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

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Circulated:

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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.

[June —, 1963.]

MR. JUSTICE STEWART, dissenting.

I think the records in the two cases before us are so fundamentally deficient as to make impossible an informed or responsible determination of the constitutional issues presented. Specifically, I cannot agree that on these records we can say that the Establishment Clause has necessarily been violated.[1] But I think there exist serious questions under both that clause and the Free Exercise Clause—insofar as each is imbedded in the Fourteenth Amendment—which require the remand of these cases for the taking of additional evidence.

[1] It is instructive, in this connection, to examine the complaints in the two cases before us. Neither complaint attacks the challenged practices as "establishments." What both allege as the basis for their causes of actions are, rather, violations of religious liberty.

I.

The First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." It is, I think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of "separation of church and state," which can be mechanically applied in every case to delineate the required boundaries between government and religion. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways. Secondly, the fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.

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

II.

As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created *National* Government. The events leading to its adop-

tion strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing *state* establishments. See *McGowan* v. *Maryland*, 366 U. S. 420, 440–441. Each State was left free to go its own way and pursue its own policy with respect to religion. Thus Virginia from the beginning pursued a policy of disestablishmentarianism. Massachusetts, by contrast, had an established church until well into the nineteenth century.

So matters stood until the adoption of the Fourteenth Amendment, or more accurately, until this Court's decision in *Cantwell* v. *Connecticut*, in 1940. 310 U. S. 296. In that case the Court said: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." [2]

I accept without question that the liberty guaranteed by the Fourteenth Amendment against impairment by the States embraces in full the right of free exercise of religion protected by the First Amendment, and I yield to no one in my conception of the breadth of that freedom. See *Braunfeld* v. *Brown*, 366 U. S. 599, 616 (dissenting opinion). I accept too the proposition that the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy. But I cannot agree with what seems to me the insensitive definition of the Establishment Clause contained in the Court's opinion, nor

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[2] 310 U. S., at 303. The Court's statement as to the Establishment Clause in *Cantwell* was dictum. The case was decided on free exercise grounds.

with the different but, I think, equally mechanistic definitions contained in the separate opinions which have been filed.

III.

Since the *Cantwell* pronouncement in 1940, this Court has only twice held invalid state laws on the ground that they were "laws respecting an establishment of religion" in violation of the Fourteenth Amendment. *McCollum* v. *Board of Education,* 333 U. S. 203; *Engel* v. *Vitale,* 370 U. S. 421. The Court has upheld against such a challenge laws establishing Sunday as a compulsory day of rest, *McGowan* v. *Maryland,* 366 U. S. 420, and a law authorizing reimbursement from public funds for the transportation of parochial school pupils. *Everson* v. *Board of Education,* 330 U. S. 1.

Unlike other First Amendment guarantees, there is an inherent limitation upon the applicability of the Establishment Clause's ban on state support to religion. That limitation was succinctly put in the very case which provided the definitive explication of the clause. "State power is no more to be used so as to handicap religions than it is to favor them." *Everson* v. *Board of Education,* 330 U. S. 1, 18.[3] And in a later case, this Court recognized that the limitation was one which was itself compelled by the free exercise guarantee. "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not . . . manifest

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

a governmental hostility to religion or religious teaching. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum* v. *Board of Education,* 333 U. S. 203, 211–212.

That the central value embodied in the First Amendment—and, more particularly, in the guarantee of "liberty" contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized. Thus, in the case of *Hamilton* v. *Regents,* 293 U. S. 245, 265, Mr. Justice Cardozo, concurring, assumed that it was ". . . *the religious liberty* protected by the First Amendment against invasion by the nation [which] is protected by the Fourteenth Amendment against invasion by the states." (Emphasis added.) And in *Cantwell* v. *Connecticut, supra,* the purpose of those guarantees was described in the following terms: "On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion." 310 U. S., at 303.

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

It has become accepted that the decision in *Pierce* v. *Society of Sisters,* 268 U. S. 510, upholding the right of parents to send their children to nonpublic schools, was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation. It

might be argued here that parents who wanted their children to be exposed to religious influences in school could, under *Pierce*, send their children to private or parochial schools. The consideration which renders this contention too facile to be determinative has already been recognized by the Court: "Freedom of speech, freedom of the press, freedom of religion, are available to all, not merely to those who can pay their own way." *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111.

It might also be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. With all its surface persuasiveness, however, this argument seriously misconstrues the basic reason in favor of permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.

What seems to me to be of paramount importance, then, is recognition of the fact that the claim advanced here in favor of Bible reading is sufficiently substantial to make simple reference to the constitutional phrase "establishment of religion" as inadequate an analysis of the cases before us as the ritualistic invocation of the nonconstitutional phrase "separation of church and state." What these cases compel, rather, is an analysis of just what the

"neutrality" is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment, as imbedded in the Fourteenth.

IV.

