

RELIGION, "STANDING," AND THE SUPREME COURT'S ROLE

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AS MIGHT BE EXPECTED of an institution engaged in catching up with itself, the Court has in late years, in many of its most important decisions, been giving pragmatic affirmance to the obvious. It has decided¹ that segregation of Negroes constitutes an "assertion of their inferiority."² It has held that a man charged with crime cannot be said to enjoy due process of law unless he has the counsel of someone who understands the law's processes.³ It has decided that the constitutional guarantee against unlawful searches and seizures shall actually be implemented, in the only way anybody has dreamed it could be implemented—by exclusion of unlawfully procured evidence.⁴

It is not so much obvious as truistic that in stepping into its anciently prepared place as vindicator, in the judicial process, of the constitutional rights of human beings, the Court has acted when it had before it people who were being specially disadvantaged by the claimed breach of fundamental law. In the fields of race discrimination, criminal procedure, or free speech, the claims brought to judgment are of the most common genus with which the judiciary has dealt—claims, broadly, of trespass to the person, of offense given to the man before the court, by diminishment of dignity, by taking away of freedom, by impairment of equality. Even the malapportionment cases⁵ do not put an unbearable strain on this concept, for the claimants, though numerous, are easily identifiable, and each complains of improper diminution of his own political influence and power.

It can plausibly be guessed that the chances of ultimate acceptance of the Court's role as defender of personal rights will be greatest if the Court sticks to this road.⁶ On this view, the religious cases present a problem that can be sketched by reference to the text of the first amendment.⁷

Judicial enforcement of the guarantee against laws "prohibiting the free

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¹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

² *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880).

³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵ See generally, *Baker v. Carr*, 369 U.S. 186 (1962).

⁶ See Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1281-82 (1961).

⁷ See Moore, *The Supreme Court and the Relationship Between the "Establishment" and the "Free Exercise" Clauses*, 42 TEXAS L. REV. 142 (1963).

exercise" of religion is in the main line of the Court's work. This clause is a shield of persons, in or out of groups, against curbs on their religious life. It overlaps with the equal protection clause,⁸ with the due process clause,⁹ and with the guarantee of free speech.¹⁰ In contrast, the "establishment" clause¹¹ is mixed. A practice violating this clause may be one which does,¹² or one which does not,¹³ involve the special interests of some person or persons.¹⁴ Is this to mean that the Court must forge a new role for itself in the religious area?

There has been concern about this lately,¹⁵ in the wake of *Engel v. Vitale*¹⁶—the *School Prayer* case—and *School Dist. v. Schempp*¹⁷—the *Bible Reading* case. It may seem that a mere accident of pleading and presentation is responsible. The cases might well have been decided under the "free exercise" clause. Some of the objections urged by the plaintiffs were explicitly religious;¹⁸ as to the others, one need only accept Professor Katz's very sensible interpretation¹⁹ applying the clause to the tenets, in religious matters, of atheists and agnostics. If what was done invaded any religious interest of the plaintiffs, then a broad construction of the free exercise clause might well have availed.²⁰ But plaintiffs in *Engel* dropped this claim in arguing the case to the Supreme Court,²¹ and both cases were decided under the establishment clause. The Court in *Schempp* used language which would suggest a difference between the clauses, with respect to the specificity of the religious belief offended and perhaps the degree of "compulsion" required.²²

Some commentators have seen a great deal more in the matter than this, and seem to fear that the Court's action signaled a general departure from its role as protector of particular people's substantial rights, and a step toward inviting any member of the public to invoke judicial aid to enforce

⁸ U.S. CONST. amend. XIV, § 1.

⁹ *Ibid.*

¹⁰ U.S. CONST. amend. I.

¹¹ *Ibid.*

¹² *E.g.* *Torcaso v. Watkins*, 367 U.S. 488 (1961).

¹³ Some of the more flagrantly unconstitutional possibilities fall here, such as out-and-out subsidy of a church building.

¹⁴ Of course, if the psychological or civic interest of the citizen in seeing the Constitution followed is regarded as a special interest of his, the distinction as stated is an unreal one, on only one side of which examples fall. But that would not mean that the difference was any less felt.

¹⁵ Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, SUPREME COURT REVIEW 1 (Kurland ed. 1963); Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962); cf. Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . ."* SUPREME COURT REVIEW 1, 19-22 (Kurland ed. 1962).

¹⁶ 370 U.S. 421 (1962).

¹⁷ 374 U.S. 203 (1963).

¹⁸ In *Schempp*, *supra* note 17, at 206-08, for example, the objections were from a Unitarian point of view. The late Professor Cahn demonstrated how naturally and on how many grounds a purely religious objection to the Regents' Prayer might arise: Cahn, *On Government and Prayer*, 37 N.Y.U.L. REV. 981, 991-94 (1962). See *Matthew* 6:5-6.

¹⁹ KATZ, RELIGION AND AMERICAN CONSTITUTIONS 5-6 (1964).

²⁰ See Mr. Justice Brennan's concurring opinion in *Schempp*, 374 U.S. 203, 288-93.

