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Article 9

Note: A Daily Prayer for Public Schools

judicial determination.[85] If Sunday closing legislation is a dying relic of the past, it now appears that it will have to die where it was born – in the state legislatures.

NOTE: A DAILY PRAYER FOR PUBLIC SCHOOLS

Ever since the Supreme Court stated that our Constitution provides for "a wall of separation between church and State"[1] the courts have been faced with the delicate problem of establishing boundaries. In facing this issue recently, Chief Judge Desmond wrote for the New York Court of Appeals, in *Engel v. Vitale,*[2] that "there is no problem of constitutionality"[3] in allowing public school teachers to offer the following daily prayer, recommended by the New York State Board of Regents to local school authorities:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.[4]

The establishment and free exercise clauses of the first amendment, which petitioners claimed prohibited the Regents Prayer, have proven standard weapons in the arsenals of all opponents of prayer, Bible reading, singing of hymns, early release programs, wearing of religious garb by teachers, and similar controversial school board action. Thus far, the Supreme Court has remained silent on the constitutionality of these acts as performed within the public schools.[5] Certiorari, however, was requested in the present case. A decision by that Court on *Engel v. Vitale,* a case which raises the very essence of the constitutional issues involved, is likely to play a significant role in establishing the future relationship between Church and State.

The purpose of this note is first, to explore the position other jurisdictions have assumed in prayer recitation, Bible reading (the most common fact pattern giving rise to these issues) and other situations, and secondly, to divine from the most allied of Supreme Court decisions the course that Court may be expected to follow when confronted with *Engel v. Vitale.*

Attitudes of the Several States

Noncompulsory prayers offered in the presence of school children have for many years survived cries of unconstitutionality in most jurisdictions. In a Kentucky case,[6] for example, decided just after the turn of the century, the court's opinion clearly in-

[85] See State v. Kidd, 167 Ohio St. 521, 150 N.E.2d 413 (1958). "Whether in this fast-moving modern age the Sunday closing law is outmoded, obsolete and unrealistic and should be eradicated is essentially a legislative and not a judicial problem." *Id.* at –, 150 N.E.2d at 419.

[1] Reynolds v. United States, 98 U.S. 145, 164 (1878).

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

[3] *Id.* at 182, 176 N.E.2d at 582, 218 N.Y.S.2d at 662.

[4] *Id.* at 179, 176 N.E.2d at 580, 218 N.Y.S.2d at 660.

[5] See Doremus v. Board of Educ., 342 U.S. 429 (1952), in which the petitioners attempted to have declared as invalid a statute allowing daily readings from the Old Testament. One of the petitioners relied on the injury to his interest as a taxpayer and the second sued as the parent of a public school child. As to the first, the Court held there was no case or controversy because the facts were insufficient to support a claim of injuries to financial interest; as to the second petitioner, the Court ruled that the question was moot since the child had graduated.

[6] Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905).

dicates that as far as that forum was concerned the crux of the question was not the delivery of a prayer, but whether or not the particular prayer was sectarian. The court found it unreasonable to believe that the legislature could have meant to exclude prayers taken from the Bible when it ratified its state constitution:

> Though it be conceded that any prayer is worship, and that public prayer is public worship, still appellant's children were not compelled to attend . . . during the prayer. The school was not "a place of worship," nor are its teachers "ministers of religion," within the contemplation of . . . [Kentucky's] Constitution, although a prayer may be offered incidentally at the opening of the school by a teacher.[7]

A decade later a Wisconsin court[8] adopted the same attitude in dealing with prayers given by both Protestant and Catholic ministers at graduation exercises. The court held the prayer to be "a mere incident, which occupies but a few moments . . ."[9] during the course of a gathering which was not for the purpose of worship.

