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

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

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Recirculated:

Nos. 142 and 119.—October Term, 1962.

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.
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.

[May —, 1963.]

Mr. Justice Brennan, concurring.

Almost a century and a half ago, John Marshall, in *McCulloch* v. *Maryland,* enjoined: ". . . we must never forget, that it is *a constitution* we are expounding." 4 Wheat. 316, 407. This Court's historic duty to expound the meaning of the Constitution has encountered few issues more delicate or more demanding than that of the relationship between religion and the public schools. Since undoubtedly we are "a religious people whose institutions presuppose a Supreme Being," *Zorach* v. *Clauson,* 343 U. S. 306, 313, deep feelings are aroused when aspects of that relationship are challenged as violative of the First Amendment's proscriptions that government may make "no law respecting an establishment of religion, or

prohibiting the free exercise thereof." Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when applied in the school classroom. Nevertheless it is this Court's inescapable responsibility to apply the prohibitions of the First Amendment to prayers in the public schools if this is required to give effect to the Amendment's commands that government keep a distance from the sphere of religion, and not abridge the individual's freedom to exercise his own religion or no religion.

When John Locke ventured in 1689, "I esteem it above all things necessary to distinguish exactly the business of government from that of religion, and to settle the just bounds that lie between the one and the other," [1] his statement anticipated the purpose of the First Amendment but not the difficulties in defining those "just bounds." For the hard fact is that the line which separates the secular from the sectarian in American life is, and probably always will be, exceedingly elusive. The difficulty of delineation inheres in a paradox which is central to our scheme of government. For while our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may neither foster nor discourage religious worship or belief. The forceful and explicit constitutional mandate against governmental intervention expresses a deliberate and considered decision by us, the governed, that such matters are to be left to the conscience of the citizen—and lays down as a basic postulate of the relation between the citizen and his government that "the rights of conscience are, in their

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[1] Locke, A Letter Concerning Tolerance (1689), 39.

nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand. . . ." [2]

I join fully in the opinion and the judgment of the Court. I see no escape from the conclusion that the exercises called in question in these two cases violate the constitutional mandate. The reasons we gave only last Term in *Engel* v. *Vitale,* 370 U. S. 421, for finding in the New York Regents prayer an impermissible establishment of religion warrant no different treatment of the practices involved in these cases. The nexus between the secular and the sectarian is neither less tightly drawn nor less dangerous here, and it is constitutionally irrelevant that the State has not composed the material for the inspirational exercises presently involved. It should not be necessary to observe that our holding does not declare that the First Amendment manifests hostility to the practice or teaching of religion, but only announces an application of prohibitions embedded in the Bill of Rights in recognition of historic needs shared by church and state alike. We could not in my view reach a contrary result without being unfaithful to the mandate of the First Amendment, and thereby inviting that discord which the Founding Fathers sought to prevent from too close a union between religion and government.

The difficulty of the issue and the deep conviction with which views on both sides are held seem to me to justify detailing at some length my reasons for joining the Court's judgment and opinion.

I.

Opinions in earlier cases have discussed at length the context and original understanding of the religious guar-

[2] Representative Daniel Carroll of Maryland during debate upon the proposed Bill of Rights in the First Congress, 1 Annals of Cong. 730 (August 15, 1789).

antees of the First Amendment. This is particularly true of both the opinion of the Court and the dissenting opinion of Mr. Justice Rutledge in *Everson* v. *Board of Education*, 330 U. S. 1, 28. More recently we carefully canvassed that history as it bore particularly upon the meaning of the Establishment Clause. *McGowan* v. *Maryland*, 366 U. S. 420, 440–444; *Engel* v. *Vitale*, *supra*, at 430–435. I would add nothing to the historical materials there collected, nor have I any doubt respecting the soundness of the conclusions drawn from that history. They prove beyond successful challenge that the prohibitions were indelibly written into our organic law to prevent the use of the machinery of government to aid or discourage the practice of religion, or to promote or inhibit the choice of any religion or the espousal of no religion.

But an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve specific problems. The very question before us in the instant cases has, for example, aroused vigorous dispute whether the architects of the First Amendment—James Madison and Thomas Jefferson particularly—understood the prohibition against "any law respecting establishment of religion" to foreclose devotional exercises in the public schools.[3] It might be that Jefferson and Madison would have held such exercises to be permissible—although even in Jefferson's case serious doubt is suggested by his warning against "putting the Bible and Testament into the

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[3] See Healey, Jefferson on Religion in Public Education (1962); Boles, The Bible, Religion and the Public Schools (1961), 16–21; Butts, The American Tradition in Religion and Education (1950), 119–130; Cahn, On Government and Prayer, 37 N. Y. U. L. Rev. 981 (1962); Costanzo, Thomas Jefferson, Religious Education and Public Law, 8 J. Pub. Law 81 (1959); Comment, The Supreme Court, the First Amendment, and Religion in the Public Schools, 63 Col. L. Rev. 73, 79–83 (1963).

hands of the children at an age when their judgments are not sufficiently matured for religious inquiries." [4] But I doubt that their view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases. A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those mischiefs which the Framers deeply feared. Whether or not modern governmental practices

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[4] Jefferson's caveat was in full:

"Instead, therefore, of putting the Bible and Testament into the hands of the children at an age when their judgments are not sufficiently matured for religious inquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history." 2 Writings of Thomas Jefferson (Memorial ed. 1903) 204.

Compare Jefferson's letter to his nephew, Peter Carr, when the latter was about to begin the study of law, in which Jefferson outlined a suggested course of private study of religion since "[y]our reason is now mature enough to examine this object." Letter to Peter Carr, August 10, 1787, in Padover, The Complete Jefferson (1943), 1058. Jefferson seems to have opposed sectarian instruction at any level of public education, see Healey, Jefferson on Religion in Public Education (1962), 206–208, 256, 264–265. The absence of any mention of religious instruction in the projected elementary and secondary schools contrasts significantly with Jefferson's quite explicit proposals concerning religious instruction at the University of Virginia. His draft for "A Bill for the More General Diffusion of Knowledge" in 1779, for example, outlined in some detail the secular curriculum for the public schools, while avoiding any references to religious studies. See Padover, *supra*, at 1048–1053. The later draft for an "Act Establishing Elementary Schools" which Jefferson submitted to the Virginia General Assembly in 1817 provided that "no religious reading, instruction or exercise, shall be prescribed or practiced inconsistent with the tenets of any religious sect or denomination." Padover, *supra*, at 1076. Reliance upon Jefferson's undoubted willingness to permit certain religious instruction at the University seems, therefore, to lend little support to such instruction in the elementary and secondary schools. Compare Costanzo, Thomas Jefferson, Religious Education and Public Law, 8 J. Pub. Law 81, 101–106 (1959).

offend the constitutional ban against laws "respecting an establishment of religion" requires an appraisal of their tendency to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.[5] Our task is to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the Twentieth century." *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 639.

A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected. First, on our precise problem the historical record is at best ambiguous; and statements can readily be found to support either side of the proposition. The ambivalence of history is understandable if we recall the nature of the problems of church and state uppermost in the thinking of the statesmen who fashioned the reli-

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[5] Cf. Mr. Justice Rutledge's observation in *Everson* v. *Board of Education,* 330 U. S. 1, 52–54 (dissenting opinion). See also Fellman Separation of Church and State in the United States: A Summary View, 1950 Wis. L. Rev. 427, 428–429 (1950); Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt. L. Rev. 561, 569 (1961). One author has suggested these reasons for cautious application of the history of the Constitution's religious guarantees to contemporary problems:

"First, the brevity of Congressional debate and the lack of writings on the question by the framers make any historical argument inconclusive and open to serious question. Second, the amendment was designed to outlaw practices which had existed before its writing, but there is no authoritative declaration of the specific practices at which it was aimed. And third, most of the modern religious-freedom cases turn on issues which were at most academic in 1789 and perhaps did not exist at all. Public education was almost nonexistent in 1789, and the question of religious education in public schools may not have been foreseen." Beth, The American Theory of Church and State (1958), 88.

gious guarantees, concerned as they were with a far more flagrant intrusion of government into the realm of religion than any that our century has witnessed.[6] Theirs was not the comparatively subtle problem whether the use of public facilities for devotional exercises was an "establishment," but the much more ominous issue of official preference for a single sect to the exclusion of others. The lesser degree of intrusion revealed in a requirement of religious exercises in public institutions would understandably have aroused little sense of urgency in light of the Framers' immediate concern with full and formal establishments.

Second, the structure of American education has undergone a profound and remarkable change since the First Amendment was written. In the context of our modern emphasis upon public education available to all citizens, any view of the eighteenth century as to whether the exercises are an "establishment" really have little significance in helping us to a decision. Education, as the Framers knew it, seldom transcended a limited system of private schools more often than not under strictly sectarian supervision. Only gradually did control of education

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[6] See generally, for discussion of the early efforts for disestablishment of the established colonial chruches, and of the conditions against which the proponents of separation of church and state contended, Sweet, The Story of Religion in America (1950), c. XIII; Cobb, The Rise of Religious Liberty in America (1902), c. IX; Eckenrode, Separation of Church and State in Virginia (1910); Brant, James Madison—The Nationalist, 1780–1787 (1948), c. XXII; Bowers, The Young Jefferson (1945), 193–195; Butts, The American Tradition in Church and State (1950), c. II. Compare also Alexander Hamilton's conception of "the characteristic difference between a tolerated and established religion" and his grounds of opposition to the latter, in his remarks on the Quebec Bill in 1775, 2 Works of Alexander Hamilton (Hamilton ed. 1905) 133–138.

pass largely to public officials.[7] It would therefore hardly be surprising if no one objected to the nearly universal devotional exercises in the schools of the young republic; even today religious ceremonies in church-

[7] The origins of the modern movement for free state-supported education cannot be fixed with precision. In England, the Levellers unavailingly urged in their platform of 1649 the establishment of free primary education for all, or at least for boys. See Brailsford, The Levellers and the English Revolution (1961), 534. In the North American Colonies, education was almost without exception under private sponsorship and supervision, frequently in control of the dominant Protestant sects. This condition prevailed after the Revolution and into the first quarter of the nineteenth century. See generally Mason, Moral Values and Secular Education (1950), c. II; Thayer, The Role of the School in American Society (1960), c. X; Greene, Religion and the State: The Making and Testing of the American Tradition (1941), 120–122. Thus, Virginia's colonial Governor Berkeley exclaimed in 1671: "I thank God there are no free schools nor printing, and I hope we shall not have them these hundred years; for learning has brought disobedience, and heresy, and sects into the world . . . ." Bates, Religious Liberty: An Inquiry (1945), 327.

The exclusively private control of American education did not, however, quite survive Berkeley's expectations. Benjamin Franklin's proposals in 1749 for a Philadelphia Academy heralded the dawn of publicly supported secondary education, although the proposal did not bear immediate fruit. See Johnson and Yost, Separation of Church and State in the United States (1948), 26–27. Jefferson's elaborate plans for a public school system in Virginia came to naught after the defeat in 1796 of his proposed Elementary School Bill, which found little favor among the wealthier legislators. See Bowers, The Young Jefferson (1945), 182–186; Eckenrode, Separation of Church and State in Virginia (1910), 139. It was not until the 1820's and 1830's, under the impetus of Jacksonian democracy, that a system of public education really took root in the United States. See Beard, The Rise of American Civilization (1937), 810–816. One force behind the development of secular public schools may have been a growing dissatisfaction with the tightly sectarian control over private education, see Harner, Religion's Place in General Education (1949), 29–30. Yet the burgeoning public school systems did not immediately supplant the old sectarian and private institutions; Alexis de Tocqueville,

supported private schools encounter no constitutional objection.

Third, in our religious composition we are a vastly more diverse people than were our forefathers. They knew

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for example, remarked after his tour of the Eastern States in 1831 that "[a]lmost all education is entrusted to the clergy." 1 Democracy in America (Bradley ed. 1945) 309, n. 4. And compare Lord Bryce's observations, a half century later, on the still largely denominational character of American higher education, 2 The American Commonwealth (1933) 734–735.

Efforts to keep the public schools of the early nineteenth century free from sectarian influence were of two kinds. One took the form of constitutional provisions and statutes adopted by a number of States forbidding appropriations from the public treasury for the support of religious instruction in any manner. See Moehlman, The Wall of Separation between Church and State (1951), 132–134. The other took the form of measures directed against the use of sectarian reading and teaching materials in the schools. The texts used in the earliest public schools had been largely taken over from the private academies, and retained a strongly religious character and content. See Nichols, Religion and American Democracy (1959), 64–80; Kinney, Church and State, The Struggle for Separation in New Hampshire, 1630–1900 (1955), 151–155. In 1827, however, Massachusetts enacted a statute providing that school boards might not thereafter "direct any school books to be purchased or used in any of the schools . . . which are calculated to favor any particular religious sect or tenet." 2 Stokes, Church and State in the United States (1950), 53. For further discussion of the background of the Massachusetts law and difficulties in its early application, see Dunn, What Happened to Religious Education? (1958), c. IV. As other States followed the example of Massachusetts, the use of sectarian texts was in time as widely prohibited as the appropriation of public funds for religious instruction.

