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Robert Lindholm

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# Comments

## CONSTITUTIONAL LAW—ESTABLISHMENT OF RELIGION— A NEW YORK SCHOOL PRAYER

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country.

In July of 1958, the Board of Education of Union Free School District Number 9, New Hyde Park, New York, resolved to adopt the prayer set forth above, recommended by the State Board of Regents,<sup>1</sup> to be recited daily and voluntarily in the District's public schools.

In January of 1959, an action was brought in the New York Supreme Court, Nassau County, seeking an order in the nature of mandamus to preclude recitation of the prayer. Petitioners were citizens of the Union Free School District, whose children attended the District's schools.

Petitioner's request for mandamus was denied, but the Board was required to provide safeguards for those children who did not wish to say the prayer, in order to protect their religious freedoms.<sup>2</sup> On appeal to the Appellate Division the order denying mandamus was affirmed, but upon different grounds.<sup>3</sup> The theory of the lower court, recognizing the prayer as historically acceptable, was rejected; instead, it was held that the prayer was but an affirmation of God—an accommodation to religion in keeping with our religious traditions—which did not amount to an establishment of religion. The Appellate Division also sought to impose different safeguards: instead of being allowed to leave or to arrive late to avoid the prayer, the children would be required to remain present, but with the opportunity to remain silent. Upon further appeal, the New York Court of Appeals affirmed on substantially the same grounds.<sup>4</sup> The case then came before the Supreme Court of the United States on grant of certiorari.

In argument before the Supreme Court it was readily conceded by respondents that the prayer was religious in nature; but was argued that, notwithstanding, it did not impinge upon First Amendment religious freedoms (made applicable to the states via the Fourteenth Amendment) because it was no

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1. The New York State Board of Regents is a governmental agency created by the New York Constitution. It is granted broad powers over the state's public school system. See N.Y. CONST. art. V, § 4; N.Y. EDUC. LAWS §§ 101-06, 201-04, 206-20, 222, 223, 226, 278, 292, 301-03, 704, 801, 803 and 806.

2. *Engle v. Vitale*, 18 Misc.2d 659, 191 N.Y.S.2d 453 (1959). This court found no repugnancy to either the United States or the New York Constitution.

3. 11 App. Div.2d 340, 206 N.Y.S.2d 183 (1960).

4. 10 N.Y.2d 174, 218 N.Y.S.2d 659, 176 N.E.2d 579 (1961).

more than a manifestation of a religious heritage and tradition.<sup>5</sup> In the view of a majority of the Supreme Court, however, recitation of the prayer in a public school constituted a breach of the "wall of separation between Church and State."

We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in 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 the government.<sup>6</sup>

Reasoning further, a brief review of the often bloody consequences of intermeddling between government and church led the Court to determine that:

The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kind of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.<sup>7</sup>

The majority refused to grant that a prayer of this nature, even though non-denominational and voluntary, could be free from the *establishment* clause, although it was suggested that a purely voluntary prayer might be free of the proscriptions of the *freedom* clause.<sup>8</sup> The *de minimis* argument, *i.e.*, the relative insignificance of the prayer, was rejected upon the ground that once an initial breach had been made, further infringements could follow to easily.<sup>9</sup>

In reaching its decision, the majority was careful to emphasize that its prohibition of the prayer was not founded upon hostility toward religion, but rather was directed toward the protection of religious freedoms and the prevention of possible religious persecution.

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.<sup>10</sup>

Mr. Justice Douglas concurred with the majority decision, but could discern only a single narrow issue: whether there were constitutional sanctions for governmental financing of religious exercises.<sup>11</sup> In his opinion, financial support in any form, direct or indirect, would be unconstitutional even though it should not amount to an establishment. This comprehensive exclusion would preclude

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5. 370 U.S. 421, 435 (1961).

6. *Id.* at 425.

7. *Id.* at 429.

8. *Ibid.*

9. *Id.* at 436. The argument as to insignificance was based upon the fact that the prayer was quite general and did not tend to establish one religion over another; that it was not nearly so extreme as governmental intrusions of two hundred years ago.

10. *Id.* at 435.