²¹ Brown, *op. cit. supra* note 15, at 13.

²² See note 25 *infra*.

the establishment clause.²³ If these fears were justified, the Court would have started on untried ways. Its wider influence has been tempered, and (it is ventured) made more acceptable, by classic judicial concern for the personal rights of suitors. Has the Court taken a giant step toward changing its function and role—and, incidentally, toward enlarging its duty of decision in one of the most difficult areas, politically and conceptually, with which it has to deal?²⁴

“Standing” names the doctrine that a constitutional provision (like many other rules of law) may be invoked in court only by those who show some special personal interest in preventing its breach.²⁵ Like most legal doctrines, this one contains its puzzles, implicating factors of policy. But its main thrust is clear enough, and attention to the problem it raises is one thing that makes a court a court, rather than a general Council of Revision. The treatment of the problem of standing in the majority opinions in the *School Prayer* and *Bible Reading* cases²⁶ may have contributed to apprehension that the Court intends to apply quite relaxed criteria of standing in establishment cases, but it will be submitted that this apprehension is unjustified.

To compress the oft-told tale, the pupils in these cases were not strictly required to recite the words put together by the Regents,²⁷ or to participate in or to listen to the Bible reading.²⁸ They might stay silent, or even stand in the hall, if they had a parental “excuse.”²⁹ It is the thesis here that the

²³ See authorities cited note 15 *supra*.

²⁴ For a sampling of political protest, see Brown, *op. cit. supra* note 15, at 3. The conceptual conflict is on the line of tension between a Declaration of Independence that acknowledges God and a Constitution that never mentions religion, even in its Preamble, except to fence it out of government.

²⁵ “Standing” is interconnected in complex ways with questions on the merits. See BICKEL, *THE LEAST DANGEROUS BRANCH* 116-27 (1962); Lewis, *Constitutional Rights and the Misuse of “Standing,”* 14 *STAN. L. REV.* 433 (1962). But the “standing” terminology is sometimes useful to isolate questions about impact on persons before the court.

²⁶ The standing question was not raised by the parties or discussed by the Court in *Engel v. Vitale*, 370 U.S. 421 (1962), the *New York “Regents’ Prayer”* case. In *School Dist. v. Schempp*, 374 U.S. 203 (1963), the Court treated the problem in a footnote: “It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. *McGowan v. Maryland* [366 U.S. 420, 429-30] . . . The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain. See *Engel v. Vitale* [370 U.S. 421 (1962)] . . . Cf. *McCullum v. Board of Education* [337 U.S. 203 (1948)] . . . *Everson v. Board of Education* [330 U.S. 1 (1947)] . . . Compare *Doremus v. Board of Education*, 342 U.S. 429 (1952), which involved the same substantive issues presented here. The appeal was there dismissed upon the graduation of the school child involved and because of the appellants’ failure to establish standing as taxpayers.” 374 U.S. 203, 224 n. 9 (1963).

²⁷ “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” *Engel v. Vitale*, 370 U.S. 421, 422 (1962).

²⁸ See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 207, 211-12 (1963).

²⁹ This seems to have been the situation in each of the cases under consideration. Many factual variations are possible in the alternatives offered to the abstaining child; see *Engel v. Vitale*, 370 U.S. 421, at 423 n. 2. All inevitably involve one factor: public declaration of dissent, by word or unavoidably noticeable deed.

requisite standing may be found in these facts, without any dangerous widening of the standing concept for religious cases.

First, as to the pupil: It has been assumed or contended that his standing must depend on whether his participation is "coerced."³⁰ But immediate coercion of prayer need not be the only ground on which his standing may be predicated. The state gives him an alternative—he may either stay in attendance on a religious exercise, or take affirmative action, by presenting a paper signed by his parent, thus marking himself and his parent publicly as nonconformists, and by going to another room, there to await the completion of the religious exercise.³¹ Attendance at the prayer may not, strictly, be coerced, but choice between these alternatives is coerced. Now as a general thing it would seem clear that a person whom the state commands either to attend a religious ceremony, or to do some other definite thing while the ceremony is going on, and to present some document or make some other showing as a condition to being allowed even to do that, is specifically and personally being dealt with by the state with respect to religion, to the extent necessary to entitle him to raise the question whether that dealing is constitutionally proper. For example, if the law provided that a man must either attend church or stay home between eleven and twelve Sunday morning, one could struggle with the question whether church attendance was being "coerced" or not, but one could hardly doubt that the man was being placed in a special position which ought to entitle him to raise in court the question of the constitutionality of such a scheme.

It is beside the point that the state owes no duty to protect anyone either from the occasion for dissenting or from the consequences of dissent.³² In these cases, the state itself *creates* the occasion for dissent, and, by its own action, makes explicit public dissent the only alternative to reciting an official prayer, or attending an official religious exercise. How can it be thought that a person so treated is not being specially affected? The real question as to the pupil would seem to be not whether he is being "coerced," but whether his being forced to this choice is so trivial a matter as to be *de minimis*. One might go further and say that the question is whether this inconvenience and unpleasantness is clearly and obviously *de minimis*, for it seems reasonable that the state, before foreclosing judicial inquiry into the constitutionality of the state-sponsored scheme, at the suit of persons specially affected, ought to have a heavy burden of persuasion on the issue whether being placed on this alternative by the law affects them enough to attract the law's notice. Given such an allocation of the burden, no court could hold that a child, forced day after day to

³⁰ Mr. Justice Stewart, dissenting in *Schempp*, 374 U.S. at 316; Brown, *op. cit. supra* note 15, at 15-33

³¹ See cases cited notes 27-29 *supra*.