Our decisions make clear that there is no constitutional bar to the use of public property for religious purposes. On the contrary, this Court has consistently held that the discriminatory barring of religious groups from public property is itself a violation of First and Fourteenth Amendment guarantees. *Fowler* v. *Rhode Island*, 345 U. S. 67; *Niemotko* v. *Maryland*, 340 U. S. 268. A different standard has been applied to public school property, because of the coercive effect which the use by religious sects of a compulsory school system would necessarily have upon the children involved. *McCollum* v. *Board of Education*, 333 U. S. 203. But insofar as the *McCollum* decision rests on the Establishment rather than the Free Exercise Clause, it is clear that its effect is limited to religious instruction—to government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets.[4]

The dangers both to government and to religion inherent in official support of instruction in the tenets of various religious sects are absent in the present cases, which involve only a reading from the Bible unaccompanied by comments which might otherwise constitute instruction. Indeed, since, from all that appears in either record, any teacher who does not wish to do so is free

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

not to participate,[5] it cannot even be contended that some infinitesimal part of the salaries paid by the State are made contingent upon the performance of a religious function.

In the absence of evidence that the legislature or school board intended to prohibit local schools from substituting a different set of readings where parents requested such a change, we should not assume that the provisions before us—as actually administered—may not be construed simply as authorizing religious exercises, nor that the designations may not be treated simply as indications of the promulgating body's view as to the community's preference. We are under a duty to interpret these provisions so as to render them constitutional if reasonably possible. Compare *Two Guys* v. *McGinley,* 366 U. S. 582, 592–595; *Everson* v. *Board of Education,* 330 U. S. 1, 4, and n. 2. In the *Schempp* case there is evidence which indicates that variations were in fact permitted by the very school there involved, and that further variations were not introduced only because of the absence of requests from parents. And the Baltimore rule itself contains a provision permitting another version of the Bible to be substituted for the King James version.

If the provisions are not so construed, I think that their validity under the Establishment Clause would be extremely doubtful, because of the designation of a particular religious book and a denominational prayer. But since, even if the provisions are construed as I think they must be, I think that the cases before us must be re-

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

manded for further evidence on other issues—thus affording the plaintiffs an opportunity to prove that local variations are not in fact permitted—I shall for the balance of this dissenting opinion treat the provisions before us as making the content of the exercises, as well as a choice as to their implementation, matters which ultimately reflect the concensus of each local school community. In the absence of coercion upon those who do not wish to participate—because they hold less strong beliefs, other beliefs, or no beliefs at all— such provisions cannot, in my view, be held to represent the type of support of religion barred by the Establishment Clause. For the only support which such rules provide for religion is the withholding of state hostility—a simple acknowledgment on the part of secular authorities that the Constitution does not require extirpation of all voluntary expression of religious belief.

V.

I have said that these provisions authorizing religious exercises are properly to be regarded as measures making possible the free exercise of religion. But it is important to stress that, strictly speaking, what is at issue here is a privilege rather than a right. In other words, the question presented is not whether exercises such as those at issue here are constitutionally compelled, but rather whether they are constitutionally invalid. And that issue, in my view, turns on the question of coercion.

It is clear that the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those presented by the use of similar exercises or affirmations in ceremonies attended by adults. Even as to children, however, the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school

environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief.

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

The governmental neutrality which the First and Fourteenth Amendments require in the cases before us, in other words, is the extension of even-handed treatment to all who believe, doubt, or disbelieve—a refusal on the part of the State to weight the scales of private choice. In these cases, therefore, what is involved is not state action based on impermissible categories, but rather an attempt by the State to accommodate those differences which the existence in our society of a variety of religious beliefs make inevitable. The Constitution requires that such efforts be struck down only if they are proven to entail the use of the secular authority of government to coerce a preference among such beliefs.

It may well be, as has been argued to us, that even the supposed benefits to be derived from noncoercive religious exercises in public schools are incommensurate with the administrative problems which they would create. The

choice involved, however, is one for each local community and its school board, and not for this Court. For, as I have said, religious exercises are not constitutionally invalid if they simply reflect differences which exist in the society from which the school draws its pupils. They become constitutionally invalid only if their administration places the sanction of secular authority behind one or more particular religious or irreligious beliefs.

To be specific, it seems to me clear that certain types of exercises would present situations in which no possibility of coercion on the part of secular officials could be claimed to exist. Thus, if such exercises were held either before or after the official school day, or if the school schedule were such that participation were merely one among a number of desirable alternatives,[6] it could hardly be contended that the exercises did anything more than to provide an opportunity for the voluntary expression of religious belief. On the other hand, a law which provided for religious exercises during the school day and which contained no excusal provision would obviously be unconstitutionally coercive upon those who did not wish to participate. And even under a law containing an excusal provision, if the exercises were held during the school day, and no equally desirable alternative were provided by the school authorities, the likelihood that children might be under at least some psychological compulsion to participate would be great. In a case such as the latter, however, I think we would err if we *assumed* such coercion in the absence of any evidence.[7]

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

[7] Cf. "The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school

VI.

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

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boards of the nation, . . . is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation." *McCollum* v. *Board of Education*, 333 U. S. 203, 237 (concurring opinion of Mr. Justice Jackson).

issue, since the case under the amended statute was decided exclusively on Establishment Clause grounds. 201 F. Supp. 815.

What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government. It is conceivable that these school boards, or even all school boards, might eventually find it impossible to administer a system of religious exercises during school hours in such a way as completely to free from any kind of official coercion those who do not affirmatively want to participate.[8] But I think we must not assume that school boards so lack the qualities of inventiveness and good will as to make impossible the achievement of that goal.

I would remand both cases for further hearings.

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