

# THE SUPREME COURT 1962 TERM

## FOREWORD: PUBLIC PRAYERS IN PUBLIC SCHOOLS

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Operating, as has recently been its wont, on a not-with-a-whimper-but-a-bang theory of judicial timing, the Supreme Court, in June 1962, closed out its 1961 Term by announcing that recitation of the New York Regents' Prayer — "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country" — as a regular part of the daily opening exercises of a public school was unconstitutional.<sup>1</sup> Since the prayer, as the Court viewed it, was an official establishment of religion, the fact that participation was not required could not operate to validate it. One year after *Engel v. Vitale*<sup>2</sup> dispatched the Regents' Prayer, the Court, in *School Dist. v. Schempp*,<sup>3</sup> wound up the 1962 Term by administering a similar *coup de grâce* to recitations of the Lord's Prayer and of Bible passages, which were part of the opening exercises in certain Pennsylvania and Maryland public schools.

The clamorous public hostility<sup>4</sup> which greeted *Engel* could hardly have come as a great surprise to the Justices. They surely knew that in entering the lists against officially sponsored professions of religious faith they were pitting the Court's authority against a vastly powerful adversary — an adversary which commands strong and widespread popular support, as segregation does among white southerners, and which is championed by potent interest groups, as is malapportionment of state legislatures. Moreover, in this combat the Court could not realistically have expected to enlist major allies; the nonsouthern national consensus has upheld the Court's stand against segregation, but massive popular opposition to official prayer is nowhere to be found. Likewise, there are many substantial interest groups which have a stake in the democratic rationalization of our legislatures, but few major interest groups are deeply committed antagonists of official prayer.

To turn aside from enforcement of the Constitution because enforcement is unpopular would be wholly antithetic to one of the Court's chief responsibilities. But the obvious hazards of the prayer issue, taken

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<sup>1</sup> *Engel v. Vitale*, 370 U.S. 421 (1962). A year earlier, the Court had also utilized the last day of the Term to announce a first-magnitude constitutional decision. The case was *Mapp v. Ohio*, 367 U.S. 643 (1961), holding that evidence seized by state officers in the course of an unreasonable search is inadmissible in a state criminal trial, and overruling *Wolf v. Colorado*, 338 U.S. 25 (1949), a decision announced on the last day of the 1948 Term.

<sup>2</sup> 370 U.S. 421 (1962).

<sup>3</sup> 374 U.S. 203 (1963).

<sup>4</sup> See Pollak, *W.B.R.: Some Reflections*, 71 YALE L.J. 1451, 1455-56 n.17 (1962).

together with the Court's need to husband the judicial authority already taxed so heavily, might quite plausibly have led the Justices, two years ago, to give thoughtful attention to avoiding the problem by denying certiorari in *Engel*. And the disposition to deny certiorari might have been strengthened by a feeling that New York's attempt to write a prayer had produced such a pathetically vacuous assertion of piety as hardly to rise to the dignity of a religious exercise. The Court might very reasonably have decided to save its scarce ammunition for a prayer that soared, rather than squander it on New York's clay-footed pigeon.

The decision was otherwise. Just why the Justices — or, to be precise, a minimum of four of the Justices — voted to grant certiorari in *Engel*, can only be conjectured. But perhaps (assuming the Justices' vote to grant certiorari was accompanied by an expectation that on the merits they would vote the prayer down) the explanation is as follows: First, the Court knew that denial of certiorari would merely delay, not avoid, the prayer question; *Schempp*, which the Court had already remanded for appraisal of an amendment to the Pennsylvania statute, would almost certainly return on appeal, no matter how the three-judge district court disposed of it. Second, the Court may have sensed that invalidation of the Regents' Prayer would compel a like disposition of a Lord's-Prayer-and-Bible-reading case; as Justice Goldberg was to put the matter in a concurring opinion in *Schempp*, "That . . . [the state] has selected, rather than written, a particular devotional liturgy seems . . . without constitutional import."<sup>5</sup> Third, possibly the Court anticipated that the public outcry sure to be engendered by a seeming judicial assault on the Lord's Prayer and the Bible might in some degree be mitigated by the prior decision of a kindred but less unsettling case — a sort of judicial inoculation calculated to give the public a partial immunity to the affliction which was to ensue.

Perhaps none of this was planned. But it is nevertheless true that *Schempp* provoked far less furor than *Engel*. This is not to say that many school systems will adhere to *Schempp* with alacrity. Indeed it may well be that a substantial number will make no move to comply until they find themselves the direct targets of court decrees, and it is entirely possible that in many communities there will be no decrees because there are no willing plaintiffs. (This in turn may well depend on who one must be to be a plaintiff. In *Schempp* the plaintiffs were schoolchildren and their parents. But, since the issue turns out to be one of state establishment of religion rather than restraint of individual rights of freedom of worship, a fair case can be made for the proposition that any member of the affected community, whether or not he is or has a child in school, has a litigable interest in the matter. To the extent that the Court, in viewing the issue as a problem of establishment

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<sup>5</sup> 374 U.S. at 307. (Justice Harlan joined in Justice Goldberg's opinion.) Of course, Justice Goldberg was not on the Court when *Engel* was decided, let alone when certiorari was granted. His statement is quoted merely to suggest that the likeness of *Engel* and *Schempp* which he and Justice Harlan expressly articulated when *Schempp* was decided may well have been in the forefront of the Court's thinking when the petition for certiorari in *Engel* was under consideration.

and thereby obviating proof of individual constraint, was desirous of relieving particular children of the burden of proving their differentness, the reasons for adopting more generous criteria of standing become weightier.)

