C. RELIGIOUS INCULCATION IN PUBLIC SCHOOLS

Another alternative for the inculcation of religion has produced a line of cases that requires attention at this point because it was the next form in which the concern of religious bodies to nurture their faith in the children of the faithful had an impact on the law of church and state.[1] In fact, it has been the single most important crucible for the church/state struggle. Many of the religious bodies in this country have not resorted to full-time schools of general education operated by the church for the inculcation of the faith, partly because they believed the public schools to be an important institution for the common education and socialization of all children in the society, and partly because they viewed the acquiring of the faith as a theologically different sort of transaction from that envisioned by the operators of parochial schools.

These traditions—primarily the "mainline" Protestant churches: Presbyterian, Methodist, "liberal" Lutheran and Baptist, Disciples, etc.[2]—could be characterized by critics as the most acculturated of the principal Christian streams in the United States and therefore able to go along with the public schools as consonant with their faith, both because the public schools were practically Protestant parochial schools and because the slight differences between what was taught there and what the churches might prefer to teach was not worth the bother of setting up and running parochial schools. Furthermore, some maintain that prayer and Bible-reading in public schools was designed to advance the cause of Protestant piety, and that this in turn diminished the importance of the Sunday school.[3]

There is some truth to the characterization of the Protestant acceptance of public schools because they were almost Protestant parochial schools, but it does not do justice to the affirmative side of the case. Many Protestants have shared the vision of the common school of democracy, in which the nontheological virtues of honesty, equality, fair play, and freedom could be inculcated, while they have felt that the theological aspects of religious faith could be taught at other times and places under church auspices. That was possible for some of these Protestant traditions because their concept of the central and essential content of the faith was not elaborate or extensive and did not require a lot of time to inculcate, or rather it was not something

---

1. One case of another kind intervened, *Everson v. Board of Education*, but that will be dealt with at the beginning of another, longer train of cases in the next section, § D2 below.

2. This acceptance of public schools as the primary vehicle of education is also true of most nonorthodox Jews. Letter from Marc Stern, American Jewish Congress, March 9, 1992.

3. Boylan, A.M., *Sunday School: Formation of an American Tradition* (New Haven: Yale Univ. Press, 1988).

best conveyed by classroom instruction but by direct experience, inspiration or revelation, which could be acquired more readily by adults than it could be painstakingly explained to children, who did not yet have the life experience to enable them to appropriate it. These traditions tended to view the most meaningful religious inculcation as an outcome of readiness, receptiveness, and/or the moving of the Holy Spirit, not to be attained by giving immature persons the answers before they had become aware of the questions.

But this approach of leaving the inculcation of the faith to the Holy Spirit, acting on adults prepared at best only by childhood and adolescent attendance upon the services of word and sacrament, came increasingly to be seen in these traditions as somewhat less than adequate. The flourishing of the Sunday schools, while it made Sunday morning (or afternoon) a time of importance—positively or negatively—for children and young people, also encouraged the growth of a company of religious educators, who became dissatisfied with the amount of teaching that could be done in one hour on Sunday. Some of them also looked with dismay at all of the children outside the church who were not receiving any religious training at all and wished that some could be made available to them. (This was not so much to inveigle them into the church as to enrich their lives with knowledge of the Good News of Salvation, without which they were thought to be doomed to perdition.)

1. "Released Time"

Even the leaders of churches that offered full-time day schools of general education were concerned about the religious illiteracy of their children who attended public schools. For these and other reasons, some Protestant church leaders began to cast about for ways in which children in public schools could be given the benefit of introduction to, or reinforcement in, the teaching of religion. This was to be in addition to religious devotions or observances, where they existed in public schools, discussed below in connection with the "school prayer" decisions.[4] The result was the plan of "released time" for religious instruction, which involved the "release" of those public-school students (whose parents gave permission) from regular classes one hour a week to attend classes of religious instruction provided at the public school by their respective churches at their own expense. Pupils whose parents did not choose to have them participate in these classes could remain in study hall during this period. No instruction was to be given which the pupils released would miss. The plan was instituted for fourth, fifth and sixth grades.[5] In Gary, Indiana, where the plan was pioneered, the superintendent of schools in 1914 sought to draw the

4. See § 2 below.

5. For a detailed discussion of the development of released time, see Pfeffer, Leo, *Church, State and Freedom* (Boston: Beacon Press, 1953), pp. 313-373.

public schools closer to the important institutions of the community, and released-time religious instruction offered a way to form a closer tie to the churches.[6]

a. *McCollum v. Board of Education* (1948). This plan was widely adopted by the 1940s, and for a while seemed to be "the wave of the future." Then, in 1948, the U.S. Supreme Court ruled on this arrangement in a case arising in Champaign, Illinois. The complaint was brought on behalf of Mrs. Vashti McCollum and her son Terry, who was in the fifth grade in public school in Champaign when released-time religious instruction was instituted. Terry was one of only two pupils who did not participate in the religious instruction program in the first semester. In the second semester the other pupil decided to participate in religious instruction, leaving Terry as the only holdout. His teacher urged him to participate also, so that the class would have "100%." He was willing to do so, but his mother refused. The teacher was perplexed about what to do with Terry. She wished to be present for the religious teaching when the teacher from the Champaign Council on Religious Education came into the regular fifth-grade classroom to give the religious instruction, but Terry had to be provided for. At first she put him at a desk outside in the hall, an arrangement sometimes also used for punishment, creating the understandable misconception among his peers that he was being punished for being an atheist and for refusing to join in the religious instruction, and they teased Terry about it, causing him to go home in tears and his mother to protest to the principal. So the teacher put Terry in the vacant music room with the door shut, but his mother complained about that. So then the teacher had him go into the other fifth-grade classroom, with the consequence that the other class of fifth-graders could observe the "outcast" results of heterodoxy.

These successive forms of "exile" suffered by her son for the sake of her views on religion led Mrs. McCollum to file suit against the Board of Education. All the Illinois judges who reviewed her complaint agreed that neither her rights nor her son's rights had been infringed and that the released-time program was not contrary to the state or federal constitutions. The case reached the Supreme Court of the United States shortly after it had taken the decisive step of declaring the Establishment Clause of the First Amendment applicable to the states through the Fourteenth and of defining the meaning of that clause as prohibiting all government aid to religion, even on a nonpreferential basis, in *Everson v. Board of Education*.[7] Justice Hugo Black, who had written the previous decision, also wrote the opinion of the court in *McCollum v. Board of Education*, saying:

> The foregoing facts... show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is

6. See *McCollum v. Bd. of Ed., infra*, Frankfurter opinion.
7. 330 U.S. 1 (1947), discussed in § D2 below.

> integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. 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. And it falls squarely under the ban of the First Amendment....
>
> Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.[8]

Five of the justices joined Black's opinion—Chief Justice Fred M. Vinson and Associate Justices Frank Murphy, William Douglas, Wiley B. Rutledge and Harold Burton. Justice Felix Frankfurter wrote a lengthy opinion in which he was joined by Justices Robert Jackson, Rutledge and Burton. It was clearly a concurring opinion but was not designated as such. Only Justice Stanley Reed dissented. Justice Frankfurter, as was his professorial wont, sketched the history of the development of public education and its relation to religion—a context useful for viewing this entire section on public school inculcation of faith.

> Traditionally, organized education in the Western world was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the Bible, and its chief purpose inculcation of piety. To the extent that the State intervened, it used its authority to further aims of the Church.
>
> The emigrants who came to these shores brought this view of education with them. Colonial schools certainly started with a religious orientation.... The evolution of colonial education, largely in the service of religion, into the public school system of today is the story of changing conceptions regarding the American democratic society, of the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people. The modern public school derived from a philosophy of freedom reflected in the First Amendment. It is appropriate to recall that the Remonstrance of James Madison, an event basic in the history of religious liberty,[9] was called forth by a proposal which involved support to religious education. As the momentum for popular education increased and in turn evoked strong claims for State support of religious education, contests not unlike that which in Virginia

8. *McCollum v. Board of Education*, 333 U.S. 203 (1948).

9. Madison, J., "A Memorial and Remonstrance Against Religious Assessments" (1785), cited and quoted repeatedly in the majority and minority opinions in *Everson v. Bd. of Ed.* (1947) and attached *in toto* to Justice Rutledge's dissent; see discussion at § D2 below.

had produced Madison's Remonstrance appeared in various forms in other States.... In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was taught. In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict. The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people. In sustaining Stephen Girard's will, this Court referred to the inevitable conflicts engendered by matters "connected with religious polity" and particularly "in a country composed of such a variety of religious sects as our country."[10] That was more than one hundred years ago.

Separation in the field of education, then, was not imposed upon unwilling States by force of superior law.... It is important 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 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 secular public school was the means of reconciling freedom in general with religious freedom....

[B]y 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation. In that year President Grant made his famous remarks to the Convention of the Army of the Tennessee:

> "Encourage free schools, and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools.... Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and the state forever separate."

...The extent to which this principle was deemed a presupposition of our Constitutional system is strikingly illustrated by the fact that every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system "free from sectarian control."

After a detailed description of the development of parochial schools and weekday (after-school) religious education, Justice Frankfurter turned to the coercive aspect of

10. *Vidal v. Girard's Executors*, 2 Howard 127 (1844), discussed at § A3 above.

the released-time program as developed in Champaign—a matter given only summary attention in the majority opinion.

> The Champaign arrangement... presents powerful elements of inherent pressure by the school system in the interest of religious sects.... Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative [to religious instruction] may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.... [N]ot even all of the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers 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.[11]

Justice Reed agreed with much in the foregoing opinions, as that government cannot set up a church, aid all or any religions or prefer one religion over another. He agreed that no tax could be levied to support the teaching or practice of religion and that the state cannot influence anyone toward religions against his will or punish him for his religious beliefs. But he contended that the Champaign arrangement did none of those things. In view of the fact that actual church services were permitted on government property at the academies of the military services and at installations of the armed services, at prisons and hospitals, and in view of the fact that no ecclesiastical body was involved in the Champaign situation, he thought that close cooperation between the public schools and the (lay) Council on Religious Education in Champaign—where no money changed hands and no students were coerced—was not prohibited by the Establishment Clause. Something of his outlook came to be expressed in *Zorach v. Clauson*, discussed next.

b. *Zorach v. Clauson* (1952). Four years later, the U.S. Supreme Court again examined a "released time" program with a very different result. The 1952 case arose in New York City as a result of a law passed by the legislature in 1940 permitting children with parental consent to be excused from public schools for one hour a week to attend released-time religious instruction at their various churches or synagogues. Except for the instruction's being given off public school premises, the New York City program was very similar to the one in Champaign, Illinois, that had been declared unconstitutional in *McCollum*.

---

11. *McCollum v. Bd. of Ed., supra*, Frankfurter opinion.

The plaintiffs, unlike Vashti McCollum, were religious persons: Tessim Zorach was an active member of Holy Trinity Episcopal Church and Esta Gluck was active in the American Jewish Congress. Their children attended New York City public schools and also religious schools at times when public schools were not in session, but they did not participate in the released-time program of religious instruction. The experience of nonparticipating pupils was described in a number of affidavits submitted to the court in support of the Zorach-Gluck complaint. One affidavit was entered by Leah Cunn, who had attended school in Brooklyn:

> When the released time students departed at 2:00 on Wednesday, I felt left behind. [They] made remarks about my being Jewish.... I endured a great deal of anguish as a result of this and decided that I would like to go along with the other children to the church center rather than continue to expose myself to such harassment. I asked my mother for permission to participate in the released time program and to accompany my Catholic classmates to their religious center, but she forbade it.
>
> Following the introduction of released time at P.S. 163, Brooklyn, I began to notice that I was ostracized by the other children in after-school activities. I was not permitted to share in their play and they made unflattering remarks about my not going to the church center because I was Jewish. As a result of arguments about my non-participation in released time, my classmates called me such names as "Christ killer" and "dirty Jew."
>
> I still live in the same neighborhood and to this day I do not talk to many of the girls with whom I went to school because of the arguments and fights which developed among us as a result of our differences which developed from the released time program.[12]

Wendy Gluck, daughter of the plaintiff, Esta Gluck, related in her affidavit that her teacher in second and third grades at P.S. 130 in Brooklyn was a supporter of the program:

> Miss Jeffries distributed blank consent cards to the children in her class and asked the children publicly for a show of hands of those who were going to participate in the released time program.... Miss Jeffries scolded those students who had participated in the released time program the term before but who did not raise their hands to show that they were continuing.[13]

Many other pupils, parents and some teachers supplied affidavits describing similar incidents. These affidavits are reprinted in a book written by the plaintiffs' counsel, Leo Pfeffer, entitled *Church, State and Freedom*, and fill ten pages of small print. But the trial court dismissed this evidence as merely describing some

12. Pfeffer, *Church, State and Freedom*, *supra*, pp. 356-357.
13. Ibid.

"administrative difficulties," and found the New York program to be constitutional, a holding affirmed by the New York State appellate courts.

(1) Justice Douglas' Opinion for the Court. Six justices of the Supreme Court agreed with the New York courts that the program was constitutional, and Justice Douglas wrote the majority opinion, which is remarkable for its "accommodationist" posture, especially coming from as staunch a "separationist" as Douglas.

> This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organization. The case is therefore unlike *McCollum*.... In that case the classrooms were turned over to religious instructors....
>
> It takes obtuse reasoning to inject any issue of the "free exercise" of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.
>
> There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.

(It is ironic that a vast array of evidence tending to show just such teacher intervention had been excluded at the trial level.)

Justice Douglas reviewed the significance of the Establishment Clause in words that have been often quoted and debated:

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. *The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.* Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.[14]

14. *Zorach v. Clauson*, 343 U.S. 306 (1952), emphasis added.

The two sentences emphasized have evoked more puzzlement than illumination among commentators, since they seem mutually contradictory, especially in light of the succeeding sentence. The First Amendment does not "studiously define" anything, let alone "specific ways" in which church and state shall or shall not relate to one another. It is almost enigmatic in its brevity and generality. The courts have done much "studious defining" of specifics, but, surprisingly, the learned justice made little reference to prior decisions and did not recite the "no aid" formula that had first appeared in *Everson* and had been reiterated, word for word, in *McCollum*, and which was to appear again twice more in decisions nine years later, *McGowan* and *Torcaso*, and in a fifth decision—*Allegheny County v. ACLU*—in 1989.

He continued with a litany of the interrelationships between church and state, starting with a curious reference to tax exemption:

> Churches could not be required to pay even property taxes.[15] Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."
>
> We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case, the teacher requires parental consent in writing. In each case, the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.

Then followed the paragraph that is the apotheosis of the "accommodationist" position.

---

15. They are not. See *Walz v. Tax Commission,* 397 U.S. 644 (1970), upholding such tax exemption of churches, to which Justice Douglas was the sole dissenter!

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Justice Douglas then recited what the state may *not* do with reference to religion that reads as though he was proposing his own version of the "no-aid" formula:

> 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. The government must be neutral when it comes to competition between sects. It must not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.[16]

If this was the second entry in the (so far) three-entry series of Tests of Establishment (the no-aid formula being the first), it was a characterization of the Establishment Clause that had no other takers for many years. The court reverted to the no-aid test in its next two church-state decisions nine years later—*McGowan* and *Torcaso*—and then moved on to a third test in 1963, that of secular purpose and primary effect (*Abington Township v. Schempp*[17]), to which it added a third "prong"—excessive entanglement—in 1971 (*Lemon v. Kurtzman*[18]).

Not until 1983 (*Marsh v. Chambers*[19]) and 1984 (*Lynch v. Donnelly*[20]) did the court again look with favor upon the accommodationist stance, whereupon it approvingly quoted the key line: "We are a religious people whose institutions

16. *Zorach v. Clauson, supra.*
17. 374 U.S. 203 (1963), discussed at § 2b(2) below.
18. 403 U.S. 602 (1975), discussed at § D5 below.
19. 463 U.S. 783 (1983), discussed at VD3.
20. 465 U.S. 668 (1984), discussed at VE2d.

presuppose a Supreme Being," and smiled upon the state that "respects the religious nature of our people and accommodates the public service to their spiritual needs." In the interim, however, Justice Douglas had become the most militant separationist on the court, or at least as much so as Justice Black.

(2) Justice Black's Dissent. Justice Hugo Black dissented on the ground that he saw no constitutionally significant difference between the New York released-time arrangement and the Illinois one that had been struck down in *McCollum*.

> As we attempted to make categorically clear, the McCollum decision would have been the same if the religious classes had not been held in the school buildings.... McCollum thus held that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do.... Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery.... The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools.... In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all.

He addressed another aspect of the majority opinion that seemed to him disturbing.

> Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells.... Before today, our judicial opinions have refrained from drawing invidious distinctions between those who believe in no religion and those who do believe. The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law.
>
> State help to religion injects political and party prejudice into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of "co-operation," to steal into the sacred area of religious choice.

Thus did Justice Black view with alarm the defections from his *McCollum* opinion. One possible reason for the defection may be discerned in one of his early paragraphs:

> I am aware that our McCollum decision on separation of church and state has been subjected to a most searching examination throughout the country. Probably few opinions from the Court in recent years have attracted more attention or stirred wider debate.... [Some] have thought

> the McCollum decision fundamentally wrong and have pledged continuous warfare against it.

Nevertheless, he was holding his earlier views despite the heavy criticism, and—as we have already indicated—the court soon returned to its strict no-aid formula.

(3) Justice Jackson's Dissent. In his usual trenchant fashion, Justice Jackson stated his view of the matter in incisive prose:

> Stripped to its essentials, the [New York] plan has two stages, first, that the State compel each student to yield a large part of his time for public secular education and, second, that some of it be "released" to him on condition that he devote it to sectarian religious purposes.
>
> No one suggests that the Constitution would permit the State directly to require this "released" time to be spent "under the control of a duly constituted religious body." This program accomplishes that forbidden result by indirection. If public education were taking so much of the pupils' time as to injure the public or the student's welfare by encroaching upon their religious opportunity, simply shortening everyone's school day would facilitate voluntary and optional attendance at church classes. But that suggestion is rejected upon the ground that if they are made free many students will not go to the church. Hence, they must be deprived of freedom for this period, with church attendance put to them as one of the two permissible ways of using it.
>
> The greater effectiveness of this system over voluntary attendance after school hours is due to the truant officer who, if the youngster fails to go to the church school, dogs him back to the public schoolroom. Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to church.

Justice Jackson was also uncomfortable about the seemingly invidious role accorded nonbelievers.

> As one whose children, as a matter of free choice, have been sent to privately supported church schools, I may challenge the Court's suggestion that opposition to this plan can only be anti-religious, atheistic, or agnostic. My evangelistic brethren confuse an objection to compulsion with an objection to religion. *It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesear.*
>
> The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power.... And, after all, if we concede to the state power and wisdom to single out "duly constituted religious" bodies as exclusive alternatives to compulsory secular instruction, it would be logical to also uphold the power and wisdom to choose the true faith among those "duly constituted." We start

> down a rough road when we begin to mix compulsory public education with compulsory godliness.[21]

Unconvinced by the majority's insistence that "we follow the *McCollum* case," Jackson observed that a comparison of the two would suggest that "the *McCollum* case has passed like a storm in a teacup.... Today's judgment will be more interesting to students of psychology and of the judicial process than to students of constitutional law."

(4) Justice Frankfurter's Dissent. Not to be outdone by the other dissenters, Justice Frankfurter added a few words to emphasize his agreement with Jackson.

> The Court tells us that in the maintenance of its public schools, "[The State government] can close its doors or suspend its operations" so that its citizens may be free for religious devotions or instruction. If that were the issue, it would not rise to the dignity of a constitutional controversy. Of course a State may provide that the classes in its schools shall be dismissed for any reason, or no reason, on fixed days, or for special occasions. The essence of this case is that the school system did not "close its doors" and did not "suspend its operations." There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes.... The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released-time program are compelled to attend. The school is very much in operation during this kind of released time. If its doors are closed, they are closed upon those students who do not attend the religious instruction in order to keep them within the school....

Justice Frankfurter also dealt sharply with the court's comment that there was no evidence in the record of coercion in the operation of the program:

> "[C]oercion" in the abstract is acknowledged to be fatal. But the Court disregards the fact that as the case comes to us, there could be no proof of coercion, for the petitioners were not allowed to make proof of it.... Petitioners sought an opportunity to adduce evidence in support of [their] allegations [of coercion] at an appropriate trial.... [T]he courts below... denied that opportunity on the ground that such proof was irrelevant to the issue of constitutionality.
>
> When constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established.... If we are to decide this case on the present record, however, a strict adherence to the usage of courts in ruling on the sufficiency of pleadings would require us to take as admitted the facts pleaded in the petitioners' complaint, including the fact of coercion, actual and inherent.... I cannot see how a finding that coercion was absent, deemed critical by this Court in sustaining the practice, can be

21. *Zorach v. Clauson, supra*, Jackson dissent; emphasis added.

> made here, when petitioners were prevented from making a timely showing of coercion because the courts below thought it irrelevant.

He concluded his dissent with an observation that resonates with one theme of this work:

> The unwillingness of the promoters of this movement to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes—an attitude that hardly reflects the faith of the greatest religious spirits.

(5) L'Envoi. *McCollum* and *Zorach* are the only Supreme Court decisions dealing with released-time religious instruction. They are dealt with at length here because, perhaps more than is often realized, they provided the battleground on which the parameters of the establishment clause were hammered out in a formative period of church-state jurisprudence in this country. Although off-premises programs were upheld in *Zorach*, they have proved to be of rapidly diminishing popularity, at least among Protestants. Despite the efforts of the weekday religious education movement to keep them going, released-time programs have generally fallen into disuse until now they are of interest mainly to Roman Catholics, and not too much to them. So it was not only *McCollum* that "passed like a storm in a teacup," but released time itself.

With the virtual passing of released-time religious instruction, the interest of religious bodies in inculcating the faith within the ambience of the public schools seemed to subside, and attention turned from the offensive to the defensive concern for protecting what faith school children might already have from various adverse influences.

2. Prayer and Bible-reading in Public Schools

A more venerable practice than released-time religious instruction—though one to which the Supreme Court did not attend until 1962—was the routine use of prayer and/or (devotional) reading of the Bible (sometimes accompanied by the singing of hymns) in public schools. Unlike released-time religious instruction, this practice was not devised and instituted by religious bodies *per se*, but was inherited from the "dame schools" and other (private) precursors of the public schools and sometimes represented more a manifestation of folk-piety than a calculated system for inculcating the faith. Nevertheless, it was often on the latter basis that the practice was attacked—and defended.

Latter-day defenders of this practice were often heard to insist that (a) prayer in public schools "never hurt anyone" and (b) was universally accepted without

question until the Supreme Court outlawed it in 1962-63.[22] Both of these assertions are contrary to fact and betrayed a remarkable—though all too prevalent—ignorance of history. It is particularly ironic that some of the most vociferous latter-day defenders of prayer in public schools have been Roman Catholics, who seem not to recall that it was Roman Catholics who were the chief objectors to what they deemed Protestant practices in public schools in the nineteenth century. Because many Americans seem unable to take account of events they do not personally remember (and not always of those), perhaps because of inadequate teaching or learning of history (to which more time and effort could profitably be given that has been devoted to classroom devotions or disputes about them), it may be useful to recount briefly the long and tumultuous history of conflict that has arisen from this cause and the impact it has had on the shape of public and private education in this country, particularly the impress it has left on the law of church and state.

a. Early State Court Decisions. Leo Pfeffer, in his monumental *Church, State and Freedom*, recounted in detail the developments of the mid-nineteenth century in which Roman Catholics encountered these religious practices in the Protestant-dominated common schools of the time.

> In November 1843 Bishop Francis Kenrick of Philadelphia—then a hotbed of Nativism—petitioned the school board of that city to allow Catholic children to use the Catholic version of the Bible where Bible reading was required. The board either granted the request, or directed that a child whose parents objected to Bible reading should not be obliged to be present at Bible exercises—it is not clear which. Whichever it was, the nativist element raised the cry that the Catholics were seeking to eject the Bible from the public schools. From that day on, public school Bible reading became a rallying cry for Nativism and Know-Nothingism.
>
> * * *
>
> The immediate effects of the Bishop's petition were both dramatic and tragic. For several months the controversy simmered, and then suddenly erupted in riots. Catholic churches were attacked; two churches in the Philadelphia suburb of Kensington were reduced to ashes. A convent was completely destroyed.... Many houses in the Irish section were destroyed by fire, some of the residents were shot down as they ran out, and a number of non-Catholic bystanders likewise lost their lives.
>
> In New York, reports of the Philadelphia riots caused Bishop Hughes to place large groups of armed men around each Catholic Church, with instructions to defend the building by force if necessary. Fortunately it did not prove necessary. Bishop Hughes also led the Catholic Church in a dual campaign to seek the division of public education funds between public and church schools, and for laws against the required reading of the "Protestant Bible" in the public schools.... Protestantism... replied by

22. Cf. testimony of J. Edgar Chenoweth, "Up until recently no objection has been raised." *School Prayers*, Hearing, 88th Congress, 1964, v. 1, p. 275, and similar comments by other witnesses.

> declaring that the Bible would not be expelled from public school classrooms "so long as a piece of Plymouth Rock remained big enough to make a gun flint out of."
>
> In Massachusetts the Know-Nothing party succeeded in capturing the state legislature in 1855, and passed a number of laws specifically aimed at the newly arrived Catholics. These laws restricted office-holding to native-born citizens, required twenty-one years' residence for the right to vote, and... [required] Bible reading in the public schools. The other laws were repealed after the nativists lost control of the legislature, but the Bible-reading statute remained on the books—the only state statute requiring public school Bible reading until the 20th century.[23]

Pfeffer contended that, had it not been for this struggle over Protestant devotional practices in public schools, the Roman Catholic laity might have accepted—as did the Jewish population—the common public school system. (Indeed, at least half of the Roman Catholic population has continued to patronize the public schools.) He admitted that this might be "speculative."

> What is not speculative but fairly certain is that the disgraceful chain of events set off by Bishop Kenrick's request left the Catholic Church with little choice but to embark on a campaign to have every Catholic child educated in a Catholic school and leave Catholic parents with little choice but to go along. Nor is it speculative that the long-standing animosity of the Catholic Church to the American public school can in large measure be traced to the ensuing half-century conflict around Bible reading.

There is another possibility: that Roman Catholic opposition to prayer and Bible-reading in public schools was a smokescreen for demands for public aid for parochial schools. Whether or not this was a formative factor—or a pretext (or a little of both)—in the development of the vast Roman Catholic system of parochial schools, it was certainly a source of intense and protracted turmoil, anguish, religious oppression and extensive litigation.[24] No one could rightfully call prayer in public schools a source of unalloyed sweetness and light.

(1) *Donahoe v. Richards* (1854). The earliest case of record arose in Maine out of events that were somewhat more colorful than the court record suggests. In 1854 a Jesuit priest, John Bapst, formerly president of the Holy Cross College, was engaged in missionary work among the Indians in Maine. Among the parishes he served was the town of Ellsworth, near Bangor. The school committee of the town adopted a regulation requiring all children to read the King James Bible. Father Bapst advised his parishioners to defy the committee and take the issue to the courts for judicial determination. Acting on his urging, the father of Bridget Donahoe directed his daughter to refuse to read from the Protestant Bible as directed by her teacher. When

---

23. Pfeffer, *Church, State and Freedom*, *supra*, pp. 374-375.

24. See Perko, F.M., "The Building Up of Zion: Religion and Education in Nineteenth Century Cincinnati," in 38 *Cinn. Hist. Soc. Bull.* #2, 97 (1980).

the rebellious Bridget was expelled, her father brought suit to compel her reinstatement.

Father Bapst's action became known to the residents of the town, who indignantly called a town meeting, at which a resolution was adopted to the effect that if Father Bapst ever entered Ellsworth again he would be tarred and feathered and ridden out of town on a rail. A few months later [he] returned to Ellsworth, and while [he was] hearing confessions on Saturday night, a mob broke into his house, dragged him out, tore off his clothing, tarred and feathered him, and after two hours of cruel treatment, finally released him. Although the ringleaders were known and the grand jury was in session, no one was indicted or even arrested in connection with the incident.[25]

The Supreme Court of Maine, in considering Mr. Donahue's suit, blandly declared:

> that "the law regards the Pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quaker, as all possessing equal rights." But, the court held, Bridget's rights had not been infringed for "reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmance of the pagan creeds." The fact... that the Ellsworth school committee designated the King James version as the text to be used did not warrant judicial interference or violate Bridget's rights, for the selection of books was exclusively within the discretion of the committee, and its selection of a particular version did not place a sanction of `purity' on the version selected.[26]

The record does not indicate whether the use of the Bible in this instance was of a devotional character or simply an exercise in reading—a distinction later to become of greater significance. It does indicate that—in this early and remote stage of church-state litigation—if Pagan, Mormon, Brahmin, Jew, Swedenborgian, Buddhist, Catholic and Quakers were deemed to have equal rights, they were rights not equal to those of the good descendants of the Puritans who composed the majority and who viewed the use of the King James version as the normal, proper and accepted thing.

It may be that prayer or Bible-reading never "hurt" anyone, but *refusing* to engage in them certainly could. And attempting to have them eliminated from public schools could lead to riots, burnings and bloodshed, as noted above. The contention that it wouldn't "hurt" children to go along with these practices is a typical majoritarian conceit, as when a large person leans on a small person and assures the latter that "it doesn't hurt." That is not a determination that one person can make for another, let alone a justification for punishing the smaller person for crying "Ouch!"[27]

---

25. Pfeffer, *supra*, p. 376.

26. Ibid.

27. Shakespeare phrased the situation thus: "He jests at scars that never felt a wound." *Romeo and Juliet*, I:1.

(2) *Commonwealth v. Cooke* (1859). A particularly glaring specimen of this genre appeared in the records of the police court of Boston five years later, whence it was retrieved by Professor Mark de Wolfe Howe in a syllabus he prepared in 1952 for a course on church-state law—itself a rare document. McLaurin F. Cooke was brought before the court by the commonwealth's prosecutor on charges of assault and battery brought by the father of a boy named Tom Wall, eleven years of age, a pupil in the public-school classroom of which Mr. Cooke was the teacher. It appeared that the teacher had been carrying out the regulation of the Boston School Committee, which provided, "The morning exercises of all the schools shall commence with reading a portion of the Scripture in each room by the teachers..., [to] be followed with the Lord's Prayer repeated by the teacher alone, or chanted by the teacher and the children in concert, and... that the pupils learn the Ten Commandments, and repeat them once a week."[28]

The school committee had through this regulation implemented and elaborated upon the statute, referred to above, which stipulated that "the School Committee of each town and city in the Commonwealth, shall require the daily reading of some portion of the Bible in the common English version." It is indicative of the frame of mind reflected in this type of exercise that the oral reading aloud invariably took on a quasi-liturgical character and was to be followed by oral prayer, either by the teacher alone or "chanted by the teacher and children in concert." Actually the dispute was not alleged to have arisen over this daily ritual but over the school committee's imaginative supplemental weekly observance: the recitation of the Ten Commandments. The police court related:

> That by the rules and regulations of the school, the Commandments were repeated by the scholars every Monday morning, and that the boy Wall had repeated them without objection until Monday, March the 7th, when he refused, and was discharged from the school. That an interview was had between the father of the boy and the Principal of the school, and the boy returned to the school.
>
> That on Monday, the 14th of March, he refused again to read or repeat the Commandments, giving as reasons for so doing, that his father had agreed with Mr. Mason that he should not say them. That his father had told him for his life not to say them, and that his priest had also told him not to say them, and that on the Sunday previous... the priest (Father Wiget) while addressing nine hundred children of St. Mary's Church, of whom Wall was one, told them not to be cowards to their religion, and not to read or repeat the Commandments in school, that if they did he would read their names from the altar.[29]

* * *

28. *Commonwealth v. Cooke*, 7 Am.L.Reg. 417 (Police Court of Boston, 1859), reprinted in Howe, M.D., *Cases on Church and State* (Cambridge: Harvard, 1952), p. 318.

29. It is suggestive of the scope of disjunction here that Catholics and Protestants enumerate the Ten Commandments differently.

> It further appeared, from the evidence, that there was a concerted plan of action on Monday, the 14th, between many of the boys to refuse to obey the orders of the school, if required to read or repeat the Lord's Prayer or the Commandments, and that two-thirds of the scholars composing the school... and numbering about sixty, declared their intention not to comply with the rules of the school in that particular.... [Wall] was told by Mr. Mason that his father had requested him to make him repeat them, and that if he did not, to punish him severely. Wall still refusing, was punished by the defendant with a rattan stick, some three feet in length, and three-eights of an inch thick, by whipping upon his hands. From the time when the punishment commenced to the time it ended, repeated inquiries were made of Wall if he would comply with the requirements of the school. Some thirty minutes' time was occupied in the whole. During this time there were several intervals [when] the defendant was absent from the room.... The blows were not given in quick succession, but with deliberation. During the chastisement Wall was encouraged by others, who told him not to give up. This was while defendant was absent from the room. The master ceased to punish, when Wall submitted to the requirements of the school.
>
> From the effect of the punishment Wall's hands were swollen, he was taken to the sink by the defendant twice, and his hands held in water. The physician who saw his hands in the afternoon of Monday, and prescribed for them... says that he did not think the injury very severe; that at the time he thought he would recover from it in twenty-four hours.

While caning pupils—usually on another portion of the anatomy—was more casually accepted in the nineteenth century, this incident does seem to have been a significant event in the history of the Eliot School, when Principal and Teacher withstood the incipient revolt of two-thirds of the student body and quelled it with a single rattan stick. From the standpoint of Tom Wall, however, it may have seemed an even more agonizing crisis, when he single-handedly sought to withstand the might of the entire commonwealth. The differing accounts of what his father had agreed with the principal—Tom's version versus the principal's—cannot have made his plight any easier.

What did the august Police Court make of all this? It reviewed the claim that this corporal punishment for refusal to recite the Ten Commandments violated that part of the Massachusetts Constitution that stated "that it is the right as well as the duty of all men in society publicly and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested or restrained in his person, liberty or estate, for worshipping God in the manner and seasons most agreeably to the dictates of his own conscience, or for his religious professions or sentiments, provided he doth not disturb the public peace, or obstruct others in their religious worship." Conceivably, "no subject shall be hurt... for his religious professions or sentiments" might seem to apply to the case.

> Can the position [of the plaintiff] be a correct one? Our schools are the granite foundation on which our republican form of government rests.... But a pupil in one of them has religious scruples of conscience, and cannot read or repeat the Commandments, unless from that version of the Bible which his parents may approve. Now what is to be done in such a case? If he has a constitutional right to refuse to read or to repeat them from books furnished for the school by statute law, then to punish him in any way would be a great wrong.... [I]s it not equally clear that he could not be compelled to hear it read?
>
> If, then, these are constitutional rights, secured to the children in our common schools, at any time when one pupil can be found in each public school in the Commonwealth with conscientious scruples against reading the Bible, or hearing it read, the Bible may be banished from them, and so the matter of education may be taken from the State government and placed in the hands of a few children.[30]

Thus did the Boston Police Court characterize the plaintiff's case, using words that might well resonate with the thoughts of champions of public school liturgies more than a century later. Like them, the court saw no connection between the promises of the state constitution and Tom Wall's plight.

> Those who drafted and adopted our constitution, could never have intended it to meet such narrow and sectarian views. That section... was clearly intended for higher and nobler purposes. It was for the protection of all religions—the Buddhist and the Brahim [*sic*], the Pagan and the Jew, the Christian and the Turk, that all might enjoy an unrestricted liberty in their religion, and feel an assurance that for their religion alone, they should never, by legislative enactments, be subjected to fines, cast in prisons, starved in dungeons, burned at the stake, or make [sic] to feel the power of the inquisition.

(But not to protect mere schoolboys from corporal punishment "for their religion alone"?)

> It was intended to prevent persecution by punishing for religious opinions. The Bible has long been in our common schools. It was placed there by our fathers, not for the purpose of teaching sectarian religion, but a knowledge of God and of his will, whose practice is religion....
>
> But, in doing this, no scholar is requested to believe it, none to receive it as the only true version of the laws of God. The teacher enters into no argument to prove its correctness, and gives no instructions in theology from it. To read the Bible in school for these and like purposes, or to require it to be read without sectarian explanations, is no interference with religious liberty.