11. *Id.* at 437.

every practice from armed forces chaplains to Christmas trees purchased with public funds.<sup>12</sup> It is noteworthy that Justice Douglas found "no element of compulsion or coercion," although "every such audience is in a sense a 'captive audience.'" Thus, being unable to recognize the establishment of religion which supported the majority opinion ("to authorize this prayer is [not] to establish a religion in the strictly historic meaning of those words."),<sup>13</sup> the Justice was forced to base his opinion upon the narrow issue of financial support.

In the lone dissenting opinion, Mr. Justice Stewart concurred with Justice Douglas in that there had been no establishment of religion, but refused to adopt the latter's financial support argument. Justice Stewart discounted the value of the history of English religious establishments and even early American establishments, reasoning that "what is relevant to the issue here is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our people, reflected in the countless practices of the institutions and officials of our government."<sup>14</sup> Noting the religious heritage reflected in the inaugural addresses of ten of our Presidents, and the Declaration of Independence, Justice Stewart found the prayer in the present case to be in the spirit of our traditions.

Thus was decided *Engle v. Vitale*, the "school prayer" case of 1961—a decision which, considering the short time elapsed since its rendition, has provoked more heated controversy than any other American court decision of recent years. By latest count, no less than two books and twenty law review articles have dealt with the case in its various ramifications,<sup>15</sup> and, doubtless, more are yet to come.

In view of this controversy, it was thought that something of value might be gleaned in a review of other Supreme Court decisions relating to the establishment of religion clause; if nothing more, at least an idea of just how far afield (if at all) the Court in *Engle* has taken us. Such will be the purpose of this comment.

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12. *Id.* at 442 n.8. For attempts to proscribe Christmas observances, see generally *Chamberlain v. Dade County Bd. of Public Instruction*, 143 So.2d 21 (Fla. 1962); *Baer v. Kolmorgen*, 14 Misc.2d 1015, 181 N.Y.S.2d 230 (1958).

13. 370 U.S. at 442.

14. *Id.* at 446.

15. The two books mentioned are McGRATH, *CHURCH AND STATE IN AMERICAN LAW: CASES AND MATERIALS* (1962); TUSSMAN, *THE SUPREME COURT AND STATE* (1962). The law review articles are as follows: Cutler, *Engle v. Vitale: An Appraisal*, 14 SYRACUSE L. REV. 48 (1962); Kirven, *Freedom of Religion or Freedom From Religion*, 48 A.B.A.J. 816 (1962); Sutherland, *Establishment According to Engle*, 76 HARV. L. REV. 25 (1962); 27 ALBANY L. REV. 119 (1963); 12 DEPAUL L. REV. 128 (1962); 31 FORDHAM L. REV. 201 (1962); 51 GEO. L. REV. 179 (1962); 14 MERCER L. REV. 284 (1962); 34 MISS. L.J. 119 (1962); 37 TUL. L. REV. 124 (1962); 24 U. PITT. L. REV. 179 (1962). Those concerning the case in the New York courts are as follows: 25 ALBANY L. REV. 318 (1961); 11 AM. U.L. REV. 91 (1962); 28 BROOKLYN L. REV. 146 (1961); 30 FORDHAM L. REV. 503 (1962); 20 MD. L. REV. 81 (1962); 33 MISS. L.J. 251 (1962); 6 N.Y.L.F. 321 (1960); 11 SYRACUSE L. REV. 285 (1960); 9 U.C.L.A.L. REV. 495 (1962).

## II. GENERAL BACKGROUND

Despite argument to the contrary,<sup>16</sup> the Supreme Court has traditionally treated the establishment clause and the freedom clause of the First Amendment as distinct, each accomplishing a separate function.<sup>17</sup> Infringements of the freedom clause have normally occurred where there have been governmental attempts to regulate religious beliefs or acts under guise of the state's police power.<sup>18</sup> The establishment clause, on the other hand, is designed to prevent governmental establishment of or aid to a religion. As was said by the Supreme Court in *Everson v. Board of Education*:

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 to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or 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."<sup>19</sup>

Insofar as the states are concerned, of course, as opposed to the federal government, the provisions of the First Amendment are not directly applicable.<sup>20</sup> Despite considerable controversy,<sup>21</sup> however, the Fourteenth Amendment has

16. See *McGowan v. Maryland*, 366 U.S. 420, 463 (1961) (concurring opinion). See also Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5-6, 55, 72, 92 (1961): "[P]roper construction of the religion clauses of the First Amendment is that the freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action. . . ."