The rationality of *Engel* and *Schempp* is of no concern to those who denounce them out of hand.<sup>6</sup> But, for most Americans, and in the long flux of time, the vitality of these Supreme Court decisions, as with others of great moment, must depend upon their intrinsic persuasiveness. Therefore it becomes relevant to turn from the judgments in *Engel* and *Schempp* to the opinions: to consider, that is, what the Justices have said in explanation of the new injunction they have placed upon their countrymen.

## I

In *Engel*, the opinion of the Court was written by Justice Black. The senior Justice had written for the Court in *Everson*,<sup>7</sup> which back in 1947 sustained, by a vote of five to four, a New Jersey school board's program of paying the bus fares of parochial school children. He had also written for the Court a year later, in *McCullum*,<sup>8</sup> which invalidated, by a vote of eight to one, the Champaign program of optional religious instruction on school premises during school hours. In 1952, he had dissented, as had Justices Frankfurter and Jackson, from the decision in *Zorach v. Clauson*,<sup>9</sup> which upheld New York City's "released time" program of optional religious instruction during school hours but off school premises. In *Engel* — joined by the Chief Justice and Justices Clark, Harlan, and Brennan — Justice Black condemned the Regents' Prayer in the following terms:

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. . . . 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, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these 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.<sup>10</sup>

To buttress his holding, Justice Black turned not to the recent cases construing the establishment clause but to the seventeenth- and eight-

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<sup>6</sup> See, e.g., N.Y. Times, Aug. 6, 1963, p. 1, col. 2. (In a last stand of nullification, Governor Wallace has promised to read the Bible to Alabama schoolchildren.)

<sup>7</sup> *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

<sup>8</sup> *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

<sup>9</sup> 343 U.S. 306 (1952).

<sup>10</sup> 370 U.S. at 430.

eenth-century history which was its predicate — especially the calamitous efforts, culminating in the Act of Uniformity, to make the Book of Common Prayer the standard of English religious observance, and the spillover of that unhappy enterprise in the American colonies. “It was in large part,” wrote Justice Black, “to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion.”<sup>11</sup>

Justice Stewart — the sole dissenter in *Engel*, as he was to be in *Schempp* — felt that the Court had looked to the wrong history. What was really relevant, he thought, was “the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government”<sup>12</sup> — for example, the invocation of the Deity at the inauguration of every President, and at the commencement of each working day of Congress and the Supreme Court. “[T]o deny the wish of these schoolchildren to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.”<sup>13</sup>

Justice Douglas concurred in the Court’s judgment in *Engel*, but he traveled a very different route. For him the constitutional difficulty was that “the teacher who leads in prayer is on the public payroll.”<sup>14</sup> Granted that the fraction of the teacher’s time thus spent was “minuscule,” any official subvention of religion is foreclosed by the establishment clause. In reaching this conclusion the Justice acknowledged that *Everson* — the New Jersey school bus opinion written by Justice Black and joined in by Justice Douglas — was erroneous. But Justice Douglas, who had written the Court’s opinion in *Zorach* — the New York “released time” decision, from which Justice Black had dissented — could not agree that, apart from the element of subvention, history supported the Court’s holding in *Engel*: “I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words. A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads.”<sup>15</sup> Indeed, it does seem that the history relied on by Justice Black was somewhat overdrawn. As Professor Arthur Sutherland observed, writing in the pages of this *Review* a year ago, “A skeptical man might doubt that if the Regents’ Prayer had been promulgated for optional use in Stuart days it would have sent the Pilgrims to a stern and rockbound coast.”<sup>16</sup> Justice Black seems to have recognized that the historical analogy was far from complete for he acknowledged that the Regents’ optional and nondenominational recital “seems relatively insignificant when compared to the governmental encroach-

<sup>11</sup> *Id.* at 433.

<sup>12</sup> *Id.* at 446.

<sup>13</sup> *Id.* at 445. Justice Frankfurter, present at the argument of *Engel* but ailing when the case was decided, did not participate. Neither did Justice White, who was appointed to the Court after *Engel* was argued.

<sup>14</sup> *Id.* at 441.

<sup>15</sup> *Id.* at 442. (Footnote omitted.)