30. *Commonwealth v. Cooke, supra.*

> If the plea of conscience is good against the reading or use of the Bible, why is it not equally good against any other book, or the language in which the book may be printed?

The logic of the court's thinking is not easy to follow. The Bible was placed in the public schools to inform the pupils of God's will. But no one is required to *believe* it. It is not to be explained, defended or argued, as would seem to be essential to the normal process of instruction, but just to be read, memorized, recited—which was also normal to the process of instruction. Is one required to *believe* the multiplication table or only to memorize it, recite it, use it in mathematical exercises? Did not the requirement to memorize and recite the Ten Commandments have behind it the same sort of authority and validity as the school imparted to the multiplication table? And if the memorization and recitation of the Ten Commandments constituted an acceptance thereof in the same way as the multiplication table, might not a person who for religious reasons objected to the form or content of the Ten Commandments find some legitimate grounds for offense in being compelled to recite them that might not arise from the multiplication table or from other materials with less religious implications than the Ten Commandments? It was the *religious* implication that elicited objections, but the court appeared to believe that the Bible, though religious, was not a *sectarian* work, and therefore should be unobjectionable. The day when objections would be raised to *biology* textbooks because of their treatment of evolution was still far in the future, and the court did not seem to contemplate the prospect of excusing individual pupils from curricular elements that might be objectionable to them for religious reasons, yet not eliminating the instruction for other, nonobjecting pupils or at least did not think it feasible.

> The last point for the consideration of the court is, was the offence one which required punishment?... The apparent magnitude of the offence depends somewhat upon the stand-point from which it is viewed. From one aspect, it appears to be of the most innocent and simple nature. A child desired the privilege in school of reading the Commandments from his Bible, the only one that his religion would allow him to read. It would seem to a generous mind tyrannical, to deny so simple and innocent a request; and it would indeed be so, were that the whole of the matter.

Would that such problems could be dealt with on such a simple and innocent basis! But the "honor" of the system was at stake. Rebellion could not be countenanced, especially from recent immigrants of Romish persuasion. The passage that followed completely outclassed the common "camel's-nose-in-the-tent" metaphor.

> That most wonderful specimen of human skill and human invention, the Suspension Bridge, that spans the dark, deep waters at Niagara, with strength to support the heaviest engines with cars laden with their freight, and defying the whirlwind and the tempest, is but the perfection of

> strength from the most feeble beginning. A tiny thread was but safely secured across the abyss, and final success became certain. Thread after thread were interchanged, until iron cables bound opposite shores together. May not the innocent pleading of a little child for its religion in school, if granted, be used like a silken thread, to first pass that heretofore impassable gulf which lies between Church and State, and when once secured, may not stronger cords be passed over it, until cables, which human hands cannot sever, shall have bound Church and State together forever?
>
> * * *
>
> The mind and the will of Wall had been prepared for insubordination and revolt by his father and the priest.... His offence became the more aggravated by reason of many others acting in concert with him, to put down the authority of the school. The extent of the punishment was left as it were to his own choice. From the first blow that fell upon his hands from the master's rattan, to the last that was given, it was in his power to make every one the last.
>
> He was punished for insubordination, and a determination to stand out against the lawful commands of the school. Every blow given was for a continued resistance and a new offence.... The punishment ceased when the offence ceased....
>
> The defendant [teacher] is discharged.[31]

So: it was to save the separation of church and state that Tom Wall was flogged into subjection! Little would the courts of 1859 envision that the time would come when the mere posting of the Ten Commandments (at private expense) on the schoolroom wall would be deemed by the Supreme Court a violation of that same "separation of Church and State"![32]

(3) Other "Pro" Decisions. Over the years a number of state court decisions have *upheld* devotional practices in public schools on more or less the same spirit and rationale as those examined above. One was *Spiller v. Inhabitants of Woburn*, in which the Supreme Judicial Court of Massachusetts upheld the expulsion of a Roman Catholic student because she refused to bow her head during school prayers (1866).[33] Such cases certainly represent the majority of state court positions prior to the Supreme Court's actions on the issue in 1962-63. But although they upheld the challenged practices, they do not suggest that all was peaceful on the prayer front: quite the contrary. It was a much-litigated question for a century prior to the Supreme Court's action. But some state courts went the other way.

---

31. Ibid.

32. See *Stone v. Graham*, 449 U.S. 39 (1980), discussed at § C3a below.

33. 94 Mass. 127. Others were: *Hackett v. Brooksville*, 120 Ky. 608 (1905); *Billard v. Board of Education*, 69 Kan. 53 (1904); *Church v. Bullock*, 104 Tex. 1 (1908); *Wilkerson v. City of Rome*, 152 Ga.App. (1921); *People v. Stanley*, 81 Colo. 276 (1927); *Kaplan v. School District*, 171 Minn. 142 (1927); and *Doremus v. Board of Education*, 5 N.J. 435 (1950).

(4) *Board of Education v. Minor* (1872). One of the earliest of these arose in Cincinnati in what has been called the "Cincinnati Bible War."[34] Daily readings from the King James version of the Bible had been routine from the time that public schools were established in that city in 1829. In 1842, Roman Catholic Bishop John Purcell, while serving as a city school examiner, obtained an amendment of the school rules to the effect that "no pupil should be required to read the Testament or Bible against the wishes of parents or guardians."[35] In 1852, pupils were permitted to "read such version of the sacred scriptures as their parents or guardians may prefer."[36] In 1869, because of protests by Roman Catholics, the school board entertained a resolution to eliminate Bible reading in public school classrooms, and invective flew thick and fast in Cincinnati. Anti-Catholic cartoons by Thomas Nast appeared in the newspapers. Clergy thundered from their pulpits against the threats of "the black brigade of the Catholic priesthood" and "the black flag of atheism"—an incongruous coupling of seemingly incompatible perils.

Despite this popular turmoil, the board voted 22 to 15 to end Bible reading, and a band of pro-Bible citizens immediately took the issue to court.

> At the ensuing trial, which lasted five days, both sides were represented by nationally prominent counsel. The board's counsel consisted of one person who was later to become a justice of the United States Supreme Court, one later to become governor of Ohio, and a third, United States minister to Italy: nevertheless they were charged by one clergyman with being consorts of the "irreligious, profane, licentious, drunken, disorderly and criminal portions of our population."[37]

By a two-to-one decision, the court held the board's action invalid as contrary to the (supposed) constitutional recognition of Christianity as an essential element of good government. (The lone dissenter was Alphonso Taft, father of President, and later Chief Justice, William Howard Taft.)

The board appealed to the Ohio Supreme Court, which in 1872 issued a unanimous opinion written by Judge Welch reversing the lower court. The arguments by counsel for both sides were set forth at some length in the opinion and gave a vigorous presentation of the merits, demonstrating—what has sometimes since been lost sight of—that there are cogent considerations advanced by persons of probity on both sides.

The city solicitor, appearing for the school board and urging reversal of the court below, contended that

---

34. Helfman, Harold M., "The Cincinnati `Bible War,' 1869-1870," 60 *Ohio State Archeological and Historical Quarterly*, No. 4, Oct. 1951, pp. 369-386. See also Perko, *supra*.

35. Pfeffer, *supra*, p. 379.

36. Ibid.

37. Ibid., p. 380, and Perko, *supra*.

> the citizens of Cincinnati, who are taxed for the support of the schools... and all of whom are equally entitled to the benefits thereof... are very much divided in opinion and practice upon matters connected with religious belief, worship, and education; that a considerable number therof are Israelites who reject the Christian religion altogether..., that a still greater number... are members of the Roman Catholic Church [which believes that] the version of the Scriptures referred to in the petition... is... incorrect as a translation and incomplete... and... that the reading of the same without note or comment, and without being properly expounded by the only authorized teachers and interpreters thereof, is not only not beneficial to the children in said schools, but likely to lead to the adoption of dangerous errors, and that... the practice of reading the King James' version of the Bible, commonly and only received as inspired and true by the Protestant religious sects, in the presence and hearing of Roman Catholic children, is regarded by the members of the Roman Catholic Church as contrary to their rights of conscience.[38]

Much had been made in the complaint of the passage from the Ordinance of the Northwest Territory that had been embodied in the constitution of the state of Ohio to the effect that "religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." Plaintiffs had contended that this proviso *required* the school board to include Bible-reading in the activities of the public schools.

The city solicitor responded that the protection of every religious denomination was the appropriate way to secure "religious and moral progress," while the encouragement of "schools and the means of instruction" was the appropriate way to impart "knowledge," and that it was not meant that the schools of the state should be responsible for imparting religion, for such an outcome would require far more than plaintiffs had asked.

> [I]f religion is to be taught in the public schools, it should be correctly and exhaustively taught. In such case, the state can not be said to perform its whole duty by an opening exercise of Bible reading with a few minutes' singing, and the reading of passages from McGuffey's reader. At least as much time should be given to it, and as much pains taken to secure the full and thorough comprehension of its vital truths by the scholar, as is bestowed in the study of arithmetic, geography, grammar, or history. We ask your honors whether, if the state must teach religion in the schools, it can be excused if it does not inculcate it with saving effect?
>
> * * *
>
> The same argument that justifies its introduction into the common school would sustain a system of Sunday-schools supported by the state;

38. *Board of Education v. Minor*, 23 Ohio 211, 214 (1872).

> and the compulsory attendance of all children, irrespective of conscientious scruples of them or their parents. It would also sustain the religious education of adults by the compulsion of the state.[39]

In this passage the city solicitor was not just elaborating a *tour de force*, a kind of *reductio ad absurdum*, but was accepting the apparent contention of the advocates of religious rites in public schools that the state has some responsibility for the inculcation of religious faith. In the complaint it had been averred "that a large majority of the children... are educated in [the public] schools, and of said children large numbers receive no religious instruction or knowledge of the Holy Bible, except that communicated... in said schools, and that the enforcement of [the school board's ban] will result in leaving such children without any religious instruction whatever." This missionary zeal to reach *all* children, including those not voluntarily enrolled in the programs of the various religious bodies, ran through the arguments of advocates for public school religious instruction unto the present day, and its implications for religious liberty are potentially those indicated by the school board's counsel. That is not the way to advance religion, he concluded; quite the contrary.

> [T]he very best method of advancing the cause of religion, of that religion which is essential to good government, [is] to refuse [to] aid this attempt to make it the creature of the state. The [court below] has imposed upon an unwilling people the duty of supporting religion out of the public treasury. In the contest, whoever gains, religion loses.

Counsel for John D. Minor *et al*. sought to effectuate the intention of the Northwest Ordinance and the state constitution to advance, not sectarian evangelism, but a common morality as the necessary basis of a functioning community.

> It is... contended throughout the argument for [the school board] that religion and religious instruction mean nothing but sectarianism and the charge of souls.... There is a religion and morality, and no doubt it was intended by the framers of this law, which is easily defined, and which, for forty years, neither the people, nor school board, nor courts of Cincinnati, had any difficulty in understanding. Dr. Johnson defines it to be "virtue, as founded upon reverence of God, and expectation of future reward and punishment." Dr. Webster explains it, distinct from theology, as being "godliness or real piety in practice, consisting in the performance of the duties we owe to God, from a principle of obedience to his will." And he quotes from George Washington these words, "Let us with caution indulge the supposition that morality can be maintained without religion...."
>
> [I]nstruction in religion and morality, as enjoined in the constitution, has no reference to theology or spirituals [*sic*]. What it seeks by its system of public education is, to teach the duty of man in this life.... It uses plain and solid words denoting that it is not that sort of invertebrate morality, which

39. Ibid., pp. 218-220.

> dresses itself in Protean names, and changes, at will, with fashion or opinion, but the robust and practical morality which grows from religion.... Centuries before Plato or Cicero, this morality founded a system, by its ten commandments, in which conscience and duty were made supreme by the hope of immortality.

Counsel then responded to the city solicitor's *reductio ad absurdum*.

> [I]t is argued that if religion be taught, then it must be thorough and with saving effect. But... the schools are not established for the charge of souls, nor yet for the private benefit and purposes of the citizen. They are for the good of the state and the furtherance of order.... The plea of conscience is met by the same answer. If state necessity demands that the religious and moral sense of the people be educated, there can be no right of conscience superior to this prerogative, if not abused.... The fundamental error of the whole argument against religious instruction, is in assuming that it is for the benefit of sectarianism, and that any citizen has rights higher than the state. No preference of any sect, or violation of any right, can result from the religious and moral teaching which the constitution requires.
>
> * * *
>
> Atheism and infidelity could seek no better hold than the total banishment of religion, which [the school board] order and compel the teachers of the schools of Cincinnati, at their peril, to enforce. Exclusion of all religious instruction or reading is the propaganda of irreligion, as certainly as darkness reigns where the sun never shines.

Concerning the contention that such matters should be left to the family, counsel pointed out the futility of that solution.

> [I]n the report of the United States Commissioner for Education for the year 1871, p. 548, [i]t is shown that it is in the very quarters where neither the help of the church nor the family can avail, that vice and immorality and ignorance are most successfully reached and combated [*sic*] by the public school. It is vain, therefore, to refer the state to the family for its renovation.
>
> * * *
>
> [W]ithout religious and moral instruction in free public schools, there is a mass of society for whom there is no other chance, and who are to be reached in no other mode; and that our overgrowing cities are frightfully multiplying the extent and danger of this mass; not only the hot-bed of vice and crime, but the easy tools of political corruption. But, not as to these only, the times are pregnant with proof of the absolute necessity for a constant and powerful reinforcement, by some means, of the moral fiber of the country. In blotting out of the constitution the potent religious and moral energies which it intended the public schools shall wield, the court are asked to take a wide step backward.

Some contemporary observers might resonate to this description of the plight of the times and the need for remedial steps to inculcate morality in the children of those

so depraved or neglectful as to contribute to the rapid deterioration of society, especially in "our overgrowing cities." Yet somehow the republic still stands over a century later.

The court sought to pare away what it considered extraneous issues.

> The arguments in this case have taken a wide range, and counsel have elaborately discussed questions of state policy, morality, and religion, which, in our judgment, do not belong to the case. We are not called upon as a court, nor are we authorized to say whether the Christian religion is the best and only true religion. There is no question before us of the wisdom or unwisdom of having "the Bible in the schools," or of withdrawing it therefrom.... The case, as we view it, presents merely or mainly a question of the courts' rightful authority to interfere in the management and control of the public schools of the state.

The court answered that question as follows:

> [I]t must be conceded that the legislature have never passed any law enjoining or requiring religious instruction in the public schools, or giving the courts power in any manner, or to any extent, to direct or determine the particular branches of learning to be taught therein, or to enforce instruction in any particular branch or branches. The extent of legislative action... has been, to establish and maintain a general system of common schools for the state, and to place their management and control *exclusively* in the hands of directors, trustees, or boards of education, other than the courts of the state.

If the legislature has not acted, does the constitution oblige the courts to do so?

> [W]hat is the true meaning and effect of these constitutional provisions on this subject? Do they enjoin religious instruction in the schools? and does this injunction bind the courts, in the absence of legislation? We are unanimous in the opinion that both these questions must be answered in the negative.

Having concluded, in effect, that the lower court did not have the power to tell the Cincinnati school board how to run the schools, the Ohio Supreme Court remarked, "This opinion might well end here." But it could not resist expatiating on the theme of religion and the state, just as counsel had done. And thus it unleashed a flow of *dicta* at least as copious as that for which it had reproved the parties' counsel.

> The real claim is, that by "religion" in this clause of the constitution is meant "Christian religion," and that by "religious denomination" in the same clause is meant "Christian denomination...." To do so, it will readily be seen, would be to withdraw from every person not of Christian belief the guaranties therein vouchsafed and to withdraw many of them from Christians themselves. In that sense the clause... in question would read as follows:

> "Christianity, morality and knowledge, however, being essential to good government it shall be the duty of the general assembly to pass suitable laws to protect every *Christian* denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."
>
> * * *
>
> We are told that this word "religion" must mean "Christian religion," because "Christianity is part of the common law of this country," lying behind and above its constitutions. Those who make this assertion can hardly be serious, and intend the real import of their language. If Christianity is a *law* of the state, like every other law, it must have a *sanction*. Adequate penalties must be provided to enforce obedience to all its requirement and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation—rather, the only excuse—for the proposition, that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people. And is not the very fact that those laws do *not* attempt to *enforce* Christianity, or to place it upon exceptional or vantage ground, itself a strong evidence that they *are* the laws of a Christian people, and that their religion is the best and purest of religious?

Then followed a passage of singular force and cogency, which has been often quoted, and which deserves to be remembered, wholly apart from the rather limited holding in this nineteenth century case.[40]

> True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual, not carnal. Armed with these, and these alone, it is not afraid nor "ashamed" to be compared with other religions, and to withstand them single-handed. And the very reason why it is not so afraid or "ashamed" is, that it is not the "power of *man*," but the "power of God," on which it depends. True Christianity never shields itself behind majorities. Nero, and the other persecuting Roman emperors, were amply supported by majorities; and yet the pure and peaceable religion of Christ in the end triumphed over all; and it was only when it attempted itself to enforce religion by the arm of authority, that it began to wane. A form of religion that can not live under equal and impartial laws ought to die, and sooner or later must die.
>
> *Legal* Christianity is a solecism, a contradiction in terms. When Christianity asks the aid of government beyond mere *impartial protection*, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with

40. It was quoted at length by the Supreme Court of Ohio in *Ohio v. Whisner*; see § B3b(4) above.

> government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both.[41]

Here—from the bench of a civil court in Middle America in 1872—came a more profound insight into the relations between church and state than can be found in most volumes of sermons, ethics or theology. Despite forty-three pages of often impressive argumentation, the court's decision was rather narrow. It held only that school boards could include or exclude Bible reading and other opening exercises at their discretion, and such practices continued in other parts of Ohio until the 1960s.

(5) *State ex rel. Weiss v. School Board* (1890). Nearly twenty years later in the nearby state of Wisconsin a similar problem arose from the daily reading by teachers from the King James version of the Bible. Again, the protesters were Roman Catholics, who took the matter to court, complaining that their church viewed that version as "incorrect as a translation, and incomplete, by reason of the omission of a part of the books held by such church to be integral portions of the inspired cannon." Moreover, the church considered that "the scriptures ought not to be read indiscriminately.... [T]he reading of the same without note or comment, and without being expounded by the only authorized teachers and interpreters thereof [i.e., the church], is not only not beneficial to the children... but likely to lead to the adoption of dangerous errors, irreligious faith, practice and worship."[42]

The school board responded at great and repetitive length to the effect that:

> 1. The portions of the Bible read in the schools were not sectarian, since all such portions are found in the Douay version also, and there are no material differences in the two versions with respect to those portions;
> 2. The Bible is an important textbook in said school, duly selected by the school board from a list recommended by the state superintendent of schools and not subject to change without his permission for a period of three years, which had not yet run since the most recent selection;
> 3. There are about 500 children in the school district, most of whom come from Protestant homes, and they desire that the King James' version of the Bible be used as a textbook in the schools;
> 4. The Roman Catholic Church is not the only infallible teacher or interpreter of the Bible, but every person has the right to read and interpret it for himself; and besides,
> 5. The children of the protesters "were not, and are not, required to remain in said school during the reading of... the Bible, but are at liberty to withdraw during such reading, if they desire to do so."

---

41. *Minor v. Board of Education*, p. 247, emphasis in original.

42. *State ex rel. Weiss v. District Board of School District No. 8 of the City of Edgerton* (Wisc.), 44 NW 967, 968 (1890).

Point 4 was a remarkable espousal of a distinctly Protestant theological position, which was followed by the contention that the protesters' view was "sectarian" and to enforce it in the schools would itself violate the state constitution! (The provision for excusal no doubt came as something of a surprise to the protesters' children, who probably had not been informed by the teachers that they were free to leave during the Bible reading.)

Judge Lyon, writing for the court, rejected the contention that there was no material difference between the versions.

> It is universally known that there are many differences between these two versions in many particulars, which the respective sects regard as material.... In considering whether such reading of the Bible is sectarian instruction, the book will be regarded as a whole; because the whole Bible, without exception, has been designated as a textbook for use in the Edgerton schools.

The court then took "judicial notice" that the religious world was divided into various sects, which based their different and conflicting doctrines on different portions of the Bible, and it listed a dozen such differences, such as predestination, apostolic succession, etc., that divided the sects from one another and might in due course be read about from the Bible by the teacher.

> The doctrines of one of these sects which are not common to all the others are sectarian.... Is the reading of the Bible in the schools—not merely selected passages therefrom, but all of it—sectarian instruction of the pupils?... [A]n affirmative answer to the question seems unavoidable.... A most forcible demonstration of the accuracy is found in certain reports of the American Bible Society of its work in Catholic countries... in which instances are given of the conversion of several persons from "Romanism" through the reading of the scriptures alone;... the reading of the Protestant or King James version of the Bible converted Catholics to Protestants without the aid of comment or exposition. In those cases the reading of the Bible certainly was sectarian instruction.

The court was besought by the school board to take into account in interpreting the constitution "the surrounding circumstances existing when it was framed and adopted, [since] contemporaneous exposition thereof is of great authority," namely, that from 1858 to the present the state department of public instruction had recommended the Bible as a textbook for use in the schools of the state. That history was proffered as an indication that the Framers of the Constitution did not intend that the Bible be excluded from the schools—a mode of argument that has been much favored over the intervening years and has even provided the justification for the Supreme Court's sustaining the constitutionality of a legislative chaplain, since the First Congress, which adopted the First Amendment, also employed a chaplain to

open its sessions with prayer.[43] But in the 1872 instance, the court was not persuaded:

> [W]e do not think the true interpretation of the constitutional provision under consideration is doubtful or uncertain, or that any extraneous aid is required in order to interpret it correctly; hence our judgment cannot properly be controlled by the action of the department of public instruction, or the opinions of its learned chiefs.

The court undertook its own exposition of the reasons for the constitutional provisions against sectarian instruction in public schools and concluded that the framers wanted to make conditions in the state attractive to prospective immigrants from Europe, who would be of varying religious affiliations.

> Many, perhaps most, of these immigrants come from countries in which a state religion was maintained and enforced, while some were non-conformists, and had suffered under the disabilities resulting from their rejection of the established religion. What more tempting inducement to cast their lot with us could have been held out to them than the assurance that, in addition to the guarantees of the right of conscience and of worship in their own way, the free district schools in which their children were to be... educated, were absolutely common ground, where the pupils were equal, and where sectarian instruction, and with its sectarian intolerance, under which they had smarted in the old country, could never enter?

The court dealt with the (supposed) provision of excusal with perspicacity that one wishes might have informed other courts during the intervening century.

> The [school board] states that the [protesters'] children are not compelled to remain in the school-room while the Bible is being read, but are at liberty to withdraw therefrom during the reading of the same. For this reason it is claimed that the [protesters] have no good cause for complaint, even though such reading be sectarian instruction. We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses 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 disadvantge in many ways with respect to the others.

---

43. *Marsh v. Chambers*, 463 U.S. 783 (1983), discussed at VD3.

The last possible defense of Bible-reading thus having been rejected, the court, without dissent, ordered its discontinuance.

Judge Cassoday wrote a concurring opinion in which he contended that "the stated reading of the Bible... may be `worship' within the meaning of the... constitution..." and therefore impermissible for that reason also. "The fact that only a small fraction of the school hours is devoted to such worship, in no way justifies such use, as against an objecting taxpayer...," since the taxpayers have all contributed to the building and support of the school, and "they have a legal right to object to its being used as a `place of worship.'"

Judge Orton could not resist adding his concurrence in writing to express his enthusiasm for the outcome, with language that probably confirmed the worst fears of the losing side:

> The clause that "no sectarian instruction shall be allowed therein" was inserted... to exclude everything pertaining to religion. They are called by those who wish to have not only religion, but their own religion, taught therein, "Godless schools." They are Godless, and the educational department of the government is Godless, in the same sense that the executive, legislative and administrative departments are Godless. So long as our constitution remains as it is, no one's religion can be taught in our common schools.... The only object, purpose or use for taxation by law in this state must be exclusively secular. There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution and war, and all evil in the state, as religion. Let it once enter into our civil affairs, our government would soon be destroyed. Let it once enter into our common schools, they would be destroyed.

This bit of judicial overkill might well have done more harm than good; it represented the aggressive secularizing zeal that has sometimes distorted the neutrality of the state with reference to religion, resulting in an almost antireligious crusade that would exclude even non-state-sponsored religion from the public arena. But Judge Orton did get in one good line. In referring to the provision for excusal of objecting pupils, he exclaimed, "They ought not to be compelled to go out of the school for such a reason for one moment. The suggestion itself concedes the whole argument."[44]

(6) *People ex rel. Ring v. Board of Education* (1910). Another twenty years passed before another state court found against religious devotional practices in public schools, this time in Illinois. Once more the plaintiffs were Roman Catholics, who objected to the practice in the public schools their children attended of teachers' reading each day to the students portions of the King James version of the Bible, the students' recitation of the Lord's Prayer as found in the King James version, and the singing of "sacred hymns" by the students in concert. During these exercises, the students "are required to rise in their seats, fold their hands and bow their heads," and

44. *State ex rel. Weiss v. School Board, supra*, Orton opinion.

sometimes particular pupils were called on to explain the meaning of certain passages of scripture that had been read. The court observed:

> The exercises mentioned in the petition constitute worship. They are the ordinary forms of worship usually practiced by Protestant Christian denominations. Their compulsory performance would be a violation of the constitutional guaranty of the free exercise and enjoyment of religious profession and worship. One does not enjoy the free exercise of religious worship who is compelled to join in any form of religious worship.... Prayer is always worship. Reading the Bible and singing may be worship.... If these exercises of reading the Bible, joining in prayer, and in the singing of hymns were performed in a church there would be no doubt of their religious character, and that character is not changed by the place of their performance. If the petitioners' children are required to join in the acts of worship, as alleged in the petition, against their consent and against the wishes of their parents, they are deprived of the freedom of religious worship guaranteed to them by the Constitution. The wrong arises, not out of the particular version of the Bible or form of prayer used... or the particular songs sung, but out of the compulsion to join in any form of worship. The free enjoyment of religious worship includes the freedom not to worship.
>
> * * *
>
> It is further contended that the reading of the Bible in the schools constitutes sectarian instruction, and that thereby that provision of the Constitution is also violated which prohibits the payment from any public fund of anything in aid of any sectarian purpose.... Is the reading of the Bible in the public schools sectarian instruction?
>
> * * *
>
> What is the Bible? Different sects of Christians disagree in their answers to this question.... The differences may seem to many so slight as to be immaterial, yet Protestants are not found to be more willing to have the Douay Bible read as a regular exercise in the public schools to which they are required to send their children, than are Catholics to have the King James' version read in schools which their children must attend.... The importance of men's religious opinions and differences is for their own, and not for a court's determination.
>
> * * *
>
> 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. Whether it may be called sectarian or not, its use in the schools necessarily results in sectarian instruction.... The only means of preventing sectarian instruction in the school is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise. The Bible is not read in the public schools as mere literature or mere history. It cannot be separated from its character as an inspired book of religion.... Such use would be

> inconsistent with its true character and the reverence in which the Scriptures are held and should be held.
>
> [T]he law knows no distinction between the Christian and the pagan, the Protestant and the Catholic. All are citizens. Their civil rights are precisely equal. The law cannot see religious differences, because the Constitution has definitely and completely excluded religion from the law's contemplation in considering men's rights. There can be no distinction based on religion. The state is not, and under our Constitution cannot be, a teacher of religion.... The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of the public school. No one denies their importance. No one denies that they should be taught to the youth of the State. The Constitution and the laws do not interfere with such teaching, but they do banish theological polemics from the schools and the school districts. This is done not from any hostility to religion, but 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.[45]

The court noted that the courts of Maine, Massachusetts, Michigan, Iowa, Kansas, Kentucky and Texas had permitted such practices as were at issue in this case on the basis of their own state constitutions, whereas Wisconsin and Nebraska had ruled against them.

> The Kentucky and Kansas decisions seem to consider the fact that the children of the complainants were not compelled to join in the exercises as affecting the question in some way. That suggestion seems to us to concede the position.... The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the Constitution....

Two judges of the Illinois Supreme Court, Hand and Cartwright, wrote a lengthy and vigorous dissent. They contended that the majority had seriously misconstrued the state constitution.

> It has always been understood that those general provisions found in the several state constitutions which usually appear in what are designated as a "bill of rights"... were primarily designed to prevent the establishment of a state religion or the compulsion of the citizen to support, by taxation or otherwise, an established ministry or places of

45. *People ex rel. Ring v. Board of Education*, 92 N.E. 251 (1910), pp. 252-256.

> established worship... and that the instruction which was to be imparted in the public schools did not fall within those provisions of the state Constitution unless the instruction sought to be imparted degenerated into what may be properly designated as denominational or sectarian instruction.... We think it obvious, therefore, that all must agree that there can be no rational constitutional basis upon which this court can hold that the Bible can be excluded from the public schools of the state other than the ground that it is sectarian in character.... We do not think the Bible can be said to be a sectarian book or that its teachings are sectarian. Its plan of salvation is broad enough to include all the world, and the fact that those who believe in the Bible do not agree as to the interpretation or its teachings and have divided into sects, and are therefore sectarian in their beliefs, does not change the Bible or make it a sectarian book.... To hold that the Bible cannot be read in the public schools requires a judicial determination that it teaches the doctrine of some sect, and if that is so we ought to be able to say what sect.

The dissenting judges then reviewed seven cases from other states dealing with the issue and found them all to consider the Bible not to be a sectarian book. *Minor* (above), merely held that the use of the Bible was to be determined by the school boards and not by the courts. Little or no notice was taken of *Weiss* (above). But did the opening exercises described in the complaint convert the public school into a place of worship?

> [T]he petition does not allege the relator's children were required to participate in the recitation of the Lord's Prayer or in the singing of said sacred hymns. At most... [they] were required to remain quiet during the exercises, and the fact that they were required to bow their heads and fold their hands during the exercises did not convert the school into a place of worship.

The upshot of the case seemed clear to the dissenters: a minority was trying to deprive the majority of its rights.

> The principle which lies at the basis of our government is that majorities must control in the determination of all questions which affect the public, and that principle applies here as it does in the decision of all public questions. The State of Illinois is a Christian state. Its people, as a people, are a Bible-reading people, and its citizens who are students of and believers of the Bible are not all found in the churches. We are of the opinion the decisions of the question whether the Bible shall be read in the public schools should be left where it has rested from the foundation of the state and through its entire history—i.e., with the local school boards....
>
> While it is true this court may construe the Constitution, it has not the power, and it should not, under a pretext to construe the Constitution, amend it, and certainly not in a case like this, where the effect of the amendment will be to deprive many thousands of children living in this state of any knowledge of the principles taught in the Bible, as the Bible is

> not taught in all the homes of the state, and the only knowledge which a large number of children in this state will ever gain of the Bible must be through the public schools, and if they do not get such knowledge there it will be lost to them entirely.

This was an archetypical expression of the view that the majority should rule in religion and that the minority who might otherwise not enjoy the blessings of religion may be edified thereby—whether they like it or not!

(7) Summary of State Cases. The foregoing state cases are quoted at some length to show that those who say the Supreme Court's school-prayer decisions of 1962-63 were totally unprecedented in American law, and that all was quiet on the school-prayer front until the Supreme Court gratuitously exiled God from the public classroom, simply do not know what they are talking about. It is also instructive to see how judges, of varying degrees of perceptiveness, dealt with the various arguments that still are made on both sides over the course of many generations.

As Justice Brennan pointed out in his scholarly concurrence in *Abington v. Schempp*, the earliest state cases on the subject of devotional practices in public schools turned simply on the discretion of local school authorities to decide matters of a pedagogical nature.

> Thus, where the local school board *required* religious exercises, the courts would not enjoin them, and where ... the school officials forbade devotional practices, the court refused on similar grounds to overrule [them].[46]

The cases listed in the first category were: *Donahoe v. Richards*, Maine, 1854; *Spiller v. Inhabitants of Woburn*, Massachusetts, 1866; *Ferriter v. Tyler*, Vermont, 1876.[47] The second category contained one case: *Board of Eduction v. Minor*, Ohio, 1873.[48]

But in the final quarter of the nineteenth century the state courts moved beyond the posture of deference to pedagogical authority and began to question the propriety of public school religious exercises under the state constitutions, which were generally less rigorous on this subject than the federal First Amendment. Even so, the courts of seven states found such practices unconstitutional.[49] In the majority of state court cases, the practices were *upheld*, even though admittedly religious, because the state constitution prohibited only expenditures of public funds for

---

46. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963), Brennan concurrence at 275 and nn. 49–50, emphasis added.

47. Citations are: 38 Maine 376 (1854), 12 Allen (Mass.) 127 (1866), and 48 Vt. 444 (1876), respectively.

48. 23 Ohio 211 (1873).

49. *Weiss v. District Board*, 76 Wisc. 177, 44 N.W. 967 (1890); *Freeman v. Scheve*, 65 Nebr. 853, 91 N.W. 845 (1902), modified 65 Nebr. 876, 93 N.W. 169 (1903); *Ring v. Board of Education*, 245 Ill. 334, 92 N.E. 251 (1910); *Herold v. Parish Board*, 136 La. 1034, 68 So. 116 (1915); *Dearle v. Frazier*, 102 Wash. 369, 173 P. 35 (1918); *Finger v. Weedman*, 55 S.D. 343, 226 N.W. 348 (1929); *Clithero v. Showalter*, 159 Wash. 519, 293 P. 1000 (1930).

sectarian purposes or activities that converted the public school into a "place of worship."[50] In addition, opinions of the Attorneys General of Oregon, California, Nevada and Michigan had ruled religious exercises or instruction to be contrary to the state or federal constitutions, and the governors of Ohio and Arizona had vetoed bills that would have permitted Bible-reading in public schools.[51] (Prayers and devotional reading of the Bible are two different aspects of public school practices challenged in these cases.)

The U.S. Supreme Court had opportunities to review cases dealing with this issue after it held the religion clauses of the First Amendment applicable to the states in the 1940s, but did not avail itself of any until 1962. In 1930 the Supreme Court of Washington had refused to order the state to institute Bible-reading in public schools, and the U.S. Supreme Court dismissed the appeal for lack of a substantial federal question.[52] In 1950, a case from New Jersey posed the opposite question: whether inclusion of Bible-reading in the public school violated a constitutional right. The New Jersey Supreme Court held that it didn't,[53] and the U.S. Supreme Court dismissed the appeal on the ground that the only plaintiff with standing—the mother of a pupil—had lost her standing because the pupil had graduated from school before the appeal was brought.[54] Therefore, it reached no conclusion on the merits. In 1962, a case came up from Florida that included challenges to a variety of religious elements in the public schools of Miami: not only Bible-reading and the recitation of prayers, but the singing of hymns and carols, on-campus religious instruction, distribution of Bibles in the schools by the Gideons, Christmas, Hannukah and Easter observances with displays of religious symbols, religious Baccalaureate services at graduation, a census of the religious affiliations of pupils, sermons and other religious content in regular assemblies, and religious tests for teachers and other employees to qualify for jobs.[55] The U.S. Supreme Court considered that case following the one next below.

---

50. Citations are: *Moore v. Monroe*, 64 Iowa 367, 20 N.W. 475 (1884); *Pfeiffer v. Bd. of Ed.*, 118 Mich. 560, 77 N.W. 250 (1898); *Billard v. Bd. of Ed.*, 69 Kans. 53, 76 P. 422 (1904); *Hackett v. Brooksville School Dist.*, 120 Ky. 608, 87 S.W. 792 (1905); *Church v. Bullock*, 104 Tex. 1, 109 S.W. 115 (1908); *Wilkerson v. City of Rome*, 152 Ga. 762, 110 S.E. 895 (1922); *Kaplan v. School Dist.*, 171 Minn. 142, 214 N.W. 18 (1927); *Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610 (1927); *Lewis v. Bd. of Ed.*, 157 N.Y.Misc. 520, N.Y.Supp. 164 (1935), 247 App.Div. 106, appeal dismissed, 276 N.Y. 490, 12 N.E.2d 172 (1937); *Doremus v. Bd. of Ed.*, 5 N.J. 435, 75 A.2d 880 (1950), appeal dismissed, 342 U.S. 429; *Carden v. Bland*, 199 Tenn. 665, 288 S.W.2d 718 (1956); and *Chamberlin v. Dade County*, 142 So.2d 21 (Fla. 1962).