Sectarianism may be an issue whether or not given prayers are called nonsectarian or nondenominational by proponents. In the area of Bible reading, sectarianism often becomes the decisive consideration. Where the courts have found prayers or the Bible to be sectarian, recitations and readings have been held unconstitutional.[10] But the majority position is that the King James version, used by most Protestants, is not sectarian within the meaning of state laws, and consequently prayers and readings taken from it are not in violation of establishment clauses. In keeping with this view, California held the King James version might be left in school libraries even though statutes of that jurisdiction demanded the exclusion from schools of all sectarian or partisan religious literature.[11] Rejecting the argument that the acquisition of a Bible would appear to be public school ratification of that edition,[12] the court concluded that the statute was not intended to apply to religious books as such, but only those which specifically advanced the ideas of one sect over those of another. The Bible, on the other hand, in either the King James or Douay versions, was held to be so generally accepted as not to be sectarian. Similarly, the Koran or Talmud could also be acquired by the school.

The conclusion reached by the California court echoed a sentiment expressed three-quarters of a century earlier in another forum. *Donahoe v. Richards*,[13] decided in 1854, was a suit for damages allegedly suffered when a child was expelled for refusing either to take part in Bible readings or to bring a note from home requesting she be excused. The court summarily decided that Bible readings as such were not prohibited by the constitution and turned to the question of whether or not use of a particular text constituted affirmation of a religion. It found that Bible reading was no more a confirmation of religion by the school than reading mythology would be. Since the petitioner did not

[7] *Id.* at ___, 87 S.W. at 793.
[8] State *ex rel.* Conway v. District Bd. of Joint School Dist., 162 Wis. 482, 156 N.W. 477 (1916).
[9] *Id.* at ___, 156 N.W. at 481.
[10] See People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); Herold v. Parish Bd. of School Directors, 136 La. 1034, 68 So. 116 (1915). *But see* State *ex rel.* Conway v. District Bd. of Joint School Dist., *supra* note 8.
[11] Evans v. Selma Union High School Dist., 193 Cal. 54, 222 Pac. 801 (1924) (per curiam).
[12] *But cf.* Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953).
[13] 38 Me. 379, 61 Am. Dec. 256 (1854).

argue against the Bible itself but merely the version, to allow her to negate what the school authorities had decided as most expedient would be to subordinate another version to the one she chose, and thus inflict on others the mischief she complained of.[14]

Thus, it is the definition of sectarianism applied by the local court which becomes decisive rather than the introduction of a Bible as such into the public schools. Where states have taken the position that the Bible in any form cannot be anything but sectarian, it follows automatically that it cannot be read in classrooms. In *Ring v. Board of Educ.*,[15] the court so ruled, saying that although differences in doctrine may seem unimportant to one individual they may not to another; Catholicism and Protestantism are two different sects and therefore the Protestant King James translation must be sectarian.

Although the *Ring* opinion is strong, the element of compulsion which was present appears to have played a major role in the decision.[16] The children were required to listen to readings from the King James version, the Lord's Prayer of that edition, and the singing of hymns. Students were also told to rise at various times, fold their hands, bow, and perform other acts of a similar nature. In considering the sum of the acts required by students the court said: "If these exercises . . . were performed in a church there would be no doubt of their religious character, and that character is not changed by the place of their performance."[17]

However, in Louisiana the court applied a more constrained definition and found the King James version sectarian, not as to Catholics but as to Jewish believers. The action was instituted by petitioners of both named religions but the court decided that because the teaching was basically Christian, to be subject to readings from the New Testament is a form of discrimination against non-Christians only. In holding that reading of the Bible, even without comment, is unconstitutional, the court said, "It is a fact that the reading of the Bible is religious instruction, and that when the New Testament is read it is Christian instruction."[18]

Notwithstanding the Illinois and Louisiana views on sectarianism, reading of the King James version has been ruled constitutional more often than not.[19] New

[14] *Id.* at 407-08, 61 Am. Dec. at 270.

[15] People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910).

[16] *Id.* at ___, 92 N.E. at 252. Where the compulsion is eliminated in a similar fact situation it has been held by the Texas Supreme Court that reading from the King James Bible, saying prayers and singing hymns, so long as nonsectarian, may be permitted in the classrooms. The court argued that those not favoring a religious society have no right to deny others who choose to hear, the privilege of instruction in public school of the moral truths in the Bible. Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908).