17. *E.g.*, *Engle v. Vitale*, *supra* note 5, at 430; *McGowan v. Maryland*, *supra* note 16; *McCullum v. Board of Education*, 333 U.S. 203, 211 (1948); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). Thus it is possible not to impinge upon the freedom clause and yet still violate the establishment clause, for any governmental entry into the religious field would invoke the proscriptions of the latter though not directly disturbing anyone's "religious liberty."

18. See *e.g.*, *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (whether or not a certain practice was religious); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (required attendance in a public school where the parents preferred an accredited parochial school); *Reynolds v. United States*, 98 U.S. 145 (1878) (state restrictions upon the practice of polygamy).

19. 330 U.S. at 15.

20. See, *e.g.*, *Permoli v. City of New Orleans*, 44 U.S. (3 How.) 589 (1845).

21. One argument against literal application of the First Amendment to the states via the Fourteenth Amendment is that the "liberties" of the Fourteenth Amendment concern only those rights essential to the concept of ordered liberty as expressed in *Palko v. Connecticut*, 302 U.S. 319 (1937), and though the freedom

since 1940 been construed to encompass within its due process clause the religious freedoms guaranteed by the First Amendment.<sup>22</sup> Thus, in *Everson*, the majority stated:

The meaning and scope of the First Amendment, . . . have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these cases has been accepted . . . since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause.<sup>23</sup>

Therefore, there can be no doubt that the Court has construed the Fourteenth Amendment to include both the establishment and the freedom of religion clauses of the First Amendment as restrictions upon the states.

### III. RELATED FIELDS WITHIN THE SCOPE OF THE ESTABLISHMENT CLAUSE

#### A. *Transportation For School Children*

In *Everson v. Board of Education*,<sup>24</sup> the Court was called upon to determine whether a New Jersey statute permitting school districts to provide transportation for their pupils, and the statute's application by the School Board, was a violation of the establishment clause of the First Amendment. The statute itself provided for all pupils except those attending private profit-making schools. However, the resolution by School Board provided for transportation both for pupils in attendance at public schools and at Catholic parochial schools.

The Court held that there had been no violation of the establishment clause, for the school board had done "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."<sup>25</sup> The Court felt that a service such as this

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of religion clause would encompass one of these fundamental rights, the establishment clause itself would not. *Cf.* *Beauharnais v. People*, 343 U.S. 287, 291 (1952) (dissenting opinion, per Jackson, J.). Another argument is to the effect that the constitutions of many of the states are more definitive upon the subject of religious establishment than is the federal constitution, and thus that better protection would be afforded if the states themselves were to regulate their religious freedoms. See VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, THE NEW YORK SCHOOL PRAYER CASE (monograph, Sept. 1962). However, some states have found a similarity between their constitutional provisions and those of the First Amendment, which would tend to weaken the above argument. *E.g.*, *Snyder v. Town of Newton*, 147 Conn. 374, 390, 161 A.2d 770, 778 (1960); *Matter of Lewis*, 11 App. Div.2d 447, 451, 207 N.Y.S.2d 862, 866 (1960); *Engle v. Vitale*, 18 Misc.2d 659, 699, 191 N.Y.S.2d 453, 496 (1959); *Swart v. South Burlington Town School Dist.*, 122 Vt. 177, 181, 167 A.2d 514, 516 (1961).

22. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

23. 330 U.S. at 14.

24. *Supra* note 17.

25. *Id.* at 18.

must be made available to all, as with police protection, even though the religious school might receive an incidental benefit.

Mr. Justice Rutledge, in his dissent,<sup>26</sup> found himself unable to reconcile the majority's ultimate result with their definition of the establishment clause.<sup>27</sup> He believed that whether an activity was directed toward the public welfare or not, the government could not finance it so long as there was any aid to a religion. To allow the public welfare aspect to remove something of this sort from the constitutional restrictions would allow the financing of any other religious education costs which could be described as public welfare. In his opinion, the First Amendment establishment clause was intended to effect a separation of church and state which would preclude aid to a religion in any form.