Concerning the evolution of the American public school systems free of sectarian influence, compare Mr. Justice Frankfurter's account:

"It is pertinent to remind that the establishment of this principle of Separation in the field of education was not due to any decline in the religious beliefs of the people. Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor

differences chiefly among Protestant sects, scarcely comparable to the heterogeneity of a nation which comprehends not only the divergent views of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.[8] See *Torcaso* v. *Watkins*, 367 U. S. 488, 495. In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, deeply devout and nonbelievers alike.

Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must thus find its measure in broad purposes, not in specific practices. Tested by such a standard, that history persuades me, as it does the Court,

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rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or public school was the means of reconciling freedom in general with religious freedom. 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." *Illinois ex rel. McCullom* v. *Board of Education*, 333 U. S. 203, 216.

[8] The comparative religious homogeneity of the United States at the time the Bill of Rights was adopted has been considered in Haller, The Puritan Background of the First Amendment, in Read ed., The Constitution Reconsidered (1938), 133–134; Beth, The American Theory of Church and State (1958), 74; Kinney, Church and State, The Struggle for Separation in New Hampshire, 1630–1900 (1955), 155–161. Significantly, Madison suggested in the Fifty-first Federalist that the religious diversity which existed at the time of the Constitutional Conventon constituted a source of strength for religious freedom, much as the multiplicity of economic and political interests enhanced the security of other civil rights. The Federalist (Cooke ed. 1961) 351–352.

that the devotional exercises carried on in the Baltimore and Abington schools offend the First Amendment because they sufficiently threaten in our day those substantive evils the fear of which called forth the Establishment Clause of the First Amendment. It is "*a Constitution* we are expounding" and our interpretation of the First Amendment must necessarily be sensitive to the much more highly charged nature of religious questions in contemporary society.

Fourth, the American experiment in free public education available to all children has been shaped in large measure by the dramatic evolution of the religious diversity of the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against too close a union between religion and government. The public schools are supported entirely, in most communities, by public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may learn about and be inspired by a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and national, patriotic and democratic.

Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to

the public school system is preeminently in the service of reserving that choice to the individual parent, rather than delegating it to the majority of voters in each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private, or sectarian education, which offers discrete values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public school from private or sectarian pressures. The choice between these very different forms of education is one which—very much like the choice of whether or not to worship—is one which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that choice. The lesson of history—drawn more from the experiences of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent.

II.

We do well before reviewing our various decisions which have considered and refined the concept of establishment to put aside some cases which, instead of aiding, have rather confused the solution of our problem. These cases fall roughly into three groups.

First. There is a line of decisions which stand for no more than the proposition that courts must be strictly neutral toward all religious questions, and especially toward sectarian disputes. This principle was first applied to cases which involved factional struggles for control of a particular church property or hierarchy. The earliest such case is *Watson* v. *Jones,* 13 Wall. 679, which

revolved about a bitter struggle for control of a church. At the core of the struggle was a deep doctrinal disagreement. The Court refused to decide the controversy on the ground that judicial intervention would open up "the whole subject of doctrinal theology, the uses and customs, the written laws, and fundamental organization of every religious denomination. . . ." Courts must above all be neutral, for "The law knows no heresy and is committed to the support of no dogma, the establishment of no sect." [9] 13 Wall., at 728. This principle has recently been reaffirmed and applied in *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94; and *Kreshik* v. *St. Nicholas Cathedral,* 363 U. S. 190.

The mandate of judicial neutrality in theological controversies met its severest test in *United States* v. *Ballard,*

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[9] Cf. *Vidal* v. *Girard's Executors,* 2 How. 127. The principle of judicial nonintervention in essentially religious disputes appears to have been reflected in the decisions of several state courts declining to enforce essentially private agreements concerning the religious education and worship of children of separated or divorced parents. See, *e. g., Hackett* v. *Hackett,* 78 Ohio Abs. 485, 150 N. E. 2d 431; *Stanton* v. *Stanton,* 213 Ga. 545, 100 S. E. 2d 289; *Boerger* v. *Boerger,* 26 N. J. Super. 90, 97 A. 2d 419; Friedman, The Parental Right to Control the Religious Education of A Child, 29 Harv. L. Rev. 485 (1916); 72 Harv. L. Rev. 372 (1958).

Governmental nonintervention in religious affairs and organizations seems assured by Article 26 of the Constitution of India, which provides:

"Subject to public order, morality and health, every religious denomination or any sect thereof shall have the right—

"(a) to establish and maintain institutions for religious and charitable purposes;

"(b) to manage its own affairs in matters of religion;

"(c) to own and acquire movable and immovable property; and

"(d) to administer such property in accordance with law." See 1 Chaudhri, Constitutional Rights and Limitations (1955), 875.

This article does not, however, appear to have completely foreclosed judicial inquiry into the merits of intradenominational disputes, see Gledhill, Fundamental Rights in India (1955), 101–102.

322 U. S. 78. That decision put in sharp relief certain principles which bear directly upon the questions presented in these cases. Ballard was indicted for fraudulent use of the mails in the dissemination of religious literature. He requested that the trial court submit to the jury the question of the truthfulness of the religious views he championed. The requested charge was refused but the Court of Appeals held that the refusal was error and set the conviction aside. This Court in turn reversed the Court of Appeals and reinstated the conviction. We held that the First Amendment command of governmental neutrality in matters of religion foreclosed any judicial inquiry into the truth or falsity of the defendant's religious beliefs. We said, "Man's relation to God was made no concern of the state . . . . He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views . . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs . . . . Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations." 322 U. S., at 86–87.

The dilemma presented by the case was intense. While the alleged truthfulness of *nonreligious* publications would ordinarily have been submitted to the jury, the defendant was deprived of that defense here only because the First Amendment forbids governmental inquiry into the veracity of *religious* beliefs. In dissent Mr. Justice Jackson expressed the concern that under this construction of the First Amendment "prosecutions of this character could easily degenerate into religious persecutions." 322 U. S., at 95. The case shows how elusive is the line which enforces the Amendment's injunction of strict neutrality,

while not manifesting official hostility toward religion [10]—a line which causes much difficulty in the cases now before us. Some might view the result of the *Ballard* case—in that the conviction stood because the defense could not be raised—as a manifestation of hostility. To others it might represent merely strict adherence to the principle of neutrality already expounded in the cases involving doctrinal disputes. Inevitably, rigorous insistence upon neutrality, justified as essential to untrammelled religious liberty, may appear to border upon religious hostility. But in the long view the independence and vitality of both church and state in their respective spheres will be better served by rigid adherence to the neutrality principle. If the choice is often difficult, the difficulty is endemic to First Amendment issues implicating the religious guarantees. Freedom of religion will be seriously jeopardized if we admit exceptions for no better reason than concern that charges of hostility may be more strongly expressed in some cases than in others.

Second. There is a line of cases which touch matters of religion but in fact raise no constitutional issue under

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[10] For a discussion of the difficulties inhering in the *Ballard* case, see Kurland, Religion and the Law (1962), 75–80. This Court eventually reversed the convictions on the quite unrelated ground that women had been systematically excluded from the jury, *Ballard* v. *United States*, 329 U. S. 187. For discussions of the difficulties in an interpretation and application of the First Amendment which foster the objective of neutrality without hostility, see, *e. g.*, Katz, Freedom of Religion and State Neutrality, 20 U. of Chi. L. Rev. 426, 438 (1953); Kauper, Church, State and Freedom: A Review, 52 Mich. L. Rev. 829, 842 (1954). Compare, for an interesting apparent attempt to avoid the *Ballard* problem at the international level, Article 3 of the Multilateral Treaty between the United States and other American Republics, which provides that extradition will not be granted, *inter alia*, when "the offense is . . . directed against religion." Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed. 1949), 316.

the First Amendment. *Bradfield* v. *Roberts,* 175 U. S. 281, is illustrative. That case involved challenges to a federal grant to a hospital administered by a Roman Catholic order. The Court rejected the claim that the hospital's allegedly sectarian control disqualified it as a recipient of federal funds. But the holding turned in fact upon the complete absence in the record of evidence of any sectarian affiliation or character. The Court refused to go behind the hospital's charter and by-laws, which revealed no sectarian influence.[11]

Quick Bear v. *Leupp,* 210 U. S. 50, is another illustration. The immediate question there was one of statutory construction, although in its origins the issue of the case involved the constitutionality of the use of federal funds to support sectarian education on Indian reservations. Congress had already prohibited federal grants for that purpose and therefore removed the constitutional question leaving only the issue whether the statute authorized the appropriation for religious teaching of Treaty funds held by the Government in trust for the Indians. Since these were the Indians' own funds, the Court held only that they might direct the use of such funds for such educational purposes as they chose, and that the supervision of expenditures through procedures administered by the Treasury did not inject into the case any issue as to the propriety of the use of federal moneys.[12] Indeed, the Court expressly approved the reasoning of the Court of

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[11] See Kurland, Religion and the Law (1962), 32–34.

[12] Compare the treatment of an apparently very similar problem in Article 28 of the Constitution of India:

"(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

"(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution." 1 Chaudhri, Constitutional Rights and Limitations (1955), 875–876, 939.

Appeals that to deny the Indians the right to spend their own moneys for religious purposes of their choice might well infringe the free exercise of their religion: "It seems inconceivable that Congress should have intended to prohibit them from receiving religious education at their own costs if they so desired it." This case, however, forecast an increasingly troublesome First Amendment paradox: that the logical interrelationship between the establishment and free exercise clauses may produce situations where a remedy against an apparent establishment must be withheld in order to avoid an infringement upon rights of free exercise. That paradox was not squarely presented in *Quick Bear*, but the care taken by the Court to avoid a constitutional confrontation bespeaks an awareness of possible conflicts between the two clauses. I shall come back to this problem later, *infra*, p. ——.

A third case in this group is *Cochran* v. *Louisiana State Board*, 281 U. S. 371, which presented a challenge to a state statute providing public funds to support a loan of free text books to pupils of both public and private schools. The constitutional issues in this Court concerned only the claim that this program amounted to a taking of private property for nonpublic use. The Court rejected the claim on the ground that no private use of property was involved; "one cannot doubt that the taxing power of the state is exerted for a public purpose." The case therefore raised no issue under the First Amendment.[13]

Pierce v. *Society of Sisters*, 268 U. S. 510, should also be read in my view as neither presenting nor deciding any question under the First Amendment. There a Catholic parochial school and a private but nonsectarian military academy challenged a state law requiring all children

[13] See Kurland, Religion and the Law (1962), 28–31; Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis. L. Rev. 427, 442 (1950).

between certain ages to attend the public schools. This Court held the law invalid as an arbitrary and unreasonable interference both with the rights of the schools and with the liberty of the parents of the children who attended them. The due process guarantee of the Fourteenth Amendment "excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." 268 U. S., at 535. While one of the plaintiffs was indeed a parochial school, the case obviously decided no First Amendment question but recognized only the constitutional right to establish and patronize private schools—including parochial schools—which meet the state's reasonable minimum curricular requirements. It was mere accident that the title of the case included the Society of Sisters; it might equally have designated as appellee the Overseers of the Hill Military Academy.

Third. Another line of cases concerns the Free Exercise Clause and present no issues under the Establishment Clause. Most of these cases have considered objections of certain religious minorities to the sanctions or prohibitions of general nonreligious legislation governing conduct and behavior. *Reynolds* v. *United States,* 98 U. S. 145, involved the claim that a religious belief in the sanctity of plural marriage prevented the application to members of a particular sect of nondiscriminatory legislation against bigamy and polygamy. The Court rejected the claim, saying:

> "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices . . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to per-

mit every citizen to become a law unto himself. Government could exist only in name under such circumstances." [14] 98 U. S., at 166–167.

Davis v. *Beason*, 133 U. S. 333, similarly involved the claim that the First Amendment insulated from civil punishment all practices inspired or motivated by religious beliefs. The claim was easily rejected: "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society." 133 U. S., at 342–343. See also *Mormon Church* v. *United States*, 136 U. S. 1; *Jacobson* v. *Massa-*

[14] This distinction, implicit in the First Amendment, had been made explicit in the original Virginia Bill of Rights provision that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrates, unless, under color of religion, any man disturb the peace and happiness or safety of society." See Cobb, The Rise of Religious Liberty in America (1902), 491. Concerning various legislative limitations and restraints upon religiously motivated behavior which endangers or offends society, see Manwaring, Render Unto Caesar: The Flag-Salute Controversy (1962), 41–52; Hudspeth, Separation of Church and State in America, 33 Tex. L. Rev. 1035, 1055 (1955). Various courts have applied this principle to proscribe certain religious exercises or activities which threatened the safety or morals of the participants or the rest of the community, *e. g.*, *State* v. *Massey*, 229 N. C. 734, 51 S. E. 2d 179; *Harden* v. *State*, 188 Tenn. 17, 216 S. W. 2d 708; *Lawson* v. *Commonwealth*, 291 Ky. 437, 164 S. W. 2d 972; cf. *Sweeney* v. *Webb*, 76 S. W. 766 (Tex. Civ. App.).

That the principle of these cases, and the distinction between belief and behavior, are susceptible of perverse application, may be suggested by Oliver Cromwell's mandate to the besieged Catholic community in Ireland:

"As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of Parliament of England prevails shall that be permitted." Quoted in Hook, The Paradoxes of Freedom (1962), 23.

chusetts, 197 U. S. 11; *Prince* v. *Massachusetts,* 321 U. S. 158; *Cleveland* v. *United States,* 329 U. S. 14.