[17] People *ex rel.* Ring v. Board of Educ., *supra* note 15 at___, 92 N.E. at 252. The court went on to say: "The reading of the Bible in school is instruction. . . . [Pupils] cannot hear the Scriptures read without being instructed as to the divinity of Jesus Christ, the Trinity, the Resurrection, baptism, predestination, a future state of punishments and rewards, the authority of the priesthood, the obligation and effect of the sacraments, and many other doctrines about which the various sects do not agree. . . . Any instruction on any one of the subjects is necessarily sectarian, because, while it may be consistent with the doctrines of one or many of the sects, it will be inconsistent with the doctrine of one or more of them." *Id.* at ___, 92 N.E. at 254-55.

[18] Herold v. Parish Bd. of School Directors, 136 La. 1034, ___, 68 So. 116, 121 (1915).

[19] See, *e.g.*, People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927); Hackett v.

York has chosen to align itself with the majority sentiment. In *Lewis v. Board of Educ.*,[20] the petitioner pleaded three causes: reading of the King James and other versions of the Bible, provisions in the city charter which were interpreted as prohibiting the Board of Education from excluding the Bible from schools, and the use by religious groups of local schools after hours. The court held that the mere reading of the Bible without comment is not in violation of any constitutional prohibition regarding sectarianism or interference with religious freedom.

> In no sense does the practice of reading from the Scriptures destroy or weaken or affect the cleavage between Church and State. . . . Nor is it shown that the practice runs counter to the "free exercise and enjoyment of religious profession and worship, without discrimination or preference." . . .[21]

This attitude is a clear statement of the majority position regarding Bible reading. In reaching its conclusion the court relied on what it considered the religious tradition of our country and the references to God in our daily activities. For those of different belief the Bible's value as a literary work of art was considered.[22] But the court was reluctant to argue the merits of Bible reading; that question was for the Board of Education. Rather than policies, power was the issue.

This distinction between policies and power has been recognized in other jurisdictions.

> The law does not forbid the use of the Bible . . . in the public schools. . . . Whether it is prudent or politic to permit Bible reading in the public schools is a question for the school authorities to determine. . . .[23]

Massachusetts has ruled constitutional a public school committee regulation ordering Bible reading and prayer each day, substantially for the above reasons, saying, however, that although the motive was instruction in piety, justice and truth, the regulation was not enforceable against children holding different religious principles.[24]

This line of argument has been used to exclude as well as admit the Bible into public schools. An Ohio municipal board of education had passed a resolution prohibiting religious instruction and the read-

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Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905); Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256 (1854); Kaplan v. Independent School Dist., 171 Minn. 142, 214 N.W. 18 (1927); State *ex rel.* Freeman v. Scheve, 65 Neb. 876, 93 N.W. 169 (1903); Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956); Religious Education, 64 Pa. D.&C.2d 549 (Dep't of Justice 1948).

[20] 157 Misc. 520, 285 N.Y. Supp. 164 (Sup. Ct. 1935), *modified in other respects,* 247 App. Div. 106, 286 N.Y. Supp. 174 (1st Dep't 1936), *appeal dismissed,* 276 N.Y. 490, 12 N.E.2d 172 (1937) (for lack of constitutional issue).

[21] *Id.* at 530, 285 N.Y. Supp. at 174, quoting from N.Y. CONST. art. I, §3. In regard to the constitutionality of religious groups holding meetings in the school building after classes, the court said that so long as the meetings did not consist of religious services it would be permissible: "It is the *use* to which the school buildings are put and not the *identity* of the users, that is decisive of the lawfulness of the use." *Id.* at 526, 285 N.Y. Supp. at 170.

[22] This argument was rejected in State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 173 Pac. 35 (1918).

[23] State *ex rel.* Freeman v. Scheve, 65 Neb. 876, ___, 93 N.W. 169, 172 (1903).