³² See Mr. Justice Jackson, concurring in *McCullum v. Board of Education*, 333 U.S. 203, 233 (1948); Brown, *op. cit. supra* note 15, at 27-29. *Cf.* Comment, *The Supreme Court, The First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 93 (1963).

mark himself out in this manner, is obviously being tendered an alternative so utterly trivial in its impact as to shut off inquiry, at his suit, as to violation of the Constitution. The irreducible nature of the tendered alternative—declaration of dissent—is, to be sure, intangible, a matter of the spirit rather than of the pocketbook. Could the sponsors of prayer maintain that intangibility makes an asserted interest valueless?

There is another ground on which standing might be based. The plaintiffs were not children but parents. The interest a parent can assert in his own name is relational. He wants to direct the religious training of his child in a certain way.³³ (The most convinced opponents of the decisions would hardly want to characterize this parental interest as trivial.) He claims immunity not from state “coercion,” at the final step, but from *undue influence* attempted by the state on the mind of his child. Having been coerced to send his child to a certain place, he objects to a practice there followed, claimed by him to violate the Constitution, which aims and tends to influence his child in religious matters. The state has set out with the aim of effectively influencing the children in its schools, with respect to religious matters, and can hardly be heard to say that the attempt is to be presumed ineffective.³⁴ Indeed, the mere threat may be enough, as it so often is in law, from the criminal code to the bill *quia timet*.

On this theory, the question is not whether the state coerces religious observance, but whether it exerts or tries to exert religious influence in a constitutionally forbidden manner. An influence need not amount to coercion. In *Robinson v. Florida*,³⁵ the Court unanimously held that a Florida administrative regulation, requiring segregated washrooms in desegregated restaurants, was “bound to discourage” desegregation, with the consequence that the action of a *segregating* proprietor (himself unconcerned about segregated washrooms), in throwing sit-inners out, was infected with “state action.” Must one employ a finer measure than this to conclude that the practices shown in the prayer cases are “bound to discourage” non-participation in the prayer? It were useless display to sample the innumerable cases in civil law, in which immunity from improper influence, or attempt at improper influence, is held a robust enough interest for law to lay hold of.

This theory of the parents’ interest, if good, would furnish standing under the free exercise clause, as well as under the establishment clause. For one of the most valuable parts of free exercise is the transmission of one’s religious beliefs to one’s children, clear of state influences, and a man who is compelled by the truancy laws to bare his child to state-sponsored religious influence is quite strictly being “prohibited” from exercising freely this part of religion.

³³ See *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925).

³⁴ *Cf. Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963).

³⁵ 84 Sup. Ct. 1693 (1964).

These theories of standing are put forward with diffidence, in the hope that others may find something in them worth refining and modifying to acceptability. What is insisted on is that they answer at least roughly to reality; the parent and the child are not "mere" members of the public, angered at a practice they believe unconstitutional. Whatever the precise form of the standing theory which admits them to court, their being given standing need not imply any major relaxation in the concept of the court as a place where particular human grievances are redressed at the suit of the affected persons.

It is hard to think that some commentators' doubts on standing in *Engel* and *Schempp* are not colored by the relative innocuousness of the assailed practices. Suppose the alternative to presenting the excuse and going into the hall were taking Communion, or reciting the Apostles' Creed. Would the doubts as to standing persist?

(The above theories do not exhaust possibility. Where the state sets out to influence an identifiable group of people in matters of religion, it is probable that many points of impact will be found. For example, teachers, in *Engel*, are *directly* coerced to say or at least to preside over the saying of the prayer. None "... is complaining . . ." [!].³⁶ But the child coerced to go to a school all of whose teachers are subjected to a "religious test"—their willingness, namely, to pronounce or to countenance the prescribed prayer, a classic form of "test"—is himself being made to undergo instruction, in all his studies, by a staff screened on religious lines, and his parent is being forced to send his child to be taught and managed, through every day, by teachers so screened. If a member of a race has standing to insist that that race not be kept systematically off the jury that is to try him, may not a sincere believer (for example) in the importance of obeying Jesus' plain injunction against public prayer³⁷ have standing to claim immunity for his child from being taught by a faculty from which persons of his religious belief are weeded out? Would a Catholic parent have standing on this basis, if school started with a prayer so worded that no conscientious Catholic could lead it, so that all Catholic teachers had to resign, or would know better than to apply?)

It is appropriate here to discuss the very different views on standing, in cases of the *Engel* type, put forward by Professor Ernest Brown, in his recent careful article,³⁸ because he has stated, more fully than anyone else, some seemingly widespread doubts. One may share all his reluctance to see standing requirements specially relaxed for religious freedom cases, and still think nothing he says demonstrates that this has happened.