<sup>16</sup> Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 35-36 (1962).

ments upon religion which were commonplace 200 years ago.”<sup>17</sup> Nevertheless, he and the four Justices joining him felt, with Madison, that “it is proper to take alarm at the first experiment on our liberties.”<sup>18</sup>

Madison’s admonition, however, simply furnishes an approach to constitutional adjudication. It does not conclude the process. The very question in *Engel* was whether the Regents’ Prayer constituted “a first experiment on our liberties.” If, as the Court’s silence seemed to indicate, little help could be gotten from the tangled doctrinal skein linking *Everson* and *McCullum* and *Zorach*, reference to history was surely appropriate. But when such reference only suggests that the danger now scotched is “relatively insignificant” in contrast with the dangers once apprehended, it seems uncertain that the Regents’ Prayer was really “a first experiment,” heavy with hazard, rather than a last and inconsequential gasp of a once weighty threat. History, as used in *Engel*, offers no persuasive guide for distinguishing the unconstitutional menace of the schoolchild’s “Almighty God, we acknowledge our dependence upon Thee,” from the ceremonial platitude of the Supreme Court Marshal’s “God save the United States and this Honorable Court.” And for the Court to say, as it did say in *Engel*, that the many patriotic and ceremonial “manifestations in our public life of belief in God . . . bear no true resemblance to the unquestioned religious exercise that the State . . . has sponsored in this instance,”<sup>19</sup> merely announces a demarcation without indicating how either history or law serves to place a challenged observance in one category rather than another.

In *Schempp*, the Court tried out a different method of constitutional adjudication. Speaking through Justice Clark, the eight members of the majority eschewed history for earlier cases — or, to be more precise, the language of earlier cases. And from its own prior language the Court distilled a principle of governmental “neutrality” with respect to religion which led — ineluctably, it appeared — to the demise of the Lord’s Prayer and Bible reading in public schools:

As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.<sup>20</sup>

The Court discussed the free exercise clause as well, but clearly emphasized the establishment clause in resolving the issue at bar. The “test” announced was thus of central importance, but all that emerges clearly from it is that recitation of the Lord’s Prayer and reading of the Bible are not permissible ingredients of exercises commencing the pub-

<sup>17</sup> 370 U.S. at 436.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.* at 435 n.21.

<sup>20</sup> 374 U.S. at 222.

lic school day. How does the "released time" program sustained in *Zorach v. Clauson* meet the test? The Court dutifully distinguished "released time" on the grounds that there the actual religious instruction took place outside of school and was not conducted by public school teachers. But could it have been said in *Zorach* that there was a "secular legislative purpose"? And could it also have been said in *Zorach* that the "primary effect" of the program "neither advances nor inhibits religion"? If the answer to either of these questions is in the affirmative, then the application of the test would appear to require a sophistication and a dexterity which have not been fully explicated. Nor is *Zorach* the only case for which the test seems ill-suited. How, for example, does one gauge the "primary effect" — not to mention the underlying "legislative purpose" — of a Sunday Closing Law? <sup>21</sup> Moreover, assuming judges can in due course learn how to measure "primary effect," why should they also be urged to venture into the quicksands of "legislative purpose"? If, on inspection, a "primary effect" either "advances" or "inhibits religion," the lawmakers' impelling purpose is of no constitutional import. But, conversely, if a legislature heavy with nonsecular legislative purpose was simply incompetent to produce a result that had a perceptible impact on religion one way or another, why should a court be thought to have any supervisory responsibility in the premises? <sup>22</sup>

And if the Court's test of an establishment poses more problems than it answers, what of the apparent breadth of the Court's constitutional premises? The Court asserts that the establishment clause "withdrew all legislative power" in the domain of religious belief and expression. But does not such an assertion tend to muddy, however inadvertently, the remote and currently placid constitutional waters in which ministers are exempt from the draft, donors can deduct their tithes, and churches are exempt from tax and other regulatory laws? Citation of these isolated examples serves as a reminder of what the whole course of American constitutional history regularly confirms: to characterize constitutional limitations as inflexible imperatives is an unproductive form of judicial activity.

With respect to the class of constitutional problems presented in *Schempp* and *Engel*, it is instructive to recall the style of the Court's opinion in *Zorach*, sustaining New York's "released time" program: "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. . . . The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter." <sup>23</sup>

What made *Zorach* wholly unintelligible in its retreat from *McCollum*, the case in which the Court invalidated the Champaign program of reli-

<sup>21</sup> Cf. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

<sup>22</sup> Perhaps what the Court had in mind was that, where a sufficiently nonsecular legislative purpose is apparent at the outset, an injunction will lie before the program takes effect. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). At whose behest? See text accompanying note 34 *infra*.

<sup>23</sup> 343 U.S. at 312. HeinOnline -- 77 Harv. L. Rev. 67 1963-1964

gious instruction, is precisely that it depended upon the first amendment alone to "studiously" define "the manner, the specific ways" in which church and state are required to stay apart. There is no "common sense of the matter" to be distilled from the words "free exercise" and "establishment" unless a disciplined appraisal is made of the role of religion in public education, an appraisal in turn geared to a thoughtful review of the first amendment's history and its "line of . . . growth."<sup>24</sup>

So, too, with respect to school prayers. Neither *Engel's* abbreviated history, nor *Schempp's* glossy inventory of the Court's case-hardened rhetoric, nor even a combination of the two, seems suitably comprehensive.

