To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Goldberg

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Circulated: 10 Apr 63

Recirculated:

Nos. 119 AND 142.—OCTOBER TERM, 1962.

William J. Murray III, etc., et al., Petitioners, 119 *v.* John N. Curlett, President, et al., Individually, and Constituting the Board of School Commissioners of Baltimore City.	On Writ of Certiorari to the Court of Appeals of Maryland.
School District of Abington Township, Pennsylvania, et al., Appellants, 142 *v.* Edward Lewis Schempp et al.	On Appeal From the United States District Court for the Eastern District of Pennsylvania.

Memorandum to the Conference.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

It is, I think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of "separation of church and state," which can be mechanically applied in every case to delineate the required boundaries between government and religion. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways. Secondly, the fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause would lead to irreconcilable con-

No single constitutional standard -

Religion & govt must interact

flict with the Free Exercise Clause. A single homely example should suffice to make the point. Spending federal funds to employ chaplains for the armed forces may be said to violate the Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion. The short of the matter is simply that the two relevant clauses of the First Amendment cannot accurately be reflected in a sterile metaphor which by its very nature may distort rather than illumine the problems involved in a particular case.

What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government.[1] I think our previous opinions in this difficult field, despite the breadth of some of their dicta, have fully recognized this.

The purpose of the present memorandum is, after a brief backward glance at history, to review our recent decisions in this light. The conclusion reached is that the two cases now before us must be remanded for further proceedings because the present records are insufficient to show (a) whether the challenged provisions violate the Establishment Clause, and (b) whether these state laws have resulted or will result in an unconstitutional restraint of any kind upon the free exercise of the religion of any person.

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[1] It is instructive, in this connection, to examine the complaints in the two cases before us. Thus, although there is one mention of a constitutional principle of "separation between church and state," neither complaint attacks the challenged practices as "establishments." What both allege as the basis for their causes of actions are, rather, violations of religious liberty.

I.

The Establishment Clause of the First Amendment, at the time of its enactment, was directed solely at the problem of preventing the *National* Government from arrogating to itself the function of supreme arbiter in religious matters.[2] Indeed, the events leading to its enactment strongly suggest that the phrasing of the Establishment Clause reflects primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing *state* establishments.

> "The First Amendment states that 'Congress shall make no law respecting an establishment of religion. . . .' U. S. Const., Amend. I. The Amendment was proposed by James Madison on June 8, 1789, in the House of Representatives. It then read, in part:
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> > " 'The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.' (Emphasis added.) I Annals of Congress 434.
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> "We are told that Madison added the word 'national' to meet the scruples of States which then had an established church. I Stokes, Church and State in the United States, 541. After being referred to committee, it was considered by the House, on August 15, 1789, acting as a Committee of the Whole. Some assitance in determining the scope of the Amendment's proscription of establishment may be found in that debate.

No - to meet voluntary

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[2] See generally Kruse, The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 Washburn L. J. 65 (1962).

"In its report to the House, the committee, to which the subject of amendments to the Constitution had been submitted, recommended the insertion of the language, 'no religion shall be established by law.' I Annals of Congress 729. Mr. Gerry 'said it would read better if it was, that no religious doctrine shall be established by law.' *Id.*, at 730. Mr. Madison 'said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. . . . He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform.' *Id.*, at 730–731.

"The Amendment, as it passed the House of Representatives nine days later, read, in part:

> " 'Congress shall make no law establishing religion. . . .' Records of the United States Senate, 1A–C2 (U. S. Nat. Archives).

"It passed the Senate on September 9, 1789, reading, in part:

> " 'Congress shall make no law establishing articles of faith, or a mode of worship . . . .' *Ibid.*

"An early commentator opined that the 'real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.' 3 Story, Commentaries on the Constitution of the United States, 728." *McGowan* v. *Maryland,* 366 U. S. 420, 440–441.

