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PUBLIC RELATIONS IN THE SUPREME COURT: JUSTICE TOM CLARK'S OPINION IN THE SCHOOL PRAYER CASE

*Thomas M. Mengler**

As Frederick Schauer observes, little empirical evidence exists that the Supreme Court ever consciously drafts an opinion for its likely audience. To be sure, Schauer notes, the audience frequently varies. Often, only lower courts and attorneys advising business clients are watching, while at other times officials for state and local governments are the primary audience. Sometimes a case might pique the curiosity of the academic world, while on other occasions the whole world—or at least the American public—seems to be watching. But, Schauer complains, the audience rarely if ever affects the manner of the message. Schauer's Court-watching has led him to conclude that "serious thought about this issue, let alone how to address these people once we decide who they are, seems conspicuously absent from the Supreme Court's processes." In Schauer's mind the Court's inattentiveness to its audience is unfortunate: "it would seem sensible, once it was decided what the Court was going to do and how it was going to do it, for the Court to devote some time to drafting an opinion that tried to talk to those to whom the opinion ought to talk."¹

I do not quarrel with Schauer's conclusion about the Court's tendency to neglect its readership. As an inductive generalization, Schauer's thesis is probably correct. My project is more modest and specific. I will focus on just one counterexample to Schauer's thesis, which is Justice Tom Clark's majority opinion in the school prayer case, *School District of Abington Township v. Schempp*.² The historical evidence shows that Justice Clark very consciously addressed the *Schempp* opinion to its primary audience, the ordinary citizen.

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1. Schauer, Book Review, 53 U. CHI. L. REV. 682, 687 (1986).

2. 374 U.S. 203 (1963).

Now, twenty-five years after the event, some may forget why Justice Clark was so strongly motivated in *Schempp* to engage in public relations. A year earlier, the Court had decided *Engel v. Vitale*,³ holding unconstitutional the New York public school regents' recommendation that school children recite a school prayer. The public outcry over *Engel*, although in the end ineffective, had threatened to rip the political structure from its moorings. Indeed, in writing about *Engel*, *New York Times* columnist Anthony Lewis found it ironic, even baffling, that *Engel* had provoked greater public outcry than *Baker v. Carr*.⁴ Lewis observed that the school prayer case had "so much less potential for real change in the country's social and political structure" than *Baker*.⁵

Schempp, however, decided a broader issue than did *Engel*—whether the state may require prayer in public schools. But surprisingly the public responded more mildly to *Schempp* than to *Engel*.⁶ I will argue that the language and style of Justice Clark's opinion were not the primary causes. This, of course, does not mean that Clark's opinion had no impact whatsoever on the public's more positive reception of *Schempp*. Further, it implies neither that Justice Clark was misguided in writing for the readership of *Time*, rather than the *Harvard Law Review*, nor that the Court does wrong to tailor its message for its audience. Indeed, Tom Clark's public relations focus in *Schempp* in no way retarded doctrinal development of the religion clauses and may have advanced a more fundamental premise: that the Constitution is, after all, for all of us. In this respect *Schempp* modestly advances Professor Schauer's contention that sometimes the Court ought to talk to those who are listening. In this respect also, this Article celebrates *Schempp* on its twenty-fifth anniversary.

I

The federal judiciary's insulated and somewhat precarious role in American government is the backdrop for *Engel* and *Schempp*.

3. 370 U.S. 421 (1962).

4. 369 U.S. 186 (1962).

5. N.Y. Times, July 2, 1962, at 12, col. 3.

6. *Schempp*, because of its broader holding, affected religious practices in public school systems throughout the country. Although initial public response to *Schempp* was milder, many school systems did not comply with *Schempp*'s holding. Even today, students pray in some public schools. Cf. *Jaffree v. Board of School Comm'rs of Mobile County*, 459 U.S. 1314 (1983) (holding unconstitutional an Alabama statute permitting public school teachers to lead their classes in prayer). For interesting studies of compliance with the *Schempp* decision, see K. DOLBEARE & P. HAMMOND, *THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE* (1971); W. MUIR, *PRAYER IN THE PUBLIC SCHOOLS* (1967); Katz, *Patterns of Compliance with the Schempp Decision*, 14 J. PUB. L. 396 (1965).

A federal judge's life-tenure ideally guarantees that the judiciary neither will be accountable to the electorate nor swayed by the moment's passion. Ironically, however, the judiciary's insularity also produces its insecurity. Because the judiciary is not accountable to voters, its creative efforts in controversial cases raise questions about such decisionmaking in a democratic society and can lead disgruntled losers to demand that judges adjudicate, not legislate.

Losers can do more than complain. Congress, for instance, can pare the Court's appellate jurisdiction; article III's grant of appellate jurisdiction to the Court qualifies that jurisdiction by "such Exceptions, and under such Regulations as the Congress shall make."⁷ Congressional and executive disagreement with the Court's views also can spring efforts to manipulate the size of the Court. Although Roosevelt's court-packing plan was unsuccessful, other efforts have been more successful. After Chief Justice Marshall's departure during the Jackson administration, judges were added to counter Marshall's remaining influence. During the Civil War, Congress enlarged Court membership to ten in order to produce a greater margin of security after the Court's closely split decision upholding the blockade of the Confederacy.⁸ Congress can also chill judicial activism and silence a misbehaving Justice through impeachment.