## II

Frequently, it falls to an individual Justice to place in sharper focus both what is right and what is wrong about the limited generalities upon which majorities can agree. Thus, in retrospect, Justice Frankfurter's concurrence in *McCollum* seems more and more to have been the weightiest statement of the case. And — especially now that Justice Douglas has disavowed the holding in *Everson* — Justice Rutledge's dissent in *Everson* today appears the most influential appraisal of the problem there presented.<sup>25</sup> Regrettably, with respect to the school prayer problem, that office was not performed in *Engel* by the one concurring opinion filed — that of Justice Douglas. Nor was it performed in *Schempp* by Justice Douglas' concurring opinion. In both cases the Justice stressed what seems a peripheral aspect of the cases, the issue of public expenditures in aid of religion. The sums involved were so minute — whether or not they surmounted what might be termed the Plimsoll line<sup>26</sup> of *de minimis* — that to have made decision turn on them would have tended to demean the larger issues. Justice Douglas' opinions in *Engel* and *Schempp* foretell deep constitutional trouble for proposals to appropriate federal funds to aid church-related schools.<sup>27</sup> But programs of this kind were not before the Court in *Engel* and *Schempp*.

Justice Goldberg's concurring opinion in *Schempp*, in which Justice Harlan joined, did not purport to attempt an independent examination of the legal and historical issues involved. Justice Goldberg was primarily concerned with emphasizing, first, the common purpose of the free exercise and establishment clauses; second, the limited nature of the Court's holding — *e.g.*, "it seems clear . . . that the Court would recognize the propriety . . . of the teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools;"<sup>28</sup> and, third, the capacity of courts to distinguish ceremonial exercises which

<sup>24</sup> Cf. Holmes, J., in *Gompers v. United States*, 233 U.S. 604, 610 (1914).

<sup>25</sup> See Pollak, *supra* note 4, at 1455-58.

<sup>26</sup> Cf. Frankfurter, J., concurring in *Fikes v. Alabama*, 352 U.S. 191, 199 (1957); Field, *Frankfurter, J., Concurring*, 71 HARV. L. REV. 77 (1957).

<sup>27</sup> See Pollak, *supra* note 4, at 1455-58. Cf. Justice Douglas' discussion in *Schempp* of "appeals by church groups for public funds to finance their religious schools," 374 U.S. at 229.

<sup>28</sup> *Id.*, at 306.

have a religious flavor but no real moment from practices which “involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude.”<sup>29</sup>

Justice Brennan's concurrence was the one opinion which attempted a comprehensive survey both of the history of prayer in American education and of the developing impact of the first amendment on American public schools. He made the sensible, but not necessarily obvious, point that “whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices.”<sup>30</sup> American public education is, of course, a form of government activity which has mainly developed since their time; these state schools, serving a religiously diverse constituency, have managed to avoid “the evils the Framers meant the Establishment Clause to forestall” because they have concentrated on “the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort . . .”<sup>31</sup> The first amendment, in Justice Brennan's view, guarantees the American parent a choice between this form of public education and private education oriented to any religious belief the parent may elect.

The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. . . . The choice between these very different forms of education is one—very much like the choice whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history—drawn more from the experiences of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent.<sup>32</sup>

Of the four members of the *Schempp* majority who filed opinions, Justice Brennan, in the language just quoted, came much the closest to providing a constitutional framework adequate to the problems before the Court. The chief difficulty with Justice Brennan's opinion (apart from its failure fully to meet Justice Stewart's free-exercise counter-argument, discussed below) is that he sought to do too many other things. For example, he sought to accommodate the Court's leading past decisions, including the intractable *Zorach*, to his construct. Also he went beyond his establishment clause analysis to decide that the prayer programs contravened the free exercise clause. This was so, notwithstanding the fact that participation in the prayers was not re-

<sup>29</sup> *Id.* at 307. See also *id.* at 308.

<sup>30</sup> *Id.* at 241.

<sup>31</sup> *Id.* at 241-42.

<sup>32</sup> *Id.* at 242.

quired, because many children, dissenters at heart but anxious to conform to group mores, would fear to avail themselves of the option of nonparticipation.

Justice Brennan's secondary holding reflects a widely shared and very plausible view of the actual impact of a school prayer program. In a speech given between *Engel* and *Schempp*, Professor Paul Freund argued just this position. But he argued it as a position to be taken in preference, not in addition, to a holding anchored in the establishment clause—as a position which would enable the Court “to put to one side all the problems of state aid on which feelings are now running high, and to limit the decision to the context of the school room.”<sup>33</sup> However, to have pitched the decision of *Engel* and *Schempp* on the free exercise clause would have seriously undercut the likelihood of their effective implementation in other school districts. For such a holding would presumably have meant that the prayer programs were constitutionally unobjectionable unless and until challenged, and, therefore, that school boards would have been under no discernible legal obligation, as assuredly they now are, to suspend ongoing prayer programs on their own initiative. Moreover, unless the holding carried with it a radical revision of accepted notions of standing, challenges could only have been forthcoming from schoolchildren and/or their parents, a limitation which would not seem so compelling when the case is made on establishment grounds.<sup>34</sup> Indeed, the hypothetical schoolchild plaintiff, whose free exercise rights would thus be enforced, would have to be a child with the gumption not only to disassociate himself from the prayer program but to prefer litigation to the relatively expeditious exit procedure contemplated by the excusal proviso. To have tailored the holdings in *Engel* and *Schempp* to the undoubted sensitivities of schoolchildren would not have significantly eased their burdens.