The only purpose of the First Amendment was to restrict the power of the National Government. Each State was left free to go its own way and pursue its own

policy with respect to religion. Thus Virginia from the beginning adopted a policy of disestablishmentarianism. Massachusetts, by contrast, had an established church until well into the nineteenth century. So matters stood until the adoption of the Fourteenth Amendment, or more accurately, until this Court's decision in *Cantwell* v. *Connecticut*, in 1940. 310 U. S. 296. In that case the Court said:

> "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." [3]

I accept without question that the liberty guaranteed by the Fourteenth Amendment against impairment by the States embraces in full the right of free exercise of religion protected by the First Amendment, and I yield to no one in my conception of the breadth of that freedom. *Braunfeld* v. *Brown*, 366 U. S. 599, 616 (dissenting opinion). I accept too the proposition that the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision explicitly designed to leave the States free to go their own way should now have become a restriction upon their autonomy.

But the question as to the scope of the practices outlawed by the Establishment Clause has continued to be a controversial one. Since the *Cantwell* pronouncement in 1940, this Court has only twice held invalid state laws on the ground that they were "laws respecting an establishment of religion" in violation of the Fourteenth ~~form of worship as the individual may choose cannot be~~

[3] 310 U. S., at 303. The Court's statement as to the Establishment Clause in *Cantwell* was dictum. The case was decided on free exercise grounds.

Amendment. *McCollum* v. *Board of Education*, 333 U. S. 203; *Engel* v. *Vitale*, 370 U. S. 421. The Court has upheld against such a challenge laws establishing Sunday as a compulsory day of rest, *McGowan* v. *Maryland*, 366 U. S. 420, and a law authorizing reimbursement for the transportation of public and Catholic school pupils. *Everson* v. *Board of Education*, 330 U. S. 1.

Unlike other First Amendment guarantees, there is an inherent limitation upon the applicability of the Establishment Clause's ban on state support to religion. That limitation was succinctly put in the very case which provided the definitive explication of the Establishment Clause. "State power is no more to be used so as to handicap religions than it is to favor them." *Everson* v. *Board of Education*, 330 U. S. 1, 18.[4] And in a later case, this Court recognized that the limitation was one which was itself compelled by the free exercise guarantee. "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not . . . manifest a governmental hostility to religion or religious teaching. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum* v. *Board of Education*, 333 U. S. 203, 211–212.[5]

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[4] See also, in this connection, *Zorach* v. *Clauson*, 343 U. S. 306, 314: "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

[5] To the same effect are the following statements by MR. JUSTICE DOUGLAS, dissenting, in *McGowan* v. *Maryland*, 366 U. S. 420, 562, 563–564. (Emphasis added):

"The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is

That the central value embodied in these clauses of the First Amendment—and, more particularly, in the guarantee of "liberty" contained in the Fourteenth [6]—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized in the decisions of this Court. Thus, in the early case of *Hamilton* v. *Regents*, 293 U. S. 245, 265, Mr. Justice Cardozo, concurring, assumed that it was ". . . *the religious liberty* protected by the First Amendment against invasion by the nation [which] is protected by the Fourteenth Amendment against invasion by the states." (Emphasis added.) And in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303, the purpose of those guarantees was described in the following terms: "On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or

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a moral law which the State is powerless to alter; *that the individual possesses rights, conferred by the Creator, which government must respect.*

. . . . .

"The idea, as I understand it, was to limit the power of government to act in religious matters (*Board of Education* v. *Barnett, supra; McCollum* v. *Board of Education*, 333 U. S. 203), *not to limit the freedom of religious men to act religiously* nor to restrict the freedom of atheists or agnostics.

. . . . .

"The First Amendment commands government to have no interest in theology or ritual; *it admonishes government to be interested in allowing religious freedom to flourish*—whether the result is to produce Catholics, Jews, or Protestants, or to turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral."

[6] As Mr. Justice Brennan has put it, concurring and dissenting in *Braunfeld* v. *Brown*, 366 U. S. 599, 610:

"[T]he values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals."

form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

It is this concept of constitutional protection embodied in our decisions which makes the cases before us such difficult ones for me. For there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible.

It has become accepted that the decision in *Pierce* v. *Society of Sisters,* 268 U. S. 510, upholding the right of parents to send their children to nonpublic schools, was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation. It might be argued here that parents who wanted their children to be exposed to religious influences in school could, under *Pierce,* send their children to private or parochial schools. The consideration which renders this contention too facile to be determinative has already been recognized by the Court: "Freedom of speech, freedom of the press, freedom of religion, are available to all, not merely to those who can pay their own way." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 111.