The Court sometimes can foresee potential criticism and forestall it. The Justices usually can recognize a controversial case and avoid it if they wish by refusing to grant certiorari or by using prudential, ripeness, or jurisdictional grounds to avoid an obligatory appeal. When it chooses to hear a hard case, the Court has shown through previous decisions its belief that it can ease to some extent the predictable public outcry. In *Brown v. Board of Education* and in every school desegregation case for years thereafter, the Court tried through unanimity to mitigate public dissatisfaction with its decisions. *Cooper v. Aaron* is the best example. For the only time in recent history, each of the nine Justices signed the opinion. Indeed, in the text of the opinion, the Court stated "Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed."⁹

The school prayer cases, both *Engel* and *Schempp*, exhibit all

7. U.S. Const. art. III, § 2. See generally, Freund, *Storms Over the Supreme Court*, 69 A.B.A.J. 1474 (1983).

8. See Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 851 (1974).

9. 358 U.S. 1, 19 (1958).

the foregoing features. The Supreme Court, faced with a controversial issue and pummeled with public criticism, tried to soften the blows. The 1962 case, *Engel*, caused a furor which the Court apparently did not foresee. The 1963 case, *Schempp*, stirred relatively little reaction. Shortly after the Court issued the opinion, Judge Irving R. Kaufman of the Second Circuit commented that *Schempp* was written "much more with an eye toward public perusal and in anticipation of public criticism," and that the milder reaction to *Schempp* "was largely due to the tone of the Court's opinions themselves."¹⁰

Judge Kaufman is at least half-right. The final opinion itself indicates Justice Clark sought to counter the public perception that the Supreme Court was undermining religion in America. We will see that the preliminary drafts are even more revealing. Kaufman's other claim, however, is dubious and largely irrelevant. To say that the crafting of an opinion predominantly determines the milder public response may simply be judicial chauvinism. Moreover, the causation question misplaces the proper focus. The real issue is whether Clark's opinion in *Schempp* addressed its readership's concerns without undermining the Court's institutional obligation to consistent, doctrinal development. Before considering the *Schempp* opinion, however, it is necessary to take a closer look at *Engel*.

II

In 1951 the New York State Board of Regents recommended that New York public school children begin each school day by reciting a twenty-two word prayer composed by the regents: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."¹¹ Although some school districts ignored the regents' recommendation, Union Free School District Number 9 complied. Later, parents of ten students challenged the constitutionality of the state law authorizing the prayer. The New York Court of Appeals sustained an order of the lower state courts permitting the prayer's use as long as a school district did not require student compliance.¹²

Speaking for the majority, Justice Black struck down the state law permitting the regents' prayer because the law violated the Establishment Clause of the first amendment. By focusing on the re-

10. Kaufman, *The Supreme Court and Its Critics*, ATLANTIC MONTHLY, Dec., 1963, at 50.

11. 370 U.S. at 422.

12. 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961).

gents' authorship of the prayer, Black kept the Court's holding narrow:

[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.¹³

Black's opinion is interesting on two grounds. First, he cited no prior Establishment Clause case, but drew exclusively on historical documents and commentaries to show that the framers intended to prohibit all establishment of religion like the regents' prayer program. Thus, Black gave no indication whether the Court's holding in *Engel* was consistent with prior Establishment Clause cases or marked a radical departure from them.¹⁴ Second, his opinion furnished little guidance to lower courts, local governments, and school districts interested in the limits of the holding. In that way, the *Engel* majority opinion serves to illustrate Professor Schauer's contention that the Court rarely if ever directs its comments to its audience. Only footnote twenty-one provides any hint about *Engel*'s outer limits:

There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.¹⁵

Justice Douglas's concurrence attempted to supply the direction missing from Black's opinion by painting with a broad brush.¹⁶ "The point for decision," he asserted, "is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financ-

13. 370 U.S. at 425.

14. As Professor Philip Kurland noted at the time, "[t]he primary authority relied upon by the petitioners was *McCollum*. The respondents rested largely on the long-continued existence of the practice of prayer in public places and on *Zorach*. Under the circumstances one might have anticipated that the Court would be required, at least, to reconcile the *McCollum* and *Zorach* cases." Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."* 1962 SUP. CT. REV. 1, 13.

15. 370 U.S. at 435 n.21. Apparently, the decision to place this passage in footnote twenty-one resulted from compromise. As one commentator notes, "The exact sequence and details are uncertain, but the footnote apparently was written near the end of the opinion-writing stage. There was difficulty in getting agreement on wording and where the words should be located." D. GREY, *THE SUPREME COURT AND THE NEWS MEDIA* 86 (1968).

16. 370 U.S. at 437 (Douglas, J., concurring).

ing. Nevertheless, I think it is an unconstitutional taking whatever form it takes." In a long footnote Douglas catalogued examples of possibly impermissible government financing of religion. These included chaplains in the armed services, Bible reading in public schools, "In God We Trust" on coins, and tax exemptions for religious organizations.