Moreover, for the Court to have held that prayer programs infringe only the rights of dissenting children would not merely have left untouched the programs conducted in the many school districts where litigation might not arise. Such a holding might well have been widely understood as legitimizing such programs, absent vocalized dissent. In short, the Court would have risked conveying the impression that, notwithstanding the establishment clause, an American public school might properly spend official energies in religious indoctrination—provided only that the entire school community was so minded, or at least that doubters remained discreetly mute. That the Court did not accept this equivocal position—that in fact it placed *Engel* and *Schempp* firmly on establishment grounds—evidenced a high order of judicial responsibility. Once the Court made its initial decision, reflected in the

<sup>33</sup> The speech, delivered on November 11, 1962, is unpublished, but Professor Freund kindly gave the writer a copy of his text.

<sup>34</sup> Contrariwise, an overzealous adherence to *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), could lead to the anomalous conclusion that no plaintiff has standing to challenge a governmental establishment of religion which does not depend on a significant expenditure of public funds. Cf. Justice Clark's and Justice Brennan's discussions of the *Schempp* plaintiffs' standing, 374 U.S. at 224 n.9, and *id.* at 266 n.30, respectively. If this is where *Doremus* leads it should be overruled. Cf. Sutherland, *supra* note 16, at 41-43.

grant of certiorari in *Engel*, to come to grips with the school prayer issue, it assumed a heavy obligation to decide the issue in full — to vote prayer programs up or down — not to leave so controversial and widespread a governmental undertaking gasping for breath in the thin atmosphere of quasi-constitutionality.

### III

Twenty years ago, in its handling of the flag salute controversy, the Court thought that it faced a somewhat similar issue of doctrinal choice. At that time it eschewed a free exercise holding for one of apparently broader compass. It is arguable that this was error. And this in turn might seem to confirm the view that the Court in *Engel* and *Schempp* should have elected the narrower doctrinal alternative. The plaintiffs in *West Virginia State Bd. of Educ. v. Barnette*<sup>35</sup> were Jehovah's Witnesses whose children could not, compatibly with their religious faith, salute the American flag. They sought injunctive relief to protect their children from having to participate in the required exercise. The Court held for the plaintiffs, but (as Justice Brennan noted in *Schempp*<sup>36</sup>) Justice Jackson's opinion for the Court traveled beyond the free exercise rights of the plaintiffs' children and others similarly situated:

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.<sup>37</sup>

And thereafter the Court's opinion concluded that the state had no such power. It seems that Justice Jackson wrote as he did for essentially instrumental reasons; that he sought a ground for reopening the prior holding in *Minersville School Dist. v. Gobitis*, a case in which Justice Frankfurter, writing for the Court, had started from the proposition, "that the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable."<sup>38</sup> Justice Jackson proceeded to debate what Justice Frankfurter had said was "not debatable," with the end in view of showing that *Gobitis* was wrong in its initial assumption that, as Justice Jackson put it, "power exists in the State to impose the flag salute discipline upon school children in general."<sup>39</sup>

In achieving his instrumental objective the Justice laid claim to broader constitutional ground than the Court has ever seriously attempted, or justly could attempt, to occupy. He was not merely making the easy point that the first amendment should be read to protect from forced participation in the salute those who had political or philosophic, as well as religious, reservations. He was not even pointing out that once

<sup>35</sup> 319 U.S. 624 (1943).

<sup>36</sup> 374 U.S. at 252.

<sup>37</sup> 319 U.S. at 634-35.

<sup>38</sup> 310 U.S. 586, 599 (1940).

<sup>39</sup> 319 U.S. at 635.

a moral scruple is asserted, it is inappropriate for a court to evaluate whether a "genuine" morality is being applied. He was denying in general the existence of governmental power to require the salute of schoolchildren, and thereby vesting in each schoolchild a "constitutional liberty" to decline to participate quite apart from any rights which the child might have had to protect "non-conformist beliefs." In short, Justice Jackson read into the Constitution a curtailment of state power broader than was necessary to protect either the freedom of worship or the freedom of speech and belief aspects of the "liberty" enshrined in the fourteenth amendment.

This is, certainly, an unconventional view of the constitutional limitations imposed upon the states. The states, after all, are the repositories of general governmental power. And — questions of federal supremacy aside — this means that for the most part the Constitution limits state authority only insofar as particular exertions of the state's general governmental power impinge on the several federal rights specified in the fourteenth amendment and other limiting provisions of the Constitution. Surely what Justice Frankfurter meant, when he said in *Gobitis* that West Virginia's power to include a flag salute in the school program was "not debatable," was that — apart from the question of the state's power to require the salute of those who asserted particularized federal liberties — West Virginia had as much authority to require a flag salute as to make each schoolchild learn the national anthem or take courses in the history of West Virginia and the United States.