But we must not confuse the issue of governmental power to *regulate or prohibit* conduct motivated by religious beliefs with the quite different problem of governmental authority to *compel* behavior offensive to religious principles. In *Hamilton* v. *Regents,* 293 U. S. 245, the question was that of the power of a State to compel students at the State University to participate in military training exercises against their religious convictions. The validity of the statute was sustained against claims based upon the First Amendment. But the decision rested on a very narrow principle: since there was neither a constitutional right nor a legal obligation to attend the State University, the condition of participation in military training exercises, reflecting a legitimate state interest, might properly be imposed upon those who chose to attend. Although the rights protected by the First and Fourteenth Amendments were recognized to include "the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training," the Amendment did not operate to free such students from the military training obligations if they chose to attend the University. Justices Brandeis, Cardozo and Stone, concurring separately, agreed that the requirement infringed no constitutionally protected liberties. They added, however, that the case presented no question under the Establishment Clause. The military instruction program was not an establishment since it in no way involved "instruction in the practice of tenets of a religion." 293 U. S., at 266. Since the only question was one of free exercise they concluded, like the majority, that the strong state interest in training a citizen militia avoided imper-

missible abridgment of free exercise rights, at least so long as attendance at the University was voluntary.[15]

Hamilton has not been overruled, although *United States* v. *Schwimmer,* 297 U. S. 644, and *United States* v. *MacIntosh,* 283 U. S. 605, upon which the Court there relied, have since been overruled by *Girouard* v. *United States,* 328 U. S. 61. But whatever may be the continuing vitality of *Hamilton* with respect to higher education, we recognized its inapplicability to cognate questions in the public primary and secondary schools when we held in *West Virginia Board of Education* v. *Barnette, supra,* that a State had no power to expel from public schools students who refused on religious grounds to comply with a daily flag salute requirement. Of course, such a requirement was no more a law "respecting an establishment of religion" than the California law compelling the college students to take military training. The *Barnette* plaintiffs, moreover, did not ask the injunction of the whole exercise, but only an excuse or exemption for those students whose religious beliefs were offended by required participation in the ceremony. The key to the holding that such a requirement abridged rights of free exercise lay in the fact that attendance at school was not voluntary but compulsory. The Court said:

> "This issue is not prejudiced by the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitu-

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[15] With respect to the decision in *Hamilton* v. *Regents,* compare two recent comments: Kurland, Religion and the Law (1962), 40; with French, Comment, Unconstitutional Conditions: An Analysis, 50 Geo. L. J. 234, 246 (1961).

> tion. . . . Hamilton v. Regents, 293 U. S. 245. In the present case attendance is not optional." 319 U. S., at 631–632.

The *Barnette* decision made another significant point. The Court held that the State must make participation in the exercise voluntary for all students and not alone for those who found participation obnoxious on religious grounds. In short, the State could not compel a particular child to reveal his religious views to the school authorities to or explain the reasons for his dissent as the condition of excusal.

The distinctions between *Hamilton* and *Barnette* are, I think, crucial to the resolution of the cases before us. The different results of those cases are attributable only in part to any difference in the strength of the particular state interests which the respective statutes were designed to serve. Far more significant is the fact that *Hamilton* dealt with the voluntary attendance at college of young adults, while *Barnette* involved the compelled attendance of young children at elementary and secondary schools.[16] This distinction fully supports a difference in constitutional results. And it is with the involuntary attendance of young school children that we are exclusively concerned in the cases now before the Court.

III.

No one questions that the Framers of the First Amendment intended to restrict exclusively the powers of the Federal Government.[17] Whatever limitations that

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[16] See generally as to the background and history of the *Barnette* case, Manwaring, Render Unto Caesar: The Flag-Salute Controversy (1962), especially at 252–253.

[17] See *Barron* v. *Baltimore*, 7 Pet. 243; *Permoli* v. *Municipality No. 1*, 3 How. 589, 609; cf. *Fox* v. *Ohio*, 5 How. 410, 434–435; *Withers* v. *Buckley*, 20 How. 84, 89–91. As early as 1825, however, at least one commentator argued that the guarantees of the Bill of

Amendment now imposes upon the States derive, of course, from the Fourteenth Amendment. The process of absorbing the religious guarantees of the First Amendment as protections against the States under the Fourteenth Amendment began with the Free Exercise Clause. As early as 1923 the Court held that the protections of the Fourteenth included at least the citizen's freedom "to worship God according to the dictates of his own conscience." [18] *Meyer* v. *Nebraska,* 262 U. S. 390, 399. See also *Hamilton* v. *Regents, supra,* at 262. *Cantwell* v. *Connecticut,* 310 U. S. 296, completed in 1940 the process of absorption of the guarantees of free exercise of religion, and recognized their dual aspect: the Court affirmed freedom of belief as an absolute liberty; but recognized that while conduct may also be comprehended by the Free Exercise Clause, conduct "remains subject to regulations for the protection of society." 310 U. S., at 303–304. This was a distinction already drawn by *Reynolds* v. *United States, supra;* from the beginning this Court has recognized that government must treat more delicately the religious beliefs of the citizen than the behavioral manifestations of those beliefs.

Rights, excepting only those of the First and Seventh Amendments, were meant to limit the powers of the States, Rawle, A View of the Constitution of the United States of America (1825), 120–121.

[18] In addition to the statement of this Court in *Meyer,* at least one state court assumed as early as 1921 that claims of abridgment of the free exercise of religion in the public schools must be tested under the guarantees of the First Amendment as well as those of the state constitution. *Hardwick* v. *Board of School Trustees,* 54 Cal. App. 696, 704–705, 205 P. 49, 52. See Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal. L. Rev. 751, 772 (1962). Even before the Fourteenth Amendment, New York State enacted a general common school law in 1844 which provided that no religious instruction should be given which could be construed to violate the rights of conscience "as secured by the Constitution of the state and of the United States." N. Y. Laws, 1944, c. 300, § 12.

The absorption of the Establishment Clause has come about more slowly and its process has been less clearly defined. It has been suggested, for example, that the prohibitions against establishment were understood by the Framers to proscribe not only any establishment of an official federal church but quite as much any attempt by Congress at disestablishment of official state churches.[19] Were that the full scope of the establishment limitation it might be difficult to explain the absorption of the Establishment Clause in the Fourteenth Amendment. It has also been contended that the draftsmen of the Fourteenth Amendment had no intention of circumscribing the residual powers of the States to aid or support religious activities and institutions.[20] That argument relies in part

[19] See, *e. g.*, Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash. U. L. Q. 371, 373–382 (1954); Katz, Religion and American Constitutions, Address at Northwestern University Law School, March 20, 1963, pp. 6–7. But see the debate in the Constitutional Convention over the question whether it was necessary or advisable to include among the enumerated powers of the Congress a power "to establish an University, in which no preferences or distinctions should be allowed on account of religion." At least one delegate thought such an explicit delegation "is not necessary," for "[t]he exclusive power at the Seat of Government, will reach the object." The proposal was defeated by only two votes. 2 Farrand, Records of the Federal Convention of 1787 (1911), 616.

[20] See Fairman and Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949); Meyer, Comment, The Blaine Amendment and the Bill of Rights, 64 Harv. L. Rev. 939 (1951). Cf. Cooley, Principles of Constitutional Law (2d ed. 1891), 213–214. Compare Professor Freund's comment:

"Looking back, it is hard to see how the Court could have done otherwise, how it could have persisted in accepting freedom of contract as a guaranteed liberty without giving equal status to freedom of press and speech, assembly, and religious observance. What does not seem so inevitable is the inclusion within the Fourteenth Amendment of the concept of nonestablishment of religion in the sense of forbidding nondiscriminatory aid to religion, where there is no inter-

upon the express terms of the abortive Blaine Amendment—proposed several years after the adoption of the Fourteenth Amendment—which would have added to the First Amendment a provision that "no state shall make any law respecting an establishment of religion . . . ." Such a restriction would have been superfluous, it is said, if the Fourteenth Amendment had already made the Establishment Clause binding upon the States.

The argument proves too much, for the Fourteenth Amendment's protection of the free exercise of religion can hardly be questioned; yet the Blaine Amendment would also have added an explicit protection against state legislation in that respect.[21] Even if we assume that the draftsmen of the Fourteenth Amendment saw no immediate connection between its protections against state action infringing personal liberty and the guarantees of the First Amendment, it is certainly too late in the day to suggest that their assumed inattention to the question

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ference with freedom of religious exercise." Freund, The Supreme Court of the United States (1961), 58–59.

Compare also Kauper, Frontiers of Constitutional Liberty (1956), c. III; with Pfeffer, Church, State and Freedom (1953), 127–132.

[21] The Blaine Amendment, 4 Cong. Rec. 5580, included also a more explicit provision that "no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination . . . ." The Amendment passed the House but failed to obtain the requisite two-thirds vote in the Senate. See 4 Cong. Rec. 5595. The prohibition which the Blaine Amendment would have engrafted onto the American Constitution has been incorporated in the constitutions of other nations; compare Article 28 (1) of the Constitution of India ("No religious instruction shall be provided in any educational institution wholly maintained out of State funds"); Article XX of the Constitution of Japan (". . . the State and its organs shall refrain from religious education or any other religious activity.") See 1 Chaudhri, Constitutional Rights and Limitations (1955), 875, 876.

dilutes the force of these constitutional guarantees in their application to the States.[22] It is enough to conclude that the superlative religious liberty which the Constitution protects would be helpless against governmental invasion

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[22] Three years after the adoption of the Fourteenth Amendment, Mr. Justice Bradley wrote a letter expressing his views on a proposed constitutional amendment designed to acknowledge the dependence of the Nation upon God, and to recognize the Bible as the foundation of its laws and the supreme ruler of its conduct:

"I have never been able to see the necessity or expediency of the movement for obtaining such an amendment. The Constitution was evidently framed and adopted by the people of the United States with the fixed determination to allow absolute religious freedom and equality, and to avoid all appearance even of a State religion, or a State endorsement of any particular creed or religious sect. . . . And after the Constitution in its original form was adopted, the people made haste to secure an amendment that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. This shows the earnest desire of our Revolutionary fathers that religion should be left to the free and voluntary action of the people themselves. I do not regard it as manifesting any hostility to religion, but as showing a fixed determination to leave the people entirely free on the subject.

"And it seems to me that our fathers were wise; that the great voluntary system of this country is quite as favorable to the promotion of real religion as the systems of governmental protection and patronage have been in other countries. And whilst I do not understand that the association which you represent desire to invoke any governmental interference, still the amendment sought is a step in that direction which our fathers (quite as good Christians as ourselves) thought it wise not to take. In this country they thought they had settled one thing at least, that it is not the province of government to teach theology.

". . . Religion, as the basis and support of civil government, must reside, not in the written constitution, but in the people themselves. And we cannot legislate religion into the people. It must be infused by gentler and wiser methods." Miscellaneous Writings of Joseph P. Bradley (1901) 357–359.

For a later phase of the controversy over such a constitutional amendment as that which Justice Bradley opposed, see Finlator, Christ in Congress, 4 J. Church and State 205 (1962).

if the Establishment Clause forbade only religious preferences on the part of the Congress. It is, moreover, without significance that many States still recognized established churches at the time of the Bill of Rights,[23] for that fact only confirms what no one doubts, that the First Amendment was *originally* inapplicable to the States, *Permoli* v. *Municipality No. 1 of the City of New Orleans,* 3 How. 589. It is equally clear and much more important that the America into which the Fourteenth Amendment was born had long since dissolved the last of the formal establishments as antithetical to the proper relationship between government and religion.[24] In terms of present needs and conditions, then, the freedoms secured by the Bill of Rights and the Fourteenth Amendment would be ill served if the Establishment Clause, alone among the guarantees of the First Amendment, did not stand between a State and its citizens.

The issue of what particular activities the Establishment Clause forbids the States to undertake is our more immediate concern. In *Everson* v. *Board of Education,* 330 U. S. 1, 15–16, a careful study of the relevant history led the Court to the view, consistently recognized in decisions since *Everson,* that the Establishment Clause embodied the Framers' conclusion that government and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other.

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[23] See generally 1 Stokes, Church and State in the United States (1950), c. V; Cobb, The Rise of Religious Liberty in America (1902), c. IX.

[24] The last formal establishment, that of Massachusetts, was dissolved in 1833. The process of disestablishment in that and other States is described in Cobb, The Rise of Religious Liberty in America (1902), c. X; Sweet, The Story of Religion in America (1950), c. XIII. The greater relevance of conditions existing at the time of adoption of the Fourteenth Amendment is suggested in Note, State Sunday Laws and the Religious Guarantees of the Constitution, 73 Harv. L. Rev. 729, 739–740 (1960).

It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.[25] It has rightly been said of the history of the Establishment Clause that "our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams." Freund, The Supreme Court of the United States (1961), 84.