[24] Spiller v. Woburn, 94 Mass. (12 Allen) 127 (1866). See also Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1922), which held that an ordinance requiring the daily reading of a portion of the King James version of the Old or New Testament along with the recitation of a prayer, in either of which individual students could decline to take a part, does not infringe on individual religious freedom.

ing from religious books, including the Bible, in public schools. In upholding the resolution, the court concluded that precisely because curricula are policy matters delegated to local boards by the legislature, it is not for the court to interfere or attempt to determine the wisdom of the board's regulation.[25]

Use of the Bible in public schools for purposes other than daily readings without comment has not usually found acceptance. For example, where schools have attempted to use the Bible as a formal textbook, even where attendance was not compulsory, the courts in general have not allowed the practice.[26] So long as the Bible is used only for selected readings, even if it is maintained that portions of a given version are sectarian, the courts will not assume that those portions will be read.[27] But when the Bible is used as a textbook the entire version must be held as suitable nonsectarian material, and, forced to this extreme, most jurisdictions have found such regulations unconstitutional.[28]

Although the question of compulsory attendance at prayer recitations and Bible readings seems as crucial as the sectarian issue, it has not been the basis for as much controversy. The reason appears to be that the attendance problem is avoided by making attendance noncompulsory. However, since it is axiomatic that *some* Bible must be used in Bible readings, whatever version chosen will be subject to cries of sectarianism from any group which authorizes a different version.

Cases emphasizing the compulsion element as the basis for objection seem uniformly agreed that mandatory attendance at readings or prayer recitations will invalidate any such exercise.[29] Three years ago an action was brought in the federal district court of Pennsylvania to have declared as unconstitutional a statute providing for Bible readings on a daily basis.[30] In one school considered, the Bible was read over a loud speaker by student members of the Radio and Television Workshop. The pupils selected to read were free to choose their own text and verse. In the past, readings had been made from the King James, Douay and Jewish Holy Scriptures.

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[25] Board of Educ. v. Minor, 23 Ohio St. 211 (1872).

[26] State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 173 Pac. 35 (1918); State *ex rel.* Weiss v. District Bd., 76 Wis. 177, 44 N.W. 967 (1890).

[27] State *ex rel.* Freeman v. Scheve, *supra* note 23.

[28] However, a Michigan court held that a book based on the Bible, containing a collection of moral principles affirming the Ten Commandments, which was read from without comment by the teacher, and during which time children could absent themselves on the application of their parents, was constitutional. The court used a historical argument and concluded that the Bible was not intended to be excluded by first amendment prohibitions. Pfeiffer v. Board of Educ., 118 Mich. 560, 77 N.W. 250 (1898).

[29] State *ex rel.* Freeman v. Scheve, *supra* note 23; People *ex rel.* Vollmar v. Stanley, *supra* note 19. See also Wilkerson v. City of Rome, *supra* note 24; Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884); Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905); People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910).

[30] Schempp v. School Dist., 177 F. Supp. 398 (E.D. Pa. 1959). Subsequent to this decision, which enjoined the defendant school district from executing the Pennsylvania statutory Bible reading requirement, the school district filed an appeal with the Supreme Court. Meanwhile, the state legislature amended the education law (PA. STAT. ANN. tit. 24, §15-1516 (Supp. 1960)), thus severely subduing the coercive elements found so objectionable in the existing Bible reading statute. Defendant then returned to the district court and

Following the readings, the students were told to rise and repeat the Lord's Prayer. Over objections, the petitioner's child was directed by the assistant principal to attend the "devotional services" and ordered by his home room teacher to stand during recitation of the Lord's Prayer.[31] Although the petitioner was Unitarian, the case seemed to hinge on the sectarian differences of Jewish students.[32]

In holding the procedure unconstitutional, the court relied heavily on compulsion and coercion involved:

> The daily reading of the Bible buttressed with the authority of the State and, more importantly to children, backed with the authority of their teachers, can hardly do less than inculcate or promote the inculcation of various religious doctrines in childish minds.[33]

It has not followed, however, that mere voluntary attendance measures will necessarily remove the constitutional ground for complaint.[34] A New Jersey case[35] held as unconstitutional a municipal board of education plan allowing free distribution in schools, after classes, of Gideon (King James version) Bibles to those students whose parents had signed written requests.