There would appear to be only two qualifications of the broad proposition that the states may, apart from the particularized federal liberties, exert their general governmental powers as they will. One qualification, which has thus far substantially defied judicial enforcement, is that the states must maintain a republican form of government. Another is that the states must refrain from undertaking programs "respecting an establishment of religion." The flag salute was not regarded as an establishment of religion by Justice Jackson or those Justices who joined his opinion. Nor should it have been so regarded, for it was not a religious exercise. It was simply an exercise which impinged on the religious, and perhaps other, first amendment scruples of some schoolchildren. Moreover, if the flag salute had been an establishment of religion, this would not have meant merely that the schools of West Virginia could not require participation in the exercise; it would have meant that the schools of West Virginia could not sponsor such an exercise at all.

Justice Jackson failed, in *Barnette*, to recognize the difference between the protections accorded religious beliefs and those accorded secular scruples. As Justice Rutledge put the matter, "the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given . . . two-fold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private."<sup>40</sup> *Barnette* was a case in which government used its schools to foster an idea —

<sup>40</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 52 (1947) (dissenting opinion). Justice Clark, in *Schempp*, quoted Justice Rutledge's views. 374 U.S. at 218-19.

namely, allegiance to the state — which lies in the “secular intellectual” realm. This is the sort of thing government does all the time, and is fully entitled to do, provided that it does not infringe the individual’s right of intellectual nonconformity, religious or otherwise. By contrast, *Engel* and *Schempp* are cases in which government used its schools to foster “religious activity.” Their holdings deny the legitimacy of such a government program and thereby they operate, in Justice Rutledge’s phrase, to keep “the religious function . . . altogether private.” The two decisions complement Brandeis’ insistence on privacy by fortifying “as against the Government, the right to be let alone — the most comprehensive of rights, and the right most valued by civilized men.”<sup>41</sup> As such, the decisions occupy rightfully, and successfully, an even broader constitutional ground than that which *Barnette* sought, and failed, to usurp.<sup>42</sup> They are not small arms hanging over the fireplaces of the stalwart, ready for use against official intruders ranging beyond their lawful authority. They are weapons of heavier caliber which ring every home, keeping government permanently at its constitutionally prescribed distance and thereby guarding that core of individuality the Constitution makes “altogether private.”

#### IV

Justice Stewart, dissenting in *Schempp*, argued that the appropriate disposition of the two cases before the Court was to remand for further proceedings. With respect to the claim under the establishment clause, Justice Stewart felt that no issue was presented if, as he supposed to be the fact, the prayer programs were actually so administered as not to be confined to “a particular religious book and a denominational prayer,” but rather in such a fashion as would make “the variety and content of the exercises, as well as a choice as to their implementation, matters which ultimately reflect the consensus of each local school community.”<sup>43</sup> But since Justice Stewart felt that the records before the Court were insufficient to justify a confident finding one way or another as to the way in which the programs were administered, he favored sending the cases back to elicit further information. Underlying his bid to amplify the records was Justice Stewart’s legal conclusion that “religious 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.”<sup>44</sup> Passing the practical questions of how, under Justice Stewart’s formula, a school board would establish a community consensus, what its visible and audible manifestations would be,

<sup>41</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

<sup>42</sup> Appropriately enough, it may be noted, the Court’s formal procedure in *Barnette* came to the right result. The judgment simply affirmed the decree entered below by the three-judge court, which was limited in application to “children having religious scruples against” saluting the flag. Record, p. 46, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>43</sup> 374 U.S. at 315-16.

<sup>44</sup> *Id.* at 317-18.

and how those manifestations would avoid the official connotation that religion is better than irreligion, it is apparent that the Justice simply does not subscribe, as his brethren of the majority do, to Justice Rutledge's conclusion that "the state . . . neither can . . . perform or aid in performing the religious function."<sup>45</sup>

There is an aspect of Justice Stewart's dissent in *Schempp* which — because it is not fully met by the Court's opinion or by any of the three concurrences — demands more extended consideration. In *Engel*, it will be recalled, Justice Stewart expressed concern at denying "the wish of these school children to join in reciting this prayer" and thereby denying "them the opportunity of sharing in the spiritual heritage of our Nation."<sup>46</sup> In *Schempp* the Justice's concern blossomed into a full-blown constitutional argument — apparently intended to show that, even assuming remand would disclose a prayer program constituting an establishment, the free exercise claims of children seeking to pray would furnish a "constitutional justification" of that establishment:

[T]here is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible.

It has become accepted that the decision in *Pierce v. Society of Sisters*, 268 U.S. 510, upholding the right of parents to send their children to nonpublic schools, was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation. It might be argued here that parents who wanted their children to be exposed to religious influences in school could, under *Pierce*, send their children to private or parochial schools. But the consideration which renders this contention too facile to be determinative has already been recognized by the Court: "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." *Murdock v. Pennsylvania*, 319 U.S. 105, 111.