51. 26 Ore. Op. Atty. Gen. 46 (1952); 25 Cal. Op. Atty. Gen. 316 (1955); 1948-50 Nev. Atty. Gen. Rep. 69 (1948); 63 Am. Jewish Yearbook (1962) 189; Stokes, A.P., *Church and State in the United States*, *supra*, II, p.568.

52. *Clithero v. Showalter*, 284 U.S. 573 (1930).

53. 75 A.2d 880 (1950).

54. *Doremus v. Bd. of Ed.*, 342 U.S. 429 (1952); the information that this was the sole reason for dismissal is found in *Zorach v. Clauson*, 343 U.S. 306 (1952).

55. *Chamberlin v. Dade County Board of Public Instruction*, 143 So.2d 21 (Fla. 1962). That case will be discussed at §d(1) below.

Since it dealt with many additional issues, it will be discussed under "Other Devotional Practices," *infra*.

b. The Supreme Court Decides. At last, in late 1961, the Supreme Court was ready to consider this long-controverted issue. At the conference on December 4, 1961, all of the justices except Charles Whittaker and Potter Stewart voted to hear the "Regents' Prayer Case" from New York.

(1) *Engel v. Vitale* (1962). The Board of Regents was the agency of the State of New York created by the state constitution and assigned by the legislature broad responsibility for supervising education in the state, not only for elementary and secondary, but for higher education, as well as for licensing various professions and practitioners, and many other duties. Amidst all its responsibilities, it had found occasion to issue a "Statement on Moral and Spiritual Training in the Schools," which included among its various recommendations to the school districts throughout the state a prayer composed by an interfaith committee of clergypersons that the Regents fondly thought would be nonsectarian and unobjectionable. It read:

> Almighty God, we acknowledge our dependence upon Thee, and we beg thy blessings on us, our parents, our teachers and our country.

Among the school districts adopting this recommendation was the Union Free School District No. 9 of New Hyde Park, Long Island. The parents of ten pupils forthwith brought suit challenging the constitutionality of the practice. The courts of New York upheld the authority of the schools to institute this exercise, provided arrangements were made for those who did not wish to participate to be excused. The Supreme Court reversed in an opinion written by Justice Black for six of the justices, Whittaker having retired and his successor, White, not having participated, Frankfurther having suffered a stroke, and Stewart dissenting.

In contrast to some of the lengthy and elaborate discussions of this issue that we have examined above, Justice Black's opinion was short and plain. It cited not a single case,[56] not even the pertinent state cases, *supra*, perhaps because most of those previously decided dealt primarily—though not exclusively—with (devotional) Bible-reading, as did the next decision on this subject by the Supreme Court, *Abington Township v. Schempp*, below. Instead, Justice Black relied heavily on certain historical events and documents.

> We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious, none

56. Observation made by Justice Clark in *Abington v. Schempp*, 374 U.S. 203 (1963), although Black did refer to *Everson* in n. 11.

> of the respondents has denied this and the trial court expressly so found.... [T]hat prayer was composed by government officials as a part of a governmental program to further religious beliefs.... [W]e think that the constitutional provision against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.[57]

Justice Black resorted to history to demonstrate that "this very practice of establishing governmentally composed prayers was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America." The Book of Common Prayer was approved by Parliament in 1548 as the only acceptable mode and form and content of prayer to be used in the Church of England.

> The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular ruler that happened to be in control at the time.

In a long footnote Justice Black recalled that the first revision of the Book of Common Prayer occurred under (Protestant) Edward VI, who was succeeded by Mary (Catholic), who abolished the book entirely. It was restored, with alterations, under Elizabeth. James I admitted certain changes at the demand of 1,000 Puritan ministers in 1603. In 1645 the Book of Common Prayer was suppressed under the rule of Oliver Cromwell following the Puritan Revolution. With the Restoration, Charles II reinstated it, with alterations, which so offended some 2,000 Puritan clergy that they left the church.

> Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government and obtain amendments of the Book more suitable to their respective notions of how religious services should be conducted in order that the official religious establishment would advance their particular religious beliefs.

A footnote at this point quoted from a history of the Book of Common Prayer an example of the kind of turmoil that swirled around the liturgy. Charles I supported the faction that wanted to retain the Elizabethan ceremonial, and Archbishop William Laud, who led this faction, was averse to Catholic extremes, on the one hand, and Calvinist extremes, on the other, and so alienated both Rome and Geneva. He helped the bishops in Scotland, "who had made large concessions to the uncouth habits of Presbyterian worship,"[58] to draw up a more seemly ceremonial in the Book of Common Prayer for Scotland, which "met with a bitter and barbarous opposition."

---

57. *Engel v. Vitale*, 370 U.S. 421 (1962).
58. Ibid., n. 8; the quotation is from Pullan, *History of the Book of Common Prayer* (1900), p. xiii.

This uproar in Scotland strengthened the hands of the Protestant faction in England with the result that both Laud and Charles II were executed, Episcopacy was abolished, and the use of any Book of Common Prayer was prohibited!

Those factions that were not strong enough to force their views upon the liturgy and thence upon the rest of the population contributed to the populating of the English colonies in America, where the hand of the Established Church was not as heavy. But they had not all brought with them the precepts of the Golden Rule.

> It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies.... But the successful revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law.

Justice Black cited the "Virginia Bill for Religious Liberty" as the precursor of disestablishment in the newly free colonies, led by James Madison and Thomas Jefferson.

> [M]any Americans... knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition... government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

This particular construction, which the justice used several times in this opinion, in striving for emphasis, is less sweeping than he obviously intended it to be. He seems to have meant to say that the government is without power to prescribe by law (a) any particular form of prayer, *or* (b) any official prayer, *or* (c) any program of governmentally sponsored religious activity. But chained together in sequence, the phrases syntactically mean that all three elements are essential to the total. That is, the sentence would not bar a governmentally prescribed prayer for "unofficial" use or for use in other-than-governmentally sponsored religious activity, nor would it prevent a governmental requirement that all persons attending public schools shall collectively engage in prayer at a certain hour or signal in whatever form they might choose. It might have been clearer simply to say that the government is without power to prescribe by law the use of any prayer for any purpose or any other religious activity for anyone. Of course, the context makes clear what was meant, but one would have thought that a lawyer as practiced in saying precisely what he meant as Justice Black would not have reiterated this ambiguity in *Engel*.

> There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer.... Neither the fact that the prayer may be denominationally neutral, nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause of the First Amendment.... The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce unobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing offically approved religion is plain.

But Justice Black was not content to leave it at that. Using his favorite proof-text in this area—and a very sound one—Madison's "Memorial and Remonstrance Against Religious Assessments," he expounded two additional aspects or purposes of the Establishment Clause:

> But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on a belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had

> been that it incurred the hatred, disrespect and even contempt of those who held contrary beliefs.[59]
>
> That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.[60]
>
> The Establishment Clause thus stands as an expression of principle on the part of the Founders of the Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate.
>
> Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.[61]
>
> The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind—a law which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions of people like John Bunyan who persisted in holding "unlawful [religious] meetings... to the great disturbance and distraction of the good subjects of this kingdom...." And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies. It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion. The New York laws officially prescribing the Regents' prayer are

---

59. Accompanying this text was a quotation in the margin from Madison's "Memorial and Remonstrance": "[A]ttempts to enforce by legal sanctions, acts obnoxious to so great a proportion of citizens, tend to enervate the laws in general, and to slacken the bonds of Society."

60. Another marginal note quoted from Madison: "It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust its own merits.... [E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution."

61. This sentence was accompanied by a lengthy excerpt from the "Memorial and Remonstrance" in the margin to the effect that the Virginia bill for imposing a tax to support teachers of religion was a "signal of persecution" which would serve as a "Beacon on our Coast" warning those fleeing European persecution to "seek some other haven."

> inconsistent with both the purposes of the Establishment Clause and with the Establishment Clause itself.[62]

Thus did Justice Black set forth the justification for the holding in *Engel v. Vitale*. It was essentially a historical rationale buttressed by quotations from a pertinent and influential work of one of the key Founders. The exposition of the *Engel* decision has not received a great deal of attention over the years, perhaps because it was to some degree an echo of *Everson*,[63] also written for the court by Black (to which he attached the entire "Memorial and Remonstrance") and perhaps because it was overshadowed by the more elaborate *Abington v. Schempp* the next year. Like *Everson* and some more recent decisions,[64] *Engel* relied heavily on historical generalizations, which—to those who accept them—seem obvious and persuasive. But history is a complex and ambiguous tapestry capable of varying interpretations, and the necessarily condensed summarization required by the limits of a judicial opinion may not be immediately convincing to those who see the same history in another way—not to mention the far more numerous group who do not know enough about history to judge one way or another, but don't like the outcome, and the most numerous group of all, those who have not read or heard about the court's purported historical rationale, but don't like the outcome either. Buttressing the court's historical reconstruction by reference to earlier historical generalizations, even by as esteemed a Founder as James Madison, does not necessarily prove the case to those who do not already resonate to the court's view of the matter.

But if one were to substitute the *reverse* of the court's conclusions, even fewer would be convinced. That is, not many would agree that the First Amendment *requires* the power and prestige of government to be applied to affect the kinds of prayer the people may use, or that the union of religion and government *enhances* both, or that religious persecution *never* follows establishment. Probaby the most popular and platitudinous generalities would lie somewhere in between: that establishment doesn't *necessarily* lead to persecution, that some mutual accommodations and interactions between religion and government are not *necessarily* bad for either, and that the First Amendment neither prohibits nor requires governmental encouragement of prayer, but *permits* it when coercion and sectarianism are not prominent qualities, etc. That was the line of argument pursued by dissenters from the majority's thoughts on this subject, from Justice Stewart in *Engel*, to other justices in ensuing years.[65]

Although these nonabsolute formulations are probably more conformable to the generally muddled and inchoate character of reality, they are not too helpful as

---

62. *Engel v. Vitale, supra*.

63. *Everson v. Board of Education*, 330 U.S.1 (1948), discussed at § D2 below.

64. *Marsh v. Chambers*, 463 U.S. 783 (1983), *Lynch v. Donnelly*, 465 U.S. 668 (1984).

65. See Chief Justice Burger, dissenting, in *Aguilar v. Felton*, 473 U.S. 402, 420 (1985), or Justice Rehnquist, dissenting, in *Wallace v. Jaffree*, 472 U.S. 38, 91ff. (1985).

guidelines for legal decision-making and enforcement. Is a *little* "establishment" "okay"? Or is it like being a little bit pregnant, that in time is apt to develop into something that cannot be ignored? Certainly a hard-and-fast line of no-establishment-at-all is a lot simpler to explain and enforce than the later tests of establishment, but has been denounced as "absolutist," "purist," and "unrealistic." How did Justice Black deal with the contention that "just a little establishment" was not forbidden by the First Amendment?

> It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:
>
> "It is proper to take alarm at the first experiment on our liberties.... Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"[66]

The *Engel* opinion confronted the possible imputation that its decision was hostile to religion.

> It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion.... It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Many Supreme Court decisions, especially those that seem likely to engender a little controversy, contain boundary definitions or "we-do-not-mean-to-say" sections—what could be called the "anchor-to-windward" kedge—and *Engel* was no exception, though it was relegated to a footnote:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are offically

66. *Engel, supra.*

> encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.[67]

Justice Douglas added a concurring opinion expressing his growing conviction that the essential evil of establishment was centered in government *financing* of religion: "The point for decision is whether the Government can constitutionally finance a religious exercise." He did not see a problem of coercion: "[T]he only one who need utter the prayer is the teacher; and no teacher is complaining of it. Students can stand mute or even leave the classroom, if they desire." He could not resist taking a cut at two other religious practices similarly financed by government: the announcement by the marshal of the Supreme Court at the beginning of every session, "God save the United States and this honorable court," and the prayer with which a governmentally paid chaplain opened each session of each House of Congress. He also rued having been among the slim majority of five that had approved *Everson*, which allowed bus transportation at public expense for parochial school pupils: "The *Everson* case seems in retrospect to be out of line with the First Amendment." He quoted at length from Justice Rutledge's dissent in that case, which objected to any payments from tax funds that might benefit religious schools because of the threat of sectarian strife "for the larger share or for any," and because of the (infinitesimal) *financial* expenditure for religion involved in implementing the Regents' Prayer recommendation, he joined the court in voting to reverse.

Justice Potter Stewart was the lone dissenter.

> With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.... What is relevant to the issue here is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our own people, reflected in countless practices of the institutions and officials of our government.

He cited the usual litany of pious practices—prayer at the opening of the Supreme Court and Congress, the motto "In God We Trust" on the coins, the congressional insertion in 1954 of "under God" in the pledge of allegiance to the flag, and the references to God in the inaugural addresses of ten presidents, from Washington to

67. Ibid., n. 21.

Kennedy, excerpts from which made up a footnote longer than the entire dissenting opinion! Of course, none of the practices referred to is justiciable, in the sense that—under the court's current practices—no one has standing to challenge them in court. Therefore, it cannot be said that they are constitutional or unconstitutional. And what a president chooses to say in expression of his presumably personal faith in his addresses to the people is certainly not public policy or state action and so does not involve the Establishment Clause, which (even if anyone did have standing to challenge it) is a limitation on the actions of *government*.

Nevertheless, the Stewart dissent did give encouragement to the many critics of the court's decision and has been much quoted as an utterance of true judicial statesmanship. It rested entirely on the dubious analogy to nonjusticiable customs involving "consenting adults" who are not an impressionable "captive audience" in the way that public school pupils are, and so is of even less probative value than Justice Black's perhaps selective historical analysis. Neither history nor custom provides an incontrovertible key to the application of the Establishment Clause, and none of the opinions on either side dealt with the actual or likely impact of the Regent's prayer on the school children in New Hyde Park or elsewhere, except for Justice Stewart's pious conjecture that the prayer-procedure was instituted in New Hyde Park because the children *wanted* to say a prayer—a conjecture for which there was no basis in the record.

Earlier in the term that began in October 1961, the court's decision requiring reapportionment of congressional districts, *Baker v. Carr*, had excited no little controversy, but it was eclipsed by the uproar elicited by *Engel v. Vitale*, which the court had, with prudence that was to typify its tactics in troublesome cases, announced on the last day of term just before the justices left for the summer recess.

> The decision in the school prayer case was met by a storm of protest. The mail attacking it was the largest in the Court's history....
>
> Even after all the abuse they had taken during the past decade, Warren and the Justices were both surprised and pained by the reaction to their decision.... Black, who normally ignored critics of his decisions, now wrote personally in answer to those who sent him letters finding fault with the decision.
>
> Clark took the almost unprecedented step of publicly defending the decision in a San Francisco speech....[68]

President Kennedy himself advanced what was probably the most cogent defense of the court's decision in response to the first question at his June 27th news conference. He reminded the public that there was a "very easy remedy" for those who thought the court had restricted prayer: "[T]hat is to pray ourselves, and I would think it would be a welcome reminder to every American family that we can pray a good deal more at home and attend our churches with a good deal more

68. Schwartz, *Super Chief, supra*.

fidelity, and we can make the true meaning of prayer much more important in the lives of all our children."

That comment indeed succinctly put the responsibility where it properly lay—in the private, voluntary sphere rather than in the governmental domain, but the advocates of enforced public piety were not yet ready to hear that message, and some still are not. But more messengers were on the way.

(2) *Abington Township v. Schempp* (1963). One year later a similar parting shot was delivered by the court on the last day of term. It "dropped the other shoe" by holding impermissible in public schools devotional reading of the Bible and recitation of the Lord's Prayer. Two cases had arisen, one in Maryland and the other in Pennsylvania, which the Court combined for adjudication.

The Maryland case was brought by Madalyn Murray, the self-proclaimed atheist and *bete noire* of all devout proponents of public school prayer, who protested a rule of the Baltimore Board of School Commissioners adopted in 1905 requiring the holding of opening exercises in the public schools consisting of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." Her complaint was rejected by the state courts of Maryland, which found the practices constitutional.

The Pennsylvania case arose from a similar complaint by a Unitarian family about a similar practice required by state law involving the reading of "at least ten verses from the Holy Bible" without comment at the beginning of each school day. In Abington Township this law was implemented by oral readings over the intercom system piped into every classroom. The reading of the Bible was followed by recitation of the Lord's Prayer, not only over the intercom, but by the students in each room, who stood and joined in the recitation in unison. Readings were taken from versions of the Bible selected by the student assigned to give the reading, although only King James versions were supplied by the school. Students and parents were advised that students could absent themselves from this activity or refrain from participating if they desired. The challenged practice and the law requiring it were declared unconstitutional by a three-judge federal district court, and the Supreme Court agreed to hear the two cases together. After oral argument before a packed courtroom, the conference of the justices on March 1 indicated a consensus not to overrule *Engel*.

> But concern was expressed that *Engel* had not fully explored the history and development of the Establishment Clause as it bore upon cases like those before the Court. Brennan in particular asked whether it could be demonstrated that the Founding Fathers meant to forbid some forms of religious activities and manifestations in public institutions while permitting other forms to survive.
>
> On the Monday following the conference, Brennan indicated that he would write a separate concurring opinion that would explore the history,

> scrutinize the Court's prior decisions, and attempt to fashion some viable distinctions between offensive and permissible practices.[69]

Justice Tom Clark was assigned to write the opinion of the court, perhaps because he was viewed as a more "conservative" member of the court, whose views might not be attacked as vehemently as had Justice Black's opinion in *Engel* the year before. Justice Clark led up to the court's view of the cases before it in a manner quite different from *Engel*. After reviewing the facts of the Maryland and Pennsylvania cases, he devoted two pages to the religious manifestations in American public life that demonstrated that "[w]e are a religious people whose institutions presuppose a Supreme Being:"[70] oaths of office sworn on the Bible with the final supplication, "So help me God;" 64 percent of the people belonging to churches and only 3 percent professing no religion at all; and even a quotation from Madison's "Memorial and Remonstrance" characterizing Americans as "earnestly praying... that the Supreme Lawgiver of the Universe... guide them into every measure which may be worthy of his... blessing." He added a reminder of the deep roots of religious liberty, dating back to Roger Williams (whose "ship" metaphor he quoted in the margin), and made especially necessary because of the diversity of religious views represented in the populace. This was followed by a quotation from a state court referred to above:

> Almost a hundred years ago in *Minor v. Board of Education of Cincinnati*, Judge Alphonso Taft, father of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of
>
> "absolute equality before the law of all religious opinions and sects...."
>
> * * *
>
> "The government is neutral, and, while protecting all, it prefers none, and it disparages none."[71]

Justice Clark then digressed for three pages to clarify two much-controverted questions: whether the First Amendment's religion clauses applied to the states (by "incorporation" into the Fourteenth Amendment), and whether the Establishment Clause "forbids only governmental preference of one religion over another." With regard to the first question, he recalled that back in 1940 the Court had said, "The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment,"[72] and he added, "In a series of cases since *Cantwell*, the Court has repeatedly reaffirmed that doctrine, and we do so now."[73] With respect to the second question, he remarked: "[T]his Court has rejected

---

69. Ibid., pp. 466-468.

70. *Abington Township v. Schempp*, 374 U.S. 203 (1963), quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

71. Ibid., quoting *Minor*, unreported, but published in *The Bible in the Common Schools* (Cincinnati: Robt. Clarke & Co., 1870). It will be recalled that Judge Taft wrote in *dissent* in this case (see § a(4) above).

72. Ibid., quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

73. Ibid., citing six cases.

unequivocally the contention that the establishment clause forbids only governmental preference of one religion over another.... The same conclusion has been firmly maintained ever since that time..., and we reaffirm it now."[74]

It is worth recalling these words in light of the fact that some neoreconstructionists are still trying to repudiate those two long-standing holdings.[75] It is significant that the court went out of its way to address its critics on these two questions and to leave no doubt of its determination not to recede:

> While none of the parties to either of these cases has questioned these basic conclusions of the Court, both of which have been long established, recognized and consistently reaffirmed, others continue to question their history, logic and efficacy. Such contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.

Justice Clark devoted five pages to tracing the court's understanding of the interrelationship between the Establishment and Free Exercise Clauses, quoting from *Everson*, *McCollum*, *Zorach*, *McGowan*, *Torcaso* and *Engel*, the court's Establishment cases since "incorporation" of that Clause in the Fourteenth Amendment, to show the development of the court's understanding that the role of the state with regard to religion was one of "neutrality," i.e., neither helping nor hindering any or all religions.

This "wholesome `neutrality'" called for a test of state action that had two elements:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[76]

This new test of Establishment posed some quandaries. Was it designed to supplant or to supplement the "no-aid" test of *Everson*? Far from repudiating or overruling the earlier test, the court followed the words quoted above with citations to *Everson* and *McGowan*, suggesting that it viewed the new test as an extension of the general principles expressed in those earlier cases.

---

74. Ibid., quoting *Everson v. Board of Education,* 330 U.S. 1 (1948), including dissents, and citing three intervening cases.

75. Cf. Cord. R., *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982); Malbin, M., *Religion and Politics: The Intention of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute), 1978; McClellan, J., "Hand's Writing on the Wall of Separation" (referring to *Jaffree v. Wallace*, 553 F.Supp. 1104 (S.D.Ala. 1983), reversed on appeal, 705 F.2d 1526), in Goldwin, R.A. and A. Kaufman, eds., *How Does the Constitution Protect Religious Freedom?* (Washington, D.C.: American Enterprise Institute, 1987).

76. *Abington v. Schempp*, 374 U.S. 203, 222 (1963).

The court contrasted the Establishment Clause with the Free Exercise Clause, pointing out an aspect of the former that was of crucial importance in the instant case for the claim that the excusal of dissenting children rendered the school-prayer practice constitutional.

> The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Having erected the conceptual framework, Justice Clark measured the instant cases against it.

> Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools.... The trial court [in the Pennsylvania case] has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial court's findings as to the religious character of the exercises. Given that finding the exercises and the law requiring them are in violation of the Establishment Clause.
>
> There is no such specific finding as to the religious character of the exercises in [the Maryland case], and the State contends... that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradiction of the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.... The short answer... is that the religious character of the exercise was admitted by the State. But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

> The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.... Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties."

Having enunciated the court's holding, Justice Clark turned to deal with two contentions of the supporters of school prayers: that disallowing the devotional practices erected a counterreligion of "secularism" in their place and prohibited the majority's free exercise of religion. In the course of his refutation, he cast a very important "anchor to windward" in characterizing the appropriate *instructional* use of the Bible and other expressions of religion, as opposed to *devotional* use.

> It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe...." We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. *Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment*. But the exercises here do not fall into those categories....[77]

The emphasized lines represent some of the most-overlooked words in American law. One evangelical leader has referred to them as "The Wide Open Door" for the achievement of much that religionists have been wanting from public schools.[78] Yet very little use has been made of this broad invitation to deal with religion in public education by way of objective instruction where such references would normally be pertinent to regular secular subject matter, partly because teachers are not trained to be aware of the religious dimension of secular subjects and partly because religious people have been focusing their fire on the wrong target—*devotional* practices in public schools—seeming to expect the schools to *play church* rather than to do what

77. Ibid., emphasis added.

78. Samuel Ericsson, Executive Director, Christian Legal Society, in numerous talks given in 1986-87.

schools are supposed to do: *teach*. Religious bodies have a greater stake in effective objective *teaching* by public schools about the part religion has played in history, art, music, literature than they do in the schools' becoming little churches for a few minutes every morning and disregarding religion the rest of the day. It is not up to the public schools to inculcate the faith of religious bodies. The religious bodies themselves must do that. And they can do it better if the public schools fulfill their proper task of teaching reading, literature and history in a way that will provide basic literacy in human civilization upon which the religious teacher can build.[79]

With regard to the second criticism of a decision adverse to public school prayer, Justice Clark had a trenchant rebuttal.

> [W]e cannot accept that the concept of neutrality, which does not permit a state to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right of free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has *never meant that a majority could use the machinery of the State to practice its beliefs*.[80]

He quoted Justice Jackson's clarion call in *West Virginia Board of Education v. Barnette*:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to... freedom of worship... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[81]

The opinion ended with an apotheosis to religion:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment.

---

79. In recent years the curriculum of many public schools has been improved with respect to giving better coverage of the religous dimension of human history, art, music and literature. But there are still complaints that the public school curriculum does not adequately accommodate the religious interests of some families. See, e.g., *Mozert v. Hawkins County Bd. of Ed.*, 827 F.2d 1058 (1987), and *Smith v. Board of Education Mobile County*, 827 F.2d 684 (1987), at § 3c below.

80. *Abington, supra*, first emphasis in original, second emphasis added.

81. Ibid., quoting from the court's opinion in *Barnette*, 319 U.S. 624, 638 (1943), ellipsis in *Schempp*. *Barnette*, the Jehovah's Witnesses' (second) flag-salute case, is discussed at IVA6b.

Justice Douglas added a brief concurrence to reiterate the point he had made in *Engel* that it was the *financial* support—however minimal—that was the essential violation of the Establishment Clause.

> *The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools*. Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional.... It is not the amount of public funds expended; as this case illustrates, it is the use to which public funds are put that is controlling.... What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery.[82]

He was obviously unable to persuade his brethren on the bench that it was the minuscule expenditure of a few pennies that could be attributed to the teacher(s)' salary for the few minutes of the prayer ritual that was the chief affront to the Establishment Clause, especially since none of it went to any religious institution or visibly advanced any or all of them in any material way. The far greater, though less tangible, ill was the symbolic support or implied endorsement given by the sovereign in the state institutions of compulsory education to one particular mode of religious ceremony. This was indeed *systematic state action* on behalf of (Protestant) Christianity, but Justice Douglas was obsessed with the financial dimension of Establishment to the virtual exclusion of far more significant elements.

Another brief concurrence was added by Justice Arthur Goldberg, with whom Justice John Marshall Harlan joined, cautioning against overenforcements of the court's decision that might go beyond its strictures on specific devotional practices to create a climate sterilized of all religious references—which to some extent is what has happened in the years since *Engel* and *Schempp*.

> It is said, and I agree, that the attitude of the state toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of the noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it....
>
> Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains and of the teaching *about* religion, as distinguished from the teaching of religion, in the public schools.... [T]oday's decision does not mean that all incidents of government which impact on the religious are

82. *Abington v. Schempp, supra*, Douglas concurrence, at 229; emphasis in original.

> therefore and without more banned by the strictures of the Establishment Clause.[83]

(a) Justice Brennan's Concurrence. The essay penned by Justice William J. Brennan in concurrence was seventy-seven pages long, dwarfing the forty-four pages of other opinions on this case, which included the court's twenty-three-page opinion and Justice Stewart's thirteen-page dissent. It represented but one of Justice Brennan's several efforts over the years to "make sense" of the Religion Clauses of the First Amendment. His characterization of the situation has been often quoted:

> While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress a particular sect or religion. Equally the Constitution enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice.

In these lines, Justice Brennan proposed his own sensible test of establishment, though it has never been adopted by the majority of the court. Though the context suggests it, the actual language does not make clear that only *state* action is limited by the First Amendment. *Private* secular institutions are free to mingle religious interests or activites with secular if they desire, and some do.

Justice Brennan reviewed the origin of the First Amendment's religion clauses and quoted various authorities—including Justice Frankfurter's lengthy concurrence in *McGowan*—to the effect that the Establishment Clause was designed to do more than prohibit "the setting up of an official church"; it "withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief." Having looked to some of the assessments of the Founders' intentions, he expressed some doubt "that their view, even if perfectly clear one way or the other, would supply a dispositive answer to the questions presented by these cases."

> A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: 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.... Second, the structure of American education has greatly changed since the First Amendment was adopted.... Education, as the Framers knew it, was in the main confined to private schools more often than not under strictly sectarian supervision. Only gradually did control of

83. Ibid., Goldberg concurrence; emphasis in original.

> education pass largely to public officials.... Third, our religious composition makes us a vastly more diverse people than were our forefathers.... Fourth, the American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve.... [T]he 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 assimilate a heritage common to all American groups and religions.... This is a heritage neither theistic nor atheistic, but simply civic and patriotic.

In Part II of his concurrence, Justice Brennan reviewed past church-state decisions of the court, which are discussed in this work where they occur in the topical arrangement of the issues. In Part III he dealt with the question of the "incorporation" of the Establishment Clause in the Fourteenth Amendment.

> That no organ of the Federal Government possessed in 1791 any power to restrain the interference of the States in religious matters is indisputable.... It is equally plain, on the other hand, that the Fourteenth Amendment created a panoply of new federal rights for the protection of the citizens of the various States. And among those rights was freedom from such state governmental involvement in the affairs of religion as the Establishment Clause had originally foreclosed on the part of Congress.
>
> It has also been suggested that the "liberty" guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in terms protects a "freedom" of the individual.... The fallacy in this contention, I think, is that it underestimates the role of the Establishment Clause as a co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone....

In reviewing the scope of the Establishment Clause, Justice Brennan touched on a theme that has recurred in many of his opinions on church-state issues:

> 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.

In commenting on the released-time cases, discussed above, Justice Brennan made clearer a contrast that was not as clearly articulated in the cases themselves.

> The crucial difference, I think,... was that the *McCollum* 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.... To be sure, a religious teacher 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 at the command of the lay teacher for the enhancement of secular instruction.[84]

In discussing the case of the notary public who refused to take the required oath signifying a belief in God—*Torcaso v. Watkins*—Brennan elucidated a point that recurred in many of his opinions and was eventally implicated in the court's view of the Establishment Clause:

> The Maryland test oath involved an attempt to employ essentially religious (albeit non-sectarian) 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 religious test.... [T]he teaching of... *Torcaso*... is that government may not employ religious means to serve secular ends, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.[85]

Turning in Part IV to the instant cases, Justice Brennan observed that if the "rather bland" Regents' prayer was contrary to the Establishment Clause, the Lord's Prayer and the Holy Bible must be also, *a fortiori*: "if anything [they] are more clearly sectarian, and the present violations of the First Amendment consequently more serious."

He traced the origins of the customs in the colonial period, when there were no "public" schools.

> As the free public schools gradually supplanted the private academies and sectarian schools between 1800 and 1850, morning devotional exercises were retained with few exceptions. 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 the American people.

Only recently, however, had such exercises come to be required by law, beginning with Massachusetts before 1900 and eleven other states by 1910. Though the practice was venerable, so were the controversies it engendered.

> Almost from the beginning 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 has exposed the public schools to religious diversities and conflicts unknown to the

84. Ibid., Brennan concurrence. This was an important factor in *Aguilar v. Felton*, 473 U.S. 402 (1985), opinion by Brennan for the court, discussed at § D7m below.

85. Ibid., referring to *Torcaso v. Watkins*, 367 U.S. 488 (1961) is discussed at VB2.

> homogeneous academies of the eighteenth century, local authorities found it necessary even before the Civil War to seek an accommodation.

In 1843, the Philadelphia School Board permitted the excusal of children whose parents objected or the substitution of other versions of the Bible where desired, and a decade later the superintendent of schools for New York State "issued an even bolder decree that prayers could no longer be required."

> 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." There was ample precedent also for Theodore Roosevelt's declaration that in the interest of "absolutely nonsectarian public schools" it was "not our business to have the Protestant Bible or the Catholic Vulgate or the Talmud read in those schools."

Justice Brennan traced the history of the litigation in state courts on this issue, which was reviewed above. He dealt with three justifications for the religious practices complained of. (A) Some educators were quoted as opining that these practices quieted the children and improved their morale. While not disputing their opinions, Justice Brennan applied the principle enunciated earlier—that religious means should not be used to attain secular ends. (B) Such practices were argued by some to be unobjectionable because nonsectarian. Brennan replied, "One answer... 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.... 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."

> 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. There are others whose reverence for the Holy Scriptures demands private study or reflection and to whom public reading or recitation is sacrilegious.... Many deeply devout persons have always regarded prayer as a necessarily private experience.

He considered briefly the "common core" idea of limiting devotional practices to those readings common to various faiths, but concluded that such a reduction would be unsatisfactory to many and still would not satisfy the Establishment Clause, as evidenced by the reductionist Regents' Prayer in *Engel*.

(C) The last extenuation suggested was that the excusal of objecting pupils rendered the practice constitutional. Justice Brennan noted that excusing some pupils did not in the least alter the fact that the state had intended "to introduce a religious ceremony into the public schools," and *that* was what violated the Establishment Clause, not who participated. But the justice went on to consider that such excusal might also violate the Free Exercise rights of dissenting children by compelling them

in effect to profess their disbelief publicly in order to qualify for abstention, contrary to the teaching of *Barnette*.[86]

> [E]ven devout children may well avoid claiming their right [to be excused] and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.

Part V of Brennan's concurrence dealt with other practices or customs that might be supposed to violate the Establishment Clause, since alarmists had contended that striking down prayers in public schools "permits this Court no alternative but to declare unconstitutional every vestige, however slight, of cooperation or accommodation between religion and government. I cannot accept that contention." These practices and customs he grouped under five headings.

> **A. The Conflict Between Establishment and Free Exercise.** There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment. Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example. The like provision by state and federal governments for chaplains in penal institutions may afford another example. Since government has deprived such persons of the opportunity to practice their faith at places of their choice,... government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be.[87]

Such arrangements are to be distinguished from public schools in various ways, he said, the most significant of which is that the requirement to attend school "in no way renders the regular religious facilities of the community less accessible to [the pupil] than they are to others. The situation of the school child is therefore plainly unlike that of the isolated soldier or the prisoner."

> [H]ostility, 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.... I do not say that government *must* provide chaplains..., or that the courts should intercede if it fails to do so.
>
> **B. Establishment and Exercises in Legislative Bodies**. The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause. Legislators... are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty,

86. *West Virginia v. Barnette*, 319 U.S. 624 (1943), the second flag-salute case, discussed at IVA6b.

87. See discussion of this subject at VD, GOVERNMENT PROPRIETARIES IN RELIGION: CHAPLAINCIES.

direct or indirect. It may also be significant that, at least in the case of the Congress..., the Constitution makes each House the monitor of the "Rules of its Proceedings," so that it is at least arguable whether such matters... [are] exclusively confided to Congress.[88]

C. Non-Devotional use 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 differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion....

D. Uniform Tax Exemptions Incidentally Available to Religious Institutions. Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character....

E. Religious Considerations in Public Welfare Programs. Since government may not support or directly aid religious *activities* without violating the Establishment Clause, there might be some doubt whether nondiscriminatory programs of governmental aid may constitutionally include *individuals* who become eligible wholly or partly for religious reasons. For example, it might be suggested that where a State provides unemployment compensation generally to those who are unable to find suitable work, it may not extend such benefits to persons who are unemployed by reason of religious beliefs or practices without thereby establishing the religion to which those persons belong. Therefore, the argument runs, the State may avoid an establishment only by singling out and excluding such persons on the ground that religious beliefs or practices have made them potential beneficiaries. Such a construction would, it seems to me, require government to impose religious discriminations and disabilities, thereby jeopardizing the free exercise of religion, in order to avoid what is thought to constitute an establishment.... I can not... accept the suggestion... that every judicial or administrative construction which is designed to prevent a public welfare program from abridging the free exercise of religious beliefs, is for that reason *ipso facto* an establishment of religion.[89]

The example to which the justice referred, of course, was far from hypothetical. Announced on the same day as *Schempp*, June 17, 1963, was *Sherbert v. Verner*, in which the court reversed South Carolina's refusal to pay unemployment

88. Since those words were written, the court upheld the constitutionality of a legislative chaplain in the Nebraska case of *Marsh v. Chambers*, with Justice Brennan filing a long and articulate dissent, which began with the admission, "[D]isagreement with the Court requires that I confront the fact that some twenty years ago... I came very close to endorsing essentially the result reached by the Court today. Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today." 463 U.S. 783 (1983), discussed at VD3.