*Everson* was the first truly modern Supreme Court decision dealing with the establishment clause-public school combination. Unfortunately, it was not a model of clarity. The seemingly strict concept of separation set forth by Mr. Justice Black for the majority was indeed contradicted by the manner in which the court at the same time escaped this strict separation by finding the transportation to be primarily for the public welfare and only indirectly of benefit to religions. The most fundamental idea seemed to be that to disallow transportation for parochial students would be to discriminate against religion. It is, therefore, difficult to draw any definite conclusions from the case as to the Court's concept of the establishment clause.<sup>28</sup> Perhaps the most apt analysis was that of Mr. Justice Jackson, who likened the inconsistency of the majority opinion to "that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'"<sup>29</sup>

### B. Released Time Cases

As mentioned above, although *Everson* had recognized an exception of sorts in the form of the "incidental benefits" theory, the majority opinion had by way of dictum defined a strict rule against establishment. Only one year later, a majority of the court, in *McCullum v. Board of Education*,<sup>30</sup> drew upon this definition<sup>31</sup> to invalidate what has become known as a "released time" plan. The plan

26. *Id.* at 56. Mr. Justice Jackson also wrote a dissenting opinion, in which he was joined by Mr. Justice Frankfurter.

27. See text accompanying note 19 *supra*.

28. Several state courts, dealing with the problem of transportation for parochial school students, have rendered decisions with respect to their state constitutions. See, e.g., *Matthews v. Ouinton*, 362 P.2d 932 (Alaska 1961); *Snyder v. Town of Newton*, *supra* note 21; *Board of Education v. Wheat*, 174 Md. 314, 322, 199 Atl. 628, 632 (1938); *Berghorn v. Reorganized School District No. 8*, 364 Mo. 121, 260 S.W.2d 573 (1953); *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (1953); *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E.2d 576 (1938). Since decided with reference to state constitutions rather than the federal constitution, however, these cases do not constitute authority for the problem discussed in this comment.

29. 330 U.S. at 19.

30. 333 U.S. 203 (1948).

31. "The greatest significance of the discussion in the *Everson* opinion is that it was used as the basis of decision in the *McCullum* case." Fahy, *Religion, Education, and the Supreme Court*, 14 LAW & CONTEMP. PROB. 73, 85 (1949).

in that case permitted religious instructors to enter the public school building weekly and to present religious subjects to pupils whose parents had requested that their children receive such schooling. The students not attending the religious classes were required to remain in school in pursuit of their secular studies. Attendance was required and records kept for those pupils whose parents elected the religious program.

In the majority opinion Mr. Justice Black found this to have breached the First Amendment "wall" between Church and State.

Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory school machinery. This is not separation of Church and State.<sup>32</sup>

The majority refused to grant that the strict separation language of the *Everson* case had been only dictum, but instead strengthened it with a statement that "The First Amendment has erected a wall between Church and State which must be kept high and impregnable."<sup>33</sup> Mr. Justice Frankfurter and Mr. Justice Jackson joined in the majority's result with long concurring opinions; Mr. Justice Reed dissented.

*McCollum*, then, in the meandering course of decisions in this field, represented the adoption of a strict separation point of view, using the more or less rigid definition of the establishment clause to which *Everson* had paid only lip service. The Court seemed to have found direction and to have left behind the ambiguity of the *Everson* decision; the course ahead seemed more predictable.

However, such did not prove to be the case. Only four years later, one finds the same court involved in distinguishing away the path they seemed to have set for themselves in *McCollum*.

The case was *Zorach v. Claiborn*,<sup>34</sup> wherein the Court purported to recognize the religious traditions of our nation.<sup>35</sup> In sustaining the released time plan in that case, the Court did not apply a different construction of the First Amendment than that in *McCollum*, but found a variance in the facts which was said to free the plan from the ban of the establishment clause. Unlike *McCollum*, these classes were held away from public school property, and for the majority this was enough.

For Mr. Justice Black, the distinction was immaterial; the compulsory machinery of the public schools was still in use:

Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants. . . . The state thus makes religious sects beneficiaries of its power. . . . Any such use of

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32. 333 U.S. at 212.