It might also be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For 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

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<sup>45</sup> See note 40 *supra*. Presumably Justice Stewart also felt that remand was required to get the factual data necessary to dispose of the free exercise claim. But it is hard to be certain of this because Justice Stewart did not, in his opinion, expressly differentiate the free exercise and establishment claims. It is not clear, therefore, whether the Justice sees the same issue of "coercion" as dispositive of both claims. Consider, for example, the following sentences:

In the absence of coercion upon those who do not wish to participate — because they hold less strong beliefs, other beliefs, or no beliefs at all — such provisions [*i.e.*, provisions requiring the religious exercises to reflect a community consensus] cannot, in my view, represent the type of support of religion barred by the Establishment Clause. For the only support which such rules provide for religion is the withholding of state hostility — a simple acknowledgment on the part of secular authorities that the Constitution does not require extirpation of all expression of religious belief.

374 U.S. at 316.

<sup>46</sup> 370 U.S. at 445. See text accompanying note 13 *supra*.

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 . . . 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.<sup>47</sup>

It is at once apparent that Justice Stewart and Justice Brennan have a common point of constitutional departure. They both acknowledge that the first amendment gives parents a choice between public and private, including church-related, schools.<sup>48</sup> For Justice Brennan, the first amendment choice of schools sufficiently protects the parent's interest in his child's religious instruction. Justice Stewart disagrees, and on grounds which cannot be lightly brushed off in a democratic society. Most parents cannot afford to send their children to private schools. And freedom of religion is not just a privilege of the well-to-do. Justice Brennan does not really come to grips with Justice Stewart's demurrer, so it behooves us to look at the matter further. Justice Stewart's argument seems to suggest in part that those who cannot afford to go to religious schools of their choice are entitled by that fact alone to require the state to furnish an equivalent religious experience in the public schools. Such an argument proves too much. It suggests that whether or not the state were to operate a public school system, and whether or not its public school system were compulsory, the state would remain under an affirmative duty to provide religious education to those children whose parents could not afford to send them to private schools. Moreover, the logic of the argument would seem to compel insistence on state sponsorship of the full panoply of denominational instruction available in private schools to the well-to-do. Random tidbits of religious activity, such as those involved in *Engel* and *Schempp*, would not seem adequate to fulfill this conception of the first amendment's mandate. But let us accept that Justice Stewart would find decisive exactly the fact that Pennsylvania and Maryland, like all other states of the Union, maintain public schools and require attendance either at them or at accredited private schools. Justice Stewart's con-

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<sup>47</sup> 374 U.S. at 312-13.

<sup>48</sup> *Pierce*, cited by Justice Stewart, is the only instance in which the Court actually confronted a state law which sought to channel all children into public schools. And that case, as Justice Brennan was careful to observe, "obviously decided no First Amendment question but recognized only the constitutional right to establish and patronize private schools—including parochial schools—which meet the state's reasonable minimum curricular requirements." 374 U.S. at 248. Justice Stewart's intimation that *Pierce* has acquired its first amendment status after the event is entirely proper. *Pierce* has undergone a sort of constitutional sea-change. It is one of the decisions which links the Constitution's past emphasis on economic liberty and its present emphasis on personal liberty. The single note of caution worth mentioning here is that, if *Pierce* had never been decided and the issue were to arise afresh today, it is by no means certain that the Court would hold the states powerless to require all children to attend the same schools. Yet, in view of the gloss on *Pierce*, and, even more important, in view of the extreme unlikelihood that any state legislature would today attempt to curtail parental option, present discussion may as well proceed on the assumption, jointly postulated by Justices Stewart and Brennan, that the choice of public or private schooling is indeed grounded in the first amendment.

stitutional concern then narrows to this: the child who cannot afford a private school which reflects his religious or antireligious choice is forced to spend a large measure of his day in state-fashioned, secular surroundings.

Yet a constitutional question could arise only if the schooling that the child was compelled to undergo operated to disparage religion. And this, at bottom, is Justice Stewart's argument. As he sees it, "the basic constitutional justification for permitting the exercises at issue in these cases" is that "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."<sup>49</sup>

This assertion appears to relate to two different claims. The first is that of the child who merely desires to pray aloud or as part of a group, and who is told that he must take the initiative of doing so before or after school, and with groups of his own formation — a displacement which by itself hardly seems to present a real constitutional problem. The second claim is that the absence of a religious exercise at the commencement of school operates to suffuse the balance of the school day with an antireligious, perhaps even "secularist" bias.<sup>50</sup> It seems highly doubtful that such an evaluation — be it proffered as a finding of fact or conclusion of law — is a generally valid description of American public education. But, assuming that as to some identifiable students in some identifiable schools the evaluation is meaningful, it becomes relevant to inquire into the propositional function which this evaluation serves.

It is, in the words of Justice Stewart, the "basic constitutional justification" of the school prayer programs. This appears to suggest that, unless the characterization is true, the challenged programs would be without "constitutional justification" — would be what at least Justice Stewart's brethren would regard as an establishment of religion. This means, of course, that proof of the "constitutional justification" is an essential ingredient of the case for school prayers. There is no middle ground such as Justice Stewart tried to find later in his opinion: "strictly speaking, what is at issue here is a privilege rather than a right. In other words, the question presented is not whether exercises such as those at issue here are constitutionally compelled, but rather whether they are constitutionally invalid. And that issue, in my view, turns on the question of coercion."<sup>51</sup> For if the child too poor to attend a private school does not require school prayers to sustain his freedom of worship — if, in short, the asserted "constitutional justification" of the prayer program is not demonstrable — then the program is not a permissible

<sup>49</sup> *Id.* at 313.