It might also be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. For all its surface persuasiveness, however, this argument seriously misconstrues the basic reason in favor of upholding the exercises at issue in these cases. For the proposition being advanced is not that, all other things being equal, prayer is a religious necessity during the hours when children are attending school, but rather that a compulsory state educational system so structures a child's life that all other things are necessarily unequal. The argument, in short, is that a wholly secular education creates a situation in which religion, by being treated as an impermissible activity, is placed at an artificial and state-created disadvantage. Thus the danger of a deci-

sion invalidating religious exercises in schools is that it would sanction not state refusal to support religion, but state hostility to religion; not a constitutionally compelled state refusal to favor religion, but a constitutionally prohibited state handicapping of religion. Viewed in this light, the reason against invalidating religious exercises in schools is simply that such exercises are necessary if the school is truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, of the religion of those who believe that religious exercises should be conducted only in private.

What seems to me to be of paramount importance, then, is recognition of the fact that the claim advanced here in favor of Bible reading is sufficiently substantial to make simple reference to the constitutional phrase "establishment of religion" as inadequate an analysis of the cases before us as the ritualistic invocation of the non-constitutional phrase "separation of church and state." If, after all, we could be satisfied with the facile analysis that religion would be a less successful force in the lives of children if these exercises were invalidated, and that *therefore* the challenged exercises must represent constitutionally barred support of religion, then even state tax exemptions for religious institutions would be constitutionally invalid. What these cases compel, rather, is an analysis of just what the "neutrality" is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment.

II.

The most recent statement by the Court concerning the interrelationship of the two clauses was contained in *Engel* v. *Vitale*, 370 U. S. 421, 430–431:

> "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of

> direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship does not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."

This statement might be interpreted as defining the entire scope of the two clauses solely in terms of coercion: direct coercion violating the Free Exercise Clause and indirect coercion, violating the Establishment Clause. Such an interpretation seems also to underlie the view expressed by MR. JUSTICE DOUGLAS, dissenting, in *McGowan* v. *Maryland*, 366 U. S. 420, 578, where he characterized "[t]he reverse side of an 'establishment' [as] a burden on the 'free exercise' of religion."

My difficulties with such a view are two-fold. First, it seems to me to eliminate the need for an Establishment Clause entirely, since every attempt at an establishment could be challenged by those persons who were coerced—directly or indirectly—in their free exercise of religion. More fundamentally, this view seems to me to ignore what the Court, although it treated the problem as one of standing, was careful to stress in *McGowan*, 366 U. S., at 430:

> "If the purpose of the 'establishment' clause was only to insure protection for the 'free exercise' of

> religion, then what we have said above concerning appellants' standing to raise the 'free exercise' contention would appear to be true here. However, the writings of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority."

Consequently, I think the Court's statement in *Engel* must be taken to mean that the "first and most immediate purpose [of the Establishment Clause], that of preventing the type of "union of government and religion [which] tends to destroy government and degrade religion," was directed, not at coercive or discriminatory acts of government—in which area the establishment and free exercise guarantees would necessarily overlap—but rather at that type of governmental support of religion which, although neither coercive nor discriminatory, represented an impermissible intrusion of the State into realms of religion.[7] A view of the Establishment Clause which would hold that it is violated only where there is coercion of an individual's free exercise of religion seems necessarily either too narrow or too broad. Too narrow, because as the example of England demonstrates, even a church established in the historical sense is not incompatible with the free exercise of a plurality of religious beliefs. Too broad, because of the possibility that—in an attempt to expand the concept of "indirect coercion" sufficiently to prevent those alliances between government and religion which, even though noncoercive and

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[7] "The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate. *Another purpose of the Establishment Clause* rested upon awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Engel* v. *Vitale*, 370 U. S. 421, 431–432. (Emphasis added.)

nondiscriminatory, are constitutionally impermissible—the definition given the Establishment Clause will become so all-encompassing as logically to require that a State must not recognize the existence of religious beliefs on the part of its people. See *Engel* v. *Vitale,* 370 U. S. 421, 437 (concurring opinion).

