

# Constitutional Law - The Engel Case in Light of Precedent - Engel v. Vitale, 370 U.S. 421 (1962)

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## Recommended Citation

DePaul College of Law, *Constitutional Law - The Engel Case in Light of Precedent - Engel v. Vitale*, 370 U.S. 421 (1962), 12 DePaul L. Rev. 128 (1962)

Available at: <https://via.library.depaul.edu/law-review/vol12/iss1/10>

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Another point raised by the respondent was that the motion to disqualify was prematurely brought since the Civil Practice Act<sup>18</sup> only made provision to *vacate* an award on grounds of partiality or bias on the part of the arbitrators. The court dismissed this contention by claiming inherent power to control all litigation before it, and, in the absence of express prohibition, disqualify an arbitrator before an award is made.<sup>19</sup>

In conclusion, the court here recognized that the tripartite type of arbitration has evolved to the point where it is the accepted practice for the arbitrators appointed by the parties to bear some relation to the appointing party, with the third arbitrator remaining neutral.<sup>20</sup>

Because of the complexity of the disputes which are arbitrated, special skill, experience and knowledge on the part of the arbitrators is invaluable in reaching a just and speedy settlement. A person who lacked this background would require extensive instruction in the technicalities of the subject matter of the dispute to have that degree of comprehension which an experienced party would already possess. Undoubtedly these practical considerations also prompted the New York Legislature, which changed Section 1462 of the C.P.A. to conform to the common practice and usage shortly after the HIP Medical Groups decision was reached.<sup>21</sup>

<sup>18</sup> NEW YORK CIVIL PRACTICE ACT, § 1462, subd. 2. This provision has been modified. Cf. note 21, ff.

<sup>19</sup> Cf. *Western Union Telegraph Co. v. Selly*, 295 N.Y. 395, 68 N.E.2d 183 (1946); *Gaer Bros. v. Mott*, 144 Conn. 303, 130 A.2d 804, 65 A.L.R. 2d 749 (1957).

<sup>20</sup> This view is accepted as morally and socially correct. See AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS AND PROCEDURAL STANDARDS FOR LABOR-MANAGEMENT ARBITRATION, I, 8 (1951).

<sup>21</sup> CPLR § 7511, subd. (b), par. 1, cl. (ii) signed into law on April 4, 1962: L. 1962, ch. 308, eff. Sept. 1, 1963. This new law permits a vacatur of an award only where the partiality is that "of an arbitrator appointed as a neutral."

## CONSTITUTIONAL LAW—THE *ENGEL* CASE IN LIGHT OF PRECEDENT

The State Board of Regents of New York *officially proposed* the following prayer which they recommended and published as part of their *Statement on Moral and Spiritual Training in the Schools*:

Almighty God, we acknowledge our dependence on thee, and we beg thy blessings upon us, our parents, our teachers, and our country.<sup>1</sup>

The respondent, the board of education of the Union Free School District, No. 9, New Hyde Park, New York, directed the school district's

<sup>1</sup> *Engel v. Vitale*, 370 U.S. 421, 422 (1962).

principal to cause the above-mentioned prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day. Proceedings were brought against the school district by five citizens who are residents of the above-mentioned school district and whose children attend schools run by the district. The proceedings were brought under Article 78 of the Civil Practice Act of New York, seeking an order in the nature of mandamus, directing the respondent school district to discontinue use of the prayer. The basis of the petitioner's complaint was that the prayer violated the religious liberty section of the New York State Constitution and the First Amendment to the United States Constitution, which is enforced upon the states through the Fourteenth Amendment. The applicable part of the First Amendment reads as follows:

Congress shall make no law respecting an Establishment of Religion or prohibiting the Free Exercise thereof.

The Supreme Court of New York<sup>2</sup> held that the prayer did not violate the State Constitution or the "Establishment Clause" of the First Amendment. In order that the "Free Exercise Clause" would not be violated, the court remanded to the school district in order that the district might provide safeguards against the possibility that a child who didn't want to say the prayer or whose parents didn't wish the child to say it might be insured of the right not to say it. The lower court's opinion was affirmed by the Supreme Court of New York, Appellate Division, in a Per Curiam opinion<sup>3</sup> and by the Court of Appeals of New York in a divided opinion.<sup>4</sup> The Supreme Court of the United States noted probable jurisdiction<sup>5</sup> and the case came to be heard. As is widely known both among legal and non-legal circles, the Supreme Court in a 6-1 decision<sup>6</sup> held the prayer to be in violation of the "Establishment Clause." *Engel v. Vitale*, 370 U.S. 421 (1962).

The meaning of the "Establishment Clause" has been in controversy in three major cases before the Supreme Court prior to the *Engel* case. The purpose of this note will be to view the *Engel* case in the light of these three precedent cases.