<sup>50</sup> The Court has elsewhere denied, in effect, that every public school curriculum which lacks a prayer program is ipso facto antisectarian. In *McCormell* Justice Black observed, in a passage quoted by Justice Stewart in *Schempp*, *id.* at 311, that "to hold that a state cannot . . . utilize its school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not . . . manifest a governmental hostility to religion or religious teachings." *Illinois ex rel. McCormell v. Board of Educ.*, 333 U.S. 203, 211 (1948).

<sup>51</sup> *Id.* at 316.

enterprise; it is invalid.<sup>52</sup> Conversely, if a prayer program is demonstrably necessary to protect the religious freedom of some public school-children, this would seem to mean that, where requested, the prayer program is “constitutionally compelled.” Moreover, that a prayer program involves coercion of a few dissenting schoolchildren seems hardly decisive if the program is necessary to the maintenance of religious freedom of other children, for in that case children’s beliefs are being coerced whether or not the program is present.

Behind Justice Stewart’s “constitutional justification” for school prayers apparently lies the idea that a prayerless compulsory school, like a chaplain-less draft army, is an institution in which the free exercise and establishment clauses inevitably collide. But, assuming that it is constitutionally permissible for the United States to employ army chaplains, the “constitutional justification” for this government program is that otherwise the draftee would have no effective opportunity whatsoever to satisfy his religious needs, a situation which does not, of course, obtain for the schoolchild. Moreover, the availability of the chaplain to a religiously oriented draftee need not, and presumably does not, operate to suffuse the army experience of all draftees with an officially sponsored program of religious activity. But a school prayer program, whether or not participation is characterized as voluntary, operates through and on the pupil group and each of its members. If as to a particular schoolchild a particular prayerless public school really operates to restrain his religious faith, this surely suggests not that such a religious establishment should be tolerated, but that the child would be constitutionally exempt from compliance with the compulsory school laws.

## V

What was sorely needed in *Engel* and *Schempp* was the kind of analysis Justice Frankfurter made in his *McCollum* concurrence — an analysis culminating in language which, with minor changes, could have been transposed to the school prayer problem:

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<sup>52</sup> Compare Justice Brennan’s apparent view that the federal government may, but is not required to, provide chaplains to cater to the religious needs of prisoners and of military personnel who would otherwise have no effective opportunity to exercise their freedom of worship. *Id.* at 299. (In his dissent in *McCollum*, in 1947, Justice Reed noted that West Point cadets and Annapolis midshipmen were required to attend church services. 333 U.S. at 254. This practice, if it still obtains, seems plainly insupportable. The issue is of course distinguishable from that presented in *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934), which sustained a state university’s requirement of military training even as to students of pacifist religious persuasion. *Cf. Barnette.*) Compare *Sherbert v. Verner*, 374 U.S. 398 (1963), decided the same day as *Schempp*, in which the Court, speaking through Justice Brennan, held that South Carolina could not deny unemployment compensation to a Seventh-Day Adventist who was fired because she declined to work on Saturday. Justice Stewart, concurring sharply, argued that the Court’s holding was inconsistent with what he felt to be the “not only insensitive, but positively wooden” view of the establishment clause reflected in *Engel* and *Schempp*. 374 U.S. at 414. Justices Harlan and White, who dissented, took the position that South Carolina was constitutionally free to award or withhold compensation for one whose refusal to take available employment was predicated on religious grounds. *Id.* at 422.

Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. 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 children belonging to . . . non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. . . . These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.

. . . . In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.<sup>53</sup>

Such an analysis would have operated, as Professor Freund argued that a free exercise holding would have operated, "to limit the decision to the context of the school room." It would have recognized that the public school presents a distinctive situation, that analogies from army posts, state tax policy, government ceremonies, and even the administration of state unemployment compensation programs<sup>54</sup> are of limited relevance. And, to the extent that attention would thereby be directed to the schoolroom and its position of unique responsibility in American society, the prayer cases could serve not merely to free the schools of a function they cannot justify, but to encourage them in those activities which only they can perform. It may well be that most American schools do very little to enlarge student awareness of the role of religion in a democratic society. To the extent that this is so, it is a salient item in a more general indictment—that American public schools do a woefully poor job of fostering citizen understanding of the nature of American freedoms and of the institutions charged with protecting those freedoms. Classroom study of the *Engel* and *Schempp* cases might be an excellent beginning point for such understanding. Many lessons might emerge from such a study. One would be a sense of the sanctity of religion. Another would be a sense of the high place of nonconformity. Still another would be a sense of the subtlety of the responsibilities Americans impose upon their legislatures and their courts. But perhaps the final lesson would be a recognition that these institutions are, in the last analysis, only secondary architects of the American experience. As Justice Frankfurter observed in *McCullum*, "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."<sup>55</sup>

<sup>53</sup> *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227-28, 231 (1948) (concurring opinion).

<sup>54</sup> See *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>55</sup> 333 U.S. at 231.