State cannot recognize religious beliefs of its people -

It is true that definitions of the Establishment Clause based upon a concept of coercion, while they do not wholly exhaust the scope of that provision, do prove workable in many situations. Where, however, the element of legally cognizable coercion is absent from a situation—where the challenged support of religion is truly nondiscriminatory and noncoercive—the proposed distinction becomes a matter of substantive importance rather than analytical neatness. Thus, assuming *arguendo* that there are no elements of coercion present in the two cases before us, the sole question presented under the Establishment Clause would be whether or not the challenged exercises represented that type of "union of government and religion [which] tends to destroy government and to degrade religion," [8] *Engel* v. *Vitale,* 370 U. S. 421, 431. On the basis of the standards laid down by prior decisions of this Court, I think that this question would have to be answered in the negative.

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[8] Cf. "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. . . . While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson* v. *Board of Education,* 330 U. S. 1, 16.

III.

Our decisions make clear that there is no constitutional bar to the use of public property for religious purposes. On the contrary, this Court has consistently held that the discriminatory barring of religious groups from public property is itself a violation of First and Fourteenth Amendment guarantees. *Fowler* v. *Rhode Island,* 345 U. S. 67; *Niemotko* v. *Maryland,* 340 U. S. 268. A different standard has been applied to public school property because of the coercive effect which the use by religious sects of a compulsory school system would necessarily have upon the children involved. *McCollum* v. *Board of Education,* 333 U. S. 203.[9] But insofar as the *McCollum* decision rests on the Establishment rather than the Free Exercise Clause, it is clear that its effect is limited to religious instruction—to the prevention of a union of government and religion which would support the proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets.[10]

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[9] "In *McCollum*, state action permitted religious instruction in public school buildings during school hours and required students not attending the religious instruction to remain in their classrooms during that time. The Court found that this system had the effect of coercing the children to attend religious classes; no such coercion to attend church services is present in the situation at bar. In *McCollum*, the only alternative available to the nonattending students was to remain in their classrooms; the alternatives open to nonlaboring persons in the instant case are far more diverse." *McGowan* v. *Maryland,* 366 U. S. 420, 452.

[10] "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups *to spread their faith.*" *McCollum* v. *Board of Education,* 333 U. S. 203, 210. (Emphasis added.)

"To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any and

The dangers both to government and to religion inherent in official support of instruction in the tenets of various religious sects are, of course, absent in the cases before us, which involve only a reading from the Bible unaccompanied by comments which might otherwise constitute instruction. As MR. JUSTICE DOUGLAS, concurring, in *Engel* v. *Vitale*, 370 U. S. 421, 439, noted in connection with the exercise challenged there, "There is . . . no effort at indoctrination and no attempt at exposition. Prayers of course may be so long and of such a character as to amount to an attempt at the religious instruction that was denied the public schools by the *McCollum* case. But New York's prayer is of a character that does not involve any element of proselytizing as in the *McCollum* case." Indeed, since, from all that appears in either record, any teacher who does not wish to do so is free not to participate,[11] it cannot even be contended that some infinitesimal part of the salaries paid by the State are made contingent upon the performance of a religious function.

Accepting the teaching of *Engel* v. *Vitale* that the Establishment Clause, whether or not coercion is present, bars any branch of government from composing a specific prayer for inclusion in the school curriculum, that case is

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all religious faiths or sects *in the dissemination of their doctrines and ideals* . . . ." 333 U. S., at 211. (Emphasis added.)

"The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the states to new limitations, the prohibition of furtherance by the State of *religious instruction* became the guiding principle, in law and feeling, of the American people." 333 U. S., at 215 (concurring opinion of Mr. Justice Frankfurter). (Emphasis added.)

[11] The Pennsylvania statute was specifically amended to remove the compulsion upon teachers. Act of December 17, 1959, P. L. 1928, 24 Purdon's Pa. Stat. Ann. § 15–1516. Since the Maryland case is here on a demurrer, the issue of whether or not a teacher could be dismissed for refusal to participate seems, among many others, never to have been raised.

not contolling here. The present cases do not involve the saying of a prayer or the reading of a religious document whose content has been composed by governmental authorities.