The difference between the field of reference in which Professor Brown

³⁶ Mr. Justice Douglas, concurring in *Engel*, 370 U.S. 421, 438 (1962).

³⁷ *Matthew* 6:5-6.

³⁸ Brown, *op. cit. supra* note 15.

perceives the problem, and the one in which the two theories put forward just above are set, is that the issue "coercion *vel non*" is seen as dominating by Professor Brown, while the theories proffered here would find less steep paths to standing. It is important to pinpoint the exact locus of this difference. No one could deny that the strictest "coercion" stands at one remove from the prayer; the pupil is coerced to be at school and to choose among a very restricted set of alternatives, and the parent is coerced to send his child to the place where this choice is tendered, and where state religious influence on his child is attempted. The "coercion" Professor Brown seeks is a direct "coercion" of participation in or presence at the prayer itself. Keeping this basic point of difference in mind, we may explore Professor Brown's views more in detail.

Let us assume first (following Professor Brown)³⁹ that the first amendment is literally applicable, and that the whole set of pressures, constraints, influences, and tendered alternatives present are considered not to add up to "coercion." We may cheerfully agree with Professor Brown that a taxpayer or "ordinary citizen" could not successfully seek judicial review of the appointment of an ambassador to the Vatican, of the Congress' granting a subsidy to the Presbyterian Church, or of the same body's creation of a Dukedom of California, with emolument.⁴⁰

But would anyone contend that child or parent had no standing to complain of the institution in the California schools of a pledge of homage and fealty to this Duke, as a part of daily opening exercises, with the alternatives offered in *Schempp* and *Engel*? The government may make a Duke, for all I can do about it, but can it make my child bend the knee to him or go out in the hall?

The *Engel* suit was not by a taxpayer or "ordinary citizen." It was by a parent anxious about the religious influences to which his very own child was being subjected. There must be some way for legal terminology to symbolize this difference. Even the juristically inarticulate must naggingly feel that some interest, other than the citizen's general interest in seeing things done right, is present in the latter case, and can somehow be given the right words. The two theories of standing set out above attempt to find these words. The remainder of Professor Brown's discussion on this point is mainly directed to showing that the court has not yet found them.

Professor Brown goes back to *McCullum v. Board of Educ.*⁴¹ and calls

³⁹ *Id.* at 17.

⁴⁰ *Id.* at 17-18.

⁴¹ 333 U.S. 203 (1948). Professor Sutherland points to the likeness between *McCullum* and the *School Prayer* cases, and suggests that the Court could have found standing on the authority of *McCullum* "without unsettling what had been the law," though "with some disregard for arguments *de minimis*." Sutherland, *supra* note 15, at 26-28. The latter qualification may be unnecessary. In *McCullum*, non-participants had to stamp themselves as non-members in one of the sects maintaining religious instruction in school. In the prayer cases, they had to register dissent from the religious tenets implied in willingness

“strange” Mr. Justice Black’s use of the following passage as authority for finding standing:

No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all. *Stearns v. Wood*, 236 U.S. 75; *Fairchild v. Hughes*, 258 U.S. 126.⁴²

Granting the settled judicial habit of quoting authority for the exception it states, Mr. Justice Black’s use of this passage is “strange” only if one denies that the objecting parent has “some specialized interest of . . . [his] own.” Further along, Professor Brown finds, in Mr. Justice Clark’s assertion that parents and children are “directly affected,”⁴³ another unsatisfactory symbol for the relation of parents and children to the prayer. Granted, it is a compressed one, and it has an unhappy history. But is it too hard, in the context of Professor Brown’s comment, which so far puts the issue as that of whether the taxpayer or “ordinary citizen” can adequately be distinguished, to see what such phrases as “specialized interest of their own” and “directly affected” are driving at? The taxpayer does not have to pray, listen, or stand in the hall “excused.” The taxpayer does not have to send his child off every morning to pray, listen, or stand in the hall. “Specialized”? Certainly! “Direct”? Well, perhaps even that.

At this point, Professor Brown turns to the difficulty of distinguishing between the publicly sponsored prayer and such things as the teaching of comparative religion.⁴⁴ With deference, this would seem more easily to be treated as a matter of the merits than of standing. If we cannot teach about the Wycliffite heresies and papal infallibility without espousing them, we are in for some confusion as we go along. Not only optional but required courses must have such components. Must we not proceed with faith that it is possible to teach about religion without soliciting religious commitment or holding religious ceremonies? Doubtless any teaching about anything reflects some of the teacher’s biases. Is it hopeless to distinguish between the unavoidable entry of such bias and the deliberate prescribing of a purely religious exercise? To be sure, if a public school ever offered a course labeled “Comparative Religion,” which actually taught as doctrine the belief in the Trinity, or featured the practice of class prayer, or included lectures asserting that the Bible is revealed truth, and if that course were offered within a narrow and unattractive range of alternatives, and if a child had to mark himself out specially, as a petitioner for “excuse,” as a

to say a prayer prescribed and made uniquely official by the state. More time was involved in *McCullum*. But a cleaner separation of the dissenter from an officially certified creed was present in the prayer case. Which is “minimal” with respect to the other?

