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Non-Injurious Establishments of Religion

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NON-INJURIOUS ESTABLISHMENTS OF RELIGION

The Supreme Court of the United States recently revitalized the public sentiment surrounding the question: At what point should the line between permissible and impermissible church-state arrangements be drawn? In *Engel v Vitale*[1] the constitutionality of allowing a twenty-two word officially composed prayer to be read by the teacher at the commencement of each public school day was challenged by the parents of five children attending schools where the prayer was recited. The parents sought the overturning of the order of the school board, which authorized the prayer, because of alleged compulsion in the program. The Supreme Court expressly renounced this ground for decision and invalidated the prayer, despite the failure to show injury, because the program violated the constitutional provision prohibiting any law respecting an establishment of religion.

The public reaction to the Engel decision was heated and varied.[2] While those denouncing the decision may have appeared to its supporters to have been improvidently impassioned, their adamant dissent should not be ignored without critical analysis. This dissent demonstrates the possibility that the Supreme Court has augmented the ever-difficult task of balancing satisfactorily the rights and interests of the various segments of society. Can there be an establishment of religion absent compulsion? Is *Engel* an instance? If so, what becomes of the underlying philosophy of government upon which this country was founded? These are the questions this note will consider.

The United States is a prime example of a government founded and maintained under the social compact theory. The basic assumption of our form of government is that a sovereign people gave to the government such powers of sovereignty as were deemed necessary to secure to the people the enjoyment of fundamental rights against any tendency toward encroachment on the part of their fellow men and to expedite interaction among the segments of society. From the very nature of the compact, government represents the people, providing for their immediate desires within the boundaries of their basic commands expressed in the Constitution. From the nature of each department of government is determined its function under the compact. Essentially, the function of the legislative department is to express as law the immediate will of the people; that of the executive department is to enforce this immediate will against those who attempt to circumvent it; and that of the judicial department is to prevent the

[1] 370 U.S. 421 (1962).

[2] See examples cited by Kurland, *The Regents Prayer Case: "Full of Sound And Fury, Signifying "*, 1962 Sup. Ct. Rev. 1.

imposition of this immediate will upon dissident members of society when the consequence of its imposition would be the injury of persons protected by the basic commands of the people.[3] While the interplay among the departments of government so conceived may fall short of formal perfection, it is precise enough to provide practical operation.

In recognition of its function, the federal judiciary has implemented rules governing the types of issues courts consider. Fundamentally, courts consider only those issues which are justiciable in nature[4] and which arise out of a case or controversy between adverse parties[5] litigated by one who has sustained a specific and measurable injury sufficient to confer upon him the standing to sue.[6] The doctrine of standing to sue is of particular significance in the present discourse. It underscores injury as a primary requisite for the invocation of the judicial power. This is completely understandable when related to the goal of efficient interplay among the departments of government. Only if some sort of absolutism, rather than social harmony and necessity, were the cornerstone of our Constitution, would the channelling of judicial energies to the task of limiting injury-free actions by the majority be explicable or even tolerable.

The Supreme Court has acknowledged the applicability of the doctrine of standing to sue to the establishment clause in *Doremus v Board of Educ.*[7] There the Court dismissed an action challenging a state statute providing for. Bible reading, because the child had graduated, thereby eliminating the possibility of injury as a basis for the parent's standing to sue. Even where the injury was substantial enough to confer standing, the Court held there was no violation of the establishment clause in *Zorach v Clauson.*[8] In that case a state released students from class to attend religious instructions off the school grounds while students choosing not to be released attended study hall. The majority opinion emphasized that no money was spent and no compulsion was shown, and concluded that there was no violation of the first amendment. The clear import of the majority opinions in both *Doremus* and *Zorach* is that there must be a substantial injury before there is a judicially cognizable violation of the establishment clause.

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[3] See generally Vanderbilt, The Doctrine of the Separation of Powers (1953).
[4] Baker v. Carr, 369 U.S. 186 (1962); Colegrove v. Green, 328 U.S. 549 (1946).
[5] United States v. Johnson, 319 U.S. 302 (1943); Muskrat v. United States, 219 U.S. 346 (1911), and cases cited therein.
[6] Tileston v. Ullman, 318 U.S. 44 (1943); Massachusetts v. Mellon, 262 U.S. 447 (1923).
[7] 342 U.S. 429 (1952).
[8] 343 U.S. 306 (1952).