It was found on the testimony of psychologists that those students who chose not to take part would have pressure exerted on them, and that the school board would seem to be putting its stamp of approval on the Gideon version.[36] The court felt that although the distribution was voluntary there was nevertheless an interference with free exercise of religion. This holding, however, has been specifically rejected in other jurisdictions,[37] is inconsistent with previous New Jersey decisions,[38] and its philosophy has not been followed in a recent ruling by the Commissioner of Education of that state.[39]

Prayer and Bible situations have no monopoly on the first amendment-public school controversy. The question of whether or not public school teachers may wear religious garb, for example, has arisen where local school boards have hired members of a particular religious sect to teach in a public school. According to the New York view, the state superintendent of schools has power to order that distinc-

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moved for relief from the injunction on the ground that the amendment caused the issue in the case to be moot. The motion was denied because of the pending appeal. Schempp v. School Dist., 184 F. Supp. 381 (E.D. Pa. 1959). In view of the amendment the Supreme Court disposed of the appeal in a per curiam opinion, vacating judgment and remanding for further proceedings as the district court might deem appropriate. School Dist. v. Schempp, 364 U.S. 298 (1960). Plaintiff Schempp thereupon moved before the district court for permission to file amended pleadings, which motion the defendant opposed. The district court ruled, per curiam, "that a useful purpose would be served by permitting it to be filed, and that *prima facie* it states a cause of action. . . . Accordingly we will grant the plaintiffs' motion but in so ruling we desire to make it clear that we decide no more than that which we have stated." Schempp v. School Dist., 195 F. Supp. 519, 520 (E.D. Pa. 1961).

[31] Schempp v. School Dist., 177 F. Supp. 398, 406 (E.D. Pa. 1959).

[32] *Id.* at 401 & n.14.

[33] *Id.* at 404.

[34] Herold v. Parish Bd. of School Directors, 136 La. 1034, ___, 68 So. 116, 121 (1915).

[35] Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954).

[36] *But cf.* Evans v. Selma Union High School Dist., 193 Cal. 54, 222 Pac. 801 (1924) (per curiam).

[37] Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956).

[38] Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed*, 342 U.S. 429 (1952), discussed in note 5 *supra*.

[39] N.Y. World Telegram & Sun, Sept. 7, 1961, p. 3, col. 1.

tive religious dress not be worn in classrooms, under penalty of dismissal. As in *Lewis* and *Engel,* the court's position is that the decision is one of policy and not constitutionality.[40] Absent a statute or state board order, the question still remains one of policy only; thus a ruling either way by the local board is constitutionally justified.[41]

Recently a New York Appellate Division case[42] presented constitutional issues similar to those now raised in *Engel v. Vitale,* although under a different factual situation. A proceeding was instituted to revoke a Board of Education regulation recommending that the words "under God" be included in the daily pledge of allegiance, pursuant to a recommendation to that effect from Congress. The court held that since the pledge was voluntary and no penalties attached for refusal, the regulation did not violate state or federal constitutions. In citing the Supreme Court, the Appellate Division said that coercion of the sort condemned by that Court was not present;[43] being made to choose between remaining silent during the pledge or leaving the room is not such forced nonconformity as would be unconstitutional.[44]

Historical Setting of the First and Fourteenth Amendments

Whenever a case of first impression arises under a given law the courts find it helpful to turn to legislative histories and to sense the population's feeling at the time of enactment. It was the result of just such a study which led to the Special Term decision permitting the Regents Prayer.[45] The court concluded that the sense of the nation at the time of ratification of the first and fourteenth amendments could not be read as intending the common practice of daily prayers and Bible readings be discontinued in the public schools.

Special Term acknowledged that in 1868, when the fourteenth amendment was ratified, the separation of public education and church affiliations had taken firm root, but maintained that separation was not considered to extend to prayer or Bible readings. Although some state constitutions contained provisions prohibiting sectarian instruction in schools, classes generally

[40] O'Connor v. Hendrick, 184 N.Y. 421, 77 N.E. 612 (1906).