33. *Ibid.*

34. 343 U.S. 306 (1952).

35. "We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with the religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Id.* at 313.



coercive power by the state . . . is just what I think the First Amendment forbids.<sup>36</sup>

Mr. Justice Frankfurter, separately dissenting, distinguished between a "released time" program and a "dismissed time" program.<sup>37</sup> Under the former, students who participate in religious instruction are released from class, while those who do not are forced to remain at their studies. This the Justice would find unconstitutional. Under the latter, the school entirely ceases its operations during the time when religious instruction is made available, and nonparticipating students are free to do as they choose. This, in Justice Frankfurter's opinion, would *not* be unconstitutional.

Mr. Justice Jackson, who in *McCullum* had voiced apprehension that the Court had dictated a sweeping constitutional doctrine which would prevent variation according to local conditions, but had not made the doctrine sufficiently clear for the states to follow,<sup>38</sup> felt that the prohibition, whatever it might be, was still violated.<sup>39</sup> To him, a distinction as to the situs of the instruction did not remove the greatest danger of the plan—that of compulsion, direct or indirect. He would prefer an outright reversal of *McCullum* rather than to distinguish it upon such a "trivial" difference in factual situation.

Thus, once again, one can discern a shift in the judicial winds. Possibly influenced by the public controversy following the *McCullum* decision, the Court seemed to back away from its prior strict analysis of the "wall of separation." Though the Court purported to distinguish *Zorach* from *McCullum* on the facts, and thus not to have changed *McCullum's* construction of the establishment clause, it is obvious that *Zorach* marked a retreat from strict interpretation as to matters of church and state.<sup>40</sup>

### C. *Miscellaneous Uses of School Property*

Supreme Court decisions concerning the establishment clause and "religion" in the public schools have been relatively rare; perhaps this fact alone accounts for some of the confusion and controversy in the area. There have been, however, several state and lower federal court decisions dealing with the establishment clause in this type of situation. By and large, the state courts have been rather liberal in their approach, while the lower federal courts have been more strict.

The Supreme Court of Florida, for instance, has held that temporary use of public school facilities during non-school hours for worship services is not an establishment of religion, but merely an accommodation in keeping with the concept that

36. *Id.* at 318.

37. *Id.* at 320. See Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROB. 92, 93 (1949), for recognition of still a third category: "Free time," where classes are held "before or after school hours or on Saturday."

38. It was here that Mr. Justice Jackson coined his phrase "super board of education." *McCullum v. Board of Education*, *supra* note 17, at 237.

39. 343 U.S. at 323.

40. For a state court decision invalidating a released time plan, see *Perry v. School District No. 81, Spokane*, 344 P.2d 1036 (1959).

the "American people are basically religious."<sup>41</sup> Shortly following that decision the same court found that distribution of the Gideon Bible in public schools violated the religious guarantees of the First Amendment.<sup>42</sup> Emphasis was placed upon the fact that these were a protestant version of the Bible, however, and the overtones of the case seem to indicate that if they had been non-denominational publications the practice would have been allowed. In 1962 the same court considered regular reading of the Bible, comments on the Bible,<sup>43</sup> and several other activities pertaining to religion, and found no constitutional violations. In similar fashion, the Supreme Court of Tennessee considered that a verse read from the Bible, without comment and not more often than once in thirty days, did not constitute an establishment of religion, although any exposition of meaning would have prevented such a holding.<sup>44</sup> Approximately the same result was reached by a Maryland court.<sup>45</sup> When a Nativity scene on public school property was challenged as a violation of the First Amendment, New York, in *Baer v. Kolmorgen*,<sup>46</sup> decided that this was not an activity that would transgress the First Amendment.

On the other side of the ledger is *School District of Abington Township v. Schempp*, a Pennsylvania case concerning Bible reading. When the case was first litigated, the Federal District Court for the Eastern District of Pennsylvania held that Bible reading and recitation of the Lord's Prayer constituted a violation of both the establishment clause and the freedom clause.<sup>47</sup> While the School District was prosecuting an appeal to the Supreme Court, the statute which the district court had found unconstitutional was amended.<sup>48</sup> Relying upon this amendment, the School District moved for relief from the original decree on the ground that the issue had become moot. The district court denied the motion, reasoning that the appeal to the high Court had ousted their jurisdiction over the matter.<sup>49</sup> Upon further appeal to the Supreme Court, the judgment of the district court was

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41. *Southside States Baptist Church v. Board of Trustees*, 115 So.2d 697 (Fla. 1959).