The response to the *Engel* decision was literally instantaneous and, consequently, uninformed. Within an hour or two of the decision's announcement, many congressmen and well-known religious leaders, despite not having read the opinion, responded to reporters' questions. The clergy had a mixed reaction; most Catholics opposed the decision, Jewish leaders approved it, and Protestant ministers divided along predictable lines.¹⁷ Francis Cardinal Spellman of New York made a typical statement: "I am shocked and frightened that the Supreme Court has declared unconstitutional a simple and voluntary declaration of belief in God by public school children. The decision strikes at the very heart of the Godly tradition in which America's children have for so long been raised."¹⁸ Even more typical was an Atlanta clergyman's comment, calling the decision "the most terrible thing that's ever happened to us"—then admitting that he did not really know what the decision said.¹⁹

Those congressmen who spoke went on the record quickly and, sensing a political bonanza, almost uniformly criticized the decision.²⁰ Senator Herman Talmadge of Georgia raged that the decision was "unconscionable" and "an outrageous edict."²¹ Representative George W. Andrews of Alabama ranted, "They put the Negroes into the schools and now they have driven God out of them."²² Though most of the bluster blew in from the South, there was an occasional Norther. Congressman John B. Williams, a Democrat from Massachusetts, sensed—even though McCarthyism had largely run its political course—"a deliberately and carefully planned conspiracy to substitute materialism for spiritual values and thus to communize America."²³

Congressional criticism took more substantial forms as well. On June 26, one day after the Court handed down *Engel*, members in both houses introduced bills to amend the Constitution. New

17. See, e.g., Beane & Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. L., 475, 482-83 (1964); Kurland, *supra* note 14; TIME, July 6, 1962, at 8.

18. Kurland, *supra* note 14, at 2 n.5.

19. TIME, *supra* note 17, at 8.

20. See BEANEY & BEISER, *supra* note 17, at 479.

21. 108 Cong. Rec. 11675 (1962).

22. N.Y. Times, June 26, 1962, at 16.

23. 108 Cong. Rec. 11734 (1962).

York Representative Frank J. Becker's amendment was typical: "Prayers may be offered in the course of any program in any public school or other public place in the United States."²⁴ Florida's Haley unsuccessfully offered an amendment to a judiciary appropriations bill to earmark funds to purchase "for the personal use of each justice a copy of the Holy Bible."²⁵ On September 27, the House voted unanimously to place the motto, "In God We Trust" behind the speaker's desk.²⁶ In all, twenty-two senators and fifty-three representatives, most of them from the South, introduced constitutional amendments responding to *Engel*.²⁷

Senator James Eastland's Judiciary Committee conducted hearings on prayer in public school.²⁸ Although the hearings ostensibly focused on the school prayer controversy, several senators used them as a general opportunity to criticize the Court. The senators' criticism of *Engel* focused on Douglas's one-man concurrence. While one might assume their focus shows that Douglas was the primary demon motivating the public outrage over *Engel*, this assumption ignores two important considerations. First, public commentary began before anyone even knew Douglas had written a concurrence, or at least before anyone knew what it said. Second, the senators' focus on Douglas's concurrence in the Eastland hearings shows only that, by then, the senators had found something to complain about. Douglas's concurrence legitimized the early outrage, rather than motivating it.

Public response was one-sidedly critical. In the first weeks after *Engel*, the Supreme Court received five thousand letters denouncing the Court's decision.²⁹ In a Gallup Poll, nearly eighty percent favored prayers in public schools.³⁰

Press reaction divided along political lines. As one might expect, newspapers such as the New York Times, Washington Post, and Chicago Sun-Times defended the decision, while the Hearst newspapers, the Chicago Tribune, and the Los Angeles Times criticized the decision.³¹ The press caused perhaps greater damage through its incompetent interpretation of the decision and aggressive attempts to fan the flames. Headlines the morning after the

24. *Hearings on Prayer in Public Schools and Other Matters Before the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. 71 (1962) [hereinafter cited as *1962 Senate Hearings*].

25. 108 Cong. Rec. 14360 (1962).

26. *Id.* at 21102.

27. BEANEY & BEISER, *supra* note 27, at 479.

28. *1962 Senate Hearings*, *supra* note 24.

29. D. GREY, *supra* note 15, at 83.

30. See Hachten, *Journalism and the Prayer Decision*, 1962 COLUM. JOURN. REV. 7.

31. BEANEY & BEISER, *supra* note 17, at 481.

decision obscured the narrowness of the Court's explicit holding: "Supreme Court Outlaws Prayers in Public Schools" (Detroit Free Press); "Possible End to Christian, Jewish Holy Day Activity in Public Schools as Court Bans N.Y. Prayer" (Baltimore Sun); "No Prayers in Schools, Supreme Court Orders" (Dallas Morning News).³² Time Magazine noted shortly after the *Schempp* decision, "Last year's New York prayer decision stirred widespread alarm—not so much for what it said as for what people thought it said. Misled by headlines, many thought that the court had all but ordered an end to all ties between government and religion"³³

Arguably worse than its misinterpretation was the press' solicitation of uninformed criticism. Starting immediately after the decision's announcement and continuing through the rest of the week, the press departed from wire service interpretations of the decision and actively sought good quotes.³⁴ Commentators have noted that the media solicited these colorful quotes without regard for whether the public figure knew what the opinion said.³⁵