[41] Hysong v. School Dist., 164 Pa. 629, 30 Atl. 482 (1894); Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936), in which the nuns employed by respondent were wearing the habit of the Sisterhood of St. Benedict. The court said: "Whether it is wise or unwise to regulate the style of dress to be worn by teachers in our public schools or to inhibit the wearing of dress or insignia indicating religious belief is not a matter for the court to determine. The limit of our inquiry is to determine . . . the provisions of the Constitution." *Id.* at ___, 267 N.W. at 135.

[42] Lewis v. Allen, 11 App. Div. 2d 447, 207 N.Y.S.2d 862 (3d Dep't 1960).

[43] *Id.* at 449-50, 207 N.Y.S.2d at 865. In Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), the Supreme Court held that the Pledge of Allegiance is not a religious act and that a state could compel school children to take part in the pledge in order to foster a sentiment of national unity. Three years later, in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), the court overruled itself, saying that such acts pertain to the individual's spirit and intellect, and as such are reserved by the first amendment from official control. New York, however, had anticipated only the former ruling, for in 1939 the Court of Appeals held in People v. Sandstrom, 279 N.Y. 523, 18 N.E.2d 840 (1939) that the salute to the Flag, not being a religious act, could be demanded of children.

[44] Lewis v. Allen, *supra* note 42, at 450, 207 N.Y.S.2d at 865-66.

[45] Engel v. Vitale, 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959). Justice Meyer wrote: "It is . . . contended that the recognition of prayer is an

opened with prayer.[46] A Massachusetts school committee had passed an order requiring Bible reading in the schools[47] and "New York's Superintendent of Common Schools had ruled no less than five times that prayer and Bible exercises could be conducted . . . before school hours . . ." if not made mandatory.[48]

A rejection of the Special Term view, said the Court of Appeals, would be difficult to explain in the face of such historical evidence as:

> The references to the Deity in the Declaration of Independence; the words of our National Anthem: "In God is our trust"; the motto on our coins; the daily prayers in Congress; the universal practice in official oaths of calling upon God to witness the truth; the official thanksgiving proclamations beginning with those of the Continental Congress and the First Congress of the United States and continuing till the present; the provisions for chaplaincies in the armed forces; the directions by Congress in modern times for a National Day of Prayer and for the insertion of the words "under God" in the Pledge of Allegiance to the Flag. . . .[49]

For the Supreme Court itself has admitted, "We are a religious people whose institutions presuppose a Supreme Being."[50]

The first amendment to the Constitution provides that Congress shall make no law respecting either the establishment of a religion or preventing the free exercise thereof. In *Cantwell v. Connecticut*,[51] the Supreme Court interpreted this to mean that an individual shall be protected from compulsion to follow a particular creed and safeguarded in freely choosing his own. Subsequent litigation implies that the test which the Supreme Court will apply and which the Regents Prayer must pass to be held constitutional will be comprised of two questions: Is it coercive,[52] and does it violate the separation philosophy? An affirmative answer to either will invalidate the prayer.

Since the trilogy of *Everson v. Board of*

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integral part of our national heritage, and that, therefore, the 'establishment' clause cannot have been intended to outlaw the practice in schools any more than from the rest of public life; . . . that prayer in the schools is permissible not as a means of teaching 'spiritual values' but because traditionally, and particularly at the time of the adoption of the First and Fourteenth Amendments, this was the accepted practice. With this argument the Court agrees." *Id.* at 673, 191 N.Y.S.2d at 470.

[46] *Id.* at 674-75, 191 N.Y.S.2d at 472.

[47] Spiller v. Woburn, 94 Mass. (12 Allen) 127 (1866).

[48] Engel v. Vitale, *supra* note 45, at 675, 191 N.Y.S.2d at 472. For a comprehensive discussion of prayer and Bible readings in the public schools at the time the first and fourteenth amendments were ratified, see *id.* at 673-80, 191 N.Y.S.2d at 470-77.