Our decisions on questions of religious education or religious exercises in the public schools have consistently reflected this dual aspect of the Establishment Clause. *Engel* v. *Vitale* unmistakably has its roots in three earlier cases which, on cognate issues, shaped the contours of the Establishment Clause. First, in *Everson* the Court held that reimbursement by the town of parents for the cost of transporting their children by public carrier to parochial (as well as public and private nonsectarian) schools did not offend the Establishment Clause. Such reimbursements, by easing the financial burden upon Catholic parents, may indirectly have fostered the operation of the Catholic schools, and may thereby indirectly have facilitated the teaching of Catholic principles, serving ultimately a religious goal within the essentially secular curriculum. But this form of governmental assistance was

[25] Compare, *e. g.*, Miller, Roger Williams: His Contribution to the American Tradition (1953), 83; with Madison, Memorial and Remonstrance Against Religious Assessments, reprinted as an Appendix to the dissenting opinion of Mr. Justice Rutledge, *Everson* v. *Board of Education*, 330 U. S. 1, 63–72. See also Cahn, On Government and Prayer, 37 N. Y. U. L. Rev. 981, 982–985 (1962); Jefferson's Act for Establishing Religious Freedom, in Padover, The Complete Jefferson (1943), 946–947; Moulton and Meyers, Report on Appointing Chaplains to the Legislature of New York, in Blau, Cornerstones of Religious Freedom in America (1949), 141–156; Bury, A History of Freedom of Thought (2d ed. 1952), 75–76.

difficult to distinguish from myriad other incidental if not insignificant government benefits enjoyed by religious institutions—fire and police protection, tax exemptions, and the pavement of streets and sidewalks, for example. "The State contributed no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U. S., at 18. Yet even this degree of assistance was thought by four Justices of the *Everson* court to be barred by the Establishment Clause because too perilously close to that public support of religion against which the First Amendment erects an impenetrable barrier.

The other two cases, *Illinois ex rel. McCullom* v. *Board of Education*, 333 U. S. 203, and *Zorach* v. *Clauson*, 343 U. S. 306, can best be considered together. Both involved programs of released time for religious instruction of public school students. There were many similarities between the two programs, but also significant differences which illuminate the constitutional distinction and explain the difference in result. I reject the suggestion that *Zorach* overruled *McCullom* in silence.[26] The distinction which the Court drew in *Zorach* between the two cases is in my view faithful to the function of the Establishment Clause.

I should first note, however, that *McCullom* and *Zorach* do not seem to me distinguishable in terms of the free exercise claims advanced in both cases.[27] The disabilities which the *Zorach* program of released time imposed upon

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[26] See Kauper, Church, State and Freedom: A Review, 52 Mich. L. Rev. 829, 839 (1954); Reed, Church-State and the Zorach Case, 27 Notre Dame Lawyer 529, 539–541 (1952).

[27] See 343 U. S., at 321–322 (Frankfurter, J., dissenting); Kurland, Religion and the Law (1962), 89; Note, 28 Geo. Wash. L. Rev. 579, 601–603 (1960); 30 Ford. L. Rev. 506–507 (1962).

the dissenting child were not different in kind from those of the *McCullom* program. Specifically, the nonparticipant in the *McCullom* program was given secular instruction in a separate room during the times his classmates had religious lessons. The nonparticipant in the *Zorach* program also received secular instruction while his classmates repaired to a place outside the school for religious instructions. Indeed, it could be argued that the New York procedure for separation and classification of the children was more and not less offensive, because the children who elected religious instruction were free to leave the school building while the dissenter was kept behind in the classroom.

But the crucial difference, I think, was that the *McCullom* program offended the Establishment Clause while the *Zorach* program did not. This is not, in my view, because of the difference in public expenditures involved. True, the *McCullom* program involved the regular use of school facilities, classrooms, heat and light and time from the regular school day—even though the actual incremental cost may have been negligible; all religious instruction under the *Zorach* program, by contrast, was carried on entirely off the school premises, and the teacher's part was simply to facilitate the children's release to the churches. The deeper difference was that the *McCullom* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not.[28] The *McCullom* pro-

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[28] Mr. Justice Frankfurter described the effects of the *McCullom* program thus:

"Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. . . . As a result the public school system of Champaign actively furthers

gram, in lending to the support of sectarian instruction all the authority and majesty of the governmentally operated public school system, brought government and religion into that relationship of proximity which the Establishment Clause forbids. To be sure, a religious teacher

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inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care." 333 U. S., at 227–228.

For similar reasons some state courts have enjoined the public schools from employing or accepting the services of members of religious orders even in the teaching of secular subjects, *e. g., Zellers* v. *Huff*, 55 N. M. 501, 236 P. 2d 949; *Berghorn* v. *Reorganized School Dist. No. 8*, 364 Mo. 121, 260 S. W. 2d 573; compare ruling of Texas Commissioner of Education, Jan. 25, 1961, in 63 American Jewish Yearbook (1962), 188. Over a half century ago a New York court sustained a school board's exclusion from the public schools of teachers wearing religious garb on similar grounds:

"Then all through the school hours these teachers . . . were before the children as object lessons of the order and church of which they were members. It is within our common observation that young children . . . are very susceptible to the influence of their teachers, and of the kind of object lessons continually before them under these circumstances and with these surroundings." *O'Connor* v. *Hendrick*, 109 App. Div. 361, 371–372, 96 N. Y. Supp. 161, 169 (1905). See also *Commonwealth* v. *Herr*, 229 Pa. 132, 78 A. 68 (1910).

Also apposite are decisions of several courts which have enjoined the use of parochial schools as part of the public school system, *Harfst* v. *Hoegen*, 349 Mo. 808, 163 S. W. 2d 609; or have invalidated programs for the distribution in public school classrooms of Gideon Bibles, *Brown* v. *Orange County Board of Instruction*, 128 So. 2d 181 (Fla. App.); *Tudor* v. *Board of Education*, 14 N. J. 31, 100 A. 2d 857. In *Tudor*, the court stressed the role of the public schools in the Bible program:

". . . the public school machinery is used to bring about the distribution of these Bibles to the children . . . . In the eyes of the pupils and their parents the board of education has placed its stamp of approval upon this distribution and, in fact, upon the Gideon Bible itself. . . . This is more than mere 'accommodation' of religion permitted in the Zorach case. The school's part in this dis-

presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority which are at the command of the lay teacher for use in secular instruction. The *Zorach* program, in contrast, kept the required distance between government and religion.

More recent decisions have further etched the contours of Establishment. In the *Sunday Law Cases,* we found in state laws compelling a uniform day of rest from worldly labor no violation of the Establishment Clause (*McGowan* v. *Maryland,* 366 U. S. 420). The basic ground of our decision was that, granted the Sunday Laws were first enacted for religious ends, they were continued in force for reasons wholly secular, namely, to provide a universal day of rest and ensure the health and tranquillity of the community. In other words, government may have originally decreed a Sunday day of rest for the impermissible purpose of supporting religion but abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends.

Such was the evolution of the contours of the Establishment Clause before *Engel* v. *Vitale.* There, a year

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tribution is an active one and cannot be sustained on the basis of a mere assistance to religion." 14 N. J., at 51–52, 100 A. 2d, at 868.

The significance of the teacher's authority was recognized by one early state court decision:

"The school being in session, the right to command was vested in the teacher, and the duty of obedience imposed upon the pupils. Under such circumstances a request and a command have the same meaning. A request from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form." *State ex rel. Freeman* v. *Scheve,* 65 Neb. 876, 880, 93 N. W. 169, 170.

ago, we held that the daily recital of the state composed Regents' Prayer constituted an establishment of religion because, although the prayer itself revealed no *sectarian* content or purpose, its nature and meaning were quite clearly *religious*. New York, in authorizing its recitation, had not maintained that distance between government and matters religious commanded by the Establishment Clause when it placed the "power, prestige and financial support of government" behind the prayer. Governmental sponsorship of so inherently religious an exercise in a secular institution threatened both the sanctity of the religious beliefs embodied in the prayer and the religious liberty of those to whose creed either the content of the prayer or the manner of its use was offensive. In *Engel*, as in *McCullom*, it mattered not that the amount of time and expense allocated to the daily recitation may have seemed insubstantial so long as the exercise itself was manifestly religious. Nor did it matter that few children had complained of the practice, for the measure of the seriousness of a breach of the strict command of the Establishment Clause has never been thought to be the number of people who complain of it.

We also held two Terms ago in *Torcaso* v. *Watkins*, *supra*, that a State may not constitutionally require an applicant for the office of Notary Public to swear or affirm that he believes in God. The problem of that case was strikingly similar to the issue presented 20 years before in the flag salute case, *West Virginia Board of Education* v. *Barnette*, *supra*. In neither case was there any claim of establishment of religion, but only of infringement of the individual's religious liberty—in the one case that of the nonbeliever who could not attest to a belief in God; in the other, that of the child whose creed forbade him to salute the flag. But *Torcaso* added a new element not

present in *Barnette*. The Maryland test oath involved an attempt to employ essentially religious (albeit nonsectarian) means to achieve a secular goal to which the means bore no reasonable relationship. No one doubted the State's interest in the integrity of its Notaries Public, but that interest did not warrant the screening of applicants by means of a purely religious test; government, we affirmed, may not use means religious in nature to accomplish secular ends achievable by nonreligious means. The *Sunday Law Cases* were different in that respect. Even if the Sunday Laws retained some vestige of religiousity, they are enforced today for essentially secular objectives which cannot be effectively achieved in modern society except by designating Sunday as the universal day of rest. The Court's opinions demonstrated that problems in selecting or enforcing an alternative day of rest were insuperable. But the teaching of both *Torcaso* and the *Sunday Law Cases* is that government may not employ religious means to serve secular interests, however legitimate, at least without the clearest demonstration that no nonreligious means will suffice.[29]

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[29] Cf., for other illustrations of the principle that where First Amendment freedoms are or may be affected, government must employ those means which will least inhibit the exercise of constitutional liberties, *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147, 161; *Martin* v. *Struthers*, 319 U. S. 141; *Saia* v. *New York*, 334 U. S. 558; *Shelton* v. *Tucker*, 364 U. S. 479, 488–489; *Bantam Books, Inc.*, v. *Sullivan*, 372 U. S. 58, 66, 69–71. See also Note, State Sunday Laws and the Religious Guarantees of the Federal Constitution, 73 Harv. L. Rev. 729, 743–745 (1960); Freund, The Supreme Court of the United States (1961), 86–87; 74 Harv. L. Rev. 613. And compare *Miller* v. *Cooper*, 56 N. M. 355, 244 P. 2d 520 (1952), in which a state court permitted the holding of public school commencement exercises in a church building only because no public buildings in the community were adequate to accommodate the gathering.

IV.

I turn now to the cases before us.[30] The religious nature of the exercises here challenged seems plain. Unless *Engel* v. *Vitale* is to be overruled, or we are to engage in wholly disingenuous distinction, we cannot sus-

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[30] No question has been raised in these cases concerning the standing of these parents to challenge the religious practices conducted in the schools which their children presently attend. Whatever authority *Doremus* v. *Board of Education*, 342 U. S. 429, might have on the question of the standing of one not the parent of children affected by the challenged exercises is not before us in these cases. Neither in *McCullom* nor in *Zorach* was there any reason to question the standing of the parent-plaintiffs under settled principles of justiciability and jurisdiction, whether or not their complaints alleged pecuniary loss or monetary injury. Where, however, the gravamen of the lawsuit is exclusively that of establishment, it may seem illogical to confer standing upon a parent who—though he is concededly in the best position to assert a free-exercise claim—suffers no greater financial hardship than the ordinary taxpayer, whose standing may be open to question. See Sutherland, Establishment According to Engel, 76 Harv. L. Rev. 25, 41–43 (1962). I would suggest several answers to this conceptual difficulty. First, the parent is surely the person most directly and immediately concerned about and affected by the challenged establishment, and to deny him standing either in his own right or on behalf of his child might effectively foreclose judicial injury into serious breaches of the prohibitions of the First Amendment—even though no special monetary injury could be shown. See Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . . ," 1962 Supreme Court Review (1962), 22. Second, the complaint in every case thus far challenging an establishment has set forth at least a colorable claim of infringement of free exercise. When the complaint includes both claims, and neither is frivolous, it would surely be over-technical to say that a parent who does not detail the monetary cost of the exercises to him may ask the court to pass only upon the free-exercise claim, however logically the two may be related. Cf. *Pierce* v. *Society of Sisters*, *supra*; *Truax* v. *Raich*, 239 U. S. 33, 38–39; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 459; *Bell* v. *Hood*, 327 U. S. 678;

tain these practices. Daily recital of the Lord's Prayer and the reading of passages of Scripture are quite as clearly breaches of the command of the Establishment Clause as was the daily use of the rather bland Regents' Prayer in the New York public schools. Indeed, I would suppose that if anything the Lord's Prayer and the Holy Bible are more clearly sectarian, and the present violations of the First Amendment consequently more serious. But the religious exercises challenged in these cases have a long history. And almost from the beginning, Bible reading and daily prayer in the schools have been the subject of debate, criticism by educators and other public officials, and proscription by courts and legislative councils. At the outset, then, we must carefully canvass both aspects of this history.