89. *Abington v. Schempp, supra,* Brennan concurrence.

compensation to a woman who for religious reasons refused to work on her Sabbath, Saturday.[90]

> **F. 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, simply because it accords with widely held religious principles... 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.... The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.... The reference to divinity in the revised pledge of allegiance... may merely recognize the historial fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.

It is ironic that, although he referred to the *Sunday Law* cases and quoted from *McGowan*, Brennan did not explicitly draw the parallel that those decisions preeminently offered. The *Sunday Law* cases stand uniquely for the proposition that, although Sunday-closing laws were originally instituted for the religious purpose of requiring cessation from toil and business as essential to Sabbath observance, they no longer serve a religious purpose but have become a secular means of insuring everyone a weekly day of rest.[91]

While this final section was not required to answer any issue central to the case, it did throw interesting sidelights on earlier, current and future cases, and should have calmed some of the hysteria that greeted the school prayer decisions, except that some people inclined to hysteria seem not to have actually read even the opinion of the court, let alone Justice Brennan's thoughtful and scholarly reflections.

(b) Justice Stewart's Dissent and the Public Response. Justice Potter Stewart was again the lone dissenter, but his dissent took a somewhat different tack from that in *Engel*.

> 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.... I would remand both cases for further hearings.

---

90. *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at IVA7c.

91. The "Sunday Law" cases include *McGowan v. Maryland*, 366 U.S. 420 (1961), discussed at IVA7a.

The reasons for this view were set forth somewhat more cogently than in *Engel*.

> Unlike other First Amendment guarantees, there is an inherent limitation upon the applicability of the Establishment Clause's ban on state support of religion. That limitation was succinctly put in *Everson v. Board of Education*...: "State power is no more to be used so as to handicap religions than it is to favor them."
>
> * * *
>
> It is this concept of constitutional protection [of religion] 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 might... 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 misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state education 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.

Justice Stewart contended that "there is no constitutional bar to the use of government property for religious purposes," citing two Jehovah's Witnesses cases involving use of public parks for religious speech,[92] and although a stricter standard had been applied to public school property because of the coercive force of compulsory education laws in *McCollum*, that case—in his view—was limited "to government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets."

> 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....

92. *Fowler v. Rhode Island,* 345 U.S. 67 (1953), and *Niemotko v. Maryland*, 340 U.S. 268 (1951), discussed at IIA2q & r. See also discussion of "public forum" cases in *Lee v. ISKCON, II*, 505 U.S. 830 (1992), discussed at IIC5e.

> 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 the promulgating body's view as to the community's preference.
>
> * * *
>
> 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 expression of religious belief.
>
> * * *
>
> 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.... Accommodation of religious differences on the part of the State... is not only permitted but required by [the] Constitution.

It was to determine whether in actual practice coercion occurred that Justice Stewart urged that the cases be remanded "for the taking of additional evidence." Although putting the argument for sustaining the prayer practices in its most favorable light, he seemed to be a bit disingenuous in his expectations of benignity on the part of school boards and teachers (contrary to the records of some of the precursor state cases, *supra*) or of their appreciation of the potential problems posed by amplifying rather than modulating in the public-school classroom the religious diversities present in the community. Religious differences there are, to be sure, but they usually are not brought into forced proximity in the community to the degree that they might be in the classroom, where the contrasts between majority and minorities would become inescapably obvious and individual children identified with one party or the other. Even some adults are shy about identifying their religious affiliation—or lack thereof—in public for fear of "diminishing their civil capacities"; why should school children be put to that exposure if mature adults often do not

relish it? The inevitable effect of even the most benignly administered of classroom religious practices, *particularly* if excusal of differing pupils is provided—as it must be under even Justice Stewart's view—is to "smoke out" those children who belong to "peculiar," unconventional or unpopular religious groups, or to increase their discomfort in conforming undetected to distasteful religious practices.

While Justice Stewart appeared to have moved a little away from the pious fiction of his dissent in *Engel* that it was the *children's* spontaneous desire to pray that was sought to be accommodated by the states' educational authorities, he still seemed unable or unwilling to recognize the central problem in the whole issue: the unavoidable element of *state sponsorship* of the religious exercises. His benign hypothetical scenario seemed to have no adult actors. The legislature, the school boards, the principals and teachers were not affirmatively providing, arranging, initiating, supervising, coordinating or synchronizing anything; they were just "authorizing" certain activities on the part of the students. Religious exercises that are a regular, routine, state-required part of the curricular school day can scarcely avoid the imputation—and actuality—of state sponsorship, which was the basic contention of the court's majority: the state *intended* to institute a little worship service at the beginning of the day in every public-school classroom, and that fact was not negated but confirmed by even the most careful and considerate provisions for excusal.

The public response to the *Schempp* decision was predominantly adverse, though somewhat less vehement than the year before. The five American cardinals were in Rome to help elect a successor to Pope John XXIII, and three of them, Cardinals McIntyre, Cushing and Spellman, criticized the decision as a victory for communism and/or secularism. Billy Graham, Episcopal Bishop James A. Pike, Methodist Bishop Fred Pierce Carson, and Dr. Robert A. Cooke, president of the National Association of Evangelicals, denounced the decision, but this time there were more voices on the other side. *America*, the Jesuit weekly magazine, which had lamented the *Engel* decision, editorialized against trying to amend the Constitution to reverse the decisions. In May 1963, the General Assembly of the United Presbyterian Church adopted an extensive policy document that had been in preparation for more than a year and contained the following pertinent passage:

> Religious observances [should] never be held in a public school or introduced into the program of a public school. Bible reading (except in conjunction with courses in history, literature or related subjects) and public prayers tend toward indoctrination or meaningless ritual and should be omitted for both reasons.[93]

93. Pfeffer, Leo, *God, Caesar and the Constitution* (Boston: Beacon Press, 1975), p. 211.

Ten days before the *Schempp* decision was announced, the General Board of the National Council of Churches adopted a policy statement on "The Churches and the Public Schools" that contained the following lines:

> The full treatment of some regular school subjects requires the use of the Bible as a source book. In such studies—including those related to character development—the Bible has a valid educational purpose. But neither true religion nor good education is dependent upon devotional use of the Bible in the public school program.
>
> The Supreme Court of the United States in the Regents' Prayer case has ruled that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." We recognize the wisdom as well as the authority of this ruling.[94]

This statement had been in preparation for several years. When it was presented for first reading in the fall of 1962, it elicited heated objections from some of the members, but by the time it came up for action at the June 1963 session, there was very little opposition—a typical instance of what happened in many Protestant groups: given time to think, study and discuss, they almost invariably moved from initial opposition to eventual acceptance of the Supreme Court's ruling. Many Jewish groups also supported the court's ruling.

c. Efforts to Amend the Constitution. Outrage over the school-prayer decisions was reflected in congressional initiatives to amend the Constitution to reverse them. There have been eight such efforts since 1962:

(1) Senator James Eastland, chairman of the Senate Judiciary Committee, held hearings on the subjects in 1962, but nothing further came of his effort.[95]

(2) Rep. Frank Becker, a congressman from Queens, N.Y., led a crusade to coordinate the scattered efforts of some 150 sponsors of proposed constitutional amendments in 1964. He persuaded some 58 members of Congress to back a consolidated proposal, which was the subject of a discharge petition designed to take the subject out of the hands of the hostile Judiciary Committee and bring it to the floor of the House for a vote. When he had enlisted about 160 signatures of the requisite 218, the venerable chairman of that committee, Emanuel Celler, decided to hold hearings on the bill, which were undertaken by the entire committee *en banc*, and went on for forty days, during which leaders of national religious bodies testified in opposition to amending the First Amendment. By the end of the hearings, the project of amendment was so thoroughly discredited that no vote was even held in committee to certify its demise.[96]

---

94. Testimony of Tuller, Edwin, in *School Prayers*, Hearings Before the Committee on the Judiciary, House of Representatives, Eighty-eighth Congress, 2d Sess., 1964, vol. 1, p. 656.

95. Pfeffer, *God, Caesar and the Constitution*, *supra*, p. 212.

96. The hearings are reported in the three-volume *School Prayers, supra.*

(3) Senator Everett Dirksen introduced a prayer amendment in the Senate in 1966, on which hearings were held in the Judiciary Committee, but the committee did not seem ready to vote his bill out to the full Senate, so the wily senator, as chairman of the Committee on National Holidays (the only committee with a Republican chairman in the Democratic-controlled Senate) added it as a rider to a bill regarding a national holiday! But when the vote was taken, 49 senators voted yea, but 37 voted nay, and 14 did not vote—well short of the two-thirds needed to approve a constitutional amendment.

(4) Senator Dirksen tried again the next year (1967), but this effort did not get as far as the earlier one. He died shortly thereafter, and his son-in-law, Howard Baker of Tennessee, vowed to carry on the battle, but nothing much came of it.

(5) Representative Chalmers Wylie led another effort in the House in 1971. This time a discharge petition was successful in taking the proposed amendment out of committee and bringing it to the floor of the House. This time the opponents had to canvass the views, not of 35 members of the Judiciary Committee, but of all 435 members of the House! Fortunately, a fluke in the scheduling of "Calendar Wednesday" gave the opponents nearly a month to acquaint the undecided members with their views. When the time came for the vote, the amendment failed of the two-thirds' majority needed to pass a Constitutional amendment by 28 votes.

(6) Senator Birch Bayh (D.-Ind.), chairman of the Judiciary subcommittee on constitutional amendments, held hearings on prayer amendments in July 1973, but these tended to be eclipsed by the Watergate hearings and the struggle over the impeachment of President Nixon, and nothing further came of them. But the issue was not dead: it rose again in 1984.

(7) President Reagan's campaign for the presidency in 1980 included a vow to "put prayer back in public schools." After he was elected, not much was heard about it again until the next election began to approach. Hearings were eventually held on it that can only be described as desultory, and it became apparent that enthusiasm for a prayer amendment in the (Republican-controlled) Senate was distinctly tepid.

As election time approached, the president began to devote more energy to mobilizing support in the Senate for his prayer amendment. The hosts of the "religious right" began to rally around, and on the night before the scheduled vote, an all-night jamboree was held on the steps of the Capitol, with TV preachers, movie stars, Gospel choirs and thousands of prayer-amendment supporters, praying, singing, and cheering. Intensive lobbying efforts were mounted by both sides, and when the vote was taken, the prayer amendment failed (again) by eleven votes!

This may well have been the high-water mark for the prayer amendment crusade, but the seventh and heaviest wave still wasn't strong enough. Although it seemed to have "everything going for it," including a persuasive president, it couldn't even get through the Republican- controlled Senate (let alone the Democratic-controlled House)! Since then, although the president was reelected by a landslide (and maybe

that was the main objective of some prayer proponents), the Republican strength was diminished in both houses, so it seemed unlikely that another such foray would be launched in the near future.

(8) In 1994 the Republican party took control of both houses of Congress, and one of the foremost features of their battle banner, the "Contract With America," was a school-prayer amendment. Though some of the new leadership, such as Speaker of the House Newt Gingrich, evinced limited enthusiasm for that project, others were avid to pursue it. The leadership of this sally was offered by Rep. Ernest Istook (R-Okla.). His efforts were overshadowed by a compromise proposal sponsored by Rep. Dick Armey, majority leader of the House, under the endearing title of "Religious Equality Amendment," reading as follows: "In order to secure the right of the people to acknowledge and serve God according to the dictates of conscience, neither the United States nor any state shall deny any person equal access to a benefit, or otherwise discriminate against any person, on account of religious belief, expression or exercise. This amendment does not authorize government to coerce or inhibit religious belief, expression, or exercise." It was succeeded by another amendment offered by Rep. Istook in 1997. At the present writing its fate is not known.

d. Other Devotional Practices. Some cases in the preceding pages have involved (devotional) reading of the Bible, and some have involved various forms of prayer, while others have involved both and sometimes additional devotional practices, such as the singing of hymns. All, however, have focused on *daily* religious rites or rituals in public schools and have evidenced the effort to instill reverence or religious homage to deity, in effect turning the public school classroom into a little church for a few moments, or into a kind of Protestant, or Christian, or nondenominational, parochial school. This effort took many other forms as well, such as occasional religious assemblies in which the student body would be gathered together in the school auditorium each week, and a regular church service would be featured from time to time, with minister and choir from a local church, the service centering around a sermon delivered by the preacher. Each year at graduation time, many high schools not only have invocations, benedictions, other prayers and sometimes hymns at the commencement ceremonies, but may arrange a separate event known as Baccalaureate, often held in a church and consisting of a traditional church service of worship and sermon. Entire constellations of such church-like practices were found in some public schools and were occasionally subjected to legal challenge. One of the more comprehensive cases was in the courts at the time of the great school-prayer controversy of 1962-64 and illustrated the range of religious practices that gave offense to minority religious groups whose children attended the public schools in regions where such practices were customary.

(1) *Chamberlin v. Dade County* (1960-64). From Miami, Florida, came a case that went to trial in 1960 and involved a broad array of religious practices that were

objected to by Jewish, Unitarian and agnostic parents, who sued the Dade County Board of Public Instruction and its individual members. A committee of residents and local Protestant clergy was permitted to intervene to defend the challenged practices, which included the following:

> 1. Devotional reading from the Bible each day, usually the King James version, pursuant to state law, which stipulated that it was to be done "without sectarian comment,"[97] a stipulation that was not always observed (as indicated by the next item).
> 2. Comment on the Bible, which might take the form of "an appropriate thought for the day that is related to the Scriptures"[98] or some other brief homily on the scriptural theme of the day's Bible selection. In addition, religious films were shown in the public schools from time to time that expanded upon or applied to Biblical texts, themes or teachings.
> 3. Bible distribution carried out by the Gideon Society with permission of the school board, which authorized an opportunity for all seventh grade students to be given a free copy of the Bible. (In addition, one high school principal's assistant had distributed to each student a tract urging them to go to Sunday school.)
> 4. Bible study in the public schools after school hours, provided by various religious groups such as the Child Evangelism Society and facilitated by announcements on school bulletin boards and newsletters.
> 5. The Lord's Prayer was regularly recited in conjunction with the morning readings from the Bible, and in some instances other prayers were used as well, including grace at meals.
> 6. Sacred hymns and carols with Christian religious content were sung in classrooms and assemblies, particularly at the time of Christmas and Easter observances.
> 7. Christmas observance in the schools included Nativity plays and pageants with accompanying instruction about the Christian doctrine of the Incarnation.
> 8. Easter observance included dramatic re-enactments of the passion and crucifixion of Christ and celebration of the Christian doctrine of the Resurrection and Christ's Atonement for human sin.
> 9. Hanukkah and Passover observances were included in some of the schools, particularly in Miami Beach, which did not mollify the plaintiffs in the least, since they considered them as objectionable as the Christian observances.
> 10. Religious symbols displayed in the schools were usually seasonal depictions associated with the religious holy days mentioned above and were usually the work of students in art classes displayed in the halls and classrooms during the holiday seasons.

97. Florida Statutes 231.09.
98. Trial transcript, p. 194.

> 11. Baccalaureate services were held in senior high school at graduation time, which resembled in liturgical format a conventional Protestant church service with hymns, prayers, scripture-reading and a sermon delivered by a clergyman (a minister, priest or rabbi, though some Catholic priests and Jewish rabbis had declined to officiate at such services). The school administration said that the attendance at such events by students was optional, but at least one student testified that he had not been so informed and thus assumed that attendance was required.
> 12. Religious censuses were taken requiring students to indicate their religious affiliations, and this information was included in each student's records in the Board's central office, though there was no evidence that this information was conveyed to churches or anyone else outside the school system.
> 13. Religious tests for employment or advancement in the school system were alleged by plaintiffs, and the Board acknowledged that since 1952 it had required applicants for employment to indicate on the application form whether they believed in God. Teachers were evaluated for promotion on their religious behavior (among many other criteria), being rated from 1 to 4 on whether they took part in their own religious organizations and respected the religious beliefs of others.

The board's defense to all of these allegations was that the practices complained of were entirely voluntary, but this voluntary aspect was not generally known throughout the schools, and indeed the board had no formal, publicly announced policy providing for excusal from attendance at any religious event or ceremony until three weeks before the trial of this case started, when it hastily adopted a resolution to that effect, trying to make it appear of long standing by the assertion, "WHEREAS, the principals of the various schools have, for many years, been instructed to release any child from participation....[etc.]"[99] The plaintiffs contended that the practices were unconstitutional whether voluntary or not, but the Supreme Court had not yet made clear that coercion was not necessary to define an impermissible "establishment" of religion, which it subsequently did in *Abington v. Schempp*, as noted above.[100]

The Circuit Court found that children could be excused from the religious programs or activities, although there was evidence that "in some instances the request to be excused was denied by the teacher," but that was apparently all right because "the teacher was not apprised of the school board regulations or did not know of the passage of Rule 60-21" (which had been hastily adopted just before trial began). So the court viewed the supposed availability of excusal as pertinent, even though in some instances it was not implemented in actuality.

---

99. Resolution 60-21, June 29, 1960, Dade County Board of Public Instruction.
100. 374 U.S. 203 (1963), discussed immediately above.

The court looked to *McCollum v. Board of Education*[101] for the principle that tax-supported property was not to be used for "religious instruction." Seizing on this term as the key to constitutionality, the circuit court proceeded to prohibit school plays at Christmastime that depict the Birth of Christ and at Eastertime that depict the Crucifixion of Christ, as well as motion pictures that depict religious happenings, on the ground that they constituted religious *teachings* on school property. It also prohibited Bible instruction by the Child Evangelism group after school hours for the same reason. With respect to the religious assemblies and Baccalaureate services, the court announced that it could not "assume that at these programs religious teachings are resorted to by the rabbi, minister or priest. If such testimony was in the record that such was true it would be enjoined but as there is none, no injunction will issue," a rather disingenuous conclusion, since for what other purpose would the clergy be sermonizing if not to impart some kind of religious teachings?

Prayers and Bible-reading were upheld because ostensibly voluntary, as was the singing of hymns and carols. Pictures of sacred symbols were viewed as expressions of individual students' interests and affinities, similar to wearing such symbols as emblems or jewelry. The alleged "religious census" was viewed by the court as consisting of a couple of isolated instances of queries by teachers that were not authorized by the school board. The alleged "religious test" for employment of teachers was disregarded by the court because none of the plaintiffs was a teacher and so had no ground to claim personal injury even if the allegation was true.

On appeal the Supreme Court of Florida upheld the circuit court, adding that the plaintiff's reliance on the U.S. Supreme Court's definition of "establishment"—the "no-aid" formula—in *Everson, McCollum, McGowan* and *Torcaso* was not persuasive:

> We are not impressed with the language quoted as being definitive of the "establishment" clause. It goes far beyond the purpose and intent of the authors [of the First Amendment] and beyond any reasonable application to the practical facts of every day life in this country. We feel that the broad language quoted must, in the course of time, be further receded from, if weight is to be accorded the true purpose of the First Amendment.[102]

The Supreme Court of Florida thought that the views of T. M. Cooley, in *Principles of Constitutional Law* (1891), were more cogent, viz.:

> "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others. It was never intended by the Constitution that the government should be prohibited from recognizing

101 . 333 U.S. 203 (1948), discussed at § C1a above.

102 . 142 So.2d 21 (1962).

> religion... where it might be done without drawing any invidious distinctions between different religious beliefs, organizations or sects."[103]

The Supreme Court of Florida devoted twenty-two pages of its twenty-seven-page opinion to disagreeing with the U.S. Supreme Court's "no-aid" stance, waxing eloquent about the need to sustain the religious foundations of the nation. The following excerpt is representative:

> The plaintiffs assume, inferentially at least, that minorities enjoy a peculiar susceptibility to psychological and emotional trauma and compulsions and are entitled to some peculiar and fatherly protection against the strange ways of the ordinary American citizen. But such is not the case. The minority is entitled to enjoy the same privileges and the same justice as are enjoyed by people generally as an inherent right. The minority and the majority are both denied the privilege of disrupting the lives of others because of some hypersensitivity or fractious temperament.
>
> To say that the vast majority of students in the Dade County public school system are to be foreclosed of the privilege of living a few moments each day with the words of the Bible, the greatest of all literature, or of observing in the classroom, if such were possible, the magnificent painting of the Last Supper, or of listening to Caruso's recording of Adeste Fidelis, because a minority might suffer some imagined and nebulous confusion, is to approach the ridiculous....

All seven judges joined in this unanimous reproach to the U.S. Supreme Court for having so misconstrued the Establishment Clause as to encourage the plaintiffs to think they had grounds to protest the practices complained of. The court apparently did not perceive the important distinction between permissible *instruction* about the content or language of the Bible as literature, about the merit of paintings or music with religious themes as art, on the one hand, and the impermissible *devotional* use of prayer and Bible-reading in state-sponsored worship services in public schools, on the other.

The plaintiffs appealed to the U.S. Supreme Court, which vacated the judgment without entertaining briefs or oral argument and remanded the case for further consideration in light of the school prayer cases,[104] which had been decided in the interim. The Florida Supreme Court on remand focused its attention upon the Bible-reading practice and concluded that the Florida statute required it "in the interest of good moral training, of a life of honorable thought and good citizenship," thus having a secular rather than a sectarian purpose, as in the case of Sunday-closing laws upheld in *McGowan*. Having thus declared the practices complained of to be

---

103. Ibid., quoting Cooley, T.M., *Principles of Constitutional Law*, pp. 213-4 (2d ed., 1891), ellipsis in original.

104. *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington v. Schempp*, 374 U.S. 203 (1963), discussed at §§ 2b(1) and (2) above.

really secular rather than religious, at least in legislative motivation, the unanimous court reaffirmed its previous decision.

The case went to the U.S. Supreme Court again, which in a *per curiam* order reversed the Florida Supreme Court with respect to prayer and Bible reading but dismissed the other issues "for want of properly presented federal questions," over the partial dissents of Justices Douglas and Black, who thought the religious test for teachers should have been heard, and of Justice Stewart, who would have heard argument on the entire case.[105]

(2) *Stein v. Oshinsky* (1963). During the lengthy hearings in 1964 on the Becker school prayer amendment,[106] much was heard about a recent case decided by the U.S. District Court for the Eastern District of New York, *Stein v. Oshinsky*, in which Judge Walter Bruchausen upheld the use of prayers by kindergarten children. The children in the morning classes at the kindergarten had been accustomed to reciting a prayer before partaking of milk and cookies: "God is great, God is good,/And we thank Him for our food. Amen." The afternoon classes recited a different prayer:

> Thank you for the world so sweet;
> Thank you for the food we eat;
> Thank you for the birds that sing;
> Thank you, God, for everything.

The principal of the school, Elihu Oshinsky, following the U.S. Supreme Court's decision(s) on public school prayers, had ordered the practice halted. On objection from parents, the principal's order was upheld by the New York City Board of Education and the Board of Regents of the State. The parents, who included members of Roman Catholic, Jewish, Armenian, Apostolic, Episcopalian and Protestant faiths, then sought an injunction against the principal, school board and Regents to compel them to permit the continuation of the prayer practice.

Contending that the prayer was not mandated by law and was therefore not covered by the *Engel* and *Schempp* precedents, Judge Bruchausen concluded as follows:

> The case at bar does not involve a state statute requiring the children or [school] personnel to actively engage in or refrain from acknowledging their complete dependence upon God. It is merely a voluntary desire of the children without any coercion or pressure being brought to offer a prayer to the Almighty.[107]

Therefore, the judge issued the injunction against the school authorities, but he was reversed on appeal by the Second Circuit Court of Appeals.[108]

---

105 . *Chamberlin v. Dade County*, 377 U.S. 402 (1964).
106 . See discussion of these hearings at § c2 above.
107 . *Stein v. Oshinsky*, 224 F.Supp. 757 (1963).
108 . *Stein v. Oshinsky*, 348 F.2d 999 (1964).

(3) *DeKalb v. DeSpain* (1967). An interesting footnote to the foregoing was a case arising in Illinois involving the afternoon "cookie prayer" that a kindergarten teacher in the Elwood Public School in DeKalb county had bowdlerized to make it constitutionally acceptable by deleting the reference to God in the fourth line:

> Thank you for the world so sweet;
> Thank you for the food we eat;
> Thank you for the birds that sing;
> Thank you [ ] for everything.

The federal court was not amused and issued an injunction against the practice, which the Supreme Court declined to hear.[109]

The deletion not only impaired the iambic tetrameter scansion of the verse but posed some interesting theological questions. Who was the "you" that was being thanked? In the absence of a named benefactor, the verse could easily have been understood by kindergarten children as being addressed to the teacher, or the school system, or the government, creating an apotheosis of the state that could only be distressing to many devout Christians, who are warned in Scripture against idolatry, the worship of a deity other than God. Yet that is often the result of a state-sponsored cultus that is gradually evacuated of its theological content and significance: it becomes a patriotic paean to the (earthly) Powers That Be, similar to the quasireligious pageantry adopted by Adolph Hitler to glorify the Third Reich.

(4) Other Ploys for Prayer. In Leyden, Massachusetts, the school board in 1971 adopted a resolution permitting student-initiated religious exercises, in which students and teachers who wished to do so could participate, thus trying to avoid the implication that the religious exercises were mandated by public authorities, but the state commissioner of education brought suit against the local school board to end the practice. The highest state court agreed with the superintendent that the Leyden approach was unconstitutional, and the U.S. Supreme Court declined to hear the case.[110]

The local school board in Netcong, New Jersey, tried an ingenious device for getting around the school prayer decisions; they arranged for a period prior to the opening of the school day during which those students who wished to do so would have the opportunity of hearing the reading from the *Congressional Record* of the opening prayer offered by the chaplain of the Senate or the House. The state board of education ordered this edifying practice discontinued. When the local board

---

109. *DeKalb School District v. DeSpain*, 384 F.2d 836 (1969), described by Pfeffer, Leo, *God, Caesar and the Constitution*, *supra*, p. 203.

110. *State Commissioner of Education v. School Committee*, 358 Mass. 776 (1970), in ibid., p. 204.

refused, the state board obtained an injunction against the practice, which the U.S. Supreme Court declined to review.[111]

(5) *Karen B. v. Treen* (1981). Another approach to the school-prayer problem was that of the Louisiana legislature, which enacted a statute having two components: (1) a provision "permitting" local public school authorities to "allow" those students and teachers "who so desire to observe a brief period of silent meditation at the beginning of each school day," and (2) a provision authorizing local public school authorities to "allow" each classroom teacher "to ask whether any student wishes to offer a prayer and, if no student volunteers, to permit the teacher to pray."[112] The first provision was not involved in the litigation.[113] Parents of pupils in Jefferson Parish (county) challenged the constitutionality of the second provision, and the federal district court upheld it.

The U.S. Court of Appeals for the Fifth Circuit analyzed the statute using the Supreme Court's threefold test of establishment from *Lemon v. Kurtzman*:[114] whether it had a secular purpose, a primary effect that neither advanced nor inhibited religion, and did not create excessive government entanglement with religion. In an opinion written by Judge Charles Clark and joined by Judge Randall, the Fifth Circuit panel found that the testimony of the statute's sponsors to the effect that the law had only a secular purpose was not conclusive.

> These witnesses stated that the purpose of the school prayer program was to increase religious tolerance by exposing school children to beliefs different from their own and to develop in students a greater esteem for themselves and others by enhancing their awareness of the spiritual dimensions of human nature.[115]

This somewhat strained attempt to find some secular purpose to justify the statute did not even persuade the dissenting judge, Allen Sharp, a federal district judge sitting by designation on the appellate panel:

> I agree that the District Court was clearly in error in finding that the purpose behind the challenged legislation was to provide a mechanism by which children could learn about beliefs different from their own (etc.).... There is no doubt in my mind that the challenged legislation was the direct result of pressure from parents who wanted their children, at the beginning of each school day, to have an opportunity to formally and audibly recognize the existence of, and seek the benevolence of, a supreme being. It seems clear to me that the purpose behind the challenged

111 . *Board of Education of Netcong v. State Board of Education*, 270 A.2d 412 (1970), in ibid., p. 204.

112 . Quotations are from the Fifth Circuit opinion in *Karen B. v. Treen*, 653 F.2d 897 (1981).

113 . For litigation over silent meditation, see § (7) below.

114 . 403 U.S. 602, discussed at § D5 below.

115 . *Karen B. v. Treen, supra,* at 900.

> legislation was to provide students with the freedom to engage in a religious exercise, opening their school day with an audible prayer.

That was at least a frank and more convincing estimate of the actual situation. How Judge Sharp reconciled that intention with the Establishment Clause is reported below. The majority continued:

> [T]his testimonial avowal of secular legislative purpose is not sufficient to avoid conflict with the Establishment Clause.... [T]he plain language of [the statute] and the Jefferson Parish guidelines makes apparent their predominantly religious purpose. Prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people.... Even if the avowed objective of the Legislature and school board is not itself strictly religious, it is sought to be achieved through the observance of an intrinsically religious practice. The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests.... Furthermore, the legislature's provision for excusing students who do not desire to participate in the daily prayer session betrays its recognition of the fundamentally religious character of the exercise.

The Circuit Court then evaluated the lower court's treatment of the "primary effect" prong of the *Lemon* test.

> Second, the district court held that [the enactments] do not inhibit or promote religion. This conclusion was predicated upon the judge's conviction that the prayer offered by a student or by a teacher could very well comprehend some secular objectives. Thus, the district court asserted that the prayers could "relate to anything from sports to the weather to religion."
>
> This analysis is disingenuous. Prayer is an address of entreaty, supplication, praise or thanksgiving directed to some sacred or divine spirit, being or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise. [These ordinances] promote religion by encouraging observance of a religious ritual in the classroom... and [therefore] violate the second prong of the test.

For these reasons the majority found the Louisiana law unconstitutional. Judge Sharp's dissent at least offered a more cogent analysis than most of the advocates of such legislation. He went on from the lines quoted earlier:

> But it seems to me that this [providing students with the freedom to engage in a religious exercise] is a perfectly legitimate secular purpose. Providing the freedom to engage in religious exercises is the purpose of the Free Exercise Clause of the First Amendment. It can surely not be argued that the First Amendment has a religious purpose. The purpose of the challenged legislation is to provide students with a small portion of the

> religious freedom which they are guaranteed outside the classroom.... I do not read the Establishment Clause to prohibit all audible public school prayer which the Free Exercise Clause does not protect....
>
> Louisiana and the Jefferson Parish School Board have not attempted to establish a religion, rather, they have attempted to provide religious freedom.... The primary effect of the challenged legislation is neither to advance nor to inhibit religion, but rather to advance religious freedom.

The dissent contended that a state has three options with respect to audible, collective prayer in public schools: "require it, allow it, or prohibit it."

> Requiring it would be an elementary violation of the Establishment Clause. But it seems to me that the state should be allowed to choose between allowing audible prayer and prohibiting it.... Allowing audible prayer may have the effect of advancing religion, but (when the government does not establish the prayer's content) does not violate the Establishment Clause because allowing audible prayer has the primary effect of promoting religious freedom.... An incidental benefit to religion is irrelevant if the challenged legislation has a legitimate primary or principle [*sic*] effect.

Judge Sharp contended that if a student's religion *required* him or her to engage in audible prayer at 9:00 AM every morning, the state would have to show a "compelling state interest" to justify not permitting the student to fulfill that requirement under the Free Exercise Clause.

> Unfortunately for the students who would have participated in the program in this case, their religion did not require them to utter such an audible prayer, even though their religion apparently encouraged it sufficiently for their parents to petition the state legislature for the allowance of such an audible prayer.

So why should the state not have the option of allowing students to pray if they wish, even if it is not a religious *requirement*, so long as the exercise is truly voluntary and the state does not determine its content? To begin with, the state would have little difficulty showing a compelling state interest in not permitting students to indulge in audible prayer at self-appointed times during the school day and disrupting the curriculum. Furthermore, the proviso of a "truly voluntary" exercise conceals an infinite range of problems about what is voluntary and how all kinds of subtle and indirect peer- and authority-pressures operate to create conditions that are not truly voluntary. But beyond that, the event envisioned by the legislature for each classroom every weekday morning is nothing more nor less than a little one-minute prayer meeting at which the teacher asks something like, "Well, who will lead in prayer today?" and some student "volunteers" to do so, or the teacher proceeds to lead the prayer.

Although the statute provided that no student or teacher was to be compelled to pray, it clearly did not contemplate that some teacher or teachers would frustrate this

arrangement by not ever having prayer at all. The school board would not care for that. If there were parents who petitioned the legislature to enact this statute, there would certainly be parents who would complain to the school board if their child's teacher blocked the plan. So a teacher who was not comfortable as leader of the daily prayer meeting would have some interesting options: arranging with some other teacher to switch classrooms long enough to lead the prayer and then go back and do the same in his or her own classroom? Getting the principal to come in every morning to lead the prayer? Prevailing upon some student or students to be primed to do so every morning? (and how would that effect the "voluntary" role of students?) or—if all the above options failed—feigning laryngitis?

Worst of all would be for the reluctant teacher to go ahead and grudgingly lead the prayer, not believing in prayer, or in a supreme being who hears prayers, or for any other reason. (And let no one think the students would not very soon and accurately recognize what the teacher thought of prayer, however well dissembled.) The legislature, assuming that any and all teachers would naturally be willing and able to lead a group of students in prayer every morning, had a very trusting and optimistic outlook. Nothing would be a greater disservice to true faith and piety than a functionary obliged to offer prayer who was embarassed, awkward, resentful, perfunctory or irreverent—all of which are more likely traits than their opposites in the average run of humankind. Perhaps Louisiana has a higher level of piety than most places, but surely even there not all teachers would be equally enthused about this opportunity. And even if they were, the event would still be a state-sponsored, state-supervised, state-regulated service of worship, which is the *opposite* of what the Establishment Clause contemplates.

(6) More Prayer Occasions. There were numerous other occasions on which prayer was offered in some public schools: athletic events, band practice, etc., that came to the attention of one court or another in subsequent years.

> In *Jager v. Douglas County School District*, the Court of Appeals held that a school district could not constitutionally delegate the task of offering prayers at high school football games to the local Ministerial Association. The Court also found unconstitutional an "equal access" plan under which student volunteers could recite prayers of their own choosing as part of a pre-game ceremony.[116]
>
> The common practice of high school coaches leading a team in prayer, or calling upon a team member to do so, before, during, or after an athletic event, is unconstitutional.[117]
>
> An individual student may engage in private, quiet, religious activities, so long as the conduct is not disruptive and does not interfere with the

116 . Kahn, David V., "Religion and the Public Schools: A Summary of the Law," Religious Liberty Resource Center, American Jewish Congress, 1990, p. 2, citing *Jager*, 862 F.2d 824 (CA11 1989); accord, *Doe v. Aldine I.S.D.*, 563 F.Supp. 883 (S.D. Tex. 1982).

117 . Ibid., citing 10 Tenn. O.A.G. 365 (1980); Wisc. O.A.G. 17-86 (1986) (college students).

> right of others to be left alone. There is no constitutional requirement that school officials prohibit student Bible reading, prayer, recitation of the rosary, or informal discussion of religious subjects with classmates.[118] On the contrary, any effort to interfere with such activities would itself be unconstitutional, unless demonstrably necessary to maintain order in the school or protect the rights of other students.
>
> Not all private religious activities are permissible. At least one court has held that school officials may ban intrusive proselytization (*e.g.*, the use of bullhorns, and thrusting religious tracts into the hands of students), in order to protect the rights of other students.[119]

(7) "Silent Meditation or Prayer." The next major line of resistance to the Court's rejection of state-sponsored prayer in public schools was a flurry of bills in state legislatures to "permit" (require) a moment of silence at the beginning of each school day. In 1973 Massachusetts enacted such a law over the governor's veto and the state attorney general's opinion that it was unconstitutional.

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation and prayer, and during such period silence shall be maintained and no activities engaged in.[120]

During the next ten years some twenty-five states adopted some version of this statute, and lawsuits were filed in several, though a disinterested observer might suppose that the advantages (or disadvantages) would be inconsequential either way. Certainly a moment of silence—if such a thing could be obtained in a classroom of restless students—could hardly be construed—in and of itself—to be of religious significance unless a rather definite expectation were created that it was to be used for *prayer* or *spiritual* meditation. Silence itself would seem to be a neutral quantity.