The intensity of public response flabbergasted almost everyone, including the Court. Departing from the Justices' traditional silence, Justice Clark at an ABA convention in August 1962 derided the press' misinformed treatment of the case.³⁶ CBS found the public outcry sufficiently volatile to broadcast a two-part series in prime time, *Storm Over the Supreme Court*.³⁷

III

Almost one year later the Supreme Court decided the issue that some of the press and public mistakenly believed it already had resolved: whether a state law may require a school to begin the school day with readings from the Bible or recitation of prayer. *Schempp* actually decided two consolidated cases. Edward Schempp was challenging the Pennsylvania law requiring that "[a]t least ten verses from the Holy Bible shall be read without comment, at the opening of each public school on each school day," but allowing children to be excused upon written request from their par-

32. See also Newland, *Press Coverage of the United States Supreme Court*, 17 W. POLITICAL Q. 15, 29 (1964).

33. TIME, June 28, 1963, at 13.

34. Newland, *supra* note 32, at 29.

35. E.g., *Storm Over the Supreme Court* 69 (CBS Television broadcast, Feb. 20, 1963 and March 13, 1963) (transcript on file at University of Texas at Austin Law Library) [hereinafter CBS Broadcast].

36. N.Y. TIMES, Aug. 4, 1962, at 9, col. 1 (summary of remarks by Justice Clark at the Commonwealth Club, San Francisco).

37. CBS Broadcast, *supra* note 35.

ents. In *Murray v. Curlett*, William Murray and his mother Madalyn Murray were challenging Baltimore's rule providing for "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer."

In an eight to one decision, the Court struck down both statutes, Justice Stewart dissenting as he had done in *Engel*. Justice Clark wrote the majority opinion—an opinion noteworthy primarily because it shows Clark's great concern over the reaction that *Engel* had spurred. Clark wrote the opinion in five parts. By examining the style chosen for the consolidated cases and by looking closely at each part of Clark's opinion in earlier drafts and final form, we can see how Clark sought to minimize public reaction.

1. *The Style*. Immediately striking is the Court's choice of *Schempp* as the style for the consolidated cases, despite the fact that Murrays' case had received docket number 119 while *Schempp*'s case had received docket number 142. By choosing *Schempp*, a Unitarian, to be the captioned plaintiff, rather than Murray and her son, who were staunch atheists, the Justices showed their concern with the widespread perception that the Supreme Court had embarked on a crusade to undermine religion.

A review of all consolidated cases resulting in full opinions for the 1961, 1962, and 1963 Terms supports this view. Of thirty-five opinions deciding consolidated cases, all but two opinions, other than *Schempp*, used the lowest numbered case as the styled case. In the two other exceptions, the Court explained why it had varied from the general practice of naming the opinion after the lowest numbered case. *McCulloch v. Sociedad Nacional de Marineros de Honduras*³⁸ decided three consolidated cases, docketed 91, 93, and 107. Justice Clark, writing for the majority, explained that the Court selected number 107 as the style and focused on 107's facts because it presented "the question in better perspective, and we have chosen it as the vehicle for our adjudication on the merits." The other opinion, *Hudson Distributors, Inc. v. Eli Lilly & Co.*,³⁹ decided two consolidated cases, docketed 489 and 490. Here also the Court revealed why it chose Number 490 as the styled case and why it focused on 490's facts. Justice Goldberg explained, "The two appeals, one involving the Upjohn Co. and one involving Eli Lilly & Co., were considered together in the Ohio courts. For simplicity we state only the facts of the *Lilly* case."⁴⁰

Thus, a review of the 1962 Term, when *Schempp* was decided,

38. 372 U.S. 10, 16 (1963).

39. 377 U.S. 386, 387 (1964).

40. *Id.* at 387.

and the terms immediately preceding and following the 1962 Term strongly suggest that styling consolidated cases with the later docketed case is both aberrational and purposive. The Court's similar action in *Brown v. Board of Education* buttresses this conclusion. Explaining why the Court granted certiorari to a handful of school segregation cases and chose *Brown* as the lead case, Justice Clark noted later, "We felt it was much better to have representative cases from different parts of the country, . . . and so we consolidated them and made *Brown* the first so that the whole question would not smack of being a purely Southern one."⁴¹

2. *The Facts in Each Case.* Clark's treatment of the facts in his rough drafts best illustrates his sensitivity to public opinion. Probably reacting to legislators' and religious leaders' comments that *Engel* would lead inevitably to a godless America, Clark considered burying the Murrays' atheism. One of his first handwritten drafts contained no factual discussion of the Murray case at all.⁴² Clark mentioned it only once and in passing: "While none of the parties to either this action or its companion case, *Wm. J. Murray III et al v. John N. Curlett et al, No. 119*, has ever questioned these basic conclusions, . . . others continue to question their history, logic, and efficacy." In a mostly-typed subsequent draft,⁴³ Clark included a handwritten insert about the "numbered case," containing a factual and procedural discussion of the Murrays' case. But here he made no reference to the Murrays' atheism. The Murrays are mentioned by name only once: "Mrs. Murray, one of the petitioners, requested and the respondent Board granted an excuse for her son, Wm. Murray III, from attending the exercises." Moreover, Clark provided only a brief, almost vacuous version of the Murrays' contentions: "Petitioners contend that both the Establishment and the Free Exercise Clauses of the First Amendment are violated by the require (sic) rule of the Board." By comparison, in the same draft Clark's summary of the State of Maryland's responses to the Murrays' claims is detailed.⁴⁴

41. R. KLUGER, *SIMPLE JUSTICE* 540 (1975).

42. Clark, J., Draft Opinion (exact date unknown, probably April, 1963) (Tom C. Clark Papers, Tarleton Law Library, University of Texas at Austin) [hereinafter Draft Opinion 1].