42. *Brown v. Orange Co. Bd. of Public Instruction*, 128 So.2d 181 (Fla. 1960). See also *Tudor v. Bd. of Education*, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954).

43. *Chamberlain v. Dade Co. Bd. of Public Instruction*, 143 So.2d 21 (Fla. 1962).

44. *Carden v. Bland*, 199 Tenn. 665, 288 S.W.2d 718 (1956).

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

46. 14 Misc.2d 1015, 181 N.Y.S.2d 230 (1958).

47. 177 F. Supp. 398 (E.D. Pa. 1959). Buried in the footnotes of the first trial of this case is an exemplar of one of the dangers the framers of the First Amendment anticipated—subjection of religious belief to civil conformity. When the son of the petitioner was required to attend the ceremony, the assistant principal justified his edict with the following rationale: "to show respect and . . . simply to obey a school rule; *matters of conscience and religion were not as important here as merely conforming to the school rule.*" *Id.* at 401 n.12. (Emphasis added.)

48. Under Section 1516 of the Pennsylvania Public School Code of 1949, there was no provision for excusing a child who did not wish to participate in the readings. The amendment, Act No. 700, Laws of Pennsylvania, session of 1959, provided for excusing students who did not wish to remain.

49. 184 F. Supp. 381 (E.D.Pa. 1959).

vacated, and the case remanded for a determination as to the constitutionality of the amended statute.<sup>50</sup> The district court granted leave to the plaintiff parents to file a supplemental pleading reflecting the amended statute and the fact that their son had since graduated from high school.<sup>51</sup>

Upon consideration of the question in light of the amended statute the district court found that the establishment clause, at least, was still violated, and the defendant School Board was perpetually enjoined from causing the Holy Bible or the Lord's Prayer to be read or recited in its schools.<sup>52</sup> Argument was recently heard by the Supreme Court, and the case is now awaiting decision.

Exactly what rationale may be drawn from these various cases is difficult to say, other than that, as previously indicated, state courts are prone to be more liberal with the matter than federal courts. It should be noted, however, that the state court decisions mentioned herein have been rendered highly questionable by the Supreme Court's recent holding in *Engle*. On the other hand, should the Supreme Court, in its soon-to-be-rendered decision in *Schempp*, display the same sort of retreat from *Engle* as was seen in the *McCullum-Zorach* cases, the area will again be thrown open to question.

#### D. *Sunday Blue Laws*

In another major area of consideration, the Supreme Court recently considered the problem of Sunday Sales Laws in a group of four cases. The most important of the four, at least for purposes of this comment, was *McGowan v. Maryland*.<sup>53</sup> After deciding that the statute there violated neither the due process nor the equal protection clauses of the Fourteenth Amendment, the Court explored the history of such laws to determine whether they were essentially religious or civil in nature. It was held that, although they had been religious in their inception, their purpose had gradually become civil, for the public welfare. "[W]e accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation."<sup>54</sup> The fact that the day of rest happened to be Sunday was not of controlling significance. All should have the same day in order to create a general atmosphere of rest and recreation; families could be together and the job of enforcement would be far easier than if each person were allowed to choose his own day of rest.

The Court recognized that the establishment clause was not an absolute ban upon governmental action within the religious field,<sup>55</sup> just as they had previously recognized that the freedom clause was not absolute where the public welfare was in the balance.<sup>56</sup> The coincidence of the public welfare and resultant benefit to religion did not provide material grounds for invalidation of the statute as an

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50. 364 U.S. 298 (1960).

51. 195 F.Supp. 518 (E.D.Pa. 1961).

52. 201 F.Supp. 815 (E.D.Pa. 1961).

53. 366 U.S. 420 (1961).

54. *Id.* at 449.

55. *Id.* at 442.