Prior to the *Engel* decision, two other decisions of the Supreme Court had dealt with the establishment clause and education. In *Everson v Board of Educ.*,[9] Justice Black spoke for the Court in upholding the reimbursement of parents of parochial school children for funds spent for school bus fare, as a part of a general program of reimbursement. In *McCollum v Board of Educ.*,[10] Justice Black again wrote the opinion of the Court, striking down the use of school buildings for religious instruction during released time in the middle of the school day. In both of these opinions, as well as in the one he wrote for the Court in *Engel*, he professed his conviction that there is an absolute, called "establishment", which the Constitution prohibits regardless of injury. Whether other members of the Court share his conviction is open to doubt despite the fact that he has written the opinion of the Court in three out of the five cases to date. In *Everson*, the government program was upheld, so acquiescence in Black's theory of absolutism cannot be imputed to the concurring Justices. In *McCollum*, the two Justices who concurred with Black also concurred with Justice Frankfurter, whose stress was on compulsion rather than absolutism.[11] *Engel* was the first of Black's opinions where the issue of compulsion supposedly was not before the Court. Indeed, Justice Douglas' concurring opinion in *Engel* urges that *Everson* be overruled and that all official marks of recognition of religion be removed from government, whether or not compulsion is involved.[12] Nevertheless, considering the background of Black's opinions in previous cases, it may well be doubted that the Justices who joined him in the majority opinion share Black's and Douglas' faith in absolutism in interpreting the establishment clause. Rather, it is more probable to suppose that the others assumed compulsion was present. This is particularly plausible since the dissenting judges in the state court of appeals treated the subject of compulsion at some length.[13]

Whatever the true popularity of Black's absolutism may be among other members of the Court, the net effect of his approach is to render the establishment clause an oddity in the Bill of Rights, because it makes it the only clause authorizing advisory opinions to uninjured parties. The approach taken by the Court in *Doremus* and *Zorach*, requiring proof of injury, is more desirable and consistent with our

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[9] 330 U.S. 1 (1947).
[10] 333 U.S. 203 (1948).
[11] 333 U.S. 203, 212 (1948).
[12] 370 U.S. 421, 437 (1962). Douglas attitude is difficult to understand since he wrote the majority opinion in *Zorach*, upholding the church-state arrangement involved there because of the lack of injury. Here he speaks as though *Everson*, not *Zorach*, poses the real obstacle to the result he wishes to reach.
[13] Engel v. Vitale, 10 N.Y.2d 174, 184, 218 N.Y.S.2d 659, 664 (1961).

functional Constitution. The argument that the requirement of proof of injury renders the establishment clause superfluous by merging its prohibitions with those of the free exercise clause can yet be avoided. Room remains for a distinction between the *type* of injury which may be remedied by resorting to one of the two companion clauses. The Court could easily distinguish between *indirect* interference with religious liberty, as by using tax money or public property for religious purposes, and *direct* interference with religious belief. The former would readily adapt itself to the contours of the establishment clause, while the latter would be in keeping with traditional concepts of the free exercise clause.

Conclusion

While the *Engel* case can be taken as another example of the absolutism of Justice Black, it must be remembered that the other members of the majority also must have had reasons for concurring in the result reached. Perhaps *Engel* is a case in which some of the Justices presumed the presence of compulsion, but declined to decide on that ground because of a desire for unanimity of support for the doctrine enunciated. On the other hand their reluctance may have been due to a fear of the type of public disfavor encountered as a result of *Brown v Board of Educ.*,[14] where the Court admittedly based its integration decision on psychological compulsion. Whatever the reasons, the result in *Engel* was reached by a route which leads neither to symmetry in the law nor to harmony in society, and when the issue comes up for re-examination at this term of Court,[15] it is hoped that the Court will face squarely the task of delineating the limits of the establishment and free exercise clauses in a manner which is constitutionally consistent and publicly palatable. Perhaps the same result will be reached. If so, it should be only after full deliberation of the real issue of compulsion.[16]

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[14] 349 U.S. 294 (1955).

[15] School Dist. of Abington Township v. Schempp, 201 F Supp. 815, *prob. juris. noted*, 83 S.Ct. 25 (1962); Murray v. Curlett, 228 Md. 239, 79 A.2d 698, *cert. granted*, 83 S.Ct. 21 (1962).

[16] For a fuller treatment of the topic of this note, published after this was written but before it was published, see Sutherland, *Establishment According to Engel*, 76 Harv. L. Rev. 25 (1962).