⁴² *Coleman v. Miller*, 307 U.S. 433, 464 (1939), cited in *McCullum*, *supra* note 41, at 206.

⁴³ See cases cited note 25 *supra*.

⁴⁴ Brown, *op. cit. supra* note 15, at 20-21.

deviant, to avoid taking it, then the case would closely resemble *Engel* and *Schempp*.

Finally (as to this point), Professor Brown cites *Ex parte Lévit*,⁴⁵ holding that a member of the Supreme Court Bar had no standing to question the validity of the appointment of a Justice, made allegedly in contravention of the constitutional requirement that no Senator or Representative be appointed to an office the "Emoluments" of which were raised during his term in Congress.⁴⁶ Now here is a lawyer, facing a panel of nine, a panel that will deal in some unforeseeable pattern of unanimity or division with such suits, if any, as he may later be retained in. The asserted defect in the commission of the Justice he assails is entirely unconnected with the merits of any litigation, or indeed with any special kind of prejudice with respect to any class of claims, litigants, or lawyers. There is nothing to indicate that breach of this provision, if breach occurred, has any bearing, "direct" or "indirect," "special" or "general," on this lawyer's or any lawyer's practice before the Court. Is it hard to see the difference between that case and the case of the parent whose child is forced by law to be in a place where partial insulation from state religious influence can be bought only by accepting the alternative of public dissent? Professor Brown knows "no absolute standards for the determination of standing."⁴⁷ Neither does anybody else. But might it not seem that such wavering, shadowy line as may be drawn (and if none can be drawn then the doctrine must be given up) ought to fall somewhere between *Engel* and *Lévit*, if there is to be any sense in the "standing" doctrine?

This is about all Professor Brown has to say, in his discussion-in-chief, about the majority's theory of standing in the prayer and Bible-reading cases, under the assumption that the first amendment directly applies. He has shown that the Court has not been painstaking in its description of the interest that gives standing. Might that be because it didn't occur to the Court that anyone would quite so seriously question the proposition that a parent, anxious about his child's religious training, has a "specialized interest" in the propriety of an attempted religious influence at school? Standing has been found in these cases by eight Justices now sitting (including those most devoted to "judicial restraint"), by all nine Justices in the similar *McCullum*⁴⁸ situation, by Mr. Justice Frankfurter in *McCullum* and *Zorach v. Clauson*.⁴⁹ To be *plus frankfurterien que Frankfurter* is a solemn matter. Yet it cannot be said that Professor Brown deals definitely with the "immunity from improper influence" theory of standing foreshadowed by Frankfurter's *McCullum* opinion.

⁴⁵ 302 U.S. 633 (1937) (per curiam).

⁴⁶ U.S. CONST. art. I, § 6.

⁴⁷ Brown, *op. cit. supra* note 15, at 15.

⁴⁸ See authorities cited note 32 *supra*.

⁴⁹ 343 U.S. 306 (1952). For the close similarity of "released-time" and similar cases to the prayer cases, see authorities cited note 41 *supra*.

The acceptance of this theory, and its application to the prayer and Bible cases, entails no general relaxation of concepts of standing. It constitutes at most a slight extension. It may be no more than an application of orthodox concepts to a new concern—an application brought about by recognition of the importance to man of his moral interests, of children's known susceptibilities, and of the special concern the parent has in the child's religious training.

Professor Brown turns next to the assumption that it is the language of the fourteenth amendment that is crucial, and that a deprivation of "life, liberty, or property" must be shown. But "liberty" *is* here being taken away—the liberty not to be forced to an alternative of prayer or open dissent, and the liberty of tending to one's own children's religious development without influence or attempted influence by the state.⁵⁰ These liberties are taken away by the truancy laws. Are the interests thus infringed sufficient to support standing? This leads us around to the same question as before.

Professor Brown comes finally to the "issue of coercion."⁵¹ If coercion is present, then standing exists without regard to any of the foregoing subtleties. Professor Brown, in short, proposes that the question of its existence—the question whether pressure is shown amounting to coercion—be treated as a question of fact, and *submitted to a jury*. The jury, he says, is the body "to which we usually look for the answer to unanswerable questions. . . ."⁵² But the very same "unanswerable questions" which juries consider are regularly submitted in great volume to judges—in equity, bankruptcy, admiralty, and jury-waived cases, as well as many others. Questions of coercion and undue influence, as "unanswerable" in one context as in another, are probably more often passed on by judge than by jury in the ordinary run of litigation. No body of experience suggests that juries are better for this work. The use of a jury to determine standing in an equity case would be a startling solecism in procedure. Under some circumstances it might even be thought to violate the statutory mandate that certain cases be heard by a three-judge federal court.⁵³ It could have no effects other than the introduction of confusion, and the subjection of minority rights to majority prejudice. (With the first of these effects Professor Brown briefly deals; with the second so delphically that one cannot be sure he has dealt with it at all.⁵⁴)

But the real issue on standing here is not, as we have seen, whether coercion exists, or whether what does exist shall be called coercion, but rather whether the shown interests of children and parents, "special" to themselves beyond doubt, are sufficient to give standing. Someone must

⁵⁰ *Pierce v. Society of Sisters*, 268 U.S. 510, 518-19 (1925).