43. Clark, J., Draft Opinion (exact date unknown, probably mid-April, 1963) (Tom C. Clark Papers, Tarleton Law Library, University of Texas at Austin) [hereinafter Draft Opinion 2].

44. The second draft describes the State of Maryland's contentions as follows:
The state counters that the Bible reading is not in the form of religious instruction or service but is used as an inspirational appeal to inculcate moral and ethical precepts of value to the beginning of the school day; it contends that the use of the Bible sources is neither the composition nor the sanctioning of an "official prayer." As to the Free Exercise Clause they claim the right to be excused removes any coercion from the exercises; and finally the state says that the striking down of the

In a third, entirely typed draft, Clark included a factual and procedural discussion of the Murrays' case essentially identical to the second draft's discussion.⁴⁵ But here Clark deleted the second draft's brief reference to the Murrays by name and referred to them only as "petitioners." Clark's only comments about the Murrays were that the "petitioners, after exhausting administrative remedies, filed a complaint in the Superior Court seeking a mandamus commanding the Board to rescind the rule"; and that their complaint contended the Maryland rule violated both the Establishment Clause and the Free Exercise Clause.

For whatever reason, whether on his own initiative or at another Justice's urging, Clark eventually decided that any attempt to hide the Murrays' atheism from public view would be either futile or improper. In the published opinion Clark noted that Madalyn Murray and her son, William J. Murray III, were indeed "professed atheists." Clark also put some flesh on the earlier drafts' bare-bones summary of the Murrays' contentions by explaining that the Murrays' petition particularized their "atheistic beliefs," and by citing a lengthy passage from their brief. In it, the Murrays contended that the Maryland rule violated their first amendment rights:

in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith.⁴⁶

Even so, Clark's description of the facts and contentions of *Murray v. Curlett* in the published opinion, though honest and more detailed than in his drafts, pales as compared to his description of *Schempp*'s facts. The facts of *Schempp* run six pages in the final opinion, while *Murray*'s facts run slightly more than one page. That six to one ratio was a holdover from the previous drafts.⁴⁷

exercise will forestall the elimination in any form of that Church-State relation which saturates and enriches innumerable facets of our public and private life.

Id. at 2-3.

Interestingly, in the published opinion, this detailed description of the State's contentions is eliminated. The published opinion says only that the State of Maryland demurred to the Murrays' petition. *Schempp*, 374 U.S. at 212.

45. Clark, J., Draft Opinion (dated May, 1963) (Tom C. Clark Papers, Tarleton Law Library, University of Texas at Austin) [hereinafter Draft Opinion 3].

46. 374 U.S. at 212.

47. Indeed in both Clark's second and third drafts, the facts of *Murray* are sandwiched and seemingly buried between a description of *Schempp*'s facts. In Drafts 2 and 3, Clark placed *Murray*'s facts after what appears as the second paragraph in the published opinion but before what appears as the remaining factual description of *Schempp*'s facts. In Drafts 2 and 3, the second paragraph of the published opinion and a description of *Murray*'s facts

3. “[O]ur national life reflects a religious people. . . .”⁴⁸ In Part II of the published opinion Justice Clark set out to dispel any notion that the Supreme Court viewed religion antagonistically. In *Zorach v. Clausen*, he noted, the Court specifically recognized that “[w]e are a religious people whose institutions presuppose a Supreme Being.”⁴⁹ Clark approvingly pointed to the prayer opening each session of Congress and references to the grace of God in Supreme Court proceedings.

Part II serves no analytic function. The importance of religion to most Americans is theoretically irrelevant to what the Free Exercise and Establishment Clauses require of government in its relation to religion. Given Clark’s concerns, of course, the Court’s acknowledgment of religion’s value was highly relevant. Not surprisingly, Part II of the published opinion survived essentially unchanged from its initial prominent place in the first handwritten draft.⁵⁰

4. *The Reach of the First Amendment.* Clark made two points in Part III, both of which he considered settled by earlier Court decisions. First, the first amendment extends to the states through the fourteenth amendment.⁵¹ Second, the Establishment Clause prohibits any union between church and state, and not simply prohibition of governmental preference of one religion over another.

Most notable in this part, as well in Part IV, is the decisiveness of Clark’s diction. In Part III, Clark emphasized that the Court “has decisively settled” and “repeatedly reaffirmed” the fourteenth amendment question. Moreover, the Court answered the Establishment Clause question “unequivocally” and has “firmly maintained” that position. Clark sprinkled similar modifiers throughout Part IV: “for a unanimous Court,” “without dissent,” and “so universally recognized.” These modifiers all appear initially in Clark’s first drafts and are carried forward essentially unedited.⁵²

5. *A Wholesome Neutrality.* Part IV, which contains the meat of Clark’s legal reasoning, is also the least satisfying. Part IV’s function in the legal argument is to explain the interrelationship of the Free Exercise Clause and Establishment Clause and the “whole-

comprise the opinion’s introduction, with the third paragraph of the published opinion beginning Part I of the drafts.