The use of prayers and Bible readings at the opening of the school day long antedates the founding of our Republic. The Rules of the New Haven Hopkins Gram-

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Bantam Books, Inc., v. *Sullivan*, 372 U. S. 58, 64, n. 6. Finally, the concept of standing is a necessarily flexible one—even though a deficiency with respect to standing will deprive this Court of jurisdiction—designed principally to ensure that the plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions . . . ." *Baker* v. *Carr*, 369 U. S. 186, 204. See generally Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit, 12 Buffalo L. Rev. 35 (1962); Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265 (1961); Sutherland, Due Process and Disestablishment, 62 Harv. L. Rev. 1306, 1327–1332 (1949); Comment, The Supreme Court, the First Amendment, and Religion in the Public Schools, 63 Col. L. Rev. 73, 94, n. 153 (1963). It seems to me that even a cursory examination of the complaints in these two cases and the opinions below discloses that these parents have very real grievances against the respective school authorities which cannot be resolved short of constitutional adjudication.

mar School required in 1684 "That the Scholars being called together, the Mr. shall every morning begin his work with a short prayer for a blessing on his Laboures and their learning . . . ." [31] More rigorous was the provision in a 1682 contract with a Dutch schoolmaster in Flatbush, New York:

> "When the school begins, one of the children shall read the morning prayer, as it stands in the catechism, and close with the prayer before dinner; in the afternoon it shall begin with the prayer after dinner and end with the evening prayer. The evening school shall begin with the Lord's Prayer, and close by singing a psalm." [32]

After the Revolution, the new States uniformly continued these long established practices in the private and the few public grammar schools. The school committee of Boston in 1789, for example, required the city's several schoolmasters "daily to commence the duties of their office by prayer and reading a portion of the Sacred Scriptures . . . ." [33] That requirement was mirrored throughout the original States, and exemplified the universal practice well into the nineteenth century. As the free public schools gradually supplanted the private academies and sectarian schools between 1800 and 1850, morning devotional exercises were retained with few alterations. Indeed, public pressures upon school administrators in many parts of the country would hardly have condoned abandonment of practices to which a century or more of private religious education had accustomed

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[31] Quoted in Dunn, What Happened to Religion Education? (1958), 21.

[32] Quoted, *id.*, at 22.

[33] Quoted in Hartford, Moral Values in Public Education: Lessons From the Kentucky Experience (1958), 31.

the American people.[34] The controversy centered, in fact, principally about the elimination of clearly preferential sectarian practices and textbooks, and the eventual substitution of less offensive nonsectarian exercises and materials.[35]

Statutory prescription of daily religious exercises is, however, of quite recent origin. At the turn of this century, there was but one State—Massachusetts—which had a law making morning prayer or Bible reading obligatory. Statutes elsewhere either permitted such practices or simply left the question to local option. It was not until after 1910 that 11 more States, within a few years, joined Massachusetts in making one or both exercises compulsory.[36] The Pennsylvania law with which we are

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[34] See Culver, Horace Mann and Religion in the Massachusetts Public Schools (1929), for an account of one prominent educator's efforts to satisfy both the protests of those who opposed continuation of sectarian lessons and exercises in public schools, and the demands of those who insisted upon the retention of some essentially religious practices. Mann's continued use of the Bible for what he regarded as nonsectarian exercises represented his response to these cross-pressures. See Mann, Religious Education, in Blau, Cornerstones of Religious Freedom in America (1949), 163–201 (from the Twelfth Annual Report for 1848 of the Secretary of the Board of Education of Massachusetts). See also Boles, The Bible, Religion, and the Public Schools (1961), 21–29.

[35] See 2 Stokes, Church and State in the United States (1950), 572–579; Greene, Religion and the State: The Making and Testing of an American Tradition (1941), 122–126.

[36] *E. g.*, Ala. Code, Tit. 52, § 542; Del. Code Ann., Tit. 14, §§ 4101–4102; Fla. Stat. Ann. § 231.09 (2); Mass. Ann. Laws, c. 71, § 31; Tenn. Code Ann. § 49–1307 (5). Some statutes, like the recently amended Pennsylvania statute involved in *Schempp*, provide for the excusal or exemption of children whose parents do not wish them to participate. See generally Johnson and Yost, Separation of Church and State in the United States (1948), 33–36; Thayer, The Role of the School in American Society (1960), 374–375; Beth, The American Theory of Church and State (1958), 106–107. Compare

concerned in the *Schempp* case, for example, took effect in 1913; and even the Rule of the Baltimore School Board involved in the *Murray* case dates only from 1905. In no State has there ever been a constitutional or statutory prohibition against the recital of prayers or the reading of scripture, although a number of States have outlawed these practices by judicial decision or administrative order. What is noteworthy about the panoply of state and local regulations from which these cases emerge is the relative recency of the statutory codification of practices which have ancient roots, and the rather small number of States which have ever prescribed compulsory religious exercises in the public schools.

The purposes underlying the adoption and perpetuation of these practices are somewhat complex. It is beyond question that the religious benefits and values realized from daily prayer and Bible reading have usually been considered paramount, and quite sufficient to justify the continuation of such practices. To Horace Mann, embroiled in an intense controversy over the role of *sectarian* instruction and textbooks in the Boston public schools, there was little question that the regular use of the Bible—which he thought essentially nonsectarian—would bear fruit in the spiritual enlightenment of his pupils.[37] A contemporary of Mann's, the Commissioner of Educa-

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with the American statutory approach Article 28 (3) of the Constitution of India:

"(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution, or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto." See 1 Chaudhri, Constitutional Rights and Limitations (1955), 876, 939.

[37] See note 34, *supra*.

tion of a neighboring State, expressed a view which many enlightened educators of that day shared:

> "As a textbook of morals the Bible is preeminent, and should have a prominent place in our schools, either as a reading book or as a source of appeal and instruction. Sectarianism, indeed, should not be countenanced in the schools; but the Bible is not sectarian . . . . The Scriptures should at least be read at the opening of the school, if no more. Prayer may also be offered with the happiest effects." [38]

Wisconsin's Superintendent of Public Instruction, writing a few years later in 1858, mirrored the attitude of his eastern colleagues, in that he regarded "with special favor the use of the Bible in public schools, as pre-eminently first in importance among text-books for teaching the noblest principles of virtue, morality, patriotism and good order—love and reverence for God—charity and good will to man." [39]

Such statements reveal the understanding of educators that the daily religious exercises in the schools served broader goals than compelling formal worship of God or fostering church attendance. The religious aims of the educators who adopted and retained such exercises were comprehensive, and in many cases quite devoid of sectarian bias—but the crucial fact is that they were nonetheless religious. While it has been suggested, see pp. —, —, *infra*, that daily prayer and reading of scripture now serve secular goals as well, there can be no doubt that the origins of these practices were purely and unambiguously religious, even where the educator's aim was not to win adherents to a particular creed or faith.

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[38] Quoted from New Hampshire School Reports, 1850, 31–32, in Kinney, Church and State: The Struggle for Separation in New Hampshire, 1630–1900 (1955), 157–158.

[39] Quoted in Boyer, Religious Education of Public School Pupils in Wisconsin, 1953 Wis. L. Rev. 181, 185 (1953).

Almost from the beginning, however, religious exercises in the public schools have been the subject of intense criticism, vigorous debate, and judicial or administrative prohibition. Significantly, educators and school boards early entertained doubts about both the legality and the soundness of opening the school day with compulsory prayer or Bible reading. Particularly in the large Eastern cities, where immigration had exposed the public schools to religious diversities and conflicts unknown to the homogeneous academies of the eighteenth century, local authorities found it necessary even before the Civil War to effect some form of accommodation. In 1843, the Philadelphia School Board adopted two highly significant resolutions:

> "RESOLVED, that no children be required to attend or unite in the reading of the Bible in the Public Schools, whose parents are conscientiously opposed thereto:
>
> "RESOLVED, that those children whose parents conscientiously prefer and desire any particular version of the Bible, without note or comment, be furnished the same." [40]

A decade later, the Superintendent of Schools of New York State issued an even bolder decree that prayers could no longer be required as part of public school activities, and that where the King James Bible was read, Catholic students could not be compelled to attend.[41] This type of accommodation was not restricted to the East Coast; the Cincinnati Board of Education resolved in 1869 that "religious instruction and the reading of religious books, including the Holy Bible, are prohibited in

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[40] Quoted in Dunn, What Happened to Religious Education? (1958), 271.

[41] Quoted in Butts, The American Tradition in Religion and Education (1950), 135–136.

the common schools of Cincinnati, it being the true object and intent of this rule to allow the children of the parents of all sects and opinions, in matters of faith and worship, to enjoy alike the benefit of the common school fund." [42] The Board repealed at the same time an earlier regulation which had required the singing of hymns and psalms to accompany the Bible reading at the start of the school day. And in 1889, the United States Commissioner of Education ventured the view that "There is not enough to be gained from Bible reading to justify the quarrel that has been raised over it." [43]

Thus a great deal of controversy over religion in the public schools had preceded the debate over the Blaine Amendment, precipitated by President Grant's insistence that matters of religion should be left "to the family altar, the church, and the private school, supported entirely by private contributions." [44] There was ample precedent, too, for Theodore Roosevelt's declaration that in the interest of "absolutely non-sectarian public schools" it was "not our business to have the Protestant Bible or the Catholic Vulgate or the Talmud read in those schools." [45] The same principle appeared in the message of an Ohio

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[42] See *Board of Education* v. *Minor*, 23 Ohio St. 211; Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed. 1949), 864.

[43] Report of the United States Commissioner of Education for the Year 1888–1889, Vol. I (1889), 627–628.

[44] Quoted in *Illinois ex rel. McCullom* v. *Board of Education*, *supra*, at 218 (opinion of Frankfurter, J.). See also President Grant's Annual Message to Congress, Dec. 7, 1875, 4 Cong. Rec. 175 *et seq.*, which apparently inspired the drafting and submission of the Blaine Amendment. See Meyer, Comment, The Blaine Amendment and the Bill of Rights, 64 Harv. L. Rev. 939 (1951).

[45] Theodore Roosevelt to Michael A. Schapp, Feb. 22, 1915, 8 Letters of Theodore Roosevelt (Morrison ed. 1954), 893–894.

Governor who vetoed a compulsory Bible-reading bill in 1925:

> "It is my belief that religious teaching in our homes, Sunday schools, churches, by the good mothers, fathers and ministers of Ohio is far preferable to compulsory teaching of religion by the state. The spirit of our federal and state constitutions from the beginning . . . [has] been to leave religious instruction to the discretion of parents." [46]

The same theme has recurred in the opinions of the Attorneys General of several States holding daily prayer and/or Bible reading to be in violation of the state or federal constitutional command of separation of church and state.[47] Thus the basic principle upon which our decision last year in *Engel* v. *Vitale* necessarily rested, and which we reaffirm today, can hardly be thought to be radical or novel.

Particularly relevant for our purposes are the decisions of the state courts on questions of religion in the public schools. While those decisions do not, of course, bind us, they serve nevertheless to define the problem now before us and to guide our inquiry. With the growth of religious diversity and the rise of vigorous dissent it was inevitable that the courts would be called upon to enjoin religious

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[46] Quoted in Boles, The Bible, Religion, and the Public Schools (1961), 238.

[47] *E. g.*, 1955 Ops. Ariz. Atty. Gen. 67; 26 Ore. Op. Atty. Gen. 46 (1952); 25 Cal. Op. Atty. Gen. 316 (1955); 1948–1950 Nev. Atty. Gen. Rep. 69 (1948). For a 1961 opinion of the Attorney General of Michigan to the same effect, see 63 American Jewish Yearbook (1962) 189. In addition to the Governor of Ohio, see note —, *supra*, a Governor of Arizona vetoed a proposed law which would have permitted "read the Bible, without comment, except to teach Historical or Literary facts." See 2 Stokes, Church and State in the United States (1950), 568.

practices in the public schools which offended certain sects and groups. The earliest of such decisions declined to review the propriety of actions taken by school authorities, so long as those actions were within the purview of the administrators' powers.[48] Thus, where the local school board *required* religious exercises, the courts would not enjoin them;[49] and where, as in at least one case, the school officials *forbade* devotional practices, the court refused on similar grounds to overrule that decision.[50] Thus, whichever way the early cases came up, the governing principle of nearly complete deference to administrative discretion effectively foreclosed any consideration of constitutional questions.

The last quarter of the nineteenth century found the courts beginning to question the constitutionality of public school religious exercises. The legal context was still, of course, that of the state constitutions, since the First Amendment was presumed to be inapplicable to state action. And the state constitutional prohibitions against church-state cooperation or governmental aid to religion were generally less rigorous than the Establishment Clause of the First Amendment. It is therefore remarkable that the courts of a half dozen States found compulsory religious exercises in the public schools in violation of their respective state constitutions.[51] These

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[48] See Johnson and Yost, Separation of Church and State in the United States (1948), 71; Note, Bible Reading in the Public Schools, 9 Vand. L. Rev. 849, 851 (1956).

[49] *E. g., Spiller* v. *Inhabitants of Woburn*, 12 Allen (Mass.) 127 (1866); *Donahoe* v. *Richards*, 38 Maine 379, 413 (1854); cf. *Ferriter* v. *Tyler*, 48 Vt. 444 (1876).

[50] *Board of Education* v. *Minor*, 23 Ohio St. 211 (1873).