56. See, e.g., *Davis v. Beason*, 133 U.S. 333, 342 (1890); *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

establishment of religion, but would be only a factor in determining whether the statute was grounded upon a religious purpose. The Court clearly indicated that the holding would apply only to the statutes before the Court, each having to be considered individually to determine whether it was enacted for primarily religious purposes.

The other three cases—*Braunfield v. Brown*,<sup>57</sup> *Two Guys from Harrison-Allentown, Inc. v. McGinley*,<sup>58</sup> and *Gallagher v. Crown Kosher Super Market*<sup>59</sup>—were decided upon much the same approach and with the same result.<sup>60</sup> *Gallagher* and *Braunfield* also involved arguments based upon the freedom clause; these too the Court rejected. Each case elicited a dissent from Mr. Justice Douglas.

Where do these blue law decisions fit into the thread of church-state decisions? Perhaps more than anything else, they represent the *Everson* outlook, wherein it was deemed acceptable for the church to receive an indirect benefit so long as the primary reason for the law was not religious. Thus, the wall of separation remained a somewhat hazy apparition; even if intended to be “high and impregnable,” as so often defined, it had not been definitely located.

#### CONCLUSION

An analysis of the cases in this field indicates perhaps only one fact clearly—that whether there has been an establishment of religion is a matter of degree. It is true that some of the cases (notably *McCullum*) have seemed more strict in their method of approach than others, but consideration of the decisions as a whole can lead only to the conclusion that the Supreme Court will review each case upon its own peculiar facts. Thus, in *Engle*, the Court felt that adoption of an official prayer, although voluntary, surpassed that elusive standard which determines whether there has been an establishment.

While a plethora of arguments have been advanced against the decision, it seems obvious that the Supreme Court has not yet, as some have argued, gone so far as to eliminate religion from the American way of life, nor may they be expected to. *Engle* does not seem a radical departure from earlier precedent; as a matter of fact, the holding might well have been anticipated, as might also be a holding of unconstitutionality in the *Schempp* case, now before the Court. Such a decision does, of course, bespeak a certain strictness of interpretation. As previously indicated, however, the course of decisions in the area indicates that the establishment clause is not to be, and will not be, defined with complete rigidity.

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57. 366 U.S. 599 (1961).

58. 366 U.S. 582 (1961).

59. 366 U.S. 617 (1961). For a discussion of these cases generally, see Kurland, *Of Church and State and Supreme Court*, 29 U. CHI. L. REV. 1, 83 (1961).

60. Several state court decisions have considered the problem, both from the point of view of the Federal Constitution and their respective state constitutions. See, e.g., *State v. Hill*, 189 Kan. 403, 369 P.2d 365 (1962); *State v. Ambs*, 20 Mo. 214 (1854); *State v. Chicago, Burlington & Quincy R. Co.*, 239 Mo. 196, 143 S.W. 785 (1912); *State v. Katz Drug Co.*, 352 S.W.2d 678 (1962); *State v. Woodville Appliance, Inc.*, 13 Ohio Op. 2d 46 (Lucas County Ct. 1960); *Carolina Amusement Co. v. Martin*, 236 S.C. 558, 115 S.E.2d 273 (1960).

On the other hand, while the minority's rights must be jealously guarded, the minority must at the same time realize that the privilege to think and act as such carries with it certain disadvantages. As was said by the Supreme Court of Alabama:

Appellant further complains that unless the school is required to conduct a separate class composed of those who share his and his daughter's religious beliefs that she will be made to appear a "speckled bird," and will be subject to the contumely of her fellow students.

All citizens so far as they hold views different from the majority of their fellows are subject to such inconveniences. And this is especially true of those who hold religious or moral beliefs which are looked upon with disdain by the majority. It is precisely every citizen's right to be a "speckled bird" that our constitutions, state and federal, seek to insure. And solace for the embarrassment that is attendant upon holding such beliefs must be found in his own moral courage and strength of conviction, and not in a court of law.<sup>61</sup>

This point must be kept in mind. In protecting a minority's rights, one must not go so far as to discriminate against those of the majority.

ROBERT LINDHOLM

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61. *Mitchell v. McCall*, 143 So.2d 629, 632 (1962).