48. 374 U.S. at 213.

49. 374 U.S. at 213 (quoting *Zorach*, 343 U.S. 306, 313 (1952)).

50. The only major editorial change was to move the citation of Judge Alphonso Taft’s neutrality remarks in *Minor v. Board of Education of Cincinnati* from Part II to Part III. See Draft Opinions 1 & 2.

51. 374 U.S. at 215-16.

52. See Draft Opinions 1, 2 & 3.

some neutrality" that the relationship engenders. What appears, however, is a rambling string of quotations from earlier first amendment religion cases. Clark omits any discussion of the facts or holdings of any of these cases, with the exception of *Engel*. In Clark's first rough draft, he included a discussion of the reasoning of *Everson v. Board of Education*.⁵³ He included it again in the second draft but then crossed it out.⁵⁴ Also in Clark's first draft he explained the motivation for the separate dissents of Black, Frankfurter, and Jackson in the controversial *Zorach* case.⁵⁵ In the second draft he deleted the entire discussion of the *Zorach* dissents.⁵⁶

Clark's decision to omit these passages in the final opinion is understandable. To discuss the cases intelligently, Clark would have had to engage in a fairly sophisticated legal analysis. In *Everson* by a five to four vote and *Zorach* by a six to three vote, the Court had found no first amendment violation. *Everson*, holding that a New Jersey board of education could reimburse catholic schools for transporting their students to and from school was, in Justice Douglas' view, wrongly decided.⁵⁷ And Douglas had voted with *Everson*'s five-person majority. In *Zorach* the Court permitted New York City to release students from the school grounds during school hours so that they could go to religious centers for instruction. Squaring *Zorach* with *Engel* and *Schempp* would have involved detailed analysis, the kind of detail one finds in Justice Brennan's lengthy concurrence in *Schempp*.

Any extended discussion of the prior Establishment Clause cases would have detracted from Clark's mission: to create for the public the illusion of "unequivocal" and "unanimous" support on religion issues. Not surprisingly, in the final opinion Clark mentioned only the facts of *Engel*, a case that most clearly supports the Court's decision in *Schempp*. Even here Clark tried to deflect some of the criticism earlier leveled at *Engel* for failing to cite a case. Clark noted approvingly that the principles in *Engel* were "so universally recognized that the Court, without the citation of a single case . . . reaffirmed them."

6. *The Establishment Clause Test*. Part V contains the opinion's only contribution to the doctrinal development of the Establishment Clause. It articulates for the first time a test to be applied

53. 330 U.S. 1 (1947).

54. Draft Opinion 1, at 13-14; Draft Opinion 2, at 15.

55. Draft Opinion 1, at 16-17.

56. Draft Opinion 2, at 19.

57. *Engel*, 370 U.S. at 443 (Douglas, J., concurring) ("The *Everson* case seems in retrospect to be out of line with the First Amendment.").

to all Establishment Clause cases. The two-part test "may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement of religion then the enactment exceeds the scope of legislative powers." In previous cases the Court, without stating a formal test, had applied one that was essentially identical to Clark's. In *McGowan v. Maryland*,⁵⁸ for example, the Court upheld the constitutionality of Sunday Blue Laws after noting that the "present purpose and effect of most of them is to provide a uniform day of rest for all citizens." Nonetheless, Clark's articulation in Part V of the "purpose and effect" test delineated for the first time a uniform rule or standard for approaching religion cases.⁵⁹

Part V also contains an attempt by Clark to prevent the kind of sweeping interpretations of *Schempp* that the public had attributed to *Engel*. Clark's effort, however, is unobtrusive and meager; it lies buried in footnote 10:

We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates that temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths.

Earlier drafts indicate Justice Clark at one point in the drafting process was much more wary that the public might read *Schempp* broadly to prohibit any interaction between church and state. For example, in his first handwritten draft, Clark spoke more affirmatively, and in the draft's body:

We take it that the Chaplain service is in a different category. There, only adults are involved and the service is purely voluntary. The soldier often has no

58. 366 U.S. 420, 445 (1961). The *McGowan* Court also employed "purpose and effect" language to describe the *Everson* Court's holding: "But the [*Everson*] Court found that the purpose and effect of the statute in question was general 'public welfare legislation. . .'" *Id.* at 443-44.

59. Justice Clark's development of the "purpose and effect" test did not come easy. In Draft Opinion 1, Clark's test for Establishment Clause cases read as follows: "In short, the Establishment Clause prohibits both federal and state governments from performing or aiding in the performance of a solely religious activity, whether coercion be present or absent." Draft Opinion 1, at 19. In Drafts 2 and 3, Clark stated only a "purpose" test:

The test is a simple one, namely, what is the primary end of the enactment? If that end derives from the advancement of religion the enactment is beyond all legislative power. That is to say there must be a legitimate and substantial legislative purpose other than the religious one.