[51] *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 92 N. E. 251 (1910); *Herold* v. *Parish Board of School Directors*, 136 La. 1034, 68 So. 116 (1915); *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 44 N. W. 967 (1890); *State ex rel. Finger* v. *Weedman*, 55 S. D. 343, 226 N. W. 348 (1929); *State ex rel. Dearle* v. *Frazier*, 102

courts attributed much significance to the clearly religious origins and content of the challenged practices, and to the impossibility of avoiding sectarian controversy in their conduct. The Illinois Supreme Court expressed in 1910 the principles which characterized these decisions:

> "The public school is supported by taxes which each citizen, regardless of his religion or lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its purpose. The truths of the Bible are the truths of religion, which do not come within the province of the public school . . . . No one denies that they should be taught to the youth of the state. The constitution and the law do not interfere with such teaching, but they do banish theological polemics from the school and the school districts. This is done, not from any hostility to religion, but simply because it is no part of the duty of the state to teach religion—to take the money of all, and apply it to teaching the children of all the religion of a part only. Instruction in religion must be voluntary." *People ex rel. Ring* v. *Board of Education,* 245 Ill. 334, 349, 92 N. E. 251, 256 (1910).

The Supreme Court of South Dakota, in banning devotional exercises from the public schools of that State, also cautioned that "the state as an educator must keep out of this field, and especially is this true in the common schools, where the child is immature, without fixed religious convictions . . . ." *State ex rel. Finger* v. *Weedman,* 55 S. D. 343, 357, 226 N. W. 348, 354.

Wash. 519, 173 P. 35 (1918); cf. *State ex rel. Clithero* v. *Showalter,* 159 Wash. 519, 293 P. 1000 (1930); *State ex rel. Freeman* v. *Scheve,* 65 Neb. 853, 91 N. W. 846 (1902), modified, 65 Neb. 876, 93 N. W. 169 (1903). The cases are discussed in Boles, The Bible, Religion and the Public Schools (1961), c. IV; Harrison, The Bible, the Constitution and Public Education, 29 Tenn. L. Rev. 363, 386–389 (1962).

Even those state courts which have sustained devotional exercises under state law have consistently recognized the primarily religious character of prayers and Bible readings.[52] If such practices were not for that reason unconstitutional, it was necessarily because the state constitution forbade only public expenditures for *sectarian* instruction, or for activities which made the schoolhouse a "place of worship," but said nothing about the subtler question of laws "respecting an establishment of religion." [53] Thus the panorama of history permits no

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[52] *Moore* v. *Monroe*, 64 Iowa 367, 20 N. W. 475 (1884); *Hackett* v. *Brooksville Graded School District*, 120 Ky. 608, 87 S. W. 792 (1905); *Billard* v. *Board of Education*, 69 Kan. 53, 76 P. 422 (1904); *Pfeiffer* v. *Board of Education*, 118 Mich. 560, 77 N. W. 250 (1898); *Kaplan* v. *School District*, 171 Minn. 142, 214 N. W. 18 (1927); *Lewis* v. *Board of Education*, 157 Misc. 520, 285 N. Y. Supp. 164 (Sup. Ct. 1935), modified on other grounds, 247 App. Div. 106, 286 N. Y. Supp. 174 (1936), appeal dismissed, 276 N. Y. 490, 12 N. E. 2d 172 (1937); *Doremus* v. *Board of Education*, 5 N. J. 435, 75 A. 2d 880 (1952), appeal dismissed, 342 U. S. 429; *Church* v. *Bullock*, 104 Tex. 1, 109 S. W. 115 (1908); *People ex rel. Vollmar* v. *Stanley*, 81 Colo. 276, 255 P. 610 (1927); *Wilkerson* v. *City of Rome*, 152 Ga. 763, 110 S. E. 895 (1921); *Carden* v. *Bland*, 199 Tenn. 665, 288 S. W. 2d 718 (1956); *Chamberlin* v. *Dade County Board of Public Instruction*, 143 So. 2d 21 (Fla. 1962).

[53] For discussion of the constitutional and statutory provisions involved in the state cases which sustained devotional exercises in the public schools, see Boles, The Bible, Religion, and the Public Schools (1961), c. III; Harrison, The Bible, The Constitution and Public Education, 29 Tenn. L. Rev. 363, 381–385 (1962); Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis. L. Rev. 427, 450–452 (1950); Note, Bible Reading in the Public Schools, 9 Vand. L. Rev. 849, 854–859 (1956); Note, Nineteenth Century Judicial Thought Concerning Church-State Relations, 40 Minn. L. Rev. 672, 675–678 (1956). State courts appear to have been increasingly influenced in sustaining devotional practices by the availability of an excuse or exemption for dissenting students. See Cushman, The Holy Bible and the Public Schools, 40 Cornell L. Q. 475, 477 (1955); 13 Vand. L. Rev. 552 (1960).

other conclusion than that daily prayers and Bible readings in the public schools have always been designed to be and have been regarded as essentially religious exercises. Unlike the Sunday closing laws, these exercises appear neither to have been divorced from their religious origins nor deprived of their centrally religious character by the passage of time,[54] cf. *McGowan* v. *Maryland, supra,* at 442–445. On this distinction alone we might well rest a constitutional decision. But three further contentions have been pressed in the argument of these cases. These contentions deserve careful consideration, for if the position of the school authorities were correct in respect to any of them, we would be misapplying the principles of *Engel* v. *Vitale.*

A.

First, it is argued that however clearly religious may have been the origins and early nature of daily prayer and Bible reading, these practices today serve so clearly secular educational purposes that their religious attributes may be overlooked. I do not doubt, for example, that morning devotional exercises may foster better discipline in the classroom, and elevate the spiritual level on which the school day opens. The Pennsylvania Superintendent of Public Instruction, testifying by deposition in the *Schempp* case, for example, offered his view that daily Bible reading "places upon the children or those hearing the reading of this, and the atmosphere which goes on during the reading . . . one of the last vestiges of moral

[54] See Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt. L. Rev. 561, 572 (1961); Harrison, The Bible, The Constitution and Public Education, 29 Tenn. L. Rev. 363, 399–400 (1962); 30 Ford. L. Rev. 801 (1962); 45 Va. L. Rev. 1381 (1959). The essentially religious character of the materials used in these exercises is, in fact, strongly suggested by the presence of excusal or exemption provisions, and by the practice of rotating or alternating the use of different versions of the Holy Bible.

value that we have left in our school system." The exercise thus affords, the Superintendent concluded, "a strong contradiction to the materialistic trends of our time." Baltimore's Superintendent of Schools expressed a similar view of the practices challenged in the *Murray* case, to the effect that "the acknowledgment of the existence of God as symbolized in the opening exercises establishes a discipline tone which tends to cause each individual pupil to constrain his overt acts and to consequently conform to accepted standards of behavior during his attendance at school." These views are by no means novel, see, *e. g., Billard* v. *Board of Education*, 69 Kan. 53, 57–58, 76 P. 422, 423 (1904).[55]

It is not the business of this Court to gainsay the judgments of experts on matters of pedagogy. Such decisions must be left to the discretion of those administrators charged with the supervision of the Nation's public schools. The limited province of the courts is to determine whether the means which the educators have chosen to achieve legitimate pedagogical ends infringe the constitutional freedoms of the First Amendment. I would therefore begin by suggesting that the secular purposes which devotional exercises are said to serve fall into two categories—those which, on the one hand, derive indirect benefits from an immediately religious experience shared by the participating children; and those which on the other hand appear sufficiently divorced from the religious

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[55] In the *Billard* case, the teacher whose use of the Lord's Prayer and the Twenty-Third Psalm was before the court, testified that the exercise served disciplinary rather than spiritual purposes:

"It is necessary to have some general exercise after the children come in from the play-ground to prepare them for their work. You need some exercise to quiet them down."

When asked again if the purpose were not at least partially religious, the teacher replied, "it was religious to the children that are religious, and to the others it was not." 69 Kan., at 57–58, 76 P., at 423.

content of the devotional material as to be susceptible of secular means. With respect to the first objective, much has been written about the moral and spiritual values of infusing some religious influence or instruction into the public school classroom.[56] To the extent that only *religious* materials will serve this purpose, it seems to me that the purpose as well as the means is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause. The fact that purely secular benefits may eventually result does not seem to me to justify the exercises, for similar indirect nonreligious benefits could no doubt have been claimed for the released time program which we struck down in *McCullom*.

The second justification presumes that religious exercises at the start of the school day may directly serve solely secular ends—for example, by fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and by inspiring better discipline. To the extent that such benefits result not from the *content* of the readings and recitation, but simply from the *holding* of such a solemn exercise at the opening assembly or the first class of the day, it would seem to me that less sensitive materials might equally well serve the same purpose.

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[56] See, *e. g.*, Henry, The Place of Religion in the Public Schools (1950); Martin, Our Public Schools—Christian or Secular (1952); Educational Policies Comm'n of the National Educational Assn., Moral and Spiritual Values in the Public Schools (1951), c. IV; Harner, Religion's Place in General Education (1949). Educators are by no means unanimous, however, on this question. See Boles, The Bible, Religion, and the Public Schools (1961), 223–224. Compare George Washington's advice in his Farewell Address:

"And let us with caution indulge the supposition, that morality can be maintained without religion—whatever may be conceded to be the influence of refined education on minds of peculiar structure—reason and experience both forbid us to expect that National Morality can prevail in exclusion of religious principles." 35 Writings of Washington (Fitzpatrick ed. 1940), 229.

I have previously suggested that *Torcaso* and the *Sunday Law Cases* forbid the use of religious means where non-religious means will suffice. Applying that principle to these cases, it has not been shown that readings, from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the convocation of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.[57] Such substitutes would, I think, be unsatisfactory or inadequate only to the extent that the present activities do in fact serve forbidden religious goals. As to the truly secular purposes, there is no indication that these patriotic materials would not serve equally well. While I do not question the judgment of experienced educators that the challenged practices may well achieve valuable secular ends, it seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice.

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[57] Thomas Jefferson's insistence that where the judgments of young children "are not sufficiently mature for religious inquiries, their memories may be stored with the useful facts from Grecian, Roman, European and American history," 2 Writings of Thomas Jefferson (Memorial ed. 1903), 204, is relevant here. Recent proposals have explored the possibility of commencing the school day "with a quiet moment that would still the tumult of the playground and start a day of study," Editorial, Washington Post, June 28, 1962, § A, p. 22, col. 2. See also New York Times, Aug. 30, 1962, § 1, p. 18, col. 2. For a consideration of these and other alternative proposals see Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 370–371 (1963). See also 2 Stokes, Church and State in the United States (1950), 571.

B.

Second, it is argued that the particular practices involved in the two cases before us are unobjectionable because they prefer no particular sect or sects at the expense of others. Both the Baltimore and Abington procedures permit, for example, the reading of any of several versions of the Bible, and this flexibility is said to ensure neutrality sufficiently to avoid the constitutional prohibition. One answer, which might be dispositive, is that any version of the Bible is inherently sectarian, else there would be no need to offer a system of rotation or alternation of versions in the first place. Thus the best that can be done is to allow different sectarian versions to be used on different days. The sectarian character of the Holy Bible has been at the core of the whole controversy over religious practices in the public schools throughout its long and often bitter history.[58] To vary the version

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[58] The history, as it bears particularly upon the role of sectarian differences concerning Biblical texts and interpretation, has been summarized in *Tudor* v. *Board of Education*, 14 N. J. 31, 36–44, 100 A. 2d 857, 859–867; cf. *Brown* v. *Orange County Board of Instruction*, 128 So. 2d 181, 182–185 (Fla. App.). See also *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 190–193, 44 N. W. 967, 972–975. One state court adverted to these differences a half century ago:

"The Bible, in its entirety, is a sectarian book as to the Jew and every believer in any religion other than the Christian religion, and as to those who are heretical or who hold beliefs that are not regarded as orthodox . . . its use in the schools necessarily results in sectarian instruction. There are many sects of Christians, and their differences grow out of their differing constructions of various parts of the Scriptures—the different conclusions drawn as to the effect of the same words. The portions of Scripture which form the basis of these sectarian differences cannot be thoughtfully and intelligently read without impressing the reader, favorably or otherwise, with reference to the doctrines supposed to be derived from them." *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 347–348, 92 N. E. 251, 255. But see, for a sharply critical comment, Schofield, Religious Lib-

as the Abington and Baltimore schools have done may well be less offensive than to read from the King James version every day, as once was the practice. But the net result even of this relatively benign procedure is that majority sects are preferred in approximate proportion to their representation in the community and in the student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided.

The argument contains, however, a more basic flaw. There are persons in every community—often deeply devout—to whom any version of the Judaeo-Christian Bible is offensive.[59] There are others whose reverence for the Holy Scriptures demands private study or reflection and abhors public reading or recitation, as one of the expert witnesses at the trial of the *Schempp* case explained. To such persons it is not the fact of using the

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erty and Bible Reading in Illinois Public Schools, 6 Ill. L. Rev. 17 (1911).

See also Dunn, What Happened to Religious Education? (1958), 268–273; Dawson, America's Way in Church, State and Society (1953), 53–54; Johnson and Yost, Separation of Church and State in the United States (1948), c. IV.