The first of these cases, *Everson v. Board of Education*,<sup>7</sup> involved the constitutionality of a local board of education of New Jersey paying the transportation to and from school of secular school students as well as

<sup>2</sup> *Engel v. Vitale*, 191 N.Y.S. 2d 453 (1959).

<sup>3</sup> *Engel v. Vitale*, 11 N.Y. App. Div. 340, 206 N.Y.S. 2d 183 (1960).

<sup>4</sup> *Engel v. Vitale*, 10 N.Y. 2d 174, 218 N.Y.S. 2d 659, 176 N.E. 2d 579 (1961).

<sup>5</sup> *Engel v. Vitale*, 368 U.S. 924 (1961).

<sup>6</sup> Justices White and Frankfurter took no part in this decision.

<sup>7</sup> 330 U.S. 1 (1947).

public school students. By a five to four decision the court held that this program did not violate the "Establishment Clause" of the federal constitution. Justice Black in writing for the majority stated what was to become the fundamental test to determine whether a government program violates the "Establishment Clause."

The 'Establishment of Religion' clause of the first amendment means at least this: Neither a state nor the Federal Government. . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.<sup>8</sup>

The five to four decision of the court was not based on a fundamental difference of opinion as to what the meaning of the "Establishment Clause" is or as to the test which Justice Black formulated. The difference of opinion grew out of the application of this test to the particular facts at hand. The majority felt that the financing by a local government body of the transportation costs of secular school students was not giving aid to support a religious activity because the furnishing of such costs is "separate and . . . indisputably marked off from the religious function. . . ."<sup>9</sup> The four dissenters, however, looked upon this financing as an aid to a religious activity. The minority felt that even though religious schools would only benefit indirectly from such financing that this was enough "aid" to come within the general prohibition which the majority had formalized.

The second important case which was to deal with the meaning of the "Establishment Clause" was the case of *McCullum v. Board of Education*.<sup>10</sup> This case dealt with the constitutionality of an Illinois school board's "Released Time Program." The Champaign Board of Education had established a program whereby students who obtained their parents' permission would be released from their regular school program and allowed to attend religious instruction for a period of thirty minutes if the students were in grade school or forty-five minutes if they were in high school. This religious instruction was to be given in the public school class rooms by qualified religious leaders of all denominations. Those students who did not wish to attend such instructions would continue with their regular class work. The Supreme Court of Illinois held that this program was not a violation of the Illinois Constitution or the Federal Constitution.<sup>11</sup> The Supreme Court of the United States in an eight to one decision, overruled the Illinois court and held that this program was a violation of the "Establishment Clause." Justice Black, in writing for the

<sup>8</sup> *Id.* at 15.

<sup>9</sup> *Id.* at 18.

<sup>10</sup> 333 U.S. 203 (1948).

<sup>11</sup> *McCullum v. Board of Education*, 396 Ill. 14, 71 N.E. 2d 161 (1947).

majority, reaffirmed the test which he had formalized in the *Everson* case. He explained that in this case Illinois was financing a religious activity because they were allowing religious instructions to be given in public buildings. This, of course, is a violation of the *Everson* test. Not only was the State of Illinois aiding religious instruction through financing but the majority also felt that they were aiding it through the use of the state's compulsory school attendance legislation:

Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The state also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery.<sup>12</sup>

The lone dissenter in the *McCullum* case, Justice Reed, did not disagree with the majority's reaffirmance of the *Everson* test but only with its application in this particular case:

It seems clear to me that the "aid" referred to by the court in the *Everson* Case could not have been those incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society.<sup>13</sup>

The third important precedent case dealing with the "Establishment Clause" is *Zorach v. Clauson*.<sup>14</sup> This case was decided four years after the *McCullum* case and deals with a somewhat similar set of facts. The City of New York had set up a "released time program" whereby students, with their parent's permission, could be released from their regular school sessions and allowed to attend religious instruction. However, unlike the *McCullum* case the religious instructions were not given on school premises but in the religious institutions' own facilities. Justice Douglas, in writing for a majority of six, reaffirmed the *McCullum* case but distinguished this "released time" program from the one found in *Zorach* because of the fact that here religious instruction was not given on school premises. Justice Douglas reaffirmed the fundamental precept of the *Everson* rule and held that here the government was not financing a religious instruction, as they did in *McCullum*, but only accommodating "their schedules to a program of outside religious instruction."<sup>15</sup>

The minority of Justice Black, Frankfurter and Jackson held that the *Zorach* case was not distinguishable from the *McCullum* case in that the "released time" program in *McCullum* was an unconstitutional "aid" not only because school premises were used for religious instruction, but also because the state was affording sectarian groups an invaluable aid in helping to provide pupils for religious instruction through the state's compul-

<sup>12</sup> *McCullum v. Board of Education*, 333 U.S. 203, 212 (1948).