At least in the absence of evidence showing that the Bible and the Lord's Prayer do not embody the religious beliefs of the people of Pennsylvania or of Baltimore, or that the legislature or school board intended to prohibit local schools from substituting a different prayer or set of readings where parents requested such a change, we should not assume that the provisions before us—as actually administered—may not be construed simply as authorizing religious exercises, and the designations treated as indications of the promulgating body's view as to the community's preference. We are constrained to interpret these provisions so as to render them constitutional if reasonably possible. Compare *Two Guys* v. *McGinley*, 366 U. S. 582, 592–595; *Everson* v. *Board of Education*, 330 U. S. 1, 4, and n. 2. In the *Schempp* case there is evidence which indicates that variations were in fact permitted by the very school there involved, and that further variations were not introduced only because of the absence of complaints from district parents. And the Baltimore rule itself contains a provision permitting another version of the Bible to be substituted for the King James version.

If the provisions are not so construed, I think that their validity under the Establishment Clause would be extremely doubtful because of the designation of a particular religious book and a denominational prayer. But since, even if they are construed as I think they must be, I conclude that the cases before us must be remanded for further evidence on other issues—thus affording the plaintiffs an opportunity to prove that local variations are not in fact permitted—and since I think the cases as briefed and argued fairly raise questions applicable to provisions which are intended to be implemented locally, I shall for

the balance of this memorandum treat the provisions before us as making the content of the exercises, as well as a choice as to their implementation, matters which are ultimately subject to the wishes of the parents whose children attend each local school. In the absence of coercion upon those who do not wish to participate—because they hold less strong beliefs, other beliefs, or no beliefs at all—such provisions cannot, in my view, be held to represent the type of support of religion barred by the Establishment Clause. For the only support which such rules provide for religion is the withholding of state hostility—a simple acknowledgment on the part of secular authorities, that the Constitution does not require extirpation of all voluntary expression of religious belief.

IV.

It has been argued above that these provisions authorizing religious exercises are properly to be regarded as measures making possible the free exercise of religion. But it is important to stress that, strictly speaking, what is at issue here is a privilege rather than a right. Thus, we are not faced here with a situation such as that presented by the Government's duty to members of the armed forces, all of whose time the Government has preempted. It is not claimed that prayer during school hours constitutes a religious necessity, and there is no claim of a constitutional duty on the part of the State to provide an opportunity for religious exercises in its schools. The question presented is not whether exercises such as those at issue here are constitutionally compelled, but rather whether they are constitutionally invalid. And that issue, as I have indicated, turns not on the meaning of the Establishment Clause, but rather on the question of coercion.

This analysis is borne out, I think, by a comparison of the two prior decisions of this Court dealing with the validity of religious instruction programs in the public

schools. Thus although both *McCollum* and *Zorach* were couched in "establishment" terms, it is apparent that the two decisions are reconcilable only if the "establishment" issue in *Zorach* was viewed as turning upon lack of coercion—upon the fact that, although "[t]here is a suggestion that the system involves the use of coercion to get public school students into religious classrooms, [t]here is no evidence in the record before us that supports that conclusion." *Zorach* v. *Clauson*, 343 U. S. 306, 311. Certainly the dissenters accepted this view of the case.[12]

In short, given the fact that public school property was not used, the system challenged in *Zorach* could withstand an attack based on the Establishment Clause alone. But for the deficiency in the record, however, it is clear that the absence of a constitutionally prohibited "establishment of religion" could not have ended this Court's inquiry into whether or not the presence of coercive factors had created a situation incompatible with Fourteenth Amendment guarantees of personal liberty. For it is only in the absence of such coercion that government could truly be said to be doing nothing more than ". . . respect[ing] the religious nature of our people and accommodat[ing] the public service to their spiritual needs." *Zorach* v. *Clauson*, 343 U. S. 306, 314.

In *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, the flag salute exercise was not struck down except as to those who had religious objections to participating in it. It is argued that since both the Baltimore

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[12] "Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery." *Zorach* v. *Clauson*, 343 U. S. 306, 218 (dissenting opinion of Mr. Justice Black).

"This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality." 343 U. S., at 323 (dissenting opinion of Mr. Justice Jackson).

and Pennsylvania laws provide that children who do not wish to participate in the exercises may be excused, these provisions have already done all that the *Barnette* decision compelled West Virginia to do, and that there can therefore be no coercion in these cases as a matter of law. But I think a more sensitive and searching probe into the question of coercion is required in the cases before us.