[59] See *Torcaso* v. *Watkins, supra,* at 495, n. 11; Cushman, The Holy Bible and the Public Schools, 40 Cornell L. Q. 475, 480–483 (1955). Few religious persons today would share the universality of the Biblical canons of John Quincy Adams:

"You ask me what Bible I take as my standard of faith—the Hebrew, the Samaritan, the old English translation, or what? I answer, the Bible containing the sermon on the mount—any Bible that I can read and understand. . . . I take any one of them for my standard of faith. If Socinus or Priestly had made a fair translation of the Bible, I would have taken that, but without their comments." John Quincy Adams to John Adams, Jan. 3, 1817, in Koch and Peden, Selected Writings of John and John Quincy Adams (1946), 292.

Bible in the public schools, nor the content of any particular version, that is offensive, but only the *manner* in which it is used.[60] For such persons, the anathema of public communion is even more pronounced when prayer is involved. Many deeply devout persons have always regarded prayer as a necessarily private experience.[61] One Protestant group recently commented, for example: "When one thinks of prayer as a sincere outreach of a human soul to the Creator, 'required prayer' becomes an

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[60] Rabbi Solomon Grayzel testified before the District Court, "In Judaism the Bible is not read, it is studied. There is no special virtue attached to a mere reading of the Bible; there is a great deal of virtue attached to a study of the Bible." (R. 49.) See Boles, The Bible, Religion, and the Public Schools (1961), 208–218; Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 372–374 (1963). One religious periodical has suggested the danger that "an observance of this sort is likely to deteriorate quickly into an empty formality with little if any significance. Prescribed forms of this sort, as many colleges have concluded after years of compulsory chapel attendance, can actually work against the inculcation of vital religion." Prayer in the Public School Opposed, 69 Christian Century, Jan. 9, 1952, p. 35.

[61] See Cahn, On Government and Prayer, 37 N. Y. U. L. Rev. 981, 993–994 (1962). A leading Protestant journal recently noted:

"Agitation for removal of religious practices in public schools is not prompted or supported entirely by Jews, humanists, and atheists. At both local and national levels, many Christian leaders, concerned both for civil rights of minorities and for adequate religious education, are opposed to religious exercises in the public schools. . . . Many persons, both Jews and Christians, believe that prayer and Bible reading are too sacred to be permitted in public schools in spite of their possible moral value." Smith, The Religious Crisis In Our Schools, 128 The Episcopalian, May 1963, pp. 12–13.

It should be unnecessary to demonstrate that the Lord's Prayer, more clearly than the Regents' Prayer involved in *Engel* v. *Vitale*, is an essentially Christian supplication. See, *e. g.*, Scott, The Lord's Prayer: Its Character, Purpose and Interpretation (1951), 55; Buttrick, So We Believe, So We Pray (1951), 142; Levy, Lord's Prayer, in 7 Universal Jewish Encyclopedia (1942), 193.

absurdity." [62] There is a similar problem with respect to comment upon the passages of scripture which are to be read. Most present statutes forbid comment, and this practice accords with the views of many religious groups as to the manner in which the Bible should be read. However, as a recent survey discloses, scriptural passages read without comment frequently convey no message to the younger children in the school. Thus has developed a practice in some schools of bridging the gap between faith and understanding by means of "definitions," even where "comment" is forbidden by statute.[63] The present practice therefore poses a difficult dilemma: While Bible reading is almost universally required to be without comment, since only by such a prohibition can sectarian interpretation be excluded from the classroom, the rule breaks down—whether or not it is ever formally waived—at the point at which rudimentary definitions of Biblical terms are necessary for comprehension if the exercise is to serve any meaningful purpose at all.

It has been suggested that a tentative solution to these problems may lie in the fashioning of a "common core" of theology tolerable to all creeds but preferential to

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[62] Statement of the Baptist Joint Committee on Public Affairs, in 4 J. Church and State 144 (1962).

[63] See Harrison, The Bible, the Constitution and Public Education, 29 Tenn. L. Rev. 363, 397 (1962). The application of statutes and regulations which forbid comment on scriptural passages is further complicated by the view of certain religious groups that reading without comment is either meaningless or actually offensive. Compare Rabbi Grayzel's testimony before the District Court that "the Bible is misunderstood when it is taken without explanation." (R. 50.) A recent survey of the attitudes of certain teachers disclosed concern that "refusal to answer pupil questions regarding any curricular activity is not educationally sound," and that reading without comment might create in the minds of the pupils the impression that something was "hidden or wrong." Boles, The Bible, Religion, and the Public Schools (1961), 235–236.

none.[64] But as one astute commentator has recently observed, "history is not encouraging to" those who hope to fashion a "common denominator of religion detached from its manifestation in any organized church." Sutherland, Establishment According to Engel, 76 Harv. L. Rev. 25, 51 (1962). Perhaps an even better answer is that if *Engel* has any meaning beyond its facts, it must hold the establishment of nonsectarian religious practices no less constitutionally improper than sectarian exercises. A further answer is that the notion of a "common core" litany or supplication offends many deeply devout worshippers who do not find clearly sectarian practices objectionable.[65] Father Gustave Weigel has recently expressed a widely shared view: "The moral code held by each separate religious community can be reductively unified, but the consistent particular believer wants no such reduction." [66] And, as the American Council on Education

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[64] See Abbott, A Common Bible Reader for the Public Schools, 56 Religious Education 20 (1961); Note, 22 Albany L. Rev. 156–157 (1958); 2 Stokes, Church and State in the United States (1950), 501–506 (describing the "common denominator" or "three faiths" plan and certain programs of instruction designed to implement the "common core" approach). The attempts to evolve a universal, nondenominational prayer are by no means novel. See, *e. g.*, Madison's letter to Edward Everett, March 19, 1823, commenting upon a "project of prayer . . . intended to comprehend and conciliate college students of every Christian denomination, by a form composed wholly of texts and phrases of Scripture." 9 Writings of James Madison (Hunt ed. 1910), 126. For a fuller description of this and other attempts to fashion a "common core" or nonsectarian exercise, see *Engel* v. *Vitale*, 18 Misc. 2d 659, 660–662, 191 N. Y. S. 2d 453, 459–460.

[65] See Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 341, 368–369. See also Hartford, Moral Values in Public Education: Lessons from the Kentucky Experience (1958), 261–262; Moehlman, The Wall of Separation Between Church and State (1951), 158–159.

[66] Quoted in Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . . .", 1962 Supreme Court Review (1962) 31.

warned several years ago, "The notion of a common core suggests a watering down of the several faiths to the point where common essentials appear. This might easily lead to a new sect—a public school sect—which would take its place alongside the existing faiths and compete with them." [67] So, even if the Establishment Clause were oblivious to nonsectarian religious practices, I think it quite likely that the "common core" approach would be sufficiently objectionable to many groups to be foreclosed by the prohibitions of the Free Exercise Clause.

C.

A third factor which is said to absolve the practices in these cases from the ban of the First Amendment is the provision for the excuse or exemption of dissenting students. The short answer, which seems to me dispositive, was given by the District Court after our remand of *Schempp*:

> "The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony . . . . The exercises are held in the school buildings and perforce are conducted by and under the authority of the local school authorities and during school sessions. Since the statute requires the reading of the 'holy Bible,' a Christian document, the practice, as we said in our first opinion, prefers the Christian religion. The record demonstrates that it was the intention of the General Assembly of the Commonwealth of Pennsylvania to introduce a religious ceremony into the public schools of the Commonwealth." 201 F. Supp., at 819.

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[67] Quoted in Harrison, The Bible, the Constitution and Public Education, 29 Tenn. L. Rev. 363, 417 (1962). See also Dawson, America's Way in Church, State and Society (1953), 54.

Whatever relevance, then, excusal or exemption may have to questions of free exercise not now before us, neither is an aid in answering the question whether the Establishment Clause has been violated.

A second answer to this defense is that the excusal procedure itself operates in what I regard as an unconstitutional manner. We held both in *Barnette* and in *Torcaso* that the State may not require its students or its licensees to profess an abhorrent belief in order to avoid expulsion from school or receive a Notary Public's commission. By the same token it seems that the State may not constitutionally require a student to profess publicly his *dis*belief—or to indicate any other reason which may disincline him to participate, whether or not based upon a lack of religious faith—as the prerequisite to the exercise of his constitutional right of abstention. And apart from *Torcaso* and *Barnette*, I think *Speiser* v. *Randall*, 357 U. S. 513, fully settles the question. We held there that a State may not condition the grant of a tax exemption upon the willingness of those entitled to the exemption to affirm their loyalty to the Government, even though the exemption was itself a matter of grace rather than of constitutional right. We concluded that to impose upon the eligible taxpayers the affirmative burden of proving their loyalty impermissibly jeopardized the freedom to engage in constitutionally protected activities close to the area to which the loyalty oath related. *Speiser* v. *Randall* seems to me to dispose of two aspects of the excusal or exemption procedure now before us. First, I submit that by requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience, from exercising an indisputable constitutional right to be

excused.[68] Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence, devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or dissidents simply on the basis of their request.

Such reluctance to seek exemption seems all the more likely in view of the fact that children are disinclined at this age to step out of line or to flout "peer-group norms." Such is the widely held view of experts who have studied the behaviors and attitudes of children.[69] This is also

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[68] See the testimony of Edward L. Schempp, the father of the children in the Abington schools and plaintiffs-appellee in No. 142, concerning his reasons for not asking that his children be excused from the morning exercises after excusal was made available through amendment of the statute:

"We originally objected to our children being exposed to the reading of the King James version of the Bible . . . and under those conditions we would have theoretically liked to have had the children excused. But we felt that the penalty of having our children labelled as 'odd balls' before their teachers and classmates every day in the year was even less satisfactory than the other problem. . . .

"The children, the classmates of Roger and Donna are very liable to label and lump all particular religious difference or religious objections as atheism, particularly, today the word 'atheism' is so often tied to atheistic communism, and atheism has very bad connotations in the minds of children and many adults today." (R. 214.)

A recent opinion of the Attorney General of California gave as one reason for finding devotional exercises unconstitutional the likelihood that "children forced by conscience to leave the room during such exercises would be placed in a position inferior to that of students adhering to the State-endorsed religion." 25 Cal. Op. Atty. Gen. 316, 319 (1955). Other views on this question, and possible effects of the excusal procedure, are summarized in Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt. L. Rev. 561, 581–585 (1961).

[69] Extensive testimony by behavioral scientists concerning the effect of similar practices upon children's attitudes and behaviors is discussed in *Tudor* v. *Board of Education*, 14 N. J. 31, 50–52, 100

the basis of Mr. Justice Frankfurter's answer to a similar contention made in the *McCullom* case:

> "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 con-

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A. 2d 857, 867–868. See also Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 344 (1963). There appear to be no reported experiments which bear directly upon the question under consideration. There have, however, been numerous experiments which indicate the susceptibility of school children to peer-group pressures, especially where important group norms and values are involved. See, *e. g.*, Rhine, The Effect of Peer Group Influence Upon Concept-Attitude Development and Change, 51 J. Social Psych. 173 (1960); French, Morrison and Levinger, Coercive Power and Forces Affecting Conformity, 61 J. Abnormal and Social Psych. 93 (1960). For a recent and important experimental study of the susceptibility of students to various factors in the school environment, see Zander, Curtis and Rosenfeld, The Influence of Teachers and Peers on Aspirations of Youth (U. S. Office of Education Cooperative Research Project No. 451, 1961). It is also apparent that the susceptibility of school children to prestige suggestion and social influence within the school environment varies inversely with the age, grade level, and consequent degree of sophistication, of the child, see Patel and Gordon, Some Personal and Situational Determinants of Yielding to Influence, 61 J. Abnormal and Social Psych. 411 (1960).

Experimental findings also shed some light upon the probable effectiveness of a provision for excusal when, as is usually the case, the percentage of the class wishing not to participate in the exercises is very small. It has been demonstrated, for example, that the inclination even of adults to depart or dissent overtly from strong group norms varies proportionately with the size of the dissenting group—that is, inversely with the apparent or perceived strength of the norm itself—and is markedly slighter in the case of the sole or isolated dissenter. See, *e. g.*, Asch, Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority (Psych. Monographs No. 416, 1956); Asch, Effects of Group Pressure Upon the Modification and Distortion of Judgments, in Cartwright and Zander, Group Dynamics (1960), 189–200. Recent important findings on these questions are summarized in Hare, Handbook of Small Group Research (1962), c. II.

> science and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend." 333 U. S., at 227.

Also apposite is the answer given more than 70 years ago by the Supreme Court of Wisconsin to the argument that an excusal provision saved an otherwise unconstitutional devotional exercise:

> ". . . the excluded pupil tends to lose caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to others." *State ex rel. Weiss* v. *District Board of School District No. 8*, 76 Wis. 177, 200, 44 N. W. 967, 975.

And 50 years ago the very same answer was offered by the Louisiana Supreme Court:

> "Under such circumstances, the children would be excused from the opening exercises because of their religious beliefs. And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious beliefs. Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious

matters." *Herold* v. *Parish Board of School Directors*, 136 La. 1034, 1050, 68 So. 116, 121. See also *Tudor* v. *Board of Education*, 14 N. J. 31, 48–51, 100 A. 2d 857, 867–868; *Brown* v. *Orange County Board of Instruction*, 128 So. 2d 181, 185 (Fla. App.).