(8) *Wallace v. Jaffree* (1985). Precisely that question was examined by the U.S. Supreme Court in 1985 in a case from Mobile, Alabama, involving three separate actions by the Alabama legislature: (1) a 1978 authorization of a one-minute period of silence in all public schools "for meditation," (2) a 1981 authorization of a period of silence "for meditation or voluntary prayer," and (3) a 1982 authorization for teachers to lead "willing students" in a prescribed prayer to "Almighty God the Creator and Supreme Judge of the world."

The trial court at the preliminary injunction stage saw nothing wrong with the first statute, but held the second and third to be invalid because the sole purpose of both was "an effort on the part of the State of Alabama to encourage a religious activity."

---

118. Ibid., citing Kans. O.A.G. 88-12; 69 Md. O.A.G. 100 (1984).

119. Ibid., citing *Clark v. Dallas Ind. School Dist.*, 671 F.Supp. 1119 (N.D.Tex. 1987), mod. 701 F.Supp. 594 (1988), remanded for further fact-finding, 880 F.2d 411 (CA5 1989) (table).

120. Quoted in Pfeffer, *God, Caesar and the Constitution*, *supra*, p. 205.

After trial on the merits, Judge W. Brevard Hand, apparently experienced a conversion and upheld the latter two statutes as constitutional because, in his view, the state of Alabama could establish a state religion if it wished to do so! This view, which Justice Stevens, writing for the majority of the U.S. Supreme Court, termed "remarkable," simply repudiated the entire body of case law that had been erected around the Establishment Clause since *Everson*[121] held that clause applicable to the states through the Fourteenth Amendment.[122]

> Holding that Federal courts do not even have jurisdiction over cases involving prayer in the public schools of Alabama, Hand offered impressive historical evidence... to demonstrate inherent flaws in the original prayer decisions of 1962, and to show further that the Court has completely misunderstood and misconstrued the meaning of the establishment clause for more than thirty-five years.
>
> The power and originality of Judge Hand's scholarly opinion... lies in [his] assault upon the doctrine of incorporation, his repudiation of the wall of separation doctrine, and his claims to judicial independence. He is apparently not only the first member of the entire Federal Judiciary in more than fifty years to question the Supreme Court's jurisdictional claims over church-state relations in the several states, but also the first to challenge the applicability of the Bill of Rights to the states. He is also the first Federal Judge since the Supreme Court assumed jurisdiction over state establishment questions to argue that the religious prohibitions of the establishment clause were never intended to include school prayers or any other form of government aid to religion short of "the outright establishment of a national religion."[123]

These same two cavils were dealt with by Justice Clark in *Abington v. Schempp*, where they were dismissed as "of value only as academic exercises."[124] The Court of Appeals agreed with the trial court's *initial* view and held unconstitutional the second and third statutes, but no one contended that the first was not constitutional. The U.S. Supreme Court summarily affirmed the Court of Appeals' holding of unconstitutionality on the third statute (authorizing teachers to lead "willing students" in a state-prescribed prayer), so only the second statute (authorizing a period of silence for "meditation or voluntary prayer") was at issue in the Supreme Court's review in 1985. Justice John Paul Stevens wrote the opinion of the Court for five of the justices, taking several pages to correct Judge Hand's misconceptions.

---

121 . 330 U.S. 1 (1947), discussed at § D2 below.

122 . *Jaffree v. Board of School Commissioners of Mobile County*, 553 Fed.Supp. 1104 (S.D.Ala. 1983).

123 . McClellan, James, "Hand's Writing on the Wall of Separation," in Goldwin and Kaufman, eds., *How Does the Constitution Protect Religious Freedom?*, *supra*, p. 44. James McClellan, the author of this article, was an advocate of the point of view expressed by Judge Hand, and may have compiled some of the "impressive historical evidence" referred to in the quotation.

124 . See § 2b(2) above.

[I]t is... appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's fredom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States.[125] But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the State's power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again.[126]

* * *

Just as the right to speak and the right to refrain from speaking are complimentary [complementary?] components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful,[127] and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain. As Justice Jackson eloquently stated in *Board of Education v. Barnette, [supra]*,

---

125. Citing *Permoli v. First Municipality of New Orleans*, 3 How. 589, 609 (1845), discussed at ID1a.

126. Citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), discussed at IVA6c; *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *West Virginia v. Barnette*, 319 U.S. 624, 637-638 (1943), discussed at IVA6b; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), discussed at IIA2c; *Hague v. CIO*, 307 U.S. 496, 519 (1939); *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); and *Abington v. Schempp*, 374 U.S. 203, 215 (1963), discussed at §C2b(2) above.

127. Quoting extensively in the margin from Madison's "Memorial and Remonstrance."

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The State of Alabama, no less than the Congress of the United States, must respect that basic truth.

* * *

[Under the three-fold test of establishment set forth in *Lemon v. Kurtzman*,[128]] the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.... In this case, the answer to that question is dispositive [without needing to examine the other two prongs]. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment... was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose.

The sponsor of the bill..., Senator Donald F. Holmes, inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools. Later... before the District Court... [i]n response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated, "No, I did not have no other purpose in mind." The State did not present evidence of *any* secular purpose.

* * *

[Since the State already had a statute providing for a minute of silent meditation at the beginning of the school day,] the Legislature enacted [the statute at issue here] for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion.

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions we must ask is "whether the Government intends to convey a message of endorsement or disapproval of religion."[129] The well-supported concurrent findings of the [courts below]—that [the statute] was intended to convey a message of State-approval of prayer activities in the public schools—make it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words "or voluntary prayer" to the statute. Keeping in mind, as we must, "both the fundamental place held

---

128. 403 U.S. 602 (1971), discussed at §D5 below.

129. Citing *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring), Justice O'Connor's "endorsement" test. That case is discussed at VE2d.

> by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," we conclude that [that addition] violates the First Amendment.[130]

Justice Powell concurred in a six-page opinion, devoted largely to rebutting the criticism of the *Lemon* test of establishment by the dissents, which will be discussed in another section.[131] Justice Sandra Day O'Connor concurred in the judgment in an opinion focusing largely on the permissibility of a genuine moment-of-silence statute.

> Nothing in the United States Constitution as interpreted by this Court or in the laws of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day. Alabama has facilitated voluntary silent prayers of students who are so inclined by [its enactment that] provides a moment of silence in... school each day. The parties to these proceedings concede the validity of this enactment.... I agree with the judgment of the Court that... [the later statute in question] violates the Establishment Clause of the First Amendment. In my view, there can be little doubt that the purpose and likely effect of this subsequent enactment is to endorse and sponsor voluntary prayer in the public schools....
>
> The religion clauses of the First Amendment, coupled with the Fourteenth Amendment's guarantee of ordered liberty, preclude both the Nation and the States from making any law respecting an establishment of religion or prohibiting the free exercise thereof. Although a distinct jurisprudence has enveloped each of these clauses, their common purpose is to secure religious liberty. On these principles the Court has been and remains unanimous.
>
> * * *
>
> Twenty-five states permit or require public school teachers to have students observe a moment of silence in their classrooms.... during which students may meditate, pray, or reflect on the activities of the day. Federal trial courts have divided on the constitutionality of these moment of silence laws.[132]...
>
> * * *
>
> A state sponsored moment of silence in the public schools is different from state sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious.... Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others.... It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

---

130 . *Wallace v. Jaffree*, 472 U.S. 38 (1985).

131 . See § D7k below.

132 . Comparing *Gaines v. Anderson*, 421 F.Supp. 337 (Mass. 1976) (upholding statute) with *May v. Cooperman*, 572 F.Supp. 1561 (NJ 1983) (striking down statute).

> By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during that period.... Even if a statute specifies that a student may wish to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives. Nonetheless, it is also possible that a moment of silence statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray.... The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer.... However deferentially one examines [the Alabama statute's] text and legislative history, however objectively one views the message attempted to be conveyed to the public, the conclusion is unavoidable that the purpose of the statute is to endorse prayer in public schools....[133]

The remainder of Justice O'Connor's opinion was directed at responding to the dissenters' criticism of the *Lemon* test of establishment, and will be discussed in a later section under the topic of the supposed conflict between the two religion clauses.[134]

Chief Justice Burger penned an impassioned dissent that viewed the majority holding as bizarre to the point of grotesquerie.

> Some who trouble to read the opinions in this case will find it ironic—perhaps even bizarre—that on the very day we heard arguments in this case, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer.... Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditation—or a moment of silence.
>
> Inevitably some wag is bound to say that the Court's holding today reflects a belief that the historic practice of the Congress and this Court is justified because members of the Judiciary and Congress are more in need of Divine guidance than are schoolchildren. Still others will say that all this controversy is "much ado about nothing," since no power on earth—including the Court and Congress—can stop any teacher from opening the school day with a moment of silence for pupils to meditate, to plan their day—or to pray if they voluntarily elect to do so.
>
> I make several points about today's curious holding.
>
> (a) It makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is *one* of the authorized activities during a moment of silence." To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a

133 . *Wallace v. Jaffree, supra*, O'Connor concurrence.

134 . See § D7k below.

> moment of silence does not, manifests not neutrality but hostility toward religion.... The Alabama legislature has no more "endorsed" religion than a state or the Congress does when it provides for legislative chaplains, or than this Court does when it opens each session with an invocation to God....
>
> (b) The inexplicable aspect of the foregoing opinions, however, is what they advance as support for the holding concerning the purpose of the Alabama legislature.... Curiously, the opinions do not mention that *all* of the sponsor's statements relied upon... were made *after* the legislature had passed the statute.... [T]here is not a shred of evidence that the legislature as a whole shared the sponsor's motive or that a majority in either house was even aware of the sponsor's view when it was passed.... No case in the 195-year history of this Court supports the disconcerting idea that post-enactment statements by individual legislators are relevant in determining the constitutionality of legislation.... [A]ll of the opinions fail to mention that the sponsor also testified that one of his purposes in drafting and sponsoring the moment-of-silence bill was to clear up a widespread misunderstanding that a schoolchild is legally *prohibited* from engaging in silent, individual prayer once he steps inside a public school building. That statement is at least as important as the statements the Court relies upon, and surely that testimony manifests a permissible purpose.
>
> (c) The Court's extended treatment of the "test" of *Lemon v. Kurtzman* suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues.... In any event, our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion....
>
> (d) The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespasss into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes—as Congress does by providing chaplains and chapels.... The statute also provides a meaningful opportunity for schoolchildren to appreciate the absolute constitutional right of each individual to worship and believe as the individual wishes. The statute "endorses" only the view that the religious observances of others should be tolerated and, where possible, accommodated....
>
> The mountains have labored and brought forth a mouse.[135]

Justice White expressed agreement with the dissents of Chief Justice Burger and Justice Rehnquist (discussed below), and added a few lines of his own.

> As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer.

---

135. *Wallace v. Jaffree, supra*, Burger dissent, quoting in the last line Horace, Epistles, bk. III (Ars Poetica), line 139.

> But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question "May I pray?"... Of course, I have been out of step with many of the Court's decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our precedents.[136]

Justice Rehnquist undertook a major essay of twenty-three pages purporting to reexamine the history of the Establishment Clause to show that it had been grossly perverted from *Everson*[137] on, especially in the three-part *Lemon* test, having been based on the misleading metaphor of a "wall," derived from a casual letter of Thomas Jefferson's written fourteen years after the First Amendment was adopted. The thrust of Justice Rehnquist's argument was that the original intent of the Establishment Clause was not to suppose that government should be neutral as between religion and irreligion, but to prevent the setting up of a state church or the preferring of one religion over another. Under this rubric, government would not be prevented from giving nonpreferential aid to all religions. This "nonpreferentialist" idea was much touted in some circles,[138] but was effectively answered by others (including Justice David Souter in concurrence in *Lee v. Weisman*[139]), who pointed out that the First Congress had had before it several alternative wordings of what was to become the First Amendment that said exactly what the nonpreferentialists contend Congress intended and *rejected them all in favor of a broader prohibition*. The Rehnquist dissent will be discussed further in a later section dealing with the supposed conflict between the two religion clauses.[140] Justice Rehnquist concluded his lengthy discourse as follows:

> It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer....
>
> The State surely has a secular interest in regulating the manner in which public schools are conducted. Nothing in the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized "endorsement" of prayer.[141]

---

136. *Wallace v. Jaffree, supra*, White dissent.

137. *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947), discussed at § D2 below.

138. See Antieau, C., A. Downey, & E. Roberts, *Freedom from Federal Establishment* (1964); Cord, Robert, *Separation of Church and State, supra,* Malbin, M., *Religion and Politics, supra*, (1978); and McClellan, J., "Hand's Writing on the Wall," *supra*.

139. 505 U.S. 577 (1992) discussed at § C2d(10) below.

140. See § D7k below.

141. *Wallace v. Jaffree, supra*, Rehnquist dissent.

The mountains had indeed labored and brought forth a mouse. But the laboring mountains were the legislatures of Alabama and twenty-five other states that adopted formal statutes on the law books to mandate or permit teachers in all the public school classrooms of the state to begin the school day with a moment of silence—in which (silent) prayer might or might not occur—as a sop to those members of the electorate who felt that God had somehow been exiled from the public schools by court order. The slightest commonsense reflection on the nature of schoolchildren might have suggested that a moment of state-mandated silence would not be the easiest thing to bring about, certainly not as a vehicle for "thoughtful" meditation, planning or prayer, at least not on a day-after-day basis. Some pupils, of course, might follow the mandated pattern of behavior, but others would be full of boredom, impatience, fidgets, mischief, and all manner of imaginings, not all of a constructive nature. If (as the adages of eld opine) "the devil finds work for idle hands" or "an idle mind is the devil's workshop," then sixty seconds or so of otherwise unoccupied time in the classroom is an invitation to straying attention as readily as to prayer. Teachers who have a hard time keeping the class's attention focused on the learning assignment may not welcome an initial window of diffusion at the beginning of the day. And to have the legislature micro-managing this ticklish enterprise is scarcely a signal service to the cause of in-school piety or even decorum. It is as apt to lead to the modern equivalents of dipping pigtails in inkwells or molding spitballs for later ballistic usage as it is to the increase of spiritual uplift. Yet this enterprise—and its enacting, litigating and adjudicating—occupied the attentions of hundreds of legislators, litigants and learned judges before it reached its conclusion (if it has concluded yet).[142]

(9) *Malnak v. Yogi* (1979). All of the religious practices in public schools discussed thus far have been Christian (with the exception of a few Hanukkah or Passover observances that were probably instituted as a sop to the Jewish community), but the possibility seems not to have occurred to the Christian proponents of such practices that the majority in some communities in the United States might not be Christian, and thus Christians in a minority might be subjected, for instance, to Buddhist observances in Hawaii.

An unusual twist on the school-prayer problem was presented by a New Jersey case in which the persons responsible for the practice complained of—both public school personnel and the practitioners—insisted that the practice was *not religious*. At five public high schools an elective course was offered in 1975-76 by teachers trained by the World Plan Executive Council—United States, using a textbook developed by Maharishi Mahesh Yogi, founder of the Science of Creative

142. A straight moment-of-silence statute (with no mention of prayer) in New Jersey was found unconstitutional in *May v. Cooperman*, 572 F.Supp. 1561 (1983), affirmed in *May v. Cooperman*, 780 F.2d 240 (1985), and an appeal to the U.S. Supreme Court was rejected for defect in the appellants, *Karcher v. May*, 484 U.S. 72 (1987).

Intelligence, which taught that "pure, creative intelligence" is the basis of life, and that it can be released and its potential fulfilled through the practice of Transcendental Meditation.

> Essential to the practice... is the "mantra"... the sound aid used while meditating. Each meditator has his own personal mantra which is never to be revealed to any other person. It is by concentrating on the mantra that one receives the beneficial effects said to result from Transcendental Meditation.
>
> To acquire his mantra, a meditator must attend a ceremony called a "puja".... A puja was performed by the teacher for each student individually; it was conducted off school premises on a Sunday; and the student was required to bring some fruit, flowers and a white handkerchief. During the puja the student stood or sat in front of a table while the teacher sang a chant and made offerings to a deified "Guru Dev."
>
> * * *
>
> Defendants argue that... the activity in question in each of the prior cases [reviewed by the court] was represented or conceded to be religious in nature whereas the activities [in this case] are not religious in nature....
>
> We agree with the district court's finding that the SCI/TM course was religious in nature. Careful examination of the textbook, the expert testimony elicited, and the uncontested facts concerning the puja convince us that religious activity was involved....[143]

Judge Arlin Adams wrote a thoughtful concurring opinion in this case that has been often cited because of the definition of "religion" it contains, and that perceptive treatment will be examined in the section on definitions of religion.[144]

(10) Prayers at Commencement. In several cases the use of prayer at public school graduation exercises was challenged, but in vain. In one such case, *Wood v. Mt. Lebanon Township School District*, plaintiffs sought a restraining order against the "pronouncement of an invocation and benediction at high school graduation ceremonies." The court discerned that the event in question "follows and is completely separate and apart from all formal requirements of the school district for graduation."

> [Those activities] are purely voluntary; there is absolutely no compulsion attached to attending the graduation to be eligible to receive a diploma....
>
> In the present case we do not have what amounts to official prayer nor does it constitute a religious program. There is no governmental stamp of approval placed on the invocation and benediction.... In the view of this Court, having a member of the clergy, who is in no way compensated by the [school], pronounce an invocation or benediction at graduation ceremonies which are totally separate from the school routine, does not

143 . *Malnak v. Yogi*, 592 F.2d 197 (1979).

144 . See VF1.

> violate any of plaintiffs' First Amendment rights. Any use of tax monies in connection with the invocation and benediction appears to be de minimis.[145]

A subsequent case, *Grossberg v. Deusebio*, was decided by a federal judge of the Richmond Division of the Eastern District of Virginia, who dealt with a similar complaint in a somewhat different way.

> An "invocation" is a prayer, and it is hard to conceive the purpose or effect of allowing a prayer being anything other than the advancement of religion. [The school authorities seem to think they have] somehow divested themselves of responsibility for the invocation by submitting the question to a vote in the senior class.... A graduation ceremony for a public school class, held on public school grounds, and administered by public school personnel, at which diplomas are officially awarded by the administration, is a public school event. No vote of a majority of those participating can absolve conduct therein which abridges constitutional rights.... A symbolic washing of hands, so to speak, by state officials cannot purge them of their responsibility.[146]

Thus Judge Robert R. Merhige, Jr. eschewed the "easy way out" taken by the Pennsylvania court in *Wood*, and turned to another aspect of the case:

> There is none of the repetitive or pedagogical function of the exercises which characterized the school prayer cases. There is no element of calculated indoctrination.... Such an occasion with such an invocation has not occurred previously before this audience and it will not occur again. The event, in short, is so fleeting that no significant transfer of government prestige can be anticipated.... Government here is not "embroiled" in religious matters.

This was an interesting concept: that one prayer (or two) doth not an establishment of religion make. A single event, in which the same audience will not participate again, does not constitute a *pattern* of "systematic state action," which one commentator considered necessary to create a violation of the Establishment Clause.[147] Under this rubric, a teacher who led the class in a brief prayer when the news arrived that President Kennedy had been assassinated was not thereby creating an "establishment of religion." There is much to be said for this principle, which may be a form of the doctrine *De minimis non curat lex*—the law does not concern itself with trifles. A single occurrence, in this sense, is a "trifle," and even two or three

---

145. *Wood v. Mt. Lebanon Township*, 342 F.Supp. 1293 (M.D.Pa. 1972). The phrase *de minimis* is derived from the legal principle *De minimis non curat lex*, usually translated, "The law does not concern itself with trifles."

146. *Grossberg v. Deusebio*, 380 F.Supp. 285 (E.D.Va., 1974) The reference to "symbolic washing of hands" is derived from Matthew 27:24: "So... Pilate... took water and washed his hands before the crowd, saying, `I am innocent of this man's blood; see to it yourselves.'"

147. LaNoue, George R., Jr., in oral communication, 1964.

repetitions might not rise to the level of visibility that should draw the attention of the courts.

But one must wonder whether the application of this useful rule may not have been a bit disingenuous in this instance. The same audience may hear the particular invocation or benediction only once, but the practice of having invocations and benedictions at graduation ceremonies in the Douglas Freeman High School in Henrico County, Virginia, did not begin or end with the events of June 10, 1974. They had occurred in each of many previous years and continued to occur in subsequent years. Even though the audience might be different—in large part—each year, the faculty and administrators of the school (as a body, not necessarily as individuals) continued throughout. It was they who lent the element of "state action" to the proceedings, and for them the state action was indeed "systematic"—an ongoing pattern of conduct that did seem to lend the *imprimatur* of the state to the use of prayer—and the arrangement for a clergyperson to offer it—such that it was the *expected* order of the day. Whether the school district *paid* the clergyperson would seem to be of much less consequence in establishment terms than the lending of the prestige of the public institution to the exercise of prayer. (If not, then why are clergypersons often flattered to be invited to give the prayer(s) or disappointed if *not* asked?)

(11) *Lee v. Weisman* (1992). The Supreme Court of the United States turned its attention to this subject in a case from Rhode Island that was widely expected to be the vehicle for a dismantling of forty-five years of Establishment Clause jurisprudence (such as had happened to the Free Exercise Clause in *Oregon v. Smith* in 1990, q.v.[148]). Several of the justices had individually expressed dissatisfaction with the test of establishment embodied in the case of *Lemon v. Kurtzman* (1971) because, like the no-aid test of *Everson v. Board of Education* (1947) that preceded it, it allowed for little or no "nonpreferential" governmental aid to religion.

The school district involved urged the court to reconstruct its test of establishment along lines suggested by Justice Anthony Kennedy in his dissenting opinion in *Allegheny County v. ACLU* (1989),[149] and the United States as *amicus curiae* echoed that urging. Several religious groups and other organizations entered friend-of-the-court briefs urging the court to accept this suggestion; others urged it to hold fast to its twenty-one-year-old three-prong *Lemon* test, and in the eyes of *amici* on both sides this question seemed more important than what the court might decide with regard to the constitutionality of the prayers offered at a public school commencement ceremony. After a lengthy period of gestation following oral argument in November 1991, the court brought forth in June 1992 an effusion of seventy pages. The opinion of the court was announced by Justice Anthony Kennedy.

148 . See discussion at IVD2e.

149 . 492 U.S. 573 (1989), discussed at VE2i.

(a) The Court's Opinion per Justice Kennedy. The fact pattern was simple. The principal of the Nathan Bishop Middle School of Providence, R.I., as permitted by school district policy, invited a clergyman, Rabbi Leslie Gutterman, to deliver an invocation and benediction at the school's graduation ceremony in June 1989. The principal gave the rabbi a pamphlet developed by the National Conference of Christians and Jews entitled "Guidelines for Civic Occasions" that recommended prayers be composed with "inclusiveness and sensitivity" when offered at nonsectarian civic occasions. The two prayers—quoted verbatim in the court's opinion—are graceful and unexceptionable to most people, but one graduating student, Deborah Weisman, took exception to any prayer on that occasion, and her father, after failing to dissuade the school authorities from proceeding with the planned prayer, took the matter to federal district court, which ruled that the practice of including prayers in public school graduations violated the Establishment Clause—a holding affirmed by the First Circuit Court of Appeals.[150]

The school board defended on the ground that these short prayers were very important to many students and parents on this very significant occasion, that the prayers were nonsectarian, and that participation in the ceremony was entirely voluntary. The court recognized the standing of the Weismans to bring suit since Deborah was attending Classical High School in the same district, which observed the same practice of prayers at graduation to which she objected when in middle school. Those who expected Justice Kennedy to take this occasion to assert his "coercion" test of establishment proposed in his dissent in *Allegheny County* as a replacement for the court's *Lemon* test (and thus to uphold the school prayer) were surprised to discover that he did not do so.

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.
>
> This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodations by the State for the religious beliefs and practices of many of its citizens.... For without reference to those principles in other contexts, the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not

150 *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990).

accept the invitation of [the school board] and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman*. The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."... The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal [Lee], decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

* * *

The State's role did not end with the decision to include a prayer and with the choice of clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Ceremonies," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayer. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," *Engel v. Vitale* (1962),[151] and that is what the school officials attempted to do.

[The school authorities] argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral.

151 . 370 U.S. 421, 425 (1962), discussed at § C2b(1) above.

The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit reference to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement of the Court of Appeals for the Sixth Circuit[152]... that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not.... If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference. James Madison, the principal author of the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority. A principal ground for his view was: "[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." Memorial and Remonstrance Against Religious Assessments....

These concerns have particular application in the case of school officials, whose efforts to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject.... [O]ur precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that the government may establish an official or civic religion as a means of avoiding the

152. *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (1987), permitting non-sectarian prayers at public school graduations.

establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted....

* * *

We turn our attention now to consider the position of the students, both those who desired the prayer and she who did not.

To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry. And tolerance presupposes some mutuality of obligation. It is argued that our constitutional vision of a free society requires confidence in our own ability to accept or reject ideas of which we do not approve, and that prayer at a high school graduation does no more than offer a choice. By the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these. Against this background, students may consider it an odd measure of justice to be subjected during the course of their education to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return. This argument cannot prevail, however. It overlooks a fundamental dynamic of the Constitution.

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own.[153] The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

The lessons of the First Amendment are as urgent in the modern world as in the 18th Century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the hallmark of a free people. To compromise that principle today would be to deny our own tradition and

153 . Citing *Meese v. Keene*, 481 U.S. 465, 480-481 (1987); *Keller v. State Bar of California*, 496 U.S. 1, 10-11 (1990); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

forfeit our standing to urge others to secure the protections of that tradition for themselves.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools....[P]rayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there.... What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention [citing studies]. To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religous exercise. It is, we

concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the Rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of objector's rights. That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or the isolation of the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.

There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. [The school] and the United States, as *amicus*, made this a center point of the case, arguing that the option for not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail. Their contention, one of considerable force were it not for the constitutional constraints applied to state action, is that the prayers are an essential part of these ceremonies because for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence. We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge

> that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.
>
> The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, here by electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.... Just as in [the earlier decisions on classroom prayer] we found that provisions... permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary does not save the religious exercise.

The opinion distinguished the graduation exercise from prayers at the opening of sessions of a legislature,[154] "where adults are free to enter and leave with little comment and for any number or reasons" because in the school setting—even at graduation—"teachers and principals must and do retain a high degree of control over... the movements, the dress, and the decorum of the students." The court rejected the proffered parallel between the two situations and added, "Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one" that would not permit equating the two. But the holding was not to be thought open-ended.

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid....

154 . Upheld in *Marsh v. Chambers,* 463 U.S. 783 (1983), discussed at VD3a.

> Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.[155] We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.[156] But these matters, often questions of accommodations of religion, are not before us. The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.[157]

This opinion was striking for several reasons, foremost among which was that Justice Kennedy was the author, since it seemed a departure from views he had expressed earlier. But he seemed to have been strongly affected by the question of coercion, even the indirect kind at issue here (and which Justice Antonin Scalia ridiculed in his dissent). One observer thought the turning point—if turning point there was—may have been at oral argument.

> Responding to the argument that prayers at a commencement are of minimal concern because students who object can skip the ceremony and still receive their diplomas, he looked deeply troubled. "In our culture, graduation is a key event in a young person's life," [Justice Kennedy] told Charles J. Cooper, the lawyer for the... school board, who along with Solicitor General [Kenneth W.] Starr, was arguing in favor of permitting the prayers.
>
> Whether the two lawyers lost Justice Kennedy's vote at that moment is impossible to say. But in his opinion... he returned to the point using almost the same words he had uttered spontaneously from the bench.[158]

Second, this decision was the first time the court had dealt definitively with the concept of *civil religion* (or "civic religion," as the court termed it), a concept lofted by Robert Bellah in a famed essay in *Daedalus* and a subject of much academic debate. Because it is such an amorphous concept, with several meanings—some thought to be socially constructive, some not—it is not a very useful term for legal

---

155 . Citing *Abington v. Schempp*, Goldberg, J., concurring.

156 . Citing *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 266 (1990), upholding "equal access" to public secondary school for student-initiated religious clubs, discussed at § E3g below.

157 . *Lee v. Weisman,* 505 U.S. 577 (1992).

158 . Linda Greenhouse, *N.Y. Times*, June 26, 1992, p. A16.

discourse, and the court in this instance simply concluded that it was not any more suitable for governmental promulgation than the more traditional or sectarian brands.

Third, the distinction between the way the First Amendment protects freedom of speech, where government may be one of the speakers, and freedom of religion, where government may not, was illuminating and original.

Fourth, the insight that the Establishment Clause is concerned not only with protecting nonconforming individuals from state-sponsored religious observances but with protecting the collective communities of religion from government interference is an element often overlooked.

Though somewhat repititious and loosely organized, the opinion had points of real force and feeling that showed convictions about religious liberty for individual dissenters. One element that was not touched on was that even devout believers are not always happy with the (necessarily?) attenuated quality of "civic religion" and its lowest-common-denominator rites—a point made by Justice Brennan in dissent in *Marsh v. Chambers.*[159]

(b) Justice Blackmun's Concurring Opinion. Justice Harry Blackmun wrote separately, apparently to build a backfire against the implication of the majority opinion that the case turned on the issue of coercion and to strengthen the rule of the *Lemon* test.

> Nearly half a century of review and refinement of Establishment Clause jurisprudence has distilled one clear understanding: Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution. The application of these principles to the present case mandates the decision reached today by the Court.

He recapitulated the history of that jurisprudence as it bore on state-sponsored prayers, going back to *Everson v. Board of Education* (1947)—quoting verbatim the famed "no aid" formula in a footnote—and touching on *Engel v. Vitale* (the Regents' Prayer case, 1962), *Abington School Dist. v. Schempp* (school prayer and Bible-reading, 1963), *Epperson v. Arkansas* (striking down a law prohibiting the teaching of evolution in public schools, 1968) and *Lemon v. Kurtzman* (formulating the three-pronged test of establishment, 1971). He summarized his survey as follows:

> Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of *Marsh v. Chambers*, 463 U.S. 783 (1983), has the Court not rested its decision on the basic principles described in *Lemon*.... In no case involving religious activities in public schools has the Court failed to apply vigorously the *Lemon* factors.[160]

159 . 463 U.S. 783, 820 (1983).

160 . *Lee v. Weisman*, *supra*, Blackmun opinion, n. 4.

Having built up a heavy bulwark to support the *Lemon* test, he applied it to the instant case.

> Application of these principles to the facts of this case is straightforward. There can be "no doubt" that the "invocation of God's blessing" delivered at Nathan Bishop Middle School "is a religious activity." *Engel*. In the words of *Engel*, the Rabbi's prayer "is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such prayer has always been religious." The question then is whether the government has "plac[ed] its official stamp of approval" on the prayer. As the Court ably demonstrates, when the government "compose[s] official prayers," selects the member of the clergy to deliver the prayer, has the prayer delivered at a public school event that is planned, supervised and given by school officials, and pressures students to attend and participate in the prayer, there can be no doubt that the government is advancing and promoting religion. As our prior decisions teach us, it is this that the Constitution prohibits.
>
> I join the Court's opinion today because I find nothing in it inconsistent with the essential precepts of the Establishment Clause developed in our precedents.... Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.
>
> But it is not enough that the government restrain [refrain?] from compelling religious practices: it must not engage in them either. The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion [citations omitted]. The Establishment Clause proscribes public schools from "conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*," even if the schools do not actually "impos[e] pressure upon a student to participate in a religious activity." *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 261 (1990), (KENNEDY, J., concurring).
>
> * * *
>
> There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience. Even subtle pressure diminishes the right of each individual to choose voluntarily what to believe. Representative Carroll explained during congressional debate over the Establishment Clause: "[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand."[161]
>
> Our decisions have gone beyond prohibiting coercion, however, because the Court has recognized that "the fullest possible scope of religious liberty"[162] entails more than freedom from coercion. The Establishment

161 . Citing I Annals of Cong. 757 (August 15, 1789).

162 . Citing *Schempp*, 374 U.S., at 305 (Goldberg, J., concurring).

Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community—both essential to safeguarding religious liberty. "Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate."[163]

The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs.[164] A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some....

When the government arrogates to itself a role in religious affairs, it abandons its obligation as guarantor of democracy. Democracy requires the nourishment of dialogue and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. When the government appropriates religious truth, it "tranforms rational debate into theological decree."[165] Those who disagree no longer are questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach.

Madison warned that government officials who would use religious authority to pursue secular ends "exceed the commission from which they derive their authority and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves." Memorial and Remonstrance against Religious Assessments (1785).... Democratic government will not last long when proclamation replaces persuasion as the medium of political exchange.

Likewise, we have recognized that "[r]eligion flourishes in greater purity, without than with the aid of Gov[ernment]." *Id.* To "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary,"[166] the government must not align itself with any one of them. When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may fear being "taint[ed]... with a corrosive secularism."[167] The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation. Keeping religion in the hands of private groups minimizes state intrusion on religious choice and best enables each

---

163. Quoting "Religious Liberty," in *Essays and Speeches of Jeremiah S. Black* 53 (C. Black ed. 1885)(Chief Justice of the Commonwealth of Pennsylvania).

164. Citing Justice O'Connor's expression of her "endorsement" test in *Wallace v. Jaffree*, 472 U.S., at 69.

165. Quoting Neuchterlein, Note, "The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause," 99 *Yale L. J.* 1127, 1131 (1990).

166. Quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

167. Quoting *Grand Rapids School Dist. v. Ball,* 473 U.S. 373, 385 (1985).

> religion to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach*.
>
> It is these understandings and these fears that underlie our Establishment Clause jurisprudence. We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is a fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religous community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause. To that end, our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.
>
> I remain convinced that our jurisprudence is not misguided, and that it requires the decision reached by the Court today.[168]

This effort to shore up the sterner conception of the Establishment Clause and to anchor it in precedent and the writings of the Founders was joined by Justices John Paul Stevens and O'Connor.

(c) Justice Souter's Concurring Opinion. If the primary surprise of the *Lee v. Weisman* decision was Justice Kennedy's taking the lead in continuing the court's course on public-school prayer, a secondary surprise was the stance of Justice Souter, whose views on church-state issues were generally unknown (aside from his statement in his confirmation hearing that the *Lemon* test should not be discarded unless something better was available to replace it). He not only joined the Kennedy opinion but wrote separately to express his rejection of the views of those (including the Chief Justice[169]) who contended that the Establishment Clause was intended only to prevent the setting up of a national church or preferring one religion over another, not to prohibit nonpreferential aid to all religions. This "nonpreferentialist" view was the leading contender to replace the *Lemon* test of establishment, and Justice Souter disputed the assertion that it represented the Founders' "original intent."

> I join the whole of the Court's opinion, and fully agree that prayers at public school graduation ceremonies indirectly coerce religious observance. I write separately nonetheless on two issues of Establishment Clause analysis that underlie my independent resolution of this case: whether the Clause applies to governmental practices that do not favor one religion or denomination over others, and whether state coercion of religious conformity, over and above state endorsement of religious exercise or belief, is a necessary element of an Establishment Clause violation.

168 . *Lee v. Weisman, supra,* Blackmun opinion.

169 . In dissent in *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985), discussed at § (7) above.

I

Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed: the Establishment Clause forbids not only state practices that "aid one religion... or prefer one religion over another," but also those that "aid all religions."[170] Today we reaffirm that principle, holding that the Establishment Clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be. In barring the State from sponsoring generically Theistic prayers where it could not sponsor sectarian ones, we hold true to a line of precedent from which there is no adequate historical case to depart.

A

Since *Everson*, we have consistently held the Clause applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others.... [collecting cases]

Such is the settled law. Here, as elsewhere, we should stick to it absent some compelling reason to discard it....

B

Some have challenged this precedent by reading the Establishment Clause to permit "nonpreferential" state promotion of religion. The challengers argue that, as originally understood by the Framers, "[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion."[171] While a case has been made for this position, it is not so convincing as to warrant reconsideration of our settled law; indeed, I find in the history of the Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson*.