An excusal provision admittedly reduces the constraints upon school school children, but it does not necessarily eliminate the coercive factors inherent in any situation in which the official authority represented by the school is itself sponsoring the challenged exercise.[13] Where the exercise is one designed to implement wholly secular goals, as in the case of patriotic ceremonies, the subtly coercive pressures which tend to undermine the efficacy of excusal provisions must be weighed against the interest of the State in seeking to promote such exercises. In such a situation, excusing children religiously opposed to participation will, under most circumstances, satisfy the commands of the free exercise guarantee. Cf. *Engel* v. *Vitale*, 370 U. S. 421, 435, n. 21. The reason for this is simply that, in serving secular ends, such as those promoted by the exercise challenged by *Barnette*, there may well exist no practicable means for abolishing entirely the coercion inherent in a compulsory school system which would not involve the dangers of withdrawing completely from the State the power to pursue those entirely legitimate and constitutionally permissible ends. There is, however, no comparable danger here, where the exercises themselves represent purely religious expressions, since the State has

[13] That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend." *McCollum* v. *Board of Education*, 333 U. S. 203, 227 (concurring opinion of Mr. Justice Frankfurter).

no constitutionally permissible interest in *urging* participation in such exercises through the use of its compulsory school laws.

The indispensability to the preservation of religious liberty of complete freedom from any kind of coercion was incisively delineated by MR. JUSTICE BLACK, dissenting, in *Zorach* v. *Clauson:* "Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells. The spiritual mind of man has thus been free to believe, or disbelieve, or doubt, without repression, great or small, by the heavy hand of government." 343 U. S., at 319–320.

Such a standard is designed to protect not only those who doubt or disbelieve, but those who are jealous of their right to believe, free from either encouragement or interference by government. The men who wrote the First Amendment knew all too well that a government which today has the power to coerce a preference for religion may tomorrow use that power to coerce preference for a given sect, and the next day to suppress all but the preferred teaching. The solution which they adopted, and in terms of which the cases before us must be judged, was to withdraw from government the power to coerce any preference in the sphere of religious beliefs. The ultimate issue in these cases, therefore—the question which *Zorach* did not reach and which it was unnecessary to decide in *McCollum*—is whether there exist coercive factors in these two cases of a nature to deny any person the free exercise of his religion.

V.

It is clear that the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those presented by the use of similar exer-

cises or affirmations in ceremonies attended by adults.[14] Even as to children, however, the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief.

These are not, it must be stressed, cases like *Brown* v. *Board of Education,* 347 U. S. 483, in which this Court held that, in the sphere of public education, the Fourteenth Amendment's guarantee of equal protection of the laws required that race not be treated as a relevant factor in terms of governmental action. A segregated school system is not invalid because its operation is coercive; it is invalid simply because our Constitution presupposes that men are created equal, and that therefore racial differences cannot provide a valid basis for governmental action. Accommodation of religious differences on the part of the State, however, is not only permitted but required by that same Constitution.

The governmental neutrality which the First and Fourteenth Amendments require in the cases before us, in other words, is the extension of even-handed treatment to all who believe, doubt, or disbelieve—a refusal on the part of the State to weight the scales of private choice. In

[14] "The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered." *McCollum* v. *Board of Education,* 333 U. S. 203, 217 (concurring opinion of Mr. Justice Frankfurter).

these cases, therefore, what is involved is not state action based on impermissible categories, but rather an attempt by the State to accommodate those differences which the existence in our society of a variety of religious beliefs make inevitable. The Constitution does not require that such efforts be struck down unless they are proven to entail the use of the secular authority of the school to coerce a preference among such beliefs.

It may well be, as has been argued to us, that even the benefit to be derived from noncoercive religious exercises in public schools are incommensurate with the administrative problems which they would create. The choice involved, however, is one for each local community and its school board, and not for this Court. For, as I have said, religious exercises are not constitutionally invalid if they simply reflect differences which exist in the society from which the school draws its pupils. They become constitutionally invalid only if their administration places the sanction of secular authority behind one or more particular religious or irreligious beliefs.[15]

To be specific, it seems to me clear that certain types of exercises would present situations in which no possibility of coercion on the part of secular officials could be claimed to exist. Thus, if such exercises were held either before or after the official school day,[16] or if the school

[15] "Insofar as these [exercises] are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular . . . program that close judicial scrutiny is demanded of the exact relation between [that program] and the public educational system in the specific situation before the Court." *McCollum* v. *Board of Education*, 333 U. S. 203, 225 (concurring opinion of Mr. Justice Frankfurter).