Speiser v. *Randall* also answers a further argument based on the excusal procedure. It has been suggested by the School Board, in *Schempp*, that we ought not pass upon the appellees' constitutional challenge at least until the children have availed themselves of the excusal procedure and found it inadequate to redress their grievances. Were the right to be excused not itself of constitutional stature, I might have some doubt about this issue. But we held in *Speiser* that the constitutional vice of the loyalty oath procedure discharged any obligation to seek the exemption before challenging the constitutionality of the conditions upon which it might have been denied. 357 U. S., at 529. Similarly, we have held that one need not apply for a permit to distribute constitutionally protected literature, *Lovell* v. *Griffin*, 303 U. S. 444, or to deliver a speech, *Thomas* v. *Collins*, 323 U. S. 516, before he may attack the constitutionality of a licensing system of which the defect is patent. So here, it seems to me that the procedure for excusal is either constitutionally irrelevant to the question of the claimed violation of the Establishment Clause, in which case it surely affords no defense; or it operates so as to discourage the free exercise of First Amendment freedoms. Under either theory the very invalidity of the system supplies the answer to the argument that excusal must first be sought and found insufficient before one may challenge the underlying practices.

To summarize my views concerning the merits of these two cases: The history, the purpose and the operation of the daily prayer recital and Bible reading leave no doubt

that these practices standing by themselves constitute an impermissible breach of the Establishment Clause. These devotional exercises may well serve legitimate nonreligious purposes. To the extent, however, that such purposes are really without religious significance, it has never been demonstrated that secular means would not suffice. Indeed, I would suggest that patriotic or other nonreligious materials might provide adequate substitutes—inadequate only to the extent that the purposes now served are indeed directly or indirectly religious. Under such circumstances, the States may not employ even remotely religious means to reach a secular goal unless secular means are wholly unavailing. Moreover, it seems irrelevant that these exercises may permit use of different versions of the Bible, and thus prefer no single sect or creed, for the dangers of sectarianism inhere in the exercise itself. Any system of selection or rotation is therefore likely to foster those divisions which make it essential to keep separate the spheres of religion and public education. Moreover, rotation or alternation of versions take no account either of those persons whose religious views accept no Judaeo-Christian theology, or to whose philosophy of worship any public supplication or scriptural reading is offensive. Finally, the availability of an excusal procedure seems to me without constitutional significance. This is so both because the cases turn upon the Establishment Clause, the application of which is unaffected by compulsion in or individual exemption from the ceremony, and because the very manner in which a student must claim the constitutional right to be excused may well jeopardize the exercise of precious constitutional liberties. I therefore agree with the Court that the judgment in *Schempp*, No. 142, must be affirmed, and that in *Murray*, No. 119, must be reversed.

V.

These considerations bring me to a final contention which has been advanced by the school officials in these cases: that the invalidation of the exercises at bar reflects a pervasive hostility toward religion in the First Amendment and permits this Court no alternative but to declare unconstitutional every vestige, however slight, of cooperation between government and religion. I cannot accept that contention. While it is of course not appropriate for this Court to reach out and decide questions not now before us, it seems to me that religious exercises in the public schools present a unique problem, and that our decision in these cases forecasts nothing about the constitutionality of different practices in other sectors of public life. The constitutionality of some such practices has already been appraised by lower federal and state courts. I think a brief survey of such practices will readily suggest that our decision today reflects not that the First Amendment commands official hostility toward religion, but only that it commands government to be neutral in matters of religion; and that the scope of our holding must be measured by the special circumstances under which these cases have arisen. It may be helpful for purposes of analysis to group the other practices into rough categories.

A. *The Conflict Between Establishment and Free Exercise.*—There are certain practices, ostensibly violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment.[70] Provisions for

[70] See, on the general problem of conflict and accommodation between the two clauses, Katz, Freedom of Religion and State Neutrality, 20 U. of Chi. L. Rev. 426, 429 (1953); Kauper, Church, State and Freedom: A Review, 52 Mich. L. Rev. 829, 833 (1954). One

churches and chaplains at military establishments for those in the armed services afford one such example.[71] The like provision by state and federal governments for

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author has suggested that the Establishment and Free Exercise Clauses must be "read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or impose a burden." Kurland, Religion and the Law (1962), 112. Compare the formula of accommodation embodied in the Australian Constitution's § 116:

"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

This section is one of the few prohibitions of the Australian Constitution which does not in terms apply like limitations to the Commonwealth and the States. See Essays on the Australian Constitution (Else-Mitchell ed. 1961), 15.

[71] There has been much difference of opinion throughout American history concerning the advisability of furnishing chaplains at government expense. Compare, *e. g.*, Washington's order regarding chaplains for the Continental Army, July 9, 1776, in 5 Writings of George Washington (Fitzpatrick ed. 1940), 244; with Madison's views on a very similar question, letter to Edward Livingston, July 10, 1822, 9 Writings of James Madison (Hunt ed. 1910), 100–103. Compare also this statement by the Armed Forces Chaplains Board concerning the chaplain's obligation:

"To us has been entrusted the spiritual and moral guidance of the young men and women in the Armed Services of this Country. A chaplain has many duties—yet, first and foremost is that of presenting God to men and women wearing the military uniform. What happens to them while they are in military service has a profound effect on what happens in the community as they resume civilian life. We, as chaplains, must take full cognizance of that fact, and dedicate our work to making them finer, spiritually strengthened citizens." Builders of Faith (U. S. Department of Defense 1955) 6.

It is interesting to compare in this regard an express provision, Article 140, of the Weimar Constitution: "The members of the armed forces are guaranteed the necessary free time for the performance of their religious duties."

chaplains in penal institutions affords another example.[72] It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be. I admit to finding great force to this argument for accommodation between the two clauses. Such a principle would also suggest the constitutionality of draft exemptions for ministers and divinity students,[73] cf. *Selective Draft Law Cases,* 245 U. S. 366, 389–390; of the excusal of children from school on their respective religious holidays; and of the allowance by government of temporary use of public buildings by religious organizations when their own churches have become unavailable because of a disaster or emergency.[74]

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[72] For a discussion of some recent and difficult problems in connection with chaplains and religious exercises in prisons, see, *e. g., Pierce* v. *La Vallee,* 293 F. 2d 233; *In re Ferguson,* 55 Cal. 2d 663, 361 P. 2d 417; *McBride* v. *McCorkle,* 44 N. J. Sup. 468, 130 A. 2d 881; *Brown* v. *McGinnis,* 10 N. Y. 2d 531, 180 N. E. 2d 791; discussed in 62 Col. L. Rev. 1488 (1962); 75 Harv. L. Rev. 837 (1962). Compare Article XVIII of the Hague Convention of 1899: "Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities." Quoted in Blakely, American State Papers and Related Documents on Freedom in Religion (1949), 313.

[73] Compare generally Sibley and Jacob, Conscription of Conscience: The American State and the Conscientious Objector (1952), with Conklin, Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins, 51 Geo. L. J. 252 (1963).

[74] See, *e. g., Southside Estates Baptist Church* v. *Board of Trustees,* 115 So. 2d 697 (Fla.); *Lewis* v. *Mandeville,* 200 Misc. 718, 107 N. Y. S.

Such activities and practices are indeed a far cry from the sponsorship of daily Bible reading and prayer recital. For one thing, there is surely no element of coercion present in the appointment of military or prison chaplains; the soldier or convict who declines the opportunities for worship would not ordinarily subject himself to the suspicion or obloquy of his fellows. And of special significance to this distinction is the fact that we are here usually dealing with adults, not with impressionable children as in the public schools. Moreover, the school exercises are not designed to provide the pupils with general opportunities for worship denied them by the legal obligation to attend school. The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others. The situation of the school child is therefore plainly unlike that of the isolated soldier or the prisoner. To sanction the one practice and to strike down the other is only to illustrate the fundamental danger of confusing governmental neutrality with governmental hostility toward religion, which I think explains the division of the Court in *United States* v. *Ballard*. The State—legislative branch as well as the judiciary—must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality. On the

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2d 856; cf. *School District No. 97* v. *Schmidt*, 128 Colo. 495, 263 P. 2d 581 (emergency loan of school district's custodian to church, later reciprocated). Quite a different problem may be presented with respect to use of public school property for religious activities, *State ex rel. Gilbert* v. *Dilley*, 95 Neb. 527, 145 N. W. 999; the erection of an essentially religious statue on public property, *State ex rel. Singleman* v. *Morrison*, 57 So. 2d 238 (La. App.); seasonal displays, *Baer* v. *Kolmorgen*, 14 Misc. 2d 1015, 181 N. Y. S. 2d 230; or the performance of a religious drama on public property, cf. *County of Los Angeles* v. *Hollinger*, 200 Cal. App. 2d 877, 19 Cal. Rptr. 648.

other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood. I do not say that government *must* provide chaplains or draft exemptions, or that the courts should intercede if it fails to do so. What the courts must do is essentially what we do in these cases—to say that just as the courts may not transgress the line of neutrality, so courts must enjoin transgressions on the part of the other branches of government. Beyond that, the proper province of the judiciary does not extend.

B. *Conflict Between Establishment and the Exercise of Other Governmental Powers.*—These are situations arguably implicating the Establishment Clause as to which the propriety of judicial intervention is at best doubtful. Since the Constitution, Art. I, § 5, for example, makes each House the monitor of the "Rules of its Proceedings," judicial interference with the saying of invocational prayers in the chambers of Congress, and with the appointment of legislative chaplains, might well encroach upon prerogatives assigned exclusively to the Congress under the doctrine of Separation of Powers.[75] Cf. *Baker* v. *Carr*, 369 U. S. 186.

Within this category, although less readily, may fall the nondevotional uses of the Bible in the public schools. The holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differ-

[75] See *Elliott* v. *White*, 23 F. 2d 997. Compare Moulton and Meyers, Report on Appointing Chaplains to the Legislature of New York, in Blau, Cornerstones of Religious Freedom in America (1949), 141–156; Comment, 63 Col. L. Rev. 73, 97 (1963).

ences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be virtually impossible to teach meaningfully almost any subject in the social sciences or the humanities without some mention of religion.[76] To what extent, and at what points in the curriculum religious materials should be cited, are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not. We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be "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." *Illinois ex rel. McCullom* v. *School District, supra,* at 237.

We do not, however, in my view usurp the jurisdiction of school administrators by holding as we do today that morning devotional exercises in any form are constitutionally invalid. But there is no occasion now to go further, and anticipate problems we cannot judge with the material now before us. Any attempt to impose rigid limits upon the mention of God or references to the Bible in the classroom would be fraught with dangers. If it

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[76] A comprehensive survey of the problems raised concerning the role of religion in the secular curriculum is contained in Brown ed., The Study of Religion in the Public Schools: An Appraisal (1958). See also Katz, Religion and American Constitutions, Lecture at Northwestern University Law School, March 21, 1963, pp. 37–41; Educational Policies Comm'n of the National Education Assn., Moral and Spiritual Values in the Public Schools (1951), 49–80. Compare, for a consideration of similar problems in state-supported colleges and universities, Louisell and Jackson, Religion, Theology and Public Higher Education, 50 Cal. L. Rev. 751 (1962).

should sometime hereafter be shown that in fact religion can play no part in the teaching of a given subject without resurrecting the ghost of the practices we strike down today, it will then be time enough to consider questions we must now defer.

C. *Uniform Tax Exemptions Incidentally Available to Religious Institutions.*—I have little doubt about the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. Provided the taxing authorities impose no sectarian conditions upon its availability, the tax-exemption or benefit is immediately and automatically available to all religious and quasi-religious groups.[77] If religious institutions benefit, it is in spite of rather than because of their religious character. There is no indication that taxing authorities are attempting in this manner to subsidize worship or belief in God. And the tax exemption, almost uniquely, can be truly nondiscriminatory, available on equal terms to large religious groups and small, to popular and unpopular sects, to those organizations which accept and those which reject the Judaeo-Christian God.[78]

D. *Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning.*—As we noted in our *Sunday Law* decisions, nearly every criminal law on the books can be traced to some religious principle or inspiration. But that does not make the present enforcement of the criminal law in any sense an establishment of religion,

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[77] See generally Torpey, Judicial Doctrines of Religious Rights in America (1948), c. VI; Hudspeth, Separation of Church and State in America, 33 Tex. L. Rev. 1035 (1955); Sutherland, Due Process and Disestablishment, 62 Harv. L. Rev. 1306, 1336–1338 (1949); Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal. L. Rev. 751, 773–780 (1962).

[78] See, *e. g.*, *Fellowship of Humanity* v. *County of Alameda*, 153 Cal. App. 2d 673, 315 P. 2d 394.

simply because it accords with widely held religious principles. As we said in *McGowan* v. *Maryland,* 366 U. S. 420, 442, "The 'Establishment' clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." This rationale suggests that the use of the motto "In God We Trust" on currency, on documents and public buildings and the like may not offend the clause. It is not that the use of those four words can be dismissed as "de minimis"—for I suspect there would be intense opposition to the abandonment of that motto. The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use is effectively divorced from its religious inspirations. This is not to say that the sight of the motto may not evoke religious thoughts in some, but only that such is not the purpose underlying its continued use.

This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact. Of course, the Pledge of Allegiance, with or without the reference to God, is not, under the *Barnette* decision, an exercise which can in any event be made compulsory. But the mere presence of a single reference to God hardly seems to render either the exercise or the particular reference to God offensive to the Establishment Clause.