When James Madison arrived at the First Congress with a series of proposals to amend the National Constitution, one of the provisions read that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[172] Madison's language did not last long. It was sent to a Select Committee of the House, which, without explanation, changed it to read that "no religion shall be established by law, nor shall the equal rights of conscience be infringed." Thence the proposal went to the Committee of the Whole, which was in turn dissatisfied with the Select Committee's language and adopted an alternative proposed by Samuel Livermore of New Hampshire: "Congress shall make no laws touching religion, or infringing the rights of conscience." Livermore's proposal would have forbidden laws having anything to do with religion and thus was not only

---

170 . *Everson v. Board of Education of Ewing*, 330 U.S. 1, 15 (1947).

171 . *Wallace, supra*, (Rehnquist, J., dissenting); see also R. Cord, *Separation of Church and State, supra.*

172 . 1 Annals of Cong. 434 (1789).

far broader than Madison's version, but broader even than the scope of the Establishment Clause as we now understand it.[173]

The House rewrote the amendment once more before sending it to the Senate, this time adopting, without recorded debate, language derived from a proposal by Fisher Ames of Massachusetts: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed".... Perhaps, on further reflection, the Representatives had thought Livermore's proposal too expansive.... We do not know; what we do know is that the House rejected the Select Committee's version, which arguably ensured only that "no religion" enjoyed an official preference over others, and deliberately chose instead a prohibition extending to laws establishing "religion" in general.

The sequence of the Senate's treatment of this House proposal, and the House's response to the Senate, confirm that the Framers meant the Establishment Clause's prohibition to encompass nonpreferential aid to religion. In September 1789, the Senate considered a number of provisions that would have permitted such aid, and ultimately it adopted one of them. First, it briefly entertained this language: "Congress shall make no law establishing One Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed." After rejecting two minor amendments to that proposal..., the Senate dropped it altogether and chose a provision identical to the House's proposal, but without the clause protecting the "rights of conscience." With no record of the Senate debates, we cannot know what prompted these changes, but the record does tell us that, six days later, the Senate went half circle and adopted its narrowest language yet: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." The Senate sent this proposal to the House along with its versions of the other constitutional amendments proposed.

Though it accepted much of the Senate's work on the Bill of Rights, the House rejected the Senate's version of the Establishment Clause and called for a joint conference committee, to which the Senate agreed. The House conferees ultimately won out, persuading the Senate to accept this as the final text of the Religion Clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." What is remarkable is that, unlike the earlier House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of "a religion," "a national religion," "one religious sect," or specific "articles of faith." The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for "religion" in general.

Implicit in their choice is the distinction between preferential and nonpreferential establishments, which the weight of evidence suggests the

---

173. See, *e.g.*, *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding legislative exemption of religious groups from certain obligations under civil rights laws).

Framers appreciated.[174] Of particular note, the Framers were vividly familiar with efforts in the colonies and, later, the States to impose general, nondenominational assessments and other incidents of ostensibly ecumenical establishments. The Virginia Statute for Religious Freedom, written by Jefferson and sponsored by Madison, captured the separationist response to such measures. Condemning all establishments, however nonpreferentialist, the Statute broadly guaranteed that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever," including his own.... Forcing a citizen to support even his own church would, among other things, deny "the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind." In general, Madison later added, "religion & Govt. will both exist in greater purity, the less they are mixed together."[175]....

What we thus know of the Framers' experience underscores the observation of one prominent commentator, that confining the Establishment Clause to a prohibition on preferential aid "requires a premise that the Framers were extraordinarily bad drafters—that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language."[176].... We must presume, since there is no conclusive evidence to the contrary, that the Framers embraced the significance of their textual judgment. Thus, on balance, history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.

C

While these considerations are, for me, sufficient to reject the nonpreferentialist position, one further concern animates my judgment. In many contexts, including this one, nonpreferentialism requires some distinction between "sectarian" religious practices and those that would be, by some measure, ecumenical enough to pass Establishment Clause muster. Simply by requiring the enquiry, nonpreferentialists invite the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.... [A] nonpreferentialist who would condemn subjecting public school graduates to, say, the Anglican liturgy would still need to explain why the government's preference for Theistic over non-Theistic religion is constitutional.

---

174 . Justice Souter cited Laycock, D., "`Nonpreferential' Aid [to Religion: A False Claim About Original Intent," 27 *Wm. & Mary L. Rev.* 875 (1986)] 902-906, Levy, Leonard W., *The Establishment Clause* (New York: Macmillan, 1986), 91-119. But cf. Curry, Thomas J., *The First Freedoms* (New York: Oxford Univ. Press, 1986) 208-222.

175 . Letter from J. Madison to E. Livingston, 10 July 1822.

176 . Laycock, "`Nonpreferential' Aid," *supra*, 882-883.

Nor does it solve the problem to say that the State should promote a "diversity" of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each. In fact, the prospect would be even worse than that. As Madison observed in criticizing religious presidential proclamations, the practice of sponsoring religious messages tends, over time, "to narrow the recommendation to the standard of the predominant sect."[177]... We have not changed much since the days of Madison, and the judiciary should not willingly enter the political arena to battle the centripetal force leading from religious pluralism to official preference for the faith with the most votes.

II

[The school authorities] rest most of their argument on a theory that, whether or not the Establishment Clause permits extensive nonsectarian support for religion, it does not forbid the state to sponsor affirmations of religious belief that coerce neither support for religion nor participation in religious observance. I appreciate the force of some of the arguments supporting a "coercion" analysis of the Clause.... But we could not adopt that reading without abandoning our settled law, a course that, in my view, the text of the Clause would not readily permit. Nor does the extratextual evidence of original meaning stand so unequivocally at odds with the textual premise inherent in existing precedent that we should fundamentally reconsider our course.

A

Over the years, the Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement. For example, in *Allegheny County, supra,* we forbade the prominent display of a nativity scene on public property; without contesting the dissent's observation that the creche coerced no one into accepting or supporting whatever message it proclaimed, five Members of the Court found its display unconstitutional as a state endorsement of Christianity. Likewise, in *Wallace v. Jaffree*, we struck down a state law requiring a moment of silence in public classrooms not because the statute coerced students to participate in prayer (for it did not), but because the manner of its enactment "convey[ed] a message of state approval of prayer activities in the public schools." [collecting additional cases]

* * *

Our cases may not always have drawn perfectly straight lines. They simply cannot, however, support the position that a showing of coercion is necessary to a successful Establishment Clause claim.

B

* * *

[The school authorities] insist that the prohibition [in the Establishment Clause] extends only to the "coercive" features and incidents of

177 . Quoting Madison's "Detached Memoranda," 3 *Wm. & Mary Q.* 534, 561.

establishment, [but] they cannot easily square that claim with the constitutional text.... The First Amendment forbids not just laws "respecting an establishment of religion," but also those "prohibiting the free exercise thereof." Yet laws that coerce nonadherents to "support or participate in any religion or its exercise"[178] would virtually by definition violate their right to religious free exercise.... Thus, a literal application of the coercion test would render the Establishment Clause a virtual nullity, as [the school board's] counsel essentially conceded at oral argument.... Without compelling evidence to the contrary, we should presume that the Framers meant the Clause to stand for something more than petitioners attribute to it.

* * *

III

While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the state may not favor or endorse either religion generally over nonreligion or one religion over others.... This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community.... Our aspirations to religious liberty, embodied in the First Amendment, permits no other standard.

A

That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings.... Contrary to the views of some, such accommodation does not necessarily signify an official endorsement of religious observance over disbelief.

In everyday life, we routinely accommodate religious beliefs that we do not share. A Christian inviting an Orthodox Jew to lunch might take pains to choose a kosher restaurant; an atheist in a hurry might yield the right of way to an Amish man steering a horse-drawn carriage. In so acting, we express respect for, but not endorsement of, the fundamental values of others. We act without expressing a position on the theological merits of those values or of religious belief in general, and no one perceives us to have taken such a position.

The government may act likewise. Most religions encourage devotional practices that are at once crucial to the lives of believers and idiosyncratic in the eyes of nonadherents. By definition, secular rules of general application are drawn from the nonadherent's vantage and, consequently, fail to take such practices into account. Yet when enforcement of such rules cuts across religious sensibilities, as it often does, it puts those affected to the choice of taking sides between God and government. In such circumstances, accommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious

178 . Quoting *Allegheny County, supra,* (opinion of Kennedy, J.)

conscience when they offend the conscience of secular society not at all. Thus, in freeing the Native American Church from federal laws forbidding peyote use,... the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans....

B

Whatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion.... Concern for the position of religious individuals in the modern regulatory state cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion over disbelief. By these lights one easily sees that, in sponsoring the graduation prayers at issue here, the State has crossed the line from permissible accommodation to unconstitutional establishment.

Religious students cannot complain that omitting prayers from their graduation ceremony would, in any realistic sense, "burden" their spiritual callings. To be sure, many of them invest this rite of passage with spiritual significance, but they may express their religious feelings about it before and after the ceremony. They may even organize a privately sponsored baccalaureate if they desire the company of likeminded students. Because they accordingly have no need for the machinery of the State to affirm their beliefs, the government's sponsorship of prayer at the graduation ceremony is most reasonably understood as an official endorsement of religion and, in this instance, of Theistic religion. One may fairly say, as one commentator has suggested, that the government brought prayer into the ceremony "precisely because some people want a symbolic affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities."[179]

[The school authorities] would deflect this conclusion by arguing that graduation prayers are no different from presidential religious proclamations and similar official "acknowledgments" of religion in public life. But religious invocations in Thanksgiving Day addresses and the like, rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular, inhabit a pallid zone worlds apart from official prayers delivered to a captive audience of public school students and their families.... When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause.

179. Quoting Laycock, D., "Summary and Synthesis: The Crisis in Religious Liberty," 60 *Geo.Wash.L.Rev.* 841, 844 (1992). Professor Laycock prepared this article at the author's invitation as the concluding event of the Bicentennial Conference on the Religion Clauses at the University of Pennsylvania School of Law in 1991.

> However "ceremonial" their messages may be, they are flatly unconstitutional.[180]

This opinion is of exceptional interest for several reasons. It constituted Justice Souter's first excursion on the tempestuous waters of the law of church and state. It showed extensive study and thought on the subject (with much indebtedness to the scholarly writings of Professor Laycock). It resolved the question of original intent by examination of the recorded actions of the First Congress in shaping the text that became and now is the Religion Clause(s) of the First Amendment.[181] And it rejected the "coercion" test as a substitute for the *Lemon* test of establishment. All in all, Justice Souter positioned himself as a defender of *stare decisis* in the field of nonestablishment of religion—a new factor for the antidisestablishmentarians to take into account. Justices Stevens and O'Connor joined this opinion as well as Justice Blackmun's, but Justice Blackmun did not (perhaps because it was not as strongly supportive of the *Lemon* test as he was), nor did Justice Kennedy (perhaps because it rejected the "coercion" test).

(d) Justice Scalia's Dissent. As might be expected, the "conservative" wing of the court (which might better be described as the "radically revisionary" wing) did not accept the majority view. Justice Scalia wrote a vehement dissent that was joined by Chief Justice Rehnquist and Justices White and Clarence Thomas. It began with an implied reproach to Justice Kennedy for having deserted the ship.

> Three terms ago, I joined an opinion recognizing that the Establishment Clause must be construed in light of the "[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage." That opinion affirmed that "the meaning of the Clause is to be determined by reference to historical practices and understandings." It said that "[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."[182]
>
> These views of course prevent me from joining today's opinion, which is conspicuously bereft of any reference to history. In holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its

180. *Lee v. Weisman, supra*, Souter opinion.

181. This author undertook such a study in the early 1970s and concluded that it was dispositive as against the array of nontextual evidences and arguments offered by the nonpreferentialists; similar conclusions—thanks to Justice Souter—are now part of the case-law of the Supreme Court.

182. Quoting *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 657, 670 (1989) (KENNEDY, J.).

social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion, which promises to do for the Establishment Clause what the *Durham* rule did for the insanity defense.... Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people....

I

* * *

The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition. Illustrations of this point have been amply provided in our prior opinions [collecting cases], but since the Court is so oblivious to our history as to suggest that the Constitution restricts "preservation and transmission of religious beliefs...to the private sphere," *ante*, it appears necessary to provide another brief account.

From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document marking our birth as a separate people, "appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions" and avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, after swearing his oath of office on a Bible, George Washington deliberately made a prayer a part of his first official act as President:

> "it would be peculiarly improper to omit in the first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes."

Such supplications have been a characteristic feature of inaugural addresses ever since. Thomas Jefferson, for example, prayed in his first inaugural address: "may that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity." In his second inaugural address, Jefferson acknowledged his need for divine guidance and invited his audience to join his prayer:

> "I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessities and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that

> whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations."
>
> Similarly, James Madison, in his first inaugural address, placed his confidence
>
> "in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as out fervent supplications and best hopes for the future."
>
> Most recently, President Bush, continuing the tradition established by President Washington, asked those attending his inauguration to bow their heads, and made a prayer his first official act as President.

These examples are quoted here at length to point out that, gracefully worded though they be, they do not exactly demonstrate Justice Scalia's contentions, since *none of the passages quoted is a prayer*! A prayer is a direct address to God, and these are all third-person references to God. They are not prayers but invitations to pray. Like the references quoted by Justice Scalia from the inaugural addresses of the presidents and the Declaration of Independence, these are statements *about* God rather than statements addressed *to* God. As such, they do not prove anything about the constitutional appropriateness of Rabbi Guttermans's real prayers at all. They prove that presidents of the United States, as part of their first official acts upon inauguration, have made gracious, though somewhat stylized, references to God designed to demonstrate their humility and earnestness in taking high office. They did not actually pray or lead others in prayer in the quoted words. (Justice Scalia did not vouchsafe to us the wording of President Bush's ostensible "prayer," and it may or may not have been of the same sort as the ones quoted.)

Justice Scalia rehearsed the usual examples of Presidential Thanksgiving Proclamations, prayers offered by chaplains of Congress and other legislative bodies and the (third person) "invocation" uttered at every session of the Supreme Court—"God save the United States and this Honorable Court," and then focused more directly on the public-school setting.

> In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public-school graduation exercises. By one account, the first public-high-school graduation ceremony took place in Connecticut in July 1868—the very month, as it happens, that the Fourteenth Amendment (the vehicle by which the Establishment Clause has been applied against the States) was ratified—when "15 seniors from the Norwich Free Academy marched in their best Sunday suits and dresses into a church hall and waited through majestic music and long prayers."[183] As the Court obliquely acknowledges

183. Citing Brodinsky, "Commencement Rites Obsolete? Not At All, A 10-Week Study Shows," *Updating School Board Policies*, Vol. 10, p. 3 (Apr., 1979). The reference does not make clear whether or in what sense the Norwich Free Academy of 1868 was a "public school."

in describing the "customary features" of high school graduations, and as [the Weismans] do not contest, the invocation and benediction have long been recognized to be "as traditional as any other parts of the [school] graduation program and are widely established."[184]

II

The Court presumably would separate graduation invocations and benedictions from other instances of public "preservation and transmission of religious beliefs" on the ground that they involve "psychological coercion." I find it a sufficient embarassment that our Establishment Clause jurisprudence regarding holiday displays has come to "requir[e] scrutiny more commonly associated with interior decorators than with the judiciary."[185] But interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of "[r]esearch in psychology" that have no particular bearing upon the precise issue here... cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court's argument that state officials have "coerced" students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.

The Court identified two "dominant facts" that it says dictate its ruling that invocations and benedictions at public-school graduation ceremonies violate the Establishment Clause. Neither of them is in any relevant sense true.

A

The Court declares that students' "attendance and participation in the [invocation and benediction] are in a fair and real sense obligatory." But what exactly is this "fair and real sense"? According to the Court, students at graduation who want "to avoid the fact or appearance of participation" in the invocation and benediction are *psychologically* obligated by "public pressure, as well as peer pressure,... to stand as a group or, at least, maintain respectful silence" during the prayers. This assertion—*the very linchpin of the Court's opinion*—is almost as intriguing for what it does not say as for what it says. It does not say, for example, that students are psychologically coerced to bow their heads, place their hands in a Dürer-like prayer position, pay attention to the prayers, utter "Amen," or in fact pray. (Perhaps further intensive psychological research remains to be done on these matters.) It claims only that students are psychologically coerced "to stand... *or*, at least, maintain respectful silence." (emphasis added). Both halves of this disjunctive (*both* of which must amount to the fact or appearance of participation in prayer if the Court's analysisis to survive on its own terms) merit particular attention.

To begin with the latter: The Court's notion that a student who simply *sits* in "respectful silence" during the invocation and benediction (when all

184. Quoting McKown, H., *Commencement Activities* 56 (1931).

185. Citing *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), and quoting *American Jewish Congress v. Chicago*, 827 F.2d 120, 129 (Easterbrook, J., dissenting).

others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely "our social conventions" have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. Since the Court does not dispute that students exposed to prayer at graduation ceremonies retain (despite "subtle coercive pressures") the free will to sit, there is absolutely no basis for the Court's decision. It is fanciful enough to say that "a reasonable dissenter," standing head erect in a class of bowed heads, "could believe that the group exercise signified her own participation or approval of it." It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.

But let us assume the very worst, that the nonparticipating graduate is "subtly coerced"... to stand! Even that half of the disjunctive does not remotely establish "participation" (or an "appearance of participation") in a religious exercise. The Court acknowledges that "in our culture standing... can signify adherence to a view or simple respect for the views of others." (Much more often the latter than the former, I think, except perhaps in the proverbial town meeting, where one votes by standing.) But if it is a permissible inference that one who is standing is doing so simply out of respect for the prayers of others that are in progress, then how can it possibly be said that a "reasonable dissenter... could believe that the group exercise signified her own participation or approval"? Quite obviously, it cannot. I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate—so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding *even the false appearance of participation* constitutionally trumps the government's interest in fostering respect for religion generally.

The opinion manifests that the Court has not given careful consideration to its test of psychological coercion. For if it had, how could it observe, with no hint of concern or disapproval, that students stood for the Pledge of Allegiance, which admittedly preceded Rabbi Gutterman's invocation? The government can, of course, no more coerce political orthodoxy than religious orthodoxy.[186] Moreover, since the Pledge of Allegiance has been revised since *Barnette* to include the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge. Must the Pledge therefore be barred from the public schools (both from graduation

186 . Citing *West Virginia Board of Education v. Barnette* (1943).

ceremonies and from the classroom)? In *Barnette* we held that a public-school student could not be compelled to *recite* the Pledge; we did not even hint that she could not be compelled to observe respectful silence—indeed, even to *stand* in respectful silence—when those who wished to recite it did so. Logically, that ought to be the next project for the Court's bulldozer.

I also find it odd that the Court concludes that high school graduates may not be subjected to this supposed psychological coercion, yet refrains from addressing whether "mature adults" may. I had thought that the reason graduation from high school is regarded as so significant an event is that it is generally associated with transition from adolescence to young adulthood. Many graduating seniors, of course, are old enough to vote. Why, then, does the Court treat them as though they were first-graders? Will we soon have a jurisprudence that distinguishes between mature and immature adults?

B

The other "dominant fac[t]" identified by the Court is that "[s]tate officials direct the performance of a formal religious exercise" at school graduation ceremonies. "Direct[ing] the performance of a formal religious exercise" has a sound of liturgy to it, summoning up images of the principal directing acolytes where to carry the cross, or showing the rabbi where to unroll the Torah. A Court professing to be engaged in a "delicate and fact-sensitive" line-drawing would better describe what it means as "prescribing the content of an invocation and benediction." But even that would be false. All the record shows is that the principals of the Providence public schools, acting within their designated authority, have invited clergy to deliver invocations and benedictions at graduations; and that Principal Lee invited Rabbi Gutterman, provided him a two-page flyer, prepared by the National Conference of Christians and Jews, giving general advice on inclusive prayers for civic occasions, and advised him that his prayers at graduation should be nonsectarian. How these facts can fairly be transformed into the charges that Principal Lee "directed and controlled the content of [Rabbi Gutterman's] prayer," that school officials "monitor prayer," and that the "governmental involvement with religious activity in this case is pervasive" is difficult to fathom. The Court identifies nothing in the record remotely suggesting that school officials have ever drafted, edited, screened or censored graduation prayers, or that Rabbi Gutterman was a mouthpiece of the school officials.

These distortions of the record are, of course, not harmless error: without them the Court's solemn assertion that the school officials could reasonably be perceived to be "enforc[ing] a religious orthodoxy" would ring as hollow as it ought.

III

The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced "peer-pressure" coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy

and of financial support *by force of law and threat of penalty*. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities.... Thus, for example, in the colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.

The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference). I will further acknowledge for the sake of argument that, as some scholars have argued, by 1790 the term "establishment" had acquired an additional meaning—"financial support of religion generally, by public taxation"— that reflected the development of "general or multiple" establishments, not limited to a single church. But that would still be an establishment coerced *by force of law*. And I will further concede that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations,[187] ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present, and indeed even when no ersatz, "peer-pressure" psycho-coercion is present—where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ). But there is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them—violated the Constitution of the United States. To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.

Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise," I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty—a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that "[s]peech is not coercive; the listener may do as he likes."[188]

187 . Citing *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), discussed at ID1c.

188 . Quoting *American Jewish Congress v. Chicago*, 827 F.2d, at 132 (Easterbrook, J., dissenting).

This historical discussion places in revealing perspective the Court's extravagant claim that the State has "for all practical purposes" and "in every practical sense" compelled students to participate in prayers at graduation. Beyond the fact, stipulated to by the parties, that attendance at graduation is voluntary, there is nothing in the record to indicate that failure of attending students to take part in the invocation or benediction was subject to any penalty or discipline. Contrast this with, for example, the facts of *Barnette*: Schoolchildren were required by law to recite the Pledge of Allegiance; failure to do so resulted in expulsion, threatened the expelled child with the prospect of being sent to a reformatory for criminally inclined juveniles, and subjected his parents to prosecution (and incarceration) for causing delinquency. To characterize the "subtle coercive pressures" allegedly present here as the "practical" equivalent of the legal sanctions in *Barnette* is... well, let me just say it is not a "delicate and fact-sensitive" analysis.

The Court relies on our "school prayer" cases, *Engel v. Vitale* and *Abington School District v. Schempp*. But whatever the merit of those cases, they do not support, much less compel, the Court's psycho-journey. In the first place, *Engel* and *Schempp* do not constitute an exception to the rule, distilled from historical practice, that public ceremonies may include prayer; rather, they simply do not fall within the scope of the rule (for the obvious reason that school instruction is not a public ceremony). Second, we have made clear our understanding that school prayer occurs within a framework in which legal coercion to attend school (*i.e.*, coercion under threat of penalty) provides the ultimate backdrop.... The question whether the opt-out procedure in *Engel* sufficed to dispel the coercion resulting from the mandatory attendance requirement is quite different from the question whether forbidden coercion exists in an environment *utterly devoid of legal compulsion*.... Voluntary prayer at graduations—a one-time ceremony at which parents, friends and relatives are present—can hardly be thought to raise the same concerns.

IV

Our religion-clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called Lemon test,... which has received well-earned criticism from many members of this Court.[189] The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may well be the one happy byproduct of the Court's otherwise lamentable decision. Unfortunately, however, the Court has replaced *Lemon* with its psycho-coercion test, which suffers the double

189. Citing *Allegheny County v. ACLU*, 492 U.S. at 655-656 (1989) (opinion of Kennedy, J.); *Edwards v. Aguillard*, 482 U.S. at 636-640 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. at 108-112 (1985) (Rehnquist, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 426-430 (1985) (O'Connor, J., dissenting); *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 768-769 (1976) (White, J., concurring in judgment).

disability of having no roots whatever in our people's historic practice, and being as infinitely expandable as the reasons for psychotherapy itself.

Another happy aspect of the case is that it is only a jurisprudential disaster and not a practical one. Given the odd basis for the Court's decision, invocations and benedictions will be able to be given at public-school graduations next June, as they have for the past century and a half, so long as school authorities make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers. All that is needed is an announcement, or perhaps a written insertion at the beginning of the graduation Program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed, by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.

* * *

The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is *not* that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations." One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.

The narrow context of the present case involves a community's celebration of one of the milestones in its young citizens' lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout the land, the expression of gratitude to God that a majority of the community wishes to make. The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing "psychological coercion," or a feeling of exclusion, upon nonbelievers. Rather, the question is *whether a mandatory choice in favor of the former has been imposed by the United States Constitution*. As the age-old practices of our people show, the answer to that question is not at all in doubt.

I must add one final observation: The founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil

> dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me to be minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.
>
> For the foregoing reasons, I dissent.[190]

(e) An Evaluation. As usual, Justice Scalia was nothing if not articulate in expressing his undiffident views. And some of his views were certainly cogent. In other contexts he had insisted that the court ought to interpret statutes on the basis of their actual wording rather than relying on "legislative history"— committee reports, floor colloquies, and other nonlegislative clues (which would require Congress to enact into law by majority vote what it intends), and there is much to be said for that approach. In this case his insistence that "coercion" ought to mean something a bit more clear-cut than psychological pressures, viz., *law enforced by penalty*, has much to commend it. But that would have required a different basis for the majority's opinion, and might have lost Justice Kennedy's vote, which apparently turned on "coercion." A better basis for decision might have been that the government was *sponsoring* or *endorsing* a religious practice as part of an official public school event—a view that Blackmun, Souter, O'Connor and Stevens had affirmed in their several opinions. In the language of this treatise, the invocation and benediction given by a cleric chosen by the principal was a "governmental proprietary in religion"—the school "playing church"[191]—and for that reason a violation of the Establishment Clause.

Justice Scalia, the defender of the nation's historic traditions (except when he disapproved of them, as he did the twenty-nine-year old "tradition" of the *Sherbert* test of free exercise of religion in his radically revisionist decision in *Oregon v. Smith*[192]), made a sweeping argument for the "century and a half"-old practice of prayers at public school graduations that relied upon several suppositions that he would probably not have indulged in a first-year law student when he was a professor of law. One has already been mentioned: that references to deity in presidential proclamations or inaugural addresses do not provide a precedent or a

190 . *Lee v. Weisman, supra*, Scalia dissent.

191 . See discussion at VD.

192 . 483 U.S. 660 (1990), discussed at IVD2e.

historical tradition that speaks to the case before the court, since they are not prayers, are not addressed to a specific "captive audience" of public-school students, and are probably not justiciable, since no one is directly aggrieved by them sufficiently to have standing to invoke the jurisdiction of the federal courts.

Another arose from his use of the Pledge of Allegiance to the flag as a parallel instance (particularly since the issue of the Pledge was not before the court in this case at all). The difference between the Pledge and the prayer is illustrative of Scalia's riding roughshod over distinctions that he would normally notice if not rushing headlong to a rhetorical conclusion, namely, that the Pledge is a secular and patriotic, not a religious, act (despite the recent insertion of the phrase "under God," which does not make it a prayer or convert it as a whole into a liturgical rite), and that the proper remedy for objection to participation in such an act is excusal, as the court held in *West Virginia v. Barnette*.[193] When the act in question, however, is a state-sponsored and -administered *religious* act, as the graduation invocation and benediction undeniably were, the remedy is not excusal of objecting individuals but discontinuance of the act for everyone as an inapproriate use of state authority.

A third misconception common to apologists for school prayers is about *who is speaking*. Justice Potter Stewart was one of the first to utter that misconception when dissenting in *Engel v. Vitale* (and again in *Abington v. Schempp*), "I cannot see how an `official religion' is established by letting those who want to say a prayer say it."[194] This amiable fiction, which runs through most of the criticisms of the court's holdings on this subject, conjures up visions of little children clamoring to be permitted to say their prayers in school, whereas in actuality no one asked them if they wanted to pray or what prayers they wanted to say. Those who arrange and manage the order and content of public-school operations made those decisions, as did Principal Lee in this instance, even though he delegated the actual formulation to Rabbi Gutterman, along with certain suggestions on how to go about it. That is, in such instances it is the *school* speaking, not the children, or only responsively the children, and—as Justice Kennedy pointed out for the majority, "In religious debate or expression the government is not [to be] a prime participant."

A key element is that of *state action*. Rabbi Gutterman was not speaking just for himself when he led the invocation and benediction at Nathan Bishop Middle School; he was leading a part of an official observance at a state institution and was at that moment an instrument of state action, which is the point at which the Constitution comes into play. It does not, as Justice Kennedy pointed out, permit government to "stifle prayers" offered by citizens, but it does not permit government to "undertake that task [of prayer] for itself." Government must represent all its people, and not some more than others because of their religious adherences (or lack thereof). As Justice Blackmun observed, "A government cannot be premised on the belief that all

193 . 319 U.S. 624 (1943), discussed at IVA6b.

194 . *Engel v. Vitale*, 370 U.S. 421 (1962), discussed at §b(1) above.

persons are created equal when it asserts that God prefers some." The students and parents and others gathered for the Nathan Bishop Middle School graduation ceremony were not selected on the basis of their religious choices, but nevertheless found themselves presumed to be of a common spiritual inclination when the time came for the invocation and benediction. But they were not a homogeneously believing congregation who had come together to pray, and the presumption that they were was just that: presumptuous. These were the central factors at issue, not the side-issue of psychological coercion of which Justice Scalia made so much.

Justice Scalia gave voice to a common fear that banning religious content from public observances will lead to the privatization of religion. "Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the *privacy* of one's room. For most believers it is *not* that, and has never been." His linking it to pornography was a clever rhetorical device, but his central concern was important.[195] If overenforcement of the Establishment Clause should lead to the exclusion of religion from public life, the entire nation would be poorer and perhaps in serious jeopardy. Several references in the prevailing opinions may seem to lend credence to this prospect. Justice Kennedy for the majority stated, "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the *private sphere*, which itself is promised freedom to pursue that mission." Justice Blackmun added in his separate concurrence, "Keeping religion in the hands of *private groups* minimizes state intrusion on religious choice...." Justice Souter, in his separate concurrence, commented that those who wanted a spiritual dimension to their graduation "may even organize a *privately sponsored* baccalaureate...."

The concern expressed by Justice Scalia and others collapses several leaps of logic into a glib assertion that needs to be unpacked. It relies upon juggling several meanings of the words "public" and "private." *Public* can have at least the following meanings:

> 1. Of, belonging to, concerning, or pertaining to the people of a nation, state, or community as a whole; as, the *public* welfare; *public* good; *public* property; the *public* service.
> 2. Open to common use; for the use or benefit of all; as, a *public* road; *public* parks.
> 3. Acting in an official capacity on behalf of the people as a whole; as, a *public* prosecutor.
> 4. Known by, or open to the knowledge of, all or most people; as, he will make this information *public*.

On the other hand, *private* can have several meanings as well:

---

195. See Neuhaus, R.J., *The Naked Public Square* (Grand Rapids, Mich.: Eerdmans, 1984) for an extensive statement of this thesis.

> 1. Of, belonging to, or concerning a particular person or group of persons; not common or general; as, *private* property.
> 2. Not open to, intended for, or controlled by the public; as, a *private* school.
> 3. Not holding public office; as, a *private* citizen.
> 4. Away from public view; secluded; as, a *private* dining room.
> 5. Not known to the public; secret; confidential; as, one's *private* opinion.[196]

Justice Scalia implied that the court's majority was bent on treating religion as *private*, in the sense of Nos. 4 or 5 above—"away from public view, secluded, not known to the public, confidential." But the three justices in the majority were using the same word in the sense of Nos. 2 or 3 above—"Not open to, intended for, or controlled by the public; not holding public office [or responsibility]." Thus, Justice Kennedy meant that religion is a choice committed to the *nongovernmental* sphere; Justice Blackmun meant keeping religion in *nongovernmental* hands; and Justice Souter meant a *nongovernmentally* sponsored baccalaureate.

To approach the issue from the other side, there are many ways of being "*public*" without being *governmental*. The "*public* square" is not "naked" just because there is no cross on the courthouse, so long as the common square is surrounded by vigorous churches and other citizen groups who can embrace, endorse, announce and display all the religious symbols and ceremonies they wish. In the spectrum between the *privacy* of one's room and the precincts of *public* in the sense of *governmental* (involving *state action*) there is a vast array of entities and arrangements, of which the end terms are as minimal as the tails of the normal distribution. Most of life occurs between those two extremes, where one associates with others in daily relationships of family, workplace, neighborhood, church or synagogue, interest groups, community organizations, fraternal lodges, recreational associations, etc. There is no realistic need to fear that religion will be privatized as long as it has a lively adherence in these *nonsolitary* but *nongovernmental* settings.

(12) Observance of Religious Holy Days: Christmas. One of the church-state conundrums that surfaced occasionally in the case law was the observance of religious holy days—particularly Christmas and Easter—in and by the public schools. That was one of the subjects of complaint in *Chamberlin v. Dade County*.[197] Another instance arose in South Dakota in 1977, which led to a decision by the Eighth Circuit Court of Appeals in 1980, entitled *Florey v. Sioux Falls School District*.[198] In 1977 the public schools of Sioux Falls held Christmas assemblies that

196. *Webster's New Universal Unabridged Dictionary* (New York: Simon & Schuster, 1983), pp. 1456, 1432.

197. See § d1 above.

198. 619 F.2d 1311 (1980).

inspired complaints that they were in essence religious exercises. This led to the appointment of a citizens' committee that drew up a set of rules outlining the bounds of permissible activity in such programs, and after a public hearing the rules were adopted by the school board. A group of citizens challenged the rules in federal court as being in violation of the Establishment and Free Exercise Clauses of the First Amendment.

The district court found that the 1977 Christmas program "exceeded the boundaries of what is constitutionally permissible under the Establishment Clause," but thought that the new rules would prevent future unconstitutional activities if properly administered. The circuit court examined the rules in light of the three-pronged test of establishment propounded by the Supreme Court in *Lemon v. Kurtzman* (1971).[199] The first element in that test was whether the rules had a secular purpose.

> The motivation behind the rules... was simply to ensure that no religious exercise was part of officially sanctioned school activities. This conclusion is supported by the opening words of the policy statement: "It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged." The statement goes on to affirmatively declare the purpose behind the rules:
>
> > The Sioux Falls School District recognizes that one of its educational goals is to advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization.
>
> The express language of the rules also leads to the conclusion that they were not promulgated with the intent to serve a religious purpose. Rule 1 limits observation of holidays to those that have both a religious *and* a secular basis. Solely religious holidays may not be observed. Rule 3 provides that music, art, literature and drama having a religious theme or basis may be included in the school curriculum only if "presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday...." We view the thrust of these rules to be the advancement of the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience.[200]

The second element was whether the primary effect of the rules was neither to hinder nor advance religion.

> The First Amendment does not forbid all mention of religion in public schools; it is the *advancement* or *inhibition* of religion that is prohibited. Hence, the *study* of religion is not forbidden "When presented objectively

199 . 403 U.S. 602 (1971), discussed at § D5 below.

200 . *Florey*, *supra*; emphasis in original.

> as part of a secular program of education....” We view the term “study” to include more than mere classroom instruction; public performance may be a legitimate part of secular study. This does not mean, of course, that religious ceremonies can be performed in the public schools under the guise of “study.” It does mean, however, that when the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content.
>
> * * *
>
> To determine whether religion is advanced or inhibited by the rules, then, we must look to see if a genuine “secular program of education” is furthered by the rules. It is unquestioned that public school students may be taught about the customs and cultural heritage of the United States and other countries. This is the principal effect of the rules. They allow the presentation of material that, although of religious origin, has taken on an independent meaning.
>
> The district court expressly found that much of the art, literature and music associated with traditional holidays, particularly Christmas, has “acquired a significance which is no longer confined to the religious sphere of life. It has become integrated into our national culture and heritage.” Furthermore, the rules guarantee that all material used has secular or cultural significance.
>
> * * *
>
> School administrators should, of course, be sensitive to the religious beliefs or disbeliefs of their constituents and should attempt to avoid conflict, but they need not and should not sacrifice the quality of the students' education.[201]

The court cited an occurrence in the 1977 observance in a Sioux Falls kindergarten class that the district court had ruled unconstitutional. It was a responsive reading between teacher and class entitled “The Beginners Christmas Quiz.”