[16] Cf. "The deeply divisive controversy aroused by the attempts to secure public school pupils for sectarian instruction would promptly

schedule were such that participation were merely one among a number of desirable alternatives,[17] it could hardly be contended that the exercises did anything more than to provide an opportunity for the voluntary expression of religious belief. On the other hand, a law which provided for religious exercises during the school day and which contained no excusal provision would obviously be unconstitutionally coercive upon those who did not wish to participate. And even under a law containing an excusal provision, if the exercises were held during the school day, and no equally desirable alternative were provided by the school authorities, the likelihood that children were under at least some psychological compulsion to participate would be great. In a case such as the latter,

no alternatives

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end if the advocates of such instruction were content to have the school 'close its doors or suspend its operations'—that is, dismiss classes in their entirety, without discrimination—instead of seeking to use the public schools as the instrument for securing attendance at denominational classes." *Zorach* v. *Clauson*, 343 U. S. 306, 323 (dissenting opinion of Mr. Justice Frankfurter).

[17] See, *e. g.*, the description of a plan permitting religious instruction off school property contained in *McCollum* v. *Board of Education*, 333 U. S. 203, 224 (concurring opinion of Mr. Justice Frankfurter):

"Accordingly, Wirt's plan sought to rotate the schedules of the children during the school-day so that some were in class, others were in the library, still others in the playground. And some, he suggested to the leading ministers of the City, might be released to attend religious classes if the churches of the City cooperated and provided them. They did, in 1914, and thus was 'released time' begun. The religious teaching was held on church premises and the public schools had no hand in the conduct of these church schools. They did not supervise the choice of instructors or the subject matter taught. Nor did they assume responsibility for the attendance, conduct or achievement of the child in a church school; and he received no credit for it. The period of attendance in the religious schools would otherwise have been a play period for the child, with the result that the arrangement did not cut into public school instruction or truly affect the activities or feelings of the children who did not attend the church schools."

however, I think we would err if we *assumed* such coercion in the absence of any evidence.[18]

Viewed in this light, it seems to me clear that the records in both of the cases before us are so seriously deficient as to render impossible an informed or responsible decision. Both cases involve provisions which explicitly permit any student who wishes, to be excused from participation in the exercises. There is no evidence in either case as to whether there would exist any coercion of any kind upon a student who did not want to participate. No evidence at all was adduced in the *Murray* case, because it was decided upon a demurrer. All that we have in that case, therefore, is the conclusory language of a pleading. While such conclusory allegations are acceptable for procedural purposes, I think that the nature of the constitutional problem involved here clearly demands that no decision be made except upon evidence. In the *Schempp* case the record shows no more than a subjective prophecy by a parent of what he thought would happen if a request were made to be excused from participation in the exercises under the amended statute. There is no evidence whatever as to what might or would actually happen, nor of what administrative arrangements the school actually might or could make to free from

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[18] Cf. "The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school boards of the nation, . . . is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation." *McCollum* v. *Board of Education*, 333 U. S. 203, 237 (concurring opinion of Mr. Justice Jackson).

pressure of any kind those who do not want to participate in the exercises. There were no District Court findings of any kind on this issue, since the case under the amended statute was decided exclusively on Establishment Clause grounds. 201 F. Supp. 815.

It is conceivable that these school boards, or even all school boards, might eventually find it impossible to administer a system of religious exercises during school hours in such a way as completely to free from any kind of official coercion those who do not want to participate.[19] But I think we must not assume that school boards so lack the qualities of inventiveness and good will as to make impossible the achievement of that goal.

I would remand both cases for further proceedings.

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[19] For example, if the record in the *Schempp* case contained proof (rather than mere prophecy) that the timing of morning announcements by the school was such as to handicap children who did not want to listen to the Bible reading, or that the excusal provision was so administered as to carry any overtones of social inferiority, then impermissible coercion would clearly exist.