⁵¹ Brown, *op. cit. supra* note 15, at 26.

⁵² *Id.* at 30.

⁵³ 28 U.S.C. § 2281 (1948).

⁵⁴ Brown, *op. cit. supra* note 15, at 26-27.

decide whether the practices complained of amount to the influencing, or the likelihood of influencing, or the attempt to influence, the child. There is no shadow of reason for the Court's not deciding this question as a matter of law for the continually recurrent case. In the *Robinson* case,⁵⁵ the Court did not bother with the question whether the state requirement of separate lavatories had been shown on the record to have discouraged any identifiable restaurateurs; it drew on its own knowledge of the world to conclude that as a general matter, that would be the result. Judges have always shaped general rules of law on the basis of their own knowledge of the world; that is the only sane way, literally, to shape general rules of law. Brennan and Frankfurter—oceans apart on so much—would explicitly do the same in these religious cases.⁵⁶ In so doing, they are safely within the most orthodox judicial tradition. No radical departure has been made, in these two cases, from the principle of standing that gives the judicial process its character. It is hard not to feel that tensions on this question may have to do with possible later judicial activity as to affirmative financial aids to religious institutions, mainly schools.⁵⁷ Here we move from the relative comfort of decided cases to the field of prediction. Federal aid to religious schools differs *toto caelo* from governmental prescription of official prayers in public schools, so far as the standing problem is concerned. There may be stirring a hope, and a fear, that means may be found to bring it about that the Court prevent such an allocation of tax money, if Congress ever decides on it.

*Frothingham v. Mellon*⁵⁸ stands across the road. That case held that a federal taxpayer had no standing to question the constitutionality of a federal appropriation:

His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminate; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.⁵⁹

The Court has overruled precedents before now. But it seems unlikely that it will overrule or seriously modify *Frothingham*.⁶⁰ Doing so would bring the Court into unbearable conflict with Congress. The supervision of

⁵⁵ 84 Sup. Ct. 1693 (1964).

⁵⁶ See Mr. Justice Frankfurter's dissent in *McCullum*, 333 U.S. 203, especially at 227-28; Mr. Justice Brennan's concurrence in *Schempp*, 374 U.S. 203, especially at 287-93.

⁵⁷ See *The Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit*, 12 BUFFALO L. REV. 35 (1962).

⁵⁸ 262 U.S. 447 (1923).

⁵⁹ 262 U.S. at 487.

⁶⁰ But see Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961). Professor Jaffe's article, now the beginning of wisdom on the set of problems suggested by *Frothingham*, does not, it seems, commit him to a breach in the *Frothingham* principle in cases of federal expenditures on parochial schools, though the problem is raised.

expenditures is all the way to the purely legislative, and the federal taxpayer's interest resembles least of any the sort of special-grievance interest with which courts commonly deal.⁶¹ As has just been shown, nothing in the standing doctrines of recent religious cases presages any such relaxation.

If *Frothingham* stands, that will hardly be lamentable any more by those who wish the Court to be a vigilant and active guard of personal rights, than by those who by and large opine that the Court's great power is given it for the purpose of its doing nothing, or nothing very much. An institution can stay strongest by keeping reasonably close to the conception that formed it. Part of the Court's strength undoubtedly lies in the concept of its acting as a shield of persons against the wrongful use of power. How could this concept be transferred to a case in which, at the suit of someone unaffected except as a disapproving member of the public, a federal appropriation for parochial schools was nullified?⁶²

It is most important to add that the unsuitability of the Court's dealing with a constitutional question does not make the question any less real, or any less "constitutional." Instead of feeling emancipated from considering constitutional questions which, for reasons of standing, cannot come under the Court's hand, Congress and the President ought to act with that special responsibility that goes with final decision. Moreover, if the Court is ever called upon, at the suit of a federal taxpayer, or of anyone else with an equally remote and unspecific claim of standing, to enjoin the spending of federal funds in some manner alleged to infringe the establishment clause, and if the Court dismisses the suit, as likely it would, on the principle of *Frothingham*, it is of first importance that very explicit means be found—and these would have to reach beyond mere formal disclaimer—to make it clear to the public, to the Bar, to Congress, and to the President that such dismissal implies no judicial legitimation of the challenged practice, no holding that it is constitutional.

There is, moreover, an extremely important collateral check on the *Frothingham* principle. That principle emphatically does not imply that no standing can ever exist to challenge any practice *arising from or connected with* governmental expenditure in aid of religious institutions. The sys-

⁶¹ See Jaffe, *supra* note 60, at 1282.

