, however, for its free exercise holding.

81. 487 F. Supp. 1219 (N.D.N.Y.), *aff'd*, 637 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

82. More recently, a contrary decision was reached in Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983) which held that a school is a limited public forum and questioned whether *Brandon* is still valid after Widmar v. Vincent, 454 U.S. 263 (1981). *See infra* note 83 and accompanying text.

83. 454 U.S. 263 (1981).

84. At least one district court has applied the rationale of *Widmar* to a high school. Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983). *See supra* note 82.

85. *See* Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934) (upholding compulsory military training at state university over religious scruples of pacifist student). On the significance of voluntary attendance, *see also* Wood v. Mt. Lebanon Township

claims of students prevailed over any question of establishment of religion.[86] The Court has, in the past, required a state to affirmatively accommodate the religious beliefs of its citizens even when this would require treating different religious groups differently,[87] thus indicating that the right to free exercise of religion may, at times, prevail over establishment considerations. Therefore, whether the voluntary prayer cases will continue to be decided against the students is not so certain as the lower court decisions in that area may indicate.[88] The Supreme Court has not yet addressed itself clearly to the precise issues involved in reconciling the rights of those students who wish to incorporate some devotional practice into their school day,[89] and the need to avoid any impression of government sponsorship or promotion of a particular type of devotion. The ability of a specific policy to achieve this balance would in any case be the subject of debate in individual school boards. But if federal courts are indeed to take roles of leadership in shaping and defining fundamental values, they should certainly show some awareness of the need to maintain this balance and avoid the tendency to over-generalize about constitutional values. The Court may be entirely correct in maintaining that the first amendment requires governments to pursue a course of strict neutrality in the religious sphere, but it may well be asked whether such neutrality is best served by letting one portion of that amendment completely swallow up another. The admonition for government not to hinder religion is equally as binding as the admonition not to advance it, and the courts should above all seek to keep both directives in perspective when dealing with such a sensitive facet of public life.

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School Dist., 342 F.Supp. 1293 (W.D. Pa. 1972) (prayers at graduation upheld because attendance not required).

86. 454 U.S. at 274 n.14 (college students can easily appreciate the significance of a policy of neutrality as opposed to sponsorship, and are not as impressionable as younger students). The same rationale prevailed in Tilton v. Richardson, 403 U.S. 672 (1971). On the facts of *Widmar*, it was found that no establishment existed. But the reasoning envinces an intent to balance the two considerations.

87. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (requiring payment of unemployment benefits to unemployed worker who refused, on religious grounds, to work on Saturday).

88. Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983) may, in fact, be the start of a new trend. *See supra* notes 82 and 84.

89. It was this consideration that Justice Stewart addressed in his *Engel* and *Schempp* dissents. *See supra* notes 40 and 70 and accompanying text.