[49] Engel v. Vitale, 10 N.Y.2d 174, 181, 176 N.E.2d 579, 581, 218 N.Y.S.2d 659, 661 (1961).

[50] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[51] 310 U.S. 296, 303 (1940).

[52] Although state courts also manifest agreement that coercion and divisiveness, if present, will invalidate any board of education regulation concerning the recitation of prayers, there is not uniform agreement on what acts constitute coercion.

Generally, where a prayer is offered and accompanied by a reading of the Bible, so long as the student is permitted to leave the room on presentation of a note from his parents, courts rule out the presence of coercion. Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884).

However, Wisconsin has held, in a similar fact pattern, that: "When . . . a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subject to reproach and insult." State *ex rel.* Weiss v. District Bd., 76 Wis. 177, ___, 44 N.W. 967, 975 (1890).

Educ.,[53] *McCollum v. Board of Educ.*[54] and *Zorach v. Clauson*[55] are comparatively recent decisions, they become quite useful in the search for a Supreme Court policy on the determining issues of coercion and separation.

Coercion

The Supreme Court has stated that any plan for accommodating the spiritual needs and desires of some, if coercive, would be unconstitutional. This position is clearly brought out in the *Zorach* case,[56] which held as constitutional a New York early release program. A majority of the Court refused to grant a trial on the plaintiff's contention that the system was coercive, because the New York Court of Appeals previously ruled the question of coercion had not been properly introduced on the trial level. However, Mr. Justice Douglas, in writing the majority opinion, stated that if coercion were in fact present then the plan would not be constitutional.[57]

Three dissenting opinions were submitted in *Zorach*. Justices Jackson and Frankfurter said that the same coercive element the majority felt would be fatal if present, was inherently a part of the early release program.[58] Mr. Justice Black also attacked the coercive element, saying that the New York law is aimed at promoting religious attendance by those who would not otherwise go; in its hindrance to nonbelievers, he maintained, early release is an abandonment of a neutral position.[59]

However, merely because two courses of conduct are laid before a student does not mean that he is thereby coerced. Mr. Justice Jackson has said:

> [I]t may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress.[60]

In *Engel v. Vitale*, the Court of Appeals decided that coercion, within the meaning given it by the Supreme Court, is not present in the Regents Prayer situation,[61] and accepted the attitude presented in the Special Term opinion:

> To recognize "subtle pressures" as compulsion under the [first] amendment is to stray far afield from oppressions the amendment was designed to prevent; to raise the psychology of dissent, which produces pressure on every dissenter, to the level of governmental force; and to subordinate the spiritual needs of believers to the psychological needs of nonbelievers. The equality of treatment which the amendment was designed to produce does not require, indeed proscribes, so doing.[62]

The Court of Appeals position on coer-

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[53] 330 U.S. 1 (1947).
[54] 333 U.S. 203 (1948).
[55] 343 U.S. 306 (1952).
[56] *Ibid.*
[57] "The government must be neutral when it comes to competition between sects. . . . It may not coerce any one to attend church, to observe a religious holiday, or to take religious instruction." *Id.* at 314. See also McGowan v. Maryland, 366 U.S. 420, 563 (1961) (Justice Douglas dissenting): "But those who fashioned the Constitution decided that if and when God is to be served, His service will not be motivated by coercive measures of government. . . ."
[58] Zorach v. Clauson, *supra* note 50, at 321, 323.
[59] *Id.* at 318.
[60] McCollum v. Board of Educ., 333 U.S. 203, 232-33 (1948) (concurring opinion) (dictum).
[61] The court also relied on an essential provision in the Special Term order which insured that no pupil need take part in or be present during the act of reverence. Engel v. Vitale, 10 N.Y.2d 174, 179, 176 N.E.2d 579, 581, 218 N.Y.S.2d 659, 660 (1961).
[62] Engel v. Vitale, 18 Misc. 2d 659, 695-96, 191 N.Y.S.2d 453, 491-92 (Sup. Ct. 1959).

cion in the Regents Prayer is not a unanimous one. Judge Dye, in his dissent to *Engel v. Vitale,* relied on the attitude of the *Zorach* dissenters and concluded that the administration of such a prayer is inherently divisive.[63]

Whatever the final decision, it is clear that the Supreme Court will carefully consider the relationship between insignificant "subtle pressures" on the one hand and unreasonable interference with the privilege of the majority to worship freely on the other.