⁶² Nothing in this very brief sketch of a probable future role for the Court is intended to suggest that Congress might not validly provide for taxpayer or citizen suits to enjoin unconstitutional expenditures in aid of religion. If Congress elects to confer on the members of any class the right to insist that unconstitutional expenditures of a named kind be stopped, and if the federal statute conferring this substantive right is valid, then the suitor would come into court not with a bare "taxpayer's" interest but as the holder of a right under federal law to insist that certain other persons refrain from making certain disbursements. This claim is both substantial and adversary. The only question would seem to be whether Congress, as a measure "necessary and proper" to carrying into effect its powers, is competent to confer this substantive right on a large class of private persons. Professor Jaffe has fully demonstrated that such a legislative decision would not be an exotic in our legal tradition; Jaffe, *supra* note 60. Contention against Congress' judgment of necessity and propriety is an uphill fight. Alternatively, *Frothingham* may not be thought a strictly constitutional decision at all.

tematic support of any activity by governmental subvention must often put government in the picture for so-called "state action" purposes, and the supported institution may have to answer for particular acts violating constitutional norms applicable to the use of power created and sustained by government. One example may serve to illustrate what could become a vast field.

Hospitals are built and financed with public money, and some are then conducted by religious groups.⁶³ It may happen that the actions of such bodies are sufficiently supported by the state's spending power to bring into play constitutional guarantees which run only against public power—such as those of the first and fourteenth amendments. (It would turn the first amendment upside down to apply a specially lenient doctrine of "state action" to governmental involvement with religious bodies.) If such a hospital, financed in substantial part by government, were to refuse Negro patients, for example, would not Negroes have the requisite standing to claim injunctive relief?⁶⁴ But immunity from racial discrimination is not the only constitutional right. Suppose such a hospital, on religious grounds, bars doctors who give contraceptive advice permitted by law, or declines to permit the performance of a lawful operation, recommended by the patient's doctor, on the ground that the operation violates some moral law vouched by the religion to which the hospital adheres. It is not purposed here to discuss either the state action problems or the ultimate constitutional questions that particular cases might raise. What is clear now is that the claims of the doctor and of the patient are claims of identifiable people suffering hurt peculiar to themselves as a result of practices at least tenably claimed to enjoy governmental support and to violate the free exercise or establishment clauses (or other guarantees), that these claims are classically suitable for resolution in court, and that the common sense of standing ought therefore to put them past the threshold.

The practical considerations adumbrated here go far to soften the impact of strict "standing" doctrine in these cases. Public money, it should be clear, is given and taken at a price. At some point in the process of public financing, it will be impossible to say that ". . . state action of every

⁶³ See *Bradfield v. Roberts*, 175 U.S. 291 (1899); *PFEFFER, CHURCH, STATE AND FREEDOM* 173-79 (1953). Extensive federal financing of hospitals now occurs under the Hill-Burton Act, 42 U.S.C. § 291 (1946).

⁶⁴ See *Cooper v. Aaron*, 358 U.S. 1, 4 (1958): ". . . [T]he Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation *through any arrangement, management, funds or property.*" *emphasis added*. In *Abernathy v. City of Irvine*, 355 S.W. 2d 159 (Ky Ct. App. 1962), *cert. denied*, 371 U.S. 831 (1962), the state court upheld a "dollar-a-year" lease of a publicly owned hospital to a religious order. It is interesting to note that the lease forbade the denial of admission for race, *creed*, or color. But the virtually ultimate power of a hospital, particularly of the only hospital in town, can be used to effect important creedal discriminations other than mere denial of admission. It is similarly interesting that in the *Bradfield* case, *supra* note 63 at 294, the agreement between public officials and the subsidized hospital provided that paying patients might select their own doctors and nurses, apparently without limitation.

kind. . ."⁶⁵ is absent from the pattern of power. The grievances of people wronged by the unconstitutional, though indirect, impact of public power thus involved are exactly suitable for judicial redress.

One troublesome set of problems remains—the problem of standing in state and municipal taxpayers' and citizens' suits, and hence of the role of the courts in policing state and municipal action of a positive nature, impinging on no particular persons with respect to their own religious life. The field is defined by *Everson v. Board of Educ.*⁶⁶ and *Doremus v. Board of Educ.*⁶⁷ In *Everson*, standing was conceded to a taxpayer, simply as such, to question the expenditure of county money for parochial school-children's bus fares. In *Doremus*, standing was denied (by the extreme step of dismissing a federal appeal from state courts that had granted standing) in a suit by one who was viewed as only a taxpayer, complaining of Bible-reading in the schools. The distinction seems to have been that money was being spent in the one case, and not in the other, or so little money as to be *de minimis* for the taxpayer's suit.

The problems here are exceedingly intricate, because of variations as to the states' concession of standing to sue.⁶⁸ Let us consider first the position in the absence of such a concession.

Suit might be brought by the state or municipal taxpayer in either state or federal court. The questions then would be: (1) Should a federal court, in the first instance, take jurisdiction of such a suit? (2) Should a state court judgment of dismissal for want of standing be reversed in the Supreme Court? It is submitted that both answers should be in the negative, except (and this doubtfully) where the taxpayer can make out a very clear case of pocketbook injury.