Draft Opinion 2, at 23; Draft Opinion 3, at 25.

Sometime between the third draft and June 10, 1963, Justice Clark concluded that a purely subjective, "motivation" test was insufficient. In a fourth draft circulated to the other Justices on June 10, 1963, Clark articulated the "purpose and effect" test found in the published opinion. Clark, J., Draft Opinion, at 19 (dated June 10, 1963) (Tom C. Clark Papers, Tarleton Law Library, University of Texas at Austin).

service available and being under command would be deprived of his religious activity had the government not made a Chaplain available. In the Congress the Chaplain's prayer is not by law but by action of each body independently.⁶⁰

In the same draft at an earlier point, Clark first wrote and then deleted that "[i]t also seems appropriate to denote what is not involved here." He then began discussing the constitutionality of religious services for the military, before ending the discussion in midsentence.

Clark's desire to curb broad readings of *Schempp* is another illustration of his sensitivity to public perception. The *Schempp* decision affected an entire nation's school practices. Clark wanted to allay the fears expressed after *Engel* that the Supreme Court was conducting a vendetta against religion. Reading the *Schempp* decision as an ordinary example of Court reasoning, therefore, misses the point. Clark's opinion primarily functions as a defensive attempt to temper the expected unfriendly response.

For whatever reason, the reaction to *Schempp* was "relatively mild" and "nothing compared to that of 1962."⁶¹ The Court received only one hundred letters from the public, in sharp contrast to the five thousand letters the Justices received after *Engel*.⁶² Religious reaction again was mixed, but on balance favored the decision.⁶³ The initial congressional reaction, though reflecting opposition, showed more restraint.⁶⁴ A few continued to rave. Senator A. Willis Robertson of Virginia argued that "we will become as Godless a nation as is the Soviet Union." Representative O'Konski of Wisconsin suggested mental tests for the Justices.

Legislative activity, however, increased. Congressmen introduced twice as many amendments to the Constitution as they had after *Engel*. By March 24, 1964, they numbered one hundred forty-six. Most of these amendments fizzled immediately. Representative Becker's efforts, however, made more noise. Though he never succeeded in getting his bill out of the House Judiciary Committee, at one time he obtained one hundred seventy of the two hundred eighteen signatures necessary to discharge the bill from committee.⁶⁵ Committee Chairman Emmanuel Celler of New York reluctantly agreed, after stalling for months, to schedule hearings. Unlike supporters of *Engel* during the Eastland hearings, the anti-Becker people managed to muster scholarly and religious support

60. Draft Opinion 1, at 20.

61. TIME, June 28, 1963, at 13-14.

62. D. GREY, *supra* note 15, at 83.

63. N.Y. TIMES, June 18, 1963 at 1, col. 7.

64. BEANEY & BEISER, *supra* note 17, at 491.

65. *Id.* at 495.

for the *Schempp* decision; whether this support mattered is hard to say, but the Becker amendment died a sorry death in June, 1964.⁶⁶

The press also reacted more favorably, provided more information and published fewer colorful reactions.⁶⁷ The Chicago Tribune, for example, noted that "Clark's controlling decision . . . sought to allay fears that the court was moving toward a banning of all religious aspects in government, such as the maintenance of military chapels and chaplains and the opening of sessions of Congress with prayers."⁶⁸ Although most papers, as they had in *Engel*, immediately sought reaction from religious and political leaders, the published stories presented more balance. The Los Angeles Times headline read, "Religious Leaders in LA Differ Widely on School Prayer Ruling."⁶⁹ The Chicago Tribune's headline stated, "Clergymen are Divided on the Issue."⁷⁰ Whether that mixed reaction derived from more balanced reporting or whether it reflected a change in perspective by religious and political leaders is debatable. Probably both factors contributed to the reporting. Criticism of the press after *Engel* probably inhibited to some extent aggressive solicitation of outlandish remarks.⁷¹ Equally true, there simply were not as many outraged individuals. It should be noted, however, that the published reactions of religious and political leaders, whether favorable or unfavorable, were as uninformed after *Schempp* as they had been after *Engel*. Few of the respondents actually read the opinion before they expressed their viewpoint.⁷²

IV

Did Clark's opinion substantially contribute to the public's milder reaction to *Schempp*? Judge Irving R. Kaufman is not alone in thinking that Clark's opinion controlled the response. *Time Magazine*, for example, commented that the less violent reaction to *Schempp* was owed to the "Supreme Court's much more careful disclaimer."⁷³

Judge Kaufman is probably wrong. His thesis assumes that violent public outcry to *Engel* came after thoughtful perusal of that opinion, and, moreover, that the milder response to *Schempp* came

66. *Id.* at 498-501.

67. D. GREY, *supra* note 15, at 95.

68. Chicago Tribune, June 18, 1963 at 1, col. 8.

69. L.A. Times, June 18, 1963, at 1, col. 3.

70. Chicago Tribune, June 18, 1963, at 1, col. 7.

71. See, e.g., Hachten, *supra* note 30; Newland, *supra* note 32.

72. See, e.g., N.Y. Times, Aug. 30, 1963, at 13, col. 8 ("It was obvious they could not have read the explanations.") (quoting Brennan, J.).