> Teacher: Of whom did heav'nly angels sing.
> And news about His birthday bring?
> Class: Jesus.
> Teacher: Now, can you name the little town
> Where they the Baby Jesus found?
> Class: Bethlehem.
> Teacher: Where had they made a little bed
> For Christ, the blessed Saviour's head?
> Class: In a manger in a cattle stall.
> Teacher: What is the day we celebrate
> As birthday of this one so great?
> Class: Christmas.

The circuit court agreed with the district court that this was an impermissible religious practice and that it would be prohibited by the new rules, remarking that

201 . Ibid., emphasis in original.

"The administration of religious training is properly in the domain of the family and the church. The First Amendment prohibits public schools from serving that function."

The third element in the *Lemon* test was whether the contested rules fostered an "excessive entanglement" between government and religion. "Rather than entangling the schools in religion, the rules provide the means to ensure that the district steers clear of religious exercises."

In response to a contention that the rules would permit infringement of non-Christian students' Free Exercise rights, the court observed, "The public schools are not required to delete from the curriculum all materials that may offend any religious sensibility." The court's opinion, written by Judge Gerald W. Heaney and joined by Judge Donald R. Ross, affirmed the district court's conclusion that the Sioux Falls rules did not violate the First Amendment, using a rationale resembling that which would emerge in the Supreme Court's decision on the Pawtucket Nativity Shrine, *Lynch v. Donnelly* (1984).[202]

The decision was not unanimous, however. The third member of the panel, Judge Theodore McMillian, dissented: "I am of the opinion that the preparation and presentation of Christmas assemblies in the public schools violates the Establishment Clause." To explain his dissent he, too, applied the three-pronged test of *Lemon v. Kurtzman*.

> The rules do not address the observance of non-religious holidays, such as Veterans Day, Arbor Day, Memorial Day, Labor Day, the birthdays of various presidents or civic leaders.... To the extent the policy and rules focus only on religious holidays, I would find [that they] unconstitutionally operate as a preference for religion.[203]

This seemed a bit unreasonable, since the only problem calling for a citizens' committee to propose rules was a *religious* one. No one was exercised over the public schools' observances of Arbor Day (if any)!

Judge McMillian approved the purported purpose of the rules: to advance the students' understanding of society's historical and cultural heritage and to encourage mutual tolerance among various ethnic traditions, but he questioned the means.

> First, I do not understand how the *observance* of religious holidays promotes these secular goals. Second,... those secular goals can be achieved in public education without the "observance" of religious holidays.... Here the school district seeks to accomplish secular goals by religious means, the observance of religious holidays. Surely the school district can advance student knowledge and tolerance of religious diversity as effectively by *non* religious means, that is, through the study of comparative religions or as part of the history or social studies curriculum.

---

202 . 465 U.S. 668 1984), discussed at VE2d.

203 . *Florey, supra,* McMillian dissent.

* * *

> Christmas is especially difficult. Despite its many diverse secular manifestations, Christmas remains an event of immense and undiminished significance to Christians: the celebration of the birth of Christ.... Unlike Thanksgiving, Christmas has no *inherent* secular basis as the anniversary of an American historical event.

Judge McMillian thought that civic Christmas observances that might be unobjectionable for a noncaptive audience of adults might still be objectionable in a public school setting. He looked at the primary effect of the rules.

> Christmas assemblies have a substantial effect, both in favor of one religion and against other religions and nonbelief, on the school district employees, the students, the parents and relatives of the students and the community.
>
> When a [school district] so openly promotes the religious meaning of one religion's holidays, the benefit reaped by that religion and the disadvantage suffered by other religions is obvious. Those persons who do not share those holidays are relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing... their belief given official sanction and special status.
>
> By sponsoring Christmas assemblies which feature programs of traditional Christmas music, including Christmas carols, only during the Christmas season, the school district has in effect endorsed the beliefs of one religion.... Viewed in context, I do not think Christmas assemblies can accurately be described as merely arts festivals or choral concerts.[204]

With respect to the third prong, excessive entanglement of government with religion, Judge McMillian felt that the necessity for the school authorities to scrutinize all seasonal observances to make sure that no religious faith was favored would be an excessive entanglement.

The observance of Christmas in public schools remained a prickly issue in many communities. One may resist the idea of totally sterilizing the public school curriculum of any reference to religious events or symbols and yet wonder why two months' activity by students and teachers devoted to the preparation and presentation of a Christmas extravaganza is necessary to the *education* process. Could not the rudiments of learning be acquired—even in history, music, literature and art—without resort to Christmas pageantry? To be sure, some patrons of the public schools would feel aggrieved if every person and group in the community did not deck themselves with boughs of holly, etc., in December, but there are others—

204. Ibid., McMillian dissent, quoting *Fox v. City of Los Angeles*, 587 P.2d at 670 (Bird, C.J., concurring), discussed at VE3e(2). Emphasis in original.

including devout Christians (heirs of the Puritans, perhaps)—who consider the increasing "hype" associated with Christmas to be no great boon to True Faith.[205]

(13) Good Friday Observance: *Metzl v. Leininger* (1994). The state of Illinois adopted a statute designating Good Friday as one of twelve state-mandated public-school holidays. Suit was brought by a public school teacher challenging that designation as a violation of the Establishment Clause of the U.S. Constitution and its Illinois counterpart. Decision was announced by Judge Ann Claire Williams.

> Good Friday is considered by Christians as one of the holiest days of the liturgical year. A solemn, even mournful day, Good Friday commemorates[,] for Christians, Jesus Christ's suffering and death on the cross.
>
> [Footnote: As plaintiff's expert, Reverend Dean Kelley explains: "Good Friday is not an occasion for frivolity or festivities. Among practicing Christians, having a party or a wedding on Good Friday would be unthinkable.... In many Christian churches, the altar paraments for Good Friday are black, a color used only on that one day of the year (aside from funerals), and the cross on the altar and crosses carried in procession by acolytes are often veiled in black or violet gauze as a sign of mourning."]
>
> Unlike Christmas, Good Friday is generally seen as having no secular components.[206]

The court reviewed prior cases dealing with the same question. In one from Hawaii, a federal district court found no Establishment Clause violation in a state law making Good Friday a statewide holiday, deeming Good Friday to have been secularized in the same sense as Sunday in the Sunday-closing cases.[207] Two other decisions found state-mandated observance of Good Friday impermissible. A Connecticut law prohibiting sale of liquor on Good Friday only (unlike all other state holidays), was struck down by a state court because "the passage of time has not converted Good Friday into a secular holiday" and "Good Friday lacks widespread public popularity or acceptance as a secular holiday." The statute in effect gave the state's "clear stamp of approval" to Christian rites and practice, suggesting an "illegal bias in favor of Protestant and Catholic forms of Christianity over Eastern Orthodox, non-Christian and non-religious practices and beliefs."[208] A California practice promulgated by the Governor of closing all government offices from noon until 3 PM on Good Friday was held unconstitutional as "an observance by the State itself... of the `wholly

205. See further discussion in part VE.

206. *Metzl v. Leininger*, 850 F. Supp. 740, 740–41 & n.5 (N.D. Ill. 1994), *aff'd*, 57 F.3d 618 (7th Cir. 1995).

207. *Cammack v. Waihee*, 932 F.2d 765 (CA9 1991), citing *McGowan v, Maryland*, 366 U.S. 420 (1961), discussed at IVA7a.

208. *Griswold Inn v. Connecticut*, 441 A.2d 16 (1981).

religious day' which the trial court found Good Friday to be."[209] The *Metzl* court agreed with the latter two decisions.

> Unlike Christmas or Thanksgiving[,] which have both secular and religious connotations, Good Friday remains a wholly religious day. "While non-believers may associate Sundays with recreation, Thanksgiving with eating turkey, and Christmas with sending and receiving gifts and greeting cards, one is hard pressed to come up with any analogous practices associated with Good Friday. Good Friday connotes the Crucifixion—and nothing else."[210] Connecting the dots, it hardly strains one's imagination to surmise that the Illinois legislature's designation of Good Friday was motivated at least in part by a desire to officially endorse the holiday's religious message....
>
> Still, courts are generally reluctant to attribute unconstitutional motives to the states.... Here, defendants assert that the State's designation of Good Friday as a legal school holiday was motivated by a sincere and legitimate desire to accommodate the religious practices and beliefs of a large percentage of its students and ensure that the smooth operation of its schools would not be impaired by their absence....
>
> However, [this] characterization of [the statute's] purpose is troubling. As an initial matter, defendants offer scant evidence in support of their broad assertion that if Good Friday were a regular school day, absenteeism would be so great that the schools would be unable to function effectively....
>
> To assert... that Illinois public school would be unable to function if Good Friday were a regular school day is quite a stretch.... [T]he Board of Education is the only state agency that is closed on Good Friday.... Conspicuously absent from defendants' case is any indication that any of these... state agencies have suffered as a result of excessive absenteeism by Christian... employees on Good Friday.... Moreover, even if a legitimate showing could be made that particular school districts would be unable to function effectively on Good Friday because of excessive absenteeism, the State's asserted purpose would still be suspect. [The state school code grant of] school-closing discretion to individual school districts... obviates any need for the declaration of a *state-wide* school holiday on Good Friday.
>
> As Justice Souter explained in his concurring opinion in *Weisman*,[211] "[w]hatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion." Here, however, it is not at all clear precisely what governmental burden on religion the state is lifting. As defendants point out, Illinois has had a long standing policy of allowing school students and school employees the opportunity to take days off for religious reasons.... Thus, in contrast to the

209 . *Mandel v. Hodges*, 54 Cal.App.3d 596 (1976).

210 . *Cammack, supra,* (Reinhardt, J., dissenting).

211 . 505 U.S. 577 (1992), discussed at § C2d(11)(d) above.

> typical accommodation case, the State's designation of Good Friday as a legal school holiday does not relieve individuals "from generally applicable rules that interfere with their religious calling."
>
> * * *
>
> [T]he Establishment Clause prohibits government from conveying a message that religion or a particular religious belief is favored or preferred.... [T]he court finds that Illinois' designation of Good Friday as a legal school holiday conveys the impermissible message that the government endorses "the individual religous choice" of Christians throughout the state.
>
> As one of only twelve legal school holidays in the state of Illinois, Good Friday undeniably occupies a place of distinction in the official state calendar. One need only briefly consider some of the other designated school holidays—such as Martin Luther King, Jr. Day, Memorial Day, or Independence Day—to surmise that a typical Illinois schoolchild might think that the government considers Good Friday to be worthy of special honor. By the same token, non-Christians and Eastern Orthodox students are reminded that their holy days somehow failed to make the grade.[212]

The court therefore enjoined the closing of Illinois schools on Good Friday.

3. Other Forms of Inculcation

Public schools, as American society's principal agency of socialization, are expected to do more and more of the molding of future citizens for their place in adult life, and every interest group is anxious to gain entree to the curriculum for its particular concerns and interests, just as every producer of food or other commodities is anxious to obtain "shelf space" in the supermarkets that have become the principal purveyors of comestibles in the current economy. The public schools are—fortunately—shielded from most of the direct or sectarian pressures of *religious* interest groups, as such, by the First Amendment, but there are indirect and modified approaches that, while purporting to be nonsectarian, moral, or secular, have religious implications. One of the responsibilities of public schools appealed to by such groups is the inculcation of *morality* in students. Whether and how this can be accomplished by public schools is one of the unsolved riddles of the twentieth century in the United States. It is apparent to most that the general tonus of morality in the nation is deteriorating, but what to do about it is less obvious. Whether public schools should or can instill morality is for many an open question, and many public schools have simply abandoned the effort for fear of offending one or another interest group in the community. This moral diffidence is not the mark of a vigorous and dynamic society, but of a decadent one, which no longer has the "ego strength," the social energy, the directionality, the self-discipline, to pose norms of behavior that its members can expect of one another, and to punish infractions thereof.

---

212 . *Metzl v. Leininger, supra*. This case is discussed further at VE5e.

In 1951 the public school administrators of the country produced a commendable statement outlining "moral and spiritual values" that could be advanced by public schools without delving into the various religious and other kinds of "sanctions" by which such values were justified. These values were relatively simple, noncontroversial, and indeed essential to an orderly society:

> 1. The basic moral and spiritual value in American life is the supreme importance of the individual personality.
> 2. [E]ach person should feel responsible for the consequences of his own conduct.
> 3. [I]nstitutional arrangements are the servants of mankind.
> 4. [M]utual consent is better than violence.
> 5. [T]he human mind should be liberated by access to information and opinion.
> 6. [E]xcellence in mind, character, and creative ability should be fostered.
> 7. [A]ll persons should be judged by the same moral standards.
> 8. [T]he concept of brotherhood should take precedence over selfish interest.
> 9. [E]ach person should have the greatest possible opportunity for the pursuit of happiness... [commensurate] with the similar opportunities of others.
> 10. [E]ach person should be offered the emotional and spiritual experiences which transcend the materialistic aspects of life.[213]

These "values" might be criticized as being too utilitarian or too hedonistic or too general, but if effectuated in public school settings, the result would certainly be preferable to what seems too often to prevail today. However, in the ensuing years not much seems to have come of these rather sensible suggestions.

Instead there have been efforts at what was called "values clarification," in which students analyzed hypothetical life situations to determine what values were at stake in the choices that could be made and what relative weight they should be accorded. The upshot of this methodology, said some critics, seemed to be that students learned to justify choices that reflected self-assertion and self-gratification more than anything else—a morality more juvenile than adult.

One of the important tasks of growing up is learning to suppress the infantile impulses for immediate gratification of the desires of self at the expense of others and to learn to work within the bounds of social order in ways that do not damage others. This essential task of the "latency" period prior to adolescence is not advanced by schools that indulge the "self-expression" of children at the very time when they most need to learn to channel and refine and focus their ebullient energies. And when *no* effective norms are asserted or enforced by the schools, even in matters as

213. *Moral and Spiritual Values in the Public Schools*, Educational Policies Commission of the National Education Association of the United States and the American Association of School Administrators, 1951, pp. 18-29, *passim*.

rudimentary and uncontroverted as punishing cheating, the task is not just not advanced, it is effectively abandoned.

Critics contend that the public schools—the primary instrument of civilizing subject to control by the society—turn out an ever greater number of uncivilized barbarians and boors, who are a frustration to themselves and a hazard to others because they have not been helped to learn the lessons necessary for attaining desired ends in this society. They have not learned that a certain amount of persistent effort and self-discipline is needed to accomplish anything that is of much worth to themselves or others. They often have not learned to hold themselves to any very demanding standards of performance, and then are unprepared for an employment market where they are expected to work at a certain level of productivity if they are to be paid or promoted. (Indeed, even the employment market is unable to demand the level of quality or quantity of performance it once did because of the deterioration of the society's educational mechanisms and the lowering of its expectations of mature conduct and proficiency.)

The only mechanism able to raise the general level of morality in a society as a whole seems to be religion, but it is religion of a kind very different from what a public school could dispense even if it could constitutionally do so. It is the kind of religion that is life-transforming for those caught up in it, the kind found only in intense, zealous, "fanatical" high-demand religious movements such as the early Wesleyan Revival, which (along with parallel evangelical movements, such as that led by George Whitefield) helped to reform eighteenth-century England.[214] By demanding total commitment from a small number of followers, such a movement has influence far out of proportion to its size, but that influence is proportionate to the level of commitment, the amount of energy, given to the cause by its members. Eventually they become the model for those around them of how to live maturely, conscientiously, attractively, "successfully" (in more than worldly terms), and their way of life comes to be reflected (however imperfectly) by others.

The most effective way to teach morality is not by exhortation but by example. Exhortation without example is hypocrisy, and inspires the reproach, "Why don't you practice what you preach?" Young people are often hungry for an example of how to live admirably, and when they see parents or teachers acting at variance with their own moral teachings, they are prone to disillusionment, which may leave them cynical and suspicious of moral exhortations in general. So giving public-school teachers responsibility for exhorting students to a level of morality the teachers themselves may not exemplify may do more harm than good.

Raising the level of morality in even a small group of people requires an immense expenditure of human energy to gain their loyalty and respect, to lead them to a better standard of conduct, to hold them to it by admonishing and even penalizing or

214. See Kelley, D.M., *Why Conservative Churches Are Growing* (New York: Harper & Row, 1972, 1976), pp. 18-29.

punishing defaulters, to show them how to hold one another accountable for their shared expectations without falling into pharisaism, judgmentary moralism or elitism. It cannot be done by cheap, least-effort "gimmicks" that cost no one anything and therefore do not accomplish anything. In human affairs a simple calculus prevails: *the less effort, the less effect*. The devices proposed for public-school religion are invariably low-energy practices that are highly ineffective in changing human motivations and conduct.

It is understandable that many people would want to find a way to upgrade the behavior of (other people's) children, and to do so they are prone to rely upon various low-energy devices such as prayer and Bible-reading in public schools. These can, of course, be very high-energy experiences among persons who come together in shared faith commitments for such activity, but that is not the basis on which public-school classes are formed, and what happens there is such a dilute, ambiguous and awkward version that it is apt to immunize children against the real thing if they ever should encounter it.

a. Posting the Ten Commandments: *Stone v. Graham* (1980). Perhaps the prize example of low-energy efforts to affect morality was seen in Kentucky in 1978, when the legislature decreed that a copy of the Ten Commandments, 16 by 20 inches and made of durable material, be posted in every public school classroom in the state, but did not appropriate any funds for that purpose. On each such poster was to appear a disclaimer of any religious intent or significance, but instead the claim was made (correctly) that the Ten Commandments are basic to the secular legal codes of the Western world, including the United States. The posters were to be paid for by private subscriptions, presumably gathered by the initiators of the drive for the legislation, the Lexington Heritage Foundation.[215]

The law was immediately challenged by the Kentucky Civil Liberties Union and others, but the Kentucky courts rejected the challenge, pointing to the disclaimer as an indication of the secular purpose of the law. The U.S. Supreme Court, however, was of a different opinion. Without even hearing oral argument, the court reversed in an unsigned (*per curiam*—by the court) opinion, holding that the statute had no secular purpose. The legislature's assertion that its purpose was secular did not make it so.

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments is undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness and covetousness. Rather, the first part of the

215. Miller, Robert T., and Ronald B. Flowers, *Toward Benevolent Neutrality: Church, State and the Supreme Court*, 4th ed. (Waco, Texas: Markham Press Fund, 1992), p. 494.

> Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the sabbath day.
>
> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.[216] Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school children to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state ojective under the Establishment Clause.
>
> It does not matter that the posted copies of the Ten Commandments are financed by private voluntary contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State... Government" that the Establishment Clause prohibits.[217]

Chief Justice Burger and Justice Blackmun dissented because they would have wanted to hear oral argument before reaching a decision. Justice Stewart dissented because he thought the courts of Kentucky had, "so far as appears, applied wholly correct constitutional criteria in reaching their decisions." And Justice Rehnquist wrote a dissent that was longer than the court's per curiam opinion, insisting that the legislature's avowal of a secular purpose should not be so "cavalierly" rejected.

> The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional.... It is... undeniable, as the elected representatives of Kentucky determined, that the Ten Commandments have had a significant impact on the development of secular legal codes of the western world....
>
> The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin.[218]

The aftermath of this decision, as of some other such decisions in this area, was instructive but not edifying. Grown men and women vilified the court and disobeyed its command, thus setting an example contrary to the morality they were supposedly trying to inculcate.

> There was a great uproar in Kentucky over this opinion. Many school districts flagrantly violated the decision.... An enterprising company printed the Ten Commandments on the front of T-shirts and sold them to students to wear to school. Another group printed the Commandments on book dust covers and gave them to students to wrap around their school books.... Of course, persons opposed to these violations of the Court's

---

216 . Citing *School District of Abington Township v. Schempp, supra*.

217 . *Stone v. Graham*, 449 U.S. 39 (1980).

218 . Ibid., Rehnquist dissent.

> decision were very vocal, and a great deal of political strife developed in Kentucky over this issue.
>
> Kentucky [was] not the only place where the role of the Ten Commandments in the public schools has been heatedly debated. Legislators in Nebraska and Georgia introduced bills which would place the Commandments in the schools in such a way that the objections raised in *Stone* would be met. And in New Mexico, in March, 1981, a law was passed allowing school districts to accept voluntary contributions to post "historical codes" in public school classrooms. The law mentions, as examples, the Ten Commandments, the Code of Hammurabi, "any injunctive compendium" from the Koran, the Bhagavad-Gita, the teachings of Buddha, or "any other teachings representing disparate ethno-cultural or religious backgrounds."[219]

How much money was contributed in New Mexico for the display of these latter injunctive compendiums deponent sayeth not. These rather childish tantrums were not only subversive of the supposed effort to inculcate morality but reached extremes in which the actual pertinent hortatory content of the material posted grew ever more tenuous, remote and diffuse: meditating upon the Code of Hammurabi as a source of moral guidance for modern life leaves much to be desired.

b. Teaching of Evolution and "Creationism." Over the years there have been religious objections to various elements in the curriculum of public schools. Christian Scientists have objected to their children's being taught the germ theory of disease. Conservative Protestants, as well as Roman Catholics, have objected to sex education in public schools. Mennonites and Dunkards have objected to their daughters having to wear gym suits that bared their limbs. In most such instances it was not contended that such teaching or practices be eliminated from public schools but only that children whose parents objected be excused from the offending experiences. Some, however, were cases in which the offending subject was thought to be improper for public schools to include for any pupils.[220]

The controversy over the teaching of evolution led at first to laws forbidding the teaching of evolution to *anyone* in public schools. But when that approach failed, the next strategy was to require *by law* that, in all public schools where evolution was taught, equal time and attention must be given to "creation science," an alternate theory of human origins deemed more consistent with the account of creation in the first chapters of Genesis.

(1) The *Scopes* Trial. The first nationally visible confrontation in the courts over this issue was the famous *Scopes* trial in Dayton, Tennessee, in 1925. The Tennessee legislature had adopted a law in that year forbidding any publicly

---

219. Miller and Flowers, *supra*, p. 619.

220. See *Smith v. Mobile County School Commissioners*, at § C5 below. On the other side of the coin, for a governmental objection to sex education in *church* schools, see *Unitarian Church West v. McConnell* at § B5 above.

employed teacher to teach "any theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead that man descended from a lower order of animals."[221] Several states, mainly in the South, had adopted such laws because the Darwinian theory of interspecial evolution was deemed by many fundamentalist Christians to contradict the account of divine creation found in the Bible. (Many other Christians were perplexed by this perception, since they believed that evolution simply traced the mechanism by which divine creation was carried out.)

A high school teacher in Dayton named John Thomas Scopes decided to disregard the law and proceeded to teach that human beings had evolved from one-celled animals. He was arrested and charged with violation of the antievolution statute. His trial drew national attention and has been recreated in literature and motion pictures. Defending Scopes were the well-known agnostic attorney, Clarence Darrow, and Arthur Garfield Hays, active in the American Civil Liberties Union, who contended, not that Scopes was innocent, but that the law was an unconstitutional anachronism. Assisting the prosecution by defending the validity and probity of the law was William Jennings Bryan, noted orator, three times Democratic candidate for president, and Secretary of State from 1913 to 1915.

Scopes and his infraction of the law were almost lost sight of in the battle between the titans over the truth of the Bible versus the truth of science. Daily headlines across the nation made "evolution" a household word to millions of people who otherwise might never have taken notice of it. Darrow easily showed Bryan to be entirely unconversant with the most rudimentary discoveries of science, but lost the case when the jury found the defendant guilty, and the judge declined to void the law but instead imposed a fine as punishment on Stokes. (Bryan died suddenly a few days after the trial ended.) On appeal the Supreme Court of Tennessee upheld the law but reversed the conviction on a technicality,[222] and the "Great Monkey Trial" became a matter of none-too-edifying history.[223]

(2) *Epperson v. Arkansas* (1968). The issue arose again with more definitive results in the state of Arkansas, which in 1928 had adopted an antievolution statute similar to Tennessee's. Susan Epperson, a teacher of biology in the Central High School of Little Rock, was confronted in 1965 with a newly adopted textbook that included (for the first time, apparently, since the law was passed) a chapter on evolution. She was supposed to use the textbook supplied by the school system, but to do so would be a criminal misdemeanor and subject her to dismissal, so she sought a court order declaring the law invalid.

---

221 . Tennessee Code (1932), §§ 2344, 2345.

222 . *Scopes v. Tennessee*, 289 S.W. 363 (1927).

223 . See. e.g., *The World's Most Famous Court Trial: Tennessee Evolution Case* (reproduction of trial transcript) (Cincinnati: Natl. Book Co., 1925), Legal Classics Library, 1984.

The Arkansas Chancery Court held that the law violated the protections of freedom of speech and thought contained in the First Amendment and made applicable to the states through the Fourteenth. The Supreme Court of Arkansas reversed, holding that the state could specify the content of the curriculum of the public schools.

The U.S. Supreme Court reversed the Arkansas Supreme Court in an opinion written by Justice Abe Fortas for a unanimous court (or at least a court without dissent: Justice Stewart concurred in the result though not in the Fortas opinion). Justice Fortas noted that only Arkansas and Mississippi still had such antievolution or "monkey" laws on their books, and that no one had ever been prosecuted under the Arkansas statute.

> It is possible that the statute is presently more of a curiosity than a vital fact of life in these States.... [T]he law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.
>
> * * *
>
> There is and can be no doubt that the First Amendment does not permit the state to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.... The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prevent, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment....
>
> In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence.[224]

Not many laws fail the first prong of the *Abington-Walz-Lemon* test, for as one commentator rightly observed, few legislatures are so tongue-tied that they cannot fashion a purported secular purpose.[225] When one fails to do so, the court's task is much simplified, as was the case in *Wallace v. Jaffree*.[226]

---

224 . *Epperson v. Arkansas*, 393 U.S. 97 (1968).

225 . LaNoue, George R., Jr., "The Child-Benefit Theory Revisited," 13 *Journal of Public Law*, 77-78, 1964.

226 . See discussion at § 2d(8) above.

This case stands for the proposition that religious people may not require that the public school curriculum be tailored to conform to their doctrinal likes or dislikes.

(3) Equal Time for "Creation-Science"? In the wake of *Epperson v. Arkansas* a massive new strategy was developed by fundamentalists for coping with the supposed evils of evolution. Institutes for "Creation Science" sprang up to marshal scientific evidence to refute the theory of evolution and to show that creation had occurred instead as set forth in Genesis. School boards and state legislatures were approached with the contention that evolution was just a theory, a hypothesis about the origin and development of life, and should not be taught as fact. It should be counterbalanced by equal treatment of other hypotheses, such as that of "creation science." As a result, the legislatures of Arkansas, Louisiana and a few other states passed laws designed to bring about such a "balance."

In Louisiana the legislature in 1981 enacted a "Balanced Treatment for Creation Science and Evolution Science Act" that required that creationism be taught whenever evolution was taught, and that evolution be taught as theory "rather than as proven scientific fact."[227] The operative portion of the act read as follows:

> Section 286.4. Authorization for balanced treatment; requirement for nondiscrimination.
>
> A. Commencing with the 1982-1983 school year, public schools within this state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact.
>
> B. Public schools within this state and their personnel shall not discriminate by reducing a grade of a student or by singling out and publicly criticizing any student who demonstrates a satisfactory understanding of both evolution-science or creation-science and who accepts or rejects either model in whole or part.
>
> C. No teacher in public elementary or secondary school or instructor in any state-supported university in Louisiana, who chooses to be a creation-scientist or to teach scientific data which points to creationism shall, for that reason, be discriminated against in any way by any school board, college board, or administrator.
>
> Section 286.5. Clarifications
>
> This subpart does not require any instruction in the subject of origins but simply permits instruction in both scientific models (of

227 . This statute will be discussed further at § (5) below.

> evolution-science and creation-science) if public schools choose to teach either. This subpart does not require each individual textbook or library book to give balanced treatment to the models of evolution-science and creation-science; it does not require any school books to be discarded. This subpart does not require each individual classroom lecture in a course to give such balanced treatment; it permits some lectures to present evolution-science and other lectures to present creation-science.

The following terms were defined in the statute:

> (1) "Balanced treatment" means providing whatever information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories in view of the textbooks and other instructional materials available for use in his classroom.
>
> (2) "Creation-science" means the scientific evidences for creation and inferences from those scientific evidences.
>
> (3) "Evolution-science" means the scientific evidences for evolution and inferences from those scientific evidences.[228]

(4) *McLean v. Arkansas* (1982). Also in 1981, Arkansas enacted a similar law, which was immediately challenged by a group of parents, teachers, clergy and professional and religious organizations, who contended that the statute violated the Establishment Clause of the First Amendment. The federal district court for the Eastern District of Arkansas agreed, finding from the legislative history that there was no valid secular purpose for the act, and that it had been motivated by, or in response to, religious beliefs.

Judge William Overton spent quite a bit of time reading the materials produced by the Creation Science Research Center, the Institute for Creation Research and the Creation Research Society, fundamentalist organizations dedicated to getting "creation science" taught in public schools as an alternative to evolution, and he concluded:

> Creationists have adopted the view that there are only two positions with respect to the origins of the earth and life: belief in the inerrancy of the Genesis story of creation and of a worldwide flood as fact, or belief in what they call evolution.
>
> * * *
>
> The two model approach of the creationists is simply a contrived dualism which has no scientific factual basis or legitimate educational purpose. It assumes only two explanations for the origins of life and existence of man, plants and animals: It was either the work of a creator or it was not.... [A]ll scientific evidence which fails to support the theory of evolution is necessarily scientific evidence in support of creationism....[229]

---

228 . La. Rev. State. § 186.1 *et seq.*

229 . *McLean v. Arkansas Board of Education*, 529 F.Supp. 1255 (1982).

The court assessed the Act from the standpoint of the three-pronged test of *Lemon v. Kurtzman*.[230] The first "prong" was whether the enactment had a secular purpose. The court noted that the act was introduced at the behest of the Greater Little Rock Evangelical Fellowship by Senator James L. Holsted, "a self-described `born again' Christian Fundamentalist."

> The State failed to produce any evidence which would warrant an inference or conclusion that at any point in the process [of enactment] anyone considered the legitimate educational value of the Act. It was simply and purely an effort to introduce the Biblical version of creation into the public school curricula.... [T]he Act was passed with the specific purpose by the General Assembly of advancing religion. The Act therefore fails the first prong of the three-pronged test, that of secular legislative purpose.

With respect to the second "prong," the court concluded that the primary effect was also "the advancement of religion in the public schools." Not only was "creation science" religious in purpose and effect, it was not science, said the judge.

> [T]he essential characteristics of science are:
> (1) It is guided by natural law;
> (2) It has to be explanatory by reference to natural law;
> (3) It is testable against the empirical world;
> (4) Its conclusions are tentative, i.e., are not necessarily the final word; and
> (5) It is falsifiable....
> Creation science... fails to meet these essential characteristics... [It] is not science because it depends upon a supernatural intervention which is not guided by natural law. It is not explanatory by reference to natural law, it is not testable and is not falsifiable.

(By "falsifiable" the court apparently meant "disprovable.") Creation science, added the court, was not considered to be science by scientists.

> There is... not one recognized scientific journal which has published an article espousing the creation science theory.... Some of the State's witnesses suggested that the scientific community was "close-minded" on the subject of creationism and that explained the lack of acceptance of the creation science arguments. Yet no witness produced a scientific article for which publication had been refused.... A theory that is by its own terms dogmatic, absolutist, and never subject to revision is not a scientific theory.... [T]hey take the literal wording of the Book of Genesis and attempt to find scientific support for it.... The Court would never criticize or discredit any person's testimony based on his or her religious beliefs. While anybody is free to approach a scientific inquiry in any fashion they

230 . 403 U.S. 602 (1971), discussed at § D5 below.

> choose, they cannot properly describe the methodology used as scientific, if they start with a conclusion and refuse to change it regardless of the evidence developed during the course of the investigation.

Furthermore, the court observed, "creationists have difficult maintaining among their ranks consistency in the claim that creationism is science." Two leading creationists were quoted by the court as contending the contrary. "Creationists have repeatedly stated that neither creation nor evolution is a scientific theory (and each is equally religious)!"[231]

In closing, the court dealt with a central contention of creationists in their plea for "equal treatment."

> The defendants argue that the teaching of evolution alone presents both a free exercise problem and an establishment problem which can only be redressed by giving balanced treatment to creation science, which is admittedly consistent with some religious beliefs.... The argument has no legal merit.
>
> If creation science is, in fact, science and not religion, as the defendants claim, it is difficult to see how the teaching of such a science could "neutralize" the religious nature of evolution.
>
> Assuming for the purposes of argument, however, that evolution is a religion or religious tenet, the remedy is to stop the teaching of evolution; not establish another religion in opposition to it. Yet it is clearly established in the case law, and perhaps also in common sense, that evolution is not a religion and that teaching religion does not violate the Establishment Clause....
>
> [One of the defendants' witnesses] testified that the public school's curriculum should reflect the subjects the public wants taught in schools. The witness said that polls indicated a significant majority of the American public thought creation science should be taught if evolution was taught....
>
> The application and content of First Amendment principles are not determined by public opinion polls or by a majority vote. Whether the proponents of [the Act] constitute the majority or the minority is quite irrelevant under a constitutional system of government. No group, no matter how large or small, may use the organs of government, of which the public schools are the most conspicuous and influential, to foist its religious beliefs on others.[232]

---

231. *McLean v. Arkansas, supra,* p. 1268, quoting Duane Gish in *Discover*, July, 1981, and also citing testimony by Paul Ellwranger ("a respiratory therapist who is trained in neither law nor science"), drafter of the model creationism statute that was enacted in Arkansas.

232. *McLean, supra*, citing *Epperson v. Arkansas*, *supra; Willoughby v. Stever*, 504 F.2d 271 (CADC 1974); *Wright v. Houston*, 366 F.Supp. 1208 (S.D.Tex. 1973), aff'd. 486 F.2d 137 (CA5 1973).

Therefore, the court permanently enjoined the enforcement of the Act. Significantly, the attorney general of Arkansas declined to appeal the decision, thus earning some obloquy in creationist quarters.

(5) *Aguillard v. Edwards* (1986). A similar dispute had arisen in Louisiana that eventually reached the Supreme Court of the United States. The Louisiana legislature in 1981 adopted a statute entitled "Balanced Treatment for Creation-Science and Evolution-Science Act," as noted in section (3) above, which, as announced in the act itself, was enacted for the purpose of "protecting academic freedom." Several plaintiffs, including parents of students in Louisiana public schools, educators, religious leaders and taxpayers, challenged the constitutionality of the statute in federal court. The court, Adrian G. Duplantier, J., granted summary judgment to the plaintiffs.

> Defendants contend that summary judgment is precluded by the presence of at least one genuine issue of material fact, the definition of "science." We decline the invitation to judge that debate. Whatever "science" may be, "creation," as the term is used in the statute, involves religion, and the teaching of "creation-science" and "creationism," as contemplated by the statute, involves teaching "tailored to the principles" of a particular religious sect or group of sects.[233] As it is ordinarily understood, the term "creation" means the bringing into existence of mankind and of the universe and implies a divine creator. While all religions may not teach the existence of a supreme being, a belief in a supreme being a creator [*sic*] is generally considered to be a religious tenet.
>
> The state may not constitutionally prohibit the teaching of evolution in the public schools, for there can be no nonreligious reason for such prohibition. The First Amendment "forbids alike the preference of a religious doctrine or the prohibition of a theory which is deemed antagonistic to a particular dogma." If the state cannot prohibit the teaching of evolution, manifestly it cannot provide that evolution can be taught only if the evolution curriculum is "balanced" with a curriculum involving tenets of a particular religious sect....
>
> Because the statute requires the teaching of creation-science if a school teaches a subject the teaching of which the state cannot constitutionally prohibit, we treat the statute as if it simply mandates the teaching of creation-science. Just as the sole reason why the Arkansas legislature prohibited the teaching of evolution was that it is deemed to conflict with a particular religious doctrine, so too the sole reason why the Louisiana Legislature would require the teaching of creationism is that it comports with the same religious doctrine. There can be no legitimate secular reason for the "Balanced-Treatment for Creation-Science and Evolution-Science Act."[234]

---

233 . Citing *Epperson v. Arkansas*, 393 U.S. 97 (1968), discussed at § (2) above.