It is difficult to see any significant general difference between the federal taxpayer's suit and that of the state taxpayer. The wrong alleged is monetary. But is it not, generally, almost impossible to establish this loss? Take the school-bus case. Money is being spent on bussing. But how much money would have to be spent on public schools if pupils who now find it possible to attend parochial schools were forced, by lack of transportation, to attend public schools? Would more traffic police be needed if buses were not provided? What would be the total cost to the public fisc of dealing with injury and health problems, without buses? If there were a net saving, would taxes really be reduced, or would the

⁶⁵ Civil Rights Cases, 109 U.S. 3, 11 (1883). An interesting and intricate question would arise if, to considerable degree in consequence of extensive governmental financing, coupled with neglect of the public schools by a voting majority no longer using them, public school children were substantially disadvantaged. State power would permeate such a pattern, and the harm would be to identifiable persons. At the least, standing would seem no problem.

⁶⁶ 330 U.S. 1 (1947).

⁶⁷ 342 U.S. 429 (1952).

⁶⁸ See Jaffe, *supra* note 60, at 1275, for a canvass of the varieties.

money be spent in sprucing up a park this taxpayer never visits? How often, in a taxpayer's suit even in a small municipality, could a taxpayer make out a net monetary loss that would justify, in ordinary litigation, submission of the issue of damages to a jury, or even the award of an injunction, on the ground that money loss, though not reducible to a sum, is certain or likely? Could such net loss ever be established at the state level? It is not established by the mere proof of the tax payment and expenditure. Most taxpayer suits rest on a transparently fictitious basis, and are really suits by members of the public to stop something they think wrong, without particular impingement on themselves. In the case uncomplicated by state concession of standing, it would seem that the role of the judiciary, as vindicator of rights personal to suitors, can best be sustained by following the principle of *Doremus*, to the place where fiscal fact takes it.

Different problems altogether arise when the state (as in *Doremus* and *Everson*) concedes taxpayer standing.⁶⁹ Without broaching the difficult technical problem of the position of the lower federal court, it is contended that there should be found here sufficient jurisdictional basis for appeal or certiorari from a state court decision. The state has conferred a tangible right—that of insisting on the stopping of certain practices—on certain persons. Eligibility to this perquisite is defined, in part, upon a showing that the practice is violative of law. It is the privilege of stopping the practice, a privilege conditionally granted by state law, and not his original taxpayer's interest, which the suitor brings into the Supreme Court as the interest supporting jurisdiction of his appeal. The determination of the appeal determines not whether the taxpayer will pay less taxes but whether his substantive state-created right to an injunction will be recognized.

Technical questions of great difficulty supervene here, and cannot be pursued. So far as the role of the Court is concerned, particularly as to the important question of its confrontation with state power, it seems that concession of standing, where the state itself concedes standing, is a gearing without friction.

This article, to sum up, advocates this delineation of the role of the Supreme Court in religious cases:

First, the Court ought to be vigilant, sensitive and active in protecting persons against tampering by government with their religious lives. The prayer and Bible-reading cases are right on this track. They uphold the religious freedom of persons definitely and individually concerned, and

⁶⁹ See Jaffe, *supra* note 60, especially at 1311-12. Professor Jaffe seems to believe *Everson* and *Frothingham* to be wholly at war. In *Frothingham*, however, the federal constitutional question has at least been resolved once by an authority speaking for the whole nation. Moreover, the kind of action taken in *Doremus* leaves undisturbed a judicial judgment affirmatively legitimating the challenged practice as a matter of federal constitutional law, which a *Frothingham* judgment does not.

do so without effecting or threatening any drastic expansion of the concept of standing.

Second, the role of the Court ought not to be here, any more than elsewhere, that of a Council of Revision, acting at the suit of the worried member of the public to strike down pure governmental aids, without any taint of adverse or restrictive impact on particular persons. The only exceptions ought to be the rare case of the truly demonstrable pocket-book standing, and the more frequent case of the state concession of standing. But this principle has no application to the problem that arises when any institution, religious or secular, is largely subsidized by government, and then uses its so-sustained power in some manner forbidden by the Constitution.

The judicial power is vast. Like all governmental power, it ought to be used imaginatively and creatively—in delight and not by halves—in pursuit of the goals of the Constitution. That is what power is for. In protecting the real and personal interests of children and parents, in *Engel* and *Schempp*, the Court used power within the lines of the best judicial tradition. The chance of public acceptance had to be taken, and that question still pends, but the guess is here ventured that in the long run the religious people of the United States will not find it unacceptable to pray in such manner and place as not thereby to outrage the religious sensibilities of others.

On the other hand, the judicial power, to enjoy the public support that goes to legitimacy, must remain judicial. Public disputes about the amount and kind of governmental aid to enterprises partly religious do not, in themselves, implicate interests suitable for judicial treatment, absent legislative action. Where it really applies, *Frothingham* ought to be followed in letter and in spirit. If Congress abdicates its constitutional responsibility, then we shall have to put up with it, just as we would have to put up with it if the Court (thereto still urged by so many voices) abdicated its own.