<sup>13</sup> *Id.* at 249.

<sup>14</sup> 343 U.S. 306 (1952).

<sup>15</sup> *Id.* at 315.

sory public school machinery. Justice Frankfurter stated, in his dissenting opinion, that he felt the majority had reversed the position that was upheld in *McCullum*:

I agree with Justice Black that those principles [expressed by the court in *McCullum*] are disregarded in reaching the result in this case. Happily they are not disavowed. . . .<sup>16</sup>

Some writers<sup>17</sup> pointing to this statement of Justice Frankfurter, concerning a reversal of principles on the part of the majority and statements by Justice Douglas in the majority opinion in *Zorach*<sup>18</sup> believe that the *Zorach* decision represents a basic change in the philosophy of the court regarding the "Establishment Clause." However, this belief is not justified. The principles that Justice Frankfurter referred to as being disregarded are not the *Everson* principles but are those principles dealing with coercion. In *McCullum*, the court found an unconditional degree of coercion which they did not find in *Zorach*. This may be a retraction of part of the *McCullum* decision, but it cannot be taken to mean a general change in the basic philosophy concerning the "Establishment Clause" which philosophy is formalized in the *Everson* test.

In retrospect it appears that, although the court has disagreed as to the application of the *Everson* test in *Everson*, *McCullum* and *Zorach*, there has developed a definite philosophy as to what the "Establishment Clause" means and that this philosophy as formalized in *Everson* means at least that government cannot finance religious activities. In the light of this concept the *Engel* case will be analyzed.

In *Engel* the court held in a six to one decision that a mandatory reading of a twenty-two word prayer was a violation of the "Establishment Clause." Due to the fact that the New York courts had undertaken to safeguard the voluntary joining in or not joining in by students in saying the prayer, the court held that there was no infringement of the "Free Exercise" clause. Justice Black in writing for the court stated that the prayer was a "religious activity" undertaken by the government and as such violates the "Establishment Clause." Justice Black states that it is an

<sup>16</sup> *Id.* at 322.

<sup>17</sup> See Reed, CHURCH-STATE AND THE ZORACH CASE, 27 NOTRE DAME LAWYER 529 (1952).

<sup>18</sup> "We are a religious people whose institutions suppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313.

"The First Amendment . . . 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. Otherwise the State and Religion would be aliens to each other—hostile, suspicious, and even unfriendly. *Id.* at 312. .

aid to religion regardless of the fact that the prayer may be nondenominational. He sums the point up when he states:

It is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government.<sup>19</sup>

It certainly appears that the court's opinion is in keeping with the *Everson* test. Here we have a religious exercise, the saying of a prayer, conducted by the government at government expense. The expense is that of the teacher who must read the prayer aloud. It amounts to nothing less than government financing of a religious exercise. This, of course, is the main prohibition laid down by the *Everson* test. Justice Douglas in writing a concurring opinion stated the issue as "whether the government can constitutionally finance a religious exercise."<sup>20</sup> Phrasing the issue in this way is exactly in keeping with the *Everson* test and its reaffirmance by the court in holding the prayer unconstitutional simply follows the philosophy that government may not finance religious exercises which philosophy has been formalized and sustained in the *Everson*, *McCullum* and *Zorach* cases. The *Engel* decision could not have been decided otherwise unless the court had been prepared to abandon the philosophy which precedent dictated.

The lone dissenter in the *Engel* case, Justice Stewart, held that this nondenominational "expression of religious faith in and reliance upon a Supreme Being"<sup>21</sup> did not violate the "Establishment Clause" because it follows "the deeply entrenched and highly cherished spiritual traditions of our nation."<sup>22</sup> He also states that if the "Establishment Clause" meant that government could not finance religious exercises, then the payment of chaplains' fees in various areas of government would be unconstitutional. By implication, he holds that the "Establishment Clause" does not prohibit government financing of religious exercises. Justice Stewart, thus, is willing to abandon the philosophy of the *Everson* test which has been established by precedent. The majority of the court, as has been shown, was unwilling to abandon this precedent.

<sup>19</sup> *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

<sup>20</sup> *Id.* at 437.

<sup>21</sup> *Id.* at 450 (footnote 9).

<sup>22</sup> *Id.* at 450.

## CONSTITUTIONAL LAW—FEDERAL JUDICIAL CONTROL OF STATE REAPPORTIONMENT

The Constitution of the State of Tennessee vests the legislative power of that state in a General Assembly consisting of a House of Representatives and a Senate. Each county of the state is to have senators and rep-