73. TIME, June 28, 1963, at 14.

after reading Clark's opinion. But as Justice Brennan bemoaned two months after the Court issued *Schempp*, "There were four majority opinions which filled 109 printed pages. Yet within two hours the critics were in print saying the Court was wrong. It was obvious they could not have read the explanations."⁷⁴

Judge Kaufman's thesis arguably depends only on the public getting accurate information about the opinion from the press, not on the public reading the opinions themselves. Even if one grants this point, however, his theory still fails. It fails because it neglects the immediacy of public response to both *Engel* and *Schempp*. The press actively solicited responses from sources who were ignorant of the cases' explicit holdings and reasoning. Immediately after *Engel* the press was able to find a good story. Right after *Schempp*, however, fewer public figures were willing to deride the Court as godless and communistic. The press's success in *Engel* and failure in *Schempp* in obtaining good quotes did not depend on the Court's differing analyses.

The better explanation for *Schempp*'s milder reaction is that people were ready for the second school prayer case. The shock had worn off.⁷⁵ A year had elapsed since the Court decided *Engel*. Although the Court's holding in *Engel* was narrow, everyone perceived it to be at least as broad as *Schempp*'s holding. In effect, the public already believed that the Court had outlawed prayer. The press had fostered this perception through exaggerated headlines and uninformed editorials and lead stories. But knowledgeable spokesmen also produced this impression. Those who understood *Engel* properly foresaw its implications and commented accordingly.⁷⁶ Moreover, between *Engel* and *Schempp* many church leaders had commented favorably and prepared their laity for the *Schempp* decision.⁷⁷ Thus, *Schempp* simply came as no surprise. The storm that *Engel* produced had dissipated by the time *Schempp* was issued because of *Engel*'s initial ferocity.

V

Although the language of Justice Clark's opinion was not principally responsible for the public's more accepting response to *Schempp*, by no means should it be criticized as a failed effort at public relations. The press eventually—that evening or the follow-

74. N.Y. Times, Aug. 30, 1963, at 13, col. 8.

75. Many commentators agree. E.g., D. GREY, *supra* note 15, at 84; BEANEY & BEISER, *supra* note 17, at 485.

76. See, e.g., Kurland, *supra* note 14.

77. BEANEY & BEISER, *supra* note 17, at 485; Time, June 28, 1963, at 14.

ing morning—delivered Clark's intended message. Some newspapers, including the New York Times, Washington Post, Los Angeles Times, and Des Moines Register, printed the entire opinion.⁷⁸ Many newspapers printed substantial excerpts.⁷⁹ In general, the press coverage focused largely on the language of the Justices' opinions, particularly Justice Clark's majority opinion. In that respect, Clark's effort was a success. By writing a relatively short opinion—it covers only twenty-two pages—and by dispensing, for the most part, with traditional legal analysis, Justice Clark produced an opinion that could be read and understood by those who would be most affected by its ruling, parents sending their children to public schools.

Moreover, Clark's lay-oriented opinion was also successful doctrinally. Indeed, rather than retarding doctrinal development of the establishment clause, Clark's opinion moved establishment clause doctrine a step the Court had not previously taken. By announcing the two-part "purpose and effect" test, Justice Clark established an analytical framework the Court since then has applied. Since *Schempp*, the Court has modified Clark's test. In *Lemon v. Kurtzman*,⁸⁰ a 1971 case, the Court altered Clark's test by adding a third wing: that a government enactment must not foster an excessive government entanglement with religion.⁸¹ But *Lemon's* three-part test, which the Court continues to apply,⁸² adds another consideration to Clark's basic approach.⁸³

The school prayer decisions presented the Court with an unusual opportunity, seldom present in other hard cases. Because *Engel* actually had decided a narrow question, the Court was able to take a second shot in *Schempp* at deflecting criticism of the Court and thereby soothing the citizenry. A review of Justice Clark's drafts and published opinion suggests he leaped at the opportunity. Those documents indicate Clark chose his words to play well in the press, if not in volume 374 of the *United States Reports*.

Twenty-five years later, one is hard pressed to name any other Supreme Court opinion decided since *Schempp* that has attempted to address the concerns of the American people. The Court's ex-

78. N.Y. Times, June 18, 1963, at 28-29; Washington Post, June 18, 1963, at A-14; L.A. Times, June 18, 1963, at 2, 14-16; Des Moines Register, June 18, 1963, at 4-5.

79. E.g., Chicago Tribune, June 18, 1963, at 1-2; Dallas Morning News, June 18, 1963, at 1; Houston Post, June 18, 1963, at 1 & 5; Philadelphia Evening Bulletin, June 17, 1963, at 1-2; Rocky Mountain News, June 18, 1963, at 3.

80. 403 U.S. 602 (1971).

81. *Id.* at 613.

82. See R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 21.3, at 344-45, 353 (1986).

83. 403 U.S. at 612-13.

cuse cannot be that no case since *Schempp* has affected us as significantly as the school prayer cases did. Nor, as the American people's curiosity about the Bork confirmation hearings reveals, can the Justices claim that the public is unconcerned with the workings of the Court. *Schempp* should remind us all that little is lost, and much can be gained, by writing for one's readership.