Separation

On their faces, the *Everson, McCollum* and *Zorach* decisions ratify a conviction of separation. A majority held in *Everson* that reimbursement to parents who financed bus transportation for their children to parochial schools was not an act establishing a religion.[64] Nevertheless, Mr. Justice Black, in writing the majority opinion, made it clear that "in the words of Jefferson, the clause against establishment . . . was intended to erect 'a wall of separation between church and State.' "[65]

A year later these words were elevated from dictum to ratio decidendi when in *McCollum* a unanimous Court ruled that the use of school buildings for religious training of children, while those not electing to attend this training either remained in their regular classes or were sent to study halls, was prevented by the first amendment.[66] Mr. Justice Frankfurter said in a concurring opinion:

> We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an "established church". . . . "Complete separation . . . is best for the state and best for religion."[67]

This year the Supreme Court again took pains to express its long standing conviction in separation. The case was *Torcaso v. Watkins,*[68] which involved the constitutionality of a provision in the Maryland constitution requiring a declaration of belief in God before assuming public office. Mr. Justice Black, writing for a unanimous Court, said neither state nor federal government:

> can constitutionally pass laws . . . which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[69]

The *Torcaso* decision is clear in its statement that *Zorach* is not to be considered a retreat from *McCollum.* Admitting then that the philosophy of the Supreme Court continues to be a firm belief in the separation theory, exactly what are the limits of that separation? It seems uniformly agreed that the theory of a healthy separation

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[63] The prayer fosters "a type of compulsion, exerting as it does . . . pressure which an immature child is unable to resist because of his inherent desire to conform, and constituting a subtle interference by the State . . . with religious freedom. . . ." Engel v. Vitale, *supra* note 61, at 190, 176 N.E.2d at 587, 218 N.Y.S.2d at 669 (Judge Dye dissenting).

Mr. Justice Frankfurter said in *McCollum, supra* note 54, at 231: "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools. . . ."

[64] Everson v. Board of Educ., 330 U.S. 1 (1947).

[65] *Id.* at 16.

[66] McCollum v. Board of Educ., 333 U.S. 203 (1948).

[67] *Id.* at 213, 232.

[68] 367 U.S. 488 (1961).

[69] Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

does not, for instance, require the state to appear completely indifferent before religion. Mr. Justice Douglas said in his majority opinion in *Zorach* that the first amendment commands:

> separation must be complete and unequivocal . . . no exception . . . absolute. The First Amendment, however, does not say that in every and all respects there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other – hostile, suspicious, and even unfriendly. . . . We are a religious people whose institutions presuppose a Supreme Being.[70]

That is, only in the areas of establishment and freedom of religious pursuit must the separation be universal; in other areas the doctrine of sensible accommodation would allow a realistic degree of contact without being in violation of the principle of separation. The Court of Appeals has held that the Regents Prayer is within the bounds of permissive accommodation. In support of New York's position the Supreme Court may look to "literally countless illustrations . . . that belief and trust in a Supreme Being was from the beginning and has been continuously part of the very essence of the American plan of government and society."[71] In addition, the Court may then turn its attention to a judicial philosophy ratifying noncompulsory nonsectarian prayers and Bible readings in the public schools, which antedates the fourteenth amendment[72] and which has continued to the present day a reflection of predominant sentiments.

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[70] Zorach v. Clauson, 343 U.S. 306, 312-14 (1952).

[71] Engel v. Vitale, 10 N.Y.2d 174, 180-81, 176 N.E.2d 579, 581, 218 N.Y.S.2d 659, 661 (1961).

[72] Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 256 (1854). For a comprehensive survey of the