234 . *Aguillard v. Treen*, E.D.La., Jan. 10, 1985, unpublished.

The state appealed to the Fifth Circuit, and a panel composed of Circuit Judges Brown, Politz and Jolly issued an opinion written by Judge E. Grady Jolly.

> [N]otwithstanding the supposed complexities of religion-versus-state issues and the lively debates they generate, this particular case is a simple one, subject to a simple disposal: the Act violates the Establishment Clause of the first amendment because the purpose of the statute is to promote a religious belief.
>
> We approach our decision in this appeal by recognizing that, irrespective of whether it is fully supported by scientific evidence, the theory of creation is a religious belief. Moreover, this case comes to us against a historical background that cannot be denied or ignored. Since the two aged warriors, Clarence Darrow and William Jennings Bryan, put Dayton, Tennessee, on the map of religious history in the celebrated *Scopes* trial in 1972,[235] courts have occasionally been involved in the controversy over public school instruction concerning the origin of man. With the igniting of fundamentalist fires in the early part of this century, "anti-evolution" sentiment, such as that in *Scopes*, emerged as a significant force in our society. As evidenced by this appeal, the place of evolution and the theory of creation in the public schools continues to be the subject of legislative action and a source of critical debate.
>
> * * *
>
> We begin by considering the stated purpose of the statute: to "protect academic freedom...." [A] review of the plain language of the Balanced Treatment Act convinces us that it has no secular legislative purpose. Although purporting to promote academic freedom, the Act does not and cannot, in reality, serve that purpose. Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment. The principle of academic freedom abjures state interference with curriculum or theory as antithetical to the search for truth. The Balanced Treatment Act is contrary to the very concept it avows; it requires, presumably upon risk of *sanction* or *dismissal* for failure to comply, the teaching of creation-science whenever evolution is taught.
>
> * * *
>
> Finally, this scheme of the statute, focusing on the religious *bete noire* of evolution, as it does, demonstrates the religious purpose of the statute. Indeed, the Act continues the battle William Jennings Bryan carried to his grave. The Act's intended effect is to discredit evolution by counter-balancing its teaching at every turn with the teaching of creationism, a religious belief. The statute, therefore is a law respecting a particular religious belief. For these reasons, we hold that the Act fails to satisfy the first [purpose] prong of the ***Lemon*** test[236] and thus is unconstitutional.

---

235 . *Scopes v. Tennessee*, 289 S.W. 363 (1927), discussed at § (1) above.

236 . For details of that test, see *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at § D5 below.

> Nothing in our opinion today should be taken to reflect adversely upon creation-science either as a religious belief or a scientific theory. Nothing in our opinion today should be taken to reflect a hostile attitude toward religion. Rather we seek to give effect to the first amendment requirement that demands that no law be enacted favoring any particular religious belief or doctrine. We seek simply to keep the government... neutral with respect to any religious controversy.[237]

That would seem to have settled the matter, as *McLean* had settled it in Arkansas. But no. Five months and thirteen volumes of the Federal Reporter, Second Series, later there appeared a remarkable sequel. The state had made the routine motion for rehearing, with the suggestion that the entire court of appeals participate, before seeking a hearing in the U.S. Supreme Court. Under date of December 12, 1985, the following entry appeared:

> ON SUGGESTION FOR REHEARING EN BANC...
>
> Treating the suggestion for rehearing as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it... the suggestion for Rehearing En Banc is DENIED.

Following that notation was a long, impassioned and sarcastic dissent by Judge Gee joined by five other judges of the Fifth Circuit objecting to the refusal of a rehearing by the full court!

> Today our full court approves, by declining review en banc, a panel opinion striking down a Louisiana statute as one "respecting an establishment of religion." The panel reasons that by requiring public school teachers to present a balanced view of the current evidence regarding the origins of life and matter (if any view is taught) rather than favoring one view only and by forbidding them to misrepresent as established fact views on the subject which today remain theories only, the statute promotes religious belief and violates the academic freedom of instructors to teach whatever they like.
>
> The *Scopes* court upheld William Jennings Bryan's view that states could constitutionally forbid teaching the scientific evidence for the theory of evolution, rejecting that of Clarence Darrow that truth was truth and could always be taught whether it favored religion or not. By requiring that the whole truth be taught, Louisiana aligned itself with Darrow; striking down that requirement, the panel holding aligns us with Bryan.
>
> * * *
>
> I am as capable as the panel of making an extra-record guess that much, if not most, of the steam which drove this enactment was generated by religious people who were hostile to having the theory of evolution misrepresented to school children as established scientific fact and who

237 . *Aguillard v. Edwards*, 765 F.2d 1251 (1985).

> wished the door left open to acceptance by these children of the Judeo-Christian religious doctrine of Divine Creation. If so, however, they did not seek to further their aim by requiring that religious doctrine be taught in public school. Instead, they chose a more modest tactic—one that I am persuaded does not infringe the Constitution.
>
> That was to provide... that neither evolution nor creation be presented as finally established scientific fact and that, when evolution is taught as a theory, the scientific evidence for such competing theories as a "big bang" production of the universe or for the sudden appearance of highly developed forms of life be given equal time (and vice versa).... I see nothing illiberal about such a requirement, nor can I imagine that Galileo or Einstein would have found fault with it....
>
> Despite this, our panel struck the statute down....
>
> In order to invalidate it as "establishing religion," it was... necessary for the panel to look beyond the statute's words and beyond legislative statement of secular purpose. To strike the statute down, the panel draws upon its visceral knowledge regarding what must have motivated the legislators. It sifts their hearts and minds, divines their motives for requiring that truth be taught, and strikes down the law that requires it. This approach eventually makes a farce of the judicial exercise of discerning legislative intent.... To disregard so completely the existing manifestations of intent and impose instead one's personal, subjective ideas to what *must* have been the true sentiment of the Louisiana legislature ignores this constitutional restraint on judicial power....
>
> I should have thought that requiring the truth to be taught on any subject displayed its own secular warrant, one at the heart of the scientific method itself. Put another way, I am surprised to learn that a state cannot forbid the teaching of half-truths in its public schools, whatever its motive for doing so. Today we strike down a statute balanced and fair on its face because of our perception of the reason why it got the votes to pass: one to prevent the closing of children's minds to religious doctrine by misrepresenting it as in conflict with established scientific laws. After today, it does not suffice to teach the truth; one must also teach it with the approved motive.... It comes as news to me... that the Constitution forbids a state to require the teaching of truth—any truth, for any purpose, and whatever the effect of teaching it may be. Because this is the holding that we endorse today, I decline to join in that endorsement and respectfully dissent.[238]

Not to be outdone, Judge Jolly added a rejoinder in a similarly injudicious vein.

> First, as a writer of the panel opinion, I offer my apologies to the majority of this court for aligning it with the forces of darkness and anti-truth. Second, I do not personally align myself with the dissenters in their commitment to the search for eternal truth through state edicts. Third, I commend to the dissenters a serious rereading of the majority

238 . *Aguillard v. Edwards,* 778 F.2d 225 (CA5 1985), Gee dissent.

> opinion that they may recognize the hyperbole of the [dissenting] opinion in which they join. And, finally, I respectfully submit, the panel opinion speaks for itself, modestly and moderately, if one will allow its words to be carefully heard.[239]

(6) *Edwards v. Aguillard* (1987). The Supreme Court brought this highly controverted litigation to a close in an opinion written by Justice Brennan and joined by Justices Thurgood Marshall, Blackmun, Lewis Powell and John Paul Stevens. (Justice O'Connor joined in all but Part II.[240]) Justice Brennan applied the three-prong *Lemon* test of "establishment of religion," but got no further than the first prong—whether the enactment had a secular purpose.[241]

> A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose.... In this case, the [State has] identified no clear secular purpose for the Louisiana Act.
>
> True, the Act's stated purpose is to protect academic freedom. This phrase might, in common parlance, be understood as referring to enhancing the freedom of teachers to teach what they will. The Court of Appeals, however, correctly concluded that the Act was not designed to further that goal[242].... Even if "academic freedom" is read to mean "teaching all the evidence" with respect to the origins of human beings [as the State claims], the Act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.
>
> While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.... It is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum. During the legislative hearings, Senator Keith stated, "My preference would be that neither [creationism nor evolution] be taught." Such a ban on teaching does not promote—indeed it undermines—the provision of a comprehensive scientific education.
>
> It is equally clear that requiring schools to teach creationism with evolution does not advance academic freedom. The Act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life. Indeed, the Court of Appeals found that no law prohibited Louisiana public school teachers from teaching any

---

239 . Ibid., Jolly response.

240 . The portion of the majority opinion in which Justice O'Connor did not join pertained to a description of the application of the Establishment Clause in the public-school context, which need not be examined here since it merely recapitulated the Court's views in earlier cases discussed above.

241 . For the *Lemon* test, see *Lemon v. Kurtzman*, 303 U.S. 608, 612-613 (1971), discussed at § D5 below.

242 . See discussion in § 5 above.

scientific theory... The Act provides Louisiana schoolteachers with no new authority. Thus the stated purpose of the Act is not furthered by it.

* * *

If the Louisiana legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the Act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught. Thus we agree with the Court of Appeals' conclusion that the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting "evolution by counterbalancing its teaching at every turn with the teaching of creation science"....

[W]e need not be blind in this case to the legislature's preeminent religious purpose in enacting this statute. There is a historic and contemporaneous link between the teaching of certain religious denominations and the teaching of evolution.... [In *Epperson v. Arkansas*[243]] the Court found that there can be no legitimate state interest in protecting particular religions from scientific views "distasteful to them," and concluded "that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."

These same... antagonisms between the teachings of certain religious denominations and the teachings of evolution are present in this case. The preeminent purpose of the Louisiana legislature was clearly to advance the religious viewpoint that a supernatural being created humankind. The term "creation science" was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act....

Furthermore, it is not happenstance that the legislature required the teaching of a theory that coincided with this religious view. The legislative history documents that the Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in it entirety.... The [sponsoring] State senator repeatedly stated that scientific evidence supporting his religious views should be included in the public school curriculum to redress the fact that the theory of evolution incidentally coincided with what he characterized as religious beliefs antithetical to his own....

In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of one scientific theory that historically has been opposed by certain religious sects.... Because the primary purpose of the Creationism Act is to advance a particular

243 . 393 U.S. 97 (1968), discussed at § (2) above.

religious belief, the Act endorses religion in violation of the First Amendment.[244]

(a) Justice Powell's Concurrence. Justice Powell wrote separately "to note certain aspects of the legislative history, and to emphasize that nothing in the Court's opinion diminishes the traditionally broad discretion accorded state and local school officials in the selection of the public school curriculum." As a former longtime member and chairman of the board of eduction of Richmond, Virginia, he felt a special sensitivity to any curtailment of the discretion enjoyed by such public bodies.

> Although the Act requires the teaching of the scientific evidences of both creation and evolution whenever either is taught, it does not define either term.... The "doctrine or theory of creation" is commonly defined as "holding that matter, the various forms of life, and the world were created by a transcendent God out of nothing." Webster's Third New International Dictionary (1981). "Evolution" is defined as "the theory that the various types of animals and plants have their origin in other preexisting types, the distinguishing differences being due to modifications in successive generations." *Id*. Thus, the Balanced Treatment Act mandates that public schools present the scientific evidence to support a theory of divine creation whenever they present the scientific evidence to support the theory of evolution. "[C]oncepts concerning God or a supreme being of some sort are manifestly religious.... These concepts do not shed that religiosity merely because they are presented as a philosophy or as a science."[245] From the face of the statute, a purpose to advance a religious belief is apparent.
>
> A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.[246] The Act contains a statement of purpose: to "protec[t] academic freedom." This statement is puzzling. Of course, the "academic freedom" of teachers to present information in public schools, and students to receive it, is broad. But it necessarily is circumscribed by the Establishment Clause. "Academic freedom" does not encompass the right to structure the public school curriculum in order to advance a particular religious belief.
>
> * * *
>
> When, as here, "both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one."[247] My examination of the language and the legislative history of the Balanced Treatment Act confirms that the intent of the Louisiana legislature was to promote a particular religious belief....

---

244. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

245. *Malnak v. Yogi*, 449 F.Supp. 1284, 1322 (N.J. 1977), aff'd *per curiam*, 592 F.2d 197 (CA3 1979), discussed at § 2d(9) above.

246. Citing *Wallace v. Jaffree*, 472 U.S. 38 (1985), Powell, J., concurring, at 64, discussed at § 2d(8) above.

247. Quoting *Wallace v. Jaffree, supra,* at 66, Powell, J. concurring.

> That the statute is limited to the scientific evidences supporting the theory does not render its purposes secular.
>
> * * *
>
> As a matter of history, school children can and should properly be informed of all aspects of this Nation's religious heritage. I would see no constitutional problem if school children were taught the nature of the Founding Father's [*sic*] religious beliefs and how these beliefs affected the attitudes of the times and structure of our government. Courses in comparative religion of course are customary and constitutionally appropriate. In fact, since religion permeates our history, a familiarity with the nature of religious belief is necessary to understand many historical as well as contemporary events. In addition, it is worth noting that the Establishment Clause does not prohibit *per se* the educational use of the Bible and other religious documents in public school education.... The Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief.
>
> In sum, I find that the language and the legislative history of the Balanced Treatment Act unquestionably demonstrate that its purpose is to advance a particular religious belief... Accordingly, I concur in the opinion of the Court and its judgment that the Balanced Treatment Act violates the Establishment Clause of the Constitution.[248]

Justice O'Connor joined in this opinion.

Justice White filed a brief opinion stating his view that the Supreme Court should defer to the lower courts' understanding of the state statute at issue, making seven justices who supported the judgment of unconstitutionality.

(b) Justice Scalia's Dissent. Justice Scalia thoroughly disagreed with all of his colleagues' views (except those of Chief Justice Rehnquist, who joined his dissent).

> Even if I agreed with the questionable premise that legislation can be invalidated under the Establishment Clause on the basis of motivation alone, I would still find no justification for today's decision. The Louisiana legislators who passed the... Balanced Treatment Act, each of whom had sworn to support the Constitution, were well aware of the potential Establishment Clause problems and considered that aspect of the legislation with great care. After seven hearings and several months of study, resulting in substantial revision of the original proposal, they approved the Act overwhelmingly and specifically articulated the secular purpose they meant it to serve. Although the record contains abundant evidence of the sincerity of that purpose (the only issue pertinent to this case), the Court today holds, essentially on the basis of "its visceral

248 . *Edwards v. Aguillard, supra,* Powell concurrence.

> knowledge regarding what *must* have motivated the legislators,"[249] that the members of the Louisiana Legislature knowingly violated their oaths and then lied about it. I dissent.

The case had been decided in the district court on summary judgment, which meant that the court granted the plaintiffs' motion to enjoin the Act solely on the basis of briefs and affidavits submitted by the parties rather than holding a trial or evidentiary hearing. Summary judgment is a special, and some say extraordinary, action that occurs only when the court concludes that there is no material disagreement between the parties on issues of fact, and the matter can be decided solely on the law. In such a situation, the court(s) must construe what facts there are most favorably to the party against whom judgment is granted. That was presumably the ground underlying Justice Scalia's next point.

> At least at this stage in the litigation, it is plain to me that we must accept [the State's] view of what the statute means.... The only evidence in the record of the "received meaning and acceptation" of "creation science" is found in five affidavits filed by [the State]. In those affidavits, two scientists, a philosopher, a theologian, and an educator, all of whom claim extensive knowledge of creation science, swear that it is essentially a collection of scientific data supporting the theory that the physical universe and life within it appeared suddenly and have not changed substantially since appearing. These experts insist that creation science is a strictly scientific concept that can be presented without religious reference. At this point, then, we must assume that the Balanced Treatment Act does *not* require the presentation of religious doctrine.
>
> Nothing in today's opinion is plainly to the contrary, but what the statute means and what it requires are of rather little concern to the Court. Like the Court of Appeals, the Court finds it necessary to consider only the motives of the legislators who supported the Balanced Treatment Act.
>
> * * *
>
> It is clear, first of all, that regardless of what "legislative purpose" may mean in other contexts, for the purpose of the *Lemon* test it means the "actual" motives of those responsible for the challenged action.... Thus, if those legislators who supported the Balanced Treatment Act *in fact* acted with "sincere" secular purpose, the Act survives the first component of the *Lemon* test, regardless of whether that purpose is likely to be achieved by the provisions they enacted.
>
> Our cases have also confirmed that when the *Lemon* Court referred to "a secular... purpose," it meant "*a* secular purpose." The author of *Lemon*, writing for the Court, has said that invalidation under the purpose prong is appropriate when "there is *no question* that the statute or activity was

249. Quoting Judge Gee's dissent to the refusal to grant *en banc* reconsideration in the Fifth Circuit, 778 F.2d 225,227 (CA5 1985), discussed at § (5) above. Emphasis added by Justice Scalia.

motivated *wholly* by religious considerations"[250].... Thus, the majority's invalidation of the Balanced Treatment Act is defensible only if the record indicates that the Louisiana legislature had *no* secular purpose.

It is important to stress that the purpose forbidden by *Lemon* is the purpose to "advance religion." Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. Also, political activism by the religiously motivated is part of our heritage. Notwithstanding the majority's implication to the contrary, we do not presume that the sole purpose of law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular faiths.[251] To do so would be to deprive religious men and women of their right to participate in the political process. Today's religious activism may give us the Balanced Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims.

Similarly, we will not presume that a law's purpose is to advance religion merely because it "`happens to coincide or harmonize with the tenets of some or all religions,'"[252] or because it benefits religion, even substantially.... On many past occasions we have had no difficulty finding a secular purpose for governmental action far more likely to advance religion than the Balanced Treatment Act.[253] Thus, the fact that creation science coincides with the beliefs of certain religions, a fact upon which the majority relies heavily, does not itself justify invalidation of the Act.

* * *

We have... held that in some circumstances government may act to accommodate religion, even if that action is not required by the First Amendment.... We have implied that voluntary governmental accommodation of religion is not only permissible, but desirable. Thus, few would contend that Title VII of the Civil Rights Act of 1964, which both forbids religious discrimination by private-sector employers... and requires them reasonably to accommodate the religious practices of their employees, violates the Establishment Clause, even though its "purpose" is, of course, to advance religion, and even though it is almost certainly not

---

250. Quoting Chief Justice Burger in *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984), discussed at VE2d.

251. Citing *Walz v. Tax Commission*, 397 U.S. 644, 670 (1970), discussed at VC6b(3), and *Harris v. McRae*, 448 U.S. 297, 319-20 (1980).

252. *Harris v. McRae, supra*, quoting *McGowan v. Maryland*, 366 U.S. 420 (1961), discussed at IVA7a.

253. Citing *Mueller v. Allen*, 463 U.S. 388 (1983); *Wolman v. Walter* 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Board of Education v. Allen*, 392 U.S. 236 (1968).

required by the Free Exercise Clause.[254] While we have warned that at some point, accommodation may devolve into "an unlawful fostering of religion," we have not suggested precisely (or even roughly) where that point might be. It is possible, then, that even if the sole motive of those voting for the Balanced Treatment Act was to advance religion, and its passage was not actually required, or even believed to be required, by either the Free Exercise or Establishment Clauses, the Act would still survive scrutiny under *Lemon*'s purpose test.

* * *

We have relatively little information upon which to judge the motives of those who supported the Act. About the only direct evidence is the statute itself and transcripts of the seven committee hearings at which it was considered.... Nevertheless, there is ample evidence that the majority is wrong in holding that the Balanced Treatment Act is without secular purpose.

At the outset, it is important to note that the Balanced Treatment Act did not fly through the Louisiana Legislature on wings of fundamentalist religious fervor—which would be unlikely, in any event, since only a small minority of the State's citizens belong to fundamentalist religious denominations.[255]

* * *

[In reviewing] the testimony of Senator Keith and his supporters, I wish to make clear that I by no means intend to endorse its accuracy. But my views (and the views of the Court) about creation science and evolution are (or should be) beside the point. Our task is not to judge the debate about teaching the origins of life, but to ascertain what the members of the Louisiana Legislature believed. The vast majority of them voted to approve a bill which explicitly stated a secular purpose; what is crucial is not their *wisdom* in believing that purpose would be achieved by the bill, but their *sincerity* in believing it would be.

Most of the testimony in support of Senator Keith's bill came from the Senator himself and from scientists and educators he presented, many of whom enjoyed academic credentials that may have been regarded as quite impressive by members of the Louisiana Legislature. To a substantial extent, their testimony was devoted to lengthy, and to the layman, seemingly expert scientific expositions of the origin of life.

* * *

Senator Keith repeatedly and vehemently denied that his purpose was to advance a particular religious doctrine....

We have no way of knowing, of course, how many legislators believed the testimony of Senator Keith and his witnesses. But in the absence of

---

254. A related point about the religious accommodation in the Civil Rights Act was made a week later in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), discussed at ID4b.

255. Citing B. Quinn, H. Anderson, M. Bradley, P. Goetting and P. Shriver, *Churches and Church Membership in the United States* (1982), p. 16.

> evidence to the contrary, we have to assume that many of them did. Given that assumption, the Court today plainly errs in holding that the Louisiana Legislature passed the Balanced Treatment Act for exclusively religious purposes.

Justice Scalia recounted in great detail the substance of the legislative hearings that led up to the enactment.

> Even with nothing more than this legislative history to go on, I think it would be extraordinary to invalidate the Balanced Treatment Act for lack of a valid secular purpose. Striking down a law approved by the democratically elected representatives of the people is no minor matter.... Even if the legislative history were silent or ambiguous about the existence of a secular purpose—and here it is not—the statute should survive *Lemon*'s purpose test. But even more validation than mere legislative history is present here. The Louisiana Legislature explicitly set forth its secular purpose ("protecting academic freedom") in the very text of the Act....
>
> The Court seeks to evade the force of this expression of purpose by stubbornly misinterpreting it, and then finding that the provisions of the Act do not advance that misinterpreted purpose, thereby showing it to be a sham. The Court first surmises that "academic freedom" means "enhancing the freedom of teachers to teach what they will"—even though "academic freedom" in that sense has little scope in the structured elementary and secondary curriculums with which the Act is concerned. Alternatively, the Court suggests that it might mean "maximiz[ing] the comprehensiveness and effectiveness of science instruction"—though that is an exceeding strange interpretation of the words, and one that is refuted on the very face of the statute. Had the Court devoted to this central question of the meaning of the legislatively expressed purpose a small fraction of the research into legislative history that produced its quotations of religiously motivated statements by individual legislators, it would have discerned quite readily what "academic freedom" meant: *students'* freedom from *indoctrination*. The legislature wanted to ensure that students would be free to decide for themselves how life began, based upon a fair and balanced presentation of the scientific evidence—that is, to protect "the right of each [student] voluntarily to determine what to believe (and what not to believe) free from any coercive pressures from the State."[256] The legislature did not care *whether* the topic of origins was taught; it simply wished to insure that *when* the topic was taught, students would receive "`all of the evidence.'"
>
> * * *
>
> If one adopts the obviously intended meaning of the statutory terms "academic freedom," there is no basis whatever for concluding that the purpose they express is a "sham." To the contrary, the Act pursues that

256 . *Grand Rapids v. Ball*, 473 U.S. 373 (1985), discussed at §D7l below.

purpose plainly and consistently.... It does *not* mandate instruction in creation science, *forbids* teachers to present creation science "as proven scientific fact," and *bans* the teaching of creation science unless the theory is (to use the Court's terminology) "discredited... `at every turn'" with the teaching of evolution. It surpasses understanding how the Court can see in this a purpose "to restructure the science curriculum to conform with a particular religious viewpoint," "to provide a persuasive advantage to a particular religious doctrine," "to promote the theory of creation science which embodies a particular religious tenet," and "to endorse a particular religious doctrine."

The Act's reference to "creation" is not convincing evidence of religious purpose. The Act defines creation science as "*scientific evidenc[e]*," and Senator Keith and his witnesses repeatedly stressed that the subject can and should be presented without religious content. We have no basis on the record to conclude that creation science need be anything other than a collection of scientific data supporting the theory that life abruptly appeared on earth. Creation science, its proponents insist, no more must explain *whence* life came than evolution must explain whence came the inanimate materials from which it says life evolved. But even if that were not so, to posit a past creator is not to posit the eternal and personal God who is the object of religious veneration. Indeed, it is not even to posit the "*unmoved* mover" hypothesized by Aristotle and other notably nonfundamentalist philosophers. Senator Keith suggested this when he referred to "a creator *however you define a creator*" (emphasis added).

* * *

It is undoubtedly true that what prompted the Legislature to direct its attention to the misrepresentation of evolution in the schools (rather than the inaccurate presentation of other topics) was its awareness of the tension between evolution and the religious beliefs of many children. But even appellees concede that a valid secular purpose is not rendered impermissible simply because its pursuit is prompted by concern for religious sensitivities....

In sum, even if one concedes, for the sake of argument, that a majority of the Louisiana Legislature voted for the Balanced Treatment Act partly in order to foster (rather than merely eliminate discrimination against) Christian fundamentalist beliefs, our cases establish that that alone would not suffice to invalidate the Act, so long as there was a genuine secular purpose as well. We have, moreover, no adequate basis for disbelieving the secular purpose set forth in the Act itself, or for concluding that it is a sham enacted to conceal the legislators' violation of their oaths of office. I am astonished by the Court's unprecedented readiness to reach such a conclusion, which I can only attribute to an intellectual predisposition created by the facts and the legend of *Scopes v. State*[257]—an instinctive reaction that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist

257 . 154 Tenn. 105, 289 S.W. 363 (1927).

repression. In this case, however, it seems to me the Court's position is the repressive one. The people of Louisiana, including those who are Christian fundamentalists, are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools, just as Mr. Scopes was entitled to present whatever scientific evidence there was for it. Perhaps what the Louisiana Legislature has done is unconstitutional because there *is* no such evidence, and the scheme they have established will amount to no more than a presentation of the Book of Genesis. But we cannot say that on the evidence before us in this summary judgment context, which includes ample uncontradicted testimony that "creation science" is a body of scientific knowledge rather than revealed belief. *Infinitely less* can we say (or should we say) that the scientific evidence for evolution is so conclusive that no one would be gullible enough to believe that there is any real scientific evidence to the contrary, so that the legislation's stated purpose must be a lie. Yet that illiberal judgment, that *Scopes*-in-reverse, is ultimately the basis on which the Court's facile rejection of the Louisiana Legislature's purpose must rest.

* * *

I have to this point assumed the validity of the *Lemon* "purpose" test. In fact, however, I think the pessimistic evaluation that the Chief Justice made of the totality of *Lemon* is particularly applicable to the "purpose" prong: it is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results."[258]...

Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious government officials can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.

But the difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. For while it is possible to discern the objective "purpose" of a statute (*i.e.*, the public good at which its provisions appear to be directed), or even the formal motivation for a statute where it is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite.

---

258. *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985), Rehnquist, J., dissenting, discussed at § C2d(8) above. (Justice Rehnquist was not yet chief justice at that time.)

In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or he may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.

Putting that problem aside, however, where ought we to look for the individual legislator's purpose? We cannot of course assume that every member present (if, as is unlikely, we know even who or how many there were) agreed with the motivation expressed in a particular legislator's pre-enactment floor or committee statement.... Can we assume, then, that they all agree with the motivation expressed in the staff-prepared committee reports they might have read—even though we are unwilling to assume that they agreed with the motivation expressed in the very statute they voted for? Should we consider post-enactment floor statements? Or post-enactment testimony from legislators obtained expressly for the lawsuit? Should we consider media reports on the realities of legislative bargaining? All of these sources, of course, are eminently manipulable. Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and post-enactment recollections conveniently distorted. Perhaps most valuable of all would be more objective indications—for example, evidence regarding the individual legislators' religious affiliations. And if that, why not evidence regarding the fervor or tepidity of their beliefs?

Having achieved, through these simple means, an assessment of what individual legislators intended, we must still confront the question (yet to be addressed in any of our cases) how *many* of them must have the invalidating intent. If a state senate approves a bill by a vote of 26 to 25, and only one of the 26 intended solely to advance religion, is the law unconstitutional? What if 13 of the 26 had that intent? What if 2 of the 26 had the impermissible intent, but 3 of the 25 voting against the bill were motivated by religious hostility or were simply attempting to "balance" the votes of their impermissibly motivated colleagues? Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it—on a

> theory, perhaps, that even though everyone else's intent was pure, what they produced was fruit of a forbidden tree?
>
> Because there are no good answers to these questions, this Court has recognized from Chief Justice Marshall[259]... to Chief Justice Warren[260]... that determining the subjective intent of legislators is a perilous enterprise. It is perilous, I might note, not just for the judges who will very likely reach the wrong result, but for the legislators who find that they must assess the validity of proposed legislation—and risk the condemnation of having voted for an unconstitutional measure—not on the basis of what the legislation contains, nor even on the basis of what they themselves intend, but on the basis of what *others* have in mind.
>
> Given the many hazards involved in assessing the subjective intent of governmental decisionmakers, the first prong of *Lemon* is defensible, I think, only if the text of the Establishment Clause demands it. That is surely not the case. The Clause states that "Congress shall make no law respecting an establishment of religion." One could argue, I suppose, that any time Congress acts with the *intent* of advancing religion, it has enacted a "law respecting an establishment of religion;" but far from being an unavoidable reading, it is quite an unnatural one. I doubt, for example, that the Clayton [Anti-trust] Act could reasonably be described as a "law respecting an establishment of religion" if bizarre new historical evidence revealed that it lacked a secular purpose, even though it has no discernable nonsecular effect. It is, in short, far from an inevitable reading of the Establishment Clause that it forbids all governmental action intended to advance religion; and if not inevitable, any reading with such untoward consequences must be wrong.
>
> In the past we have attempted to justify our embarrassing Establishment Clause jurisprudence on the ground that it "sacrifices clarity and predictability for flexibility...." [261] I think it time that we sacrifice some "flexibility" for "clarity and predictability." Abandoning *Lemon*'s purpose test—a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or the history of the amendment, and, as today's decision shows, has wonderfully flexible consequences—would be a good place to start.[262]

(c) An Evaluation: "Purpose," "Motive" and "Intent." As is often the case, the court's opinion was shorter and shallower than some dissents (and some concurrences) can be, partly because its weight of five or more votes eases somewhat the necessity to persuade and partly because certain ambiguities may be necessary to retain some of those votes. But occasionally a dissent can cast the ambiguities and

---

259. Citing *Fletcher v. Peck*, 6 Cranch 87, 130 (1810).

260. Citing *U.S. v. O'Brien*, 391 U.S. 367, 383-384 (1968); also *Palmer v. Thompson*, 403 U.S. 217, 224-225 (1971) and *Epperson v. Arkansas* 393 U.S. 97, 113 (1968), Black, J., concurring, discussed at § b(2) above.

261. *PEARL v. Regan*, 444 U.S. 646, 662 (1980), discussed at § D7i below.

262. *Edwards v. Aguillard, supra*, Scalia dissent; emphasis throughout in original.

compromises of the majority in such sharp relief that it is worth reviewing at length, as is done here and in several other instances, such as Justice Rehnquist's dissent in *Wallace v. Jaffree*,[263] referred to with approval by Justice Scalia, *supra*. Extended treatment does not necessarily mean approval of the argument so much as appreciation for its acuity. Justice Scalia's highly articulate dissent, with its striking *tour de force* describing the difficulties of determining legislators' motivation(s), is worth studying, not only for its penetrating critique of the court's somewhat wandering path through the Establishment thicket, but because of its intimations for possible future new directions for that path—not only in the First Amendment field but elsewhere. (His disdain for legislative history as a supplement—or indeed a substitute—for the actual language of the statute in determining the meaning of a law was not limited to the First Amendment field.)

There is little in Justice Scalia's review of legislative history or his treatment of the search for legislators' motivations with which one can find much fault—so far as they go. It is certainly true that the "scientific establishment" is not very receptive to alternate views of the origins of life, and that some of the acolytes of science in the elementary and secondary levels of education can be as intolerant of reservations about a simplistic doctrine of Evolution as are the priests of other religions about heresies that challenge the Established Faith. Nonconforming teachers viewed as heretics may well have suffered ostracism and reprisals at their hands, and the legislature may well have wanted to ease their plight, as well as making a wider range of evidentiary data available to students. But to conclude that that was all that was at issue here would be as disingenuous as the dissent considered the majority opinion to be needlessly suspicious of legislators' intent.

The creationism cause did not come to the Louisiana legislature without a history, a context and a powerful dynamic, as Justice Powell sought to suggest. As noted in earlier pages, from *Scopes* through *Epperson* to *McLean*, the courts have wrestled with vigorous, widespread and persistent efforts on the part of many Christians—not just "fundamentalists"—to reverse what they believed to be a progressive marginalization of religion from the common civilizing institution of society, the public school, particularly in the science curriculum, where the theory of evolution was thought by them to be a major threat to belief in Divine Creation.

The Balanced Treatment Act did not spring full-blown from the brow of Senator Keith in June of 1980. It was the carefully crafted product of a strategy developed by the supporters of "creationism" several years earlier and enacted in Arkansas—as in Louisiana—in 1981. It built upon concerns that were reflected in the statutes outlawing the teaching of evolution in public schools at issue in *Epperson* (1968) and *Scopes* (1925). It was supported by a broad and vocal movement throughout the "Bible Belt" of the southeastern and south central states.

263 . 472 U.S. 38, 112 (1985), discussed at § C2d(7) above.

Justice Scalia's contention that "only a small minority of the State's citizens belong to fundamentalist religious denominations" failed to take account of the heavy dominance of Southern Baptists, Methodists, Presbyterians, and, indeed, Roman Catholics in that part of the country who viewed the issue of evolution v. creation in much the same way, though not normally categorized as "fundamentalists"—at least not, apparently, in Justice Scalia's calculus. Perhaps he recognized this prevalence when he referred at a later point to "the tension between evolution and the religious beliefs of *many* children" (emphasis added). Senator Keith's bill would not even have come to visibility if it had not been responding to, and given impetus to, a heavy groundswell of support with decades of frustration behind it, which may not, however, have left much trace on the transcripts of legislative hearings or debates.

Whatever the history, context or support of the Balanced Treatment Act, it is difficult to avoid the clear implication for legislative purpose on the face of the Act itself, not in what it *claimed* as its purpose—to protect and expand "academic freedom"—but in the means chosen to do so: to require the teaching of "creation science" whenever evolution was taught in public schools. "Creation science," whatever its specific content and supposedly nonreligious evidences may be, was explicitly directed to showing that life was created suddenly and relatively recently rather than millions of years ago through gradual, incremental and adaptive changes. The whole point of that enterprise was to open the possibility of "creation" (as though the other process might not also be creation). And "creation" is an action that implies an actor, a creator, even though the "creation science" curriculum professes to eschew conjecture about who or what did the creating. Contrary to Justice Scalia's references to Aristotle's "unmoved mover," to posit a creator of whatever kind is to enter the realm of religion rather than of scientific fact or even theory. In this sense the term "creation science" was itself a contradiction in terms that gave the whole game away.

While Justice Scalia's description of legislators' mixed motivations was a refreshing recognition of reality, such realism seemed to be strangely absent from his earlier expression of pious deference to legislative purpose, viewed formally and collectively. He chided the majority for imputing to the legislators a mass covert violation of their oaths to uphold the Constitution, which was disingenuous in the extreme. When the Supreme Court's parsing of the Constitution in this area was, according to Scalia, itself unclear and unpredictable, it would be quite possible for state legislators to believe in all honesty that their actions, however diverse, were consistent with the Constitution. Beyond that, there might be legislators who believed that the courts had grossly misconstrued the Establishment Clause, so they (the legislators) were upholding what the courts had not. And still other legislators have been heard to announce in public debate that it is the responsibility of the courts, not the legislature, to rule on constitutionality, so that—cynics may maintain—the legislature, under various political pressures, may enact laws about

which many members may entertain strong constitutional doubts, but leave to the (unelected) judiciary the unpleasant task of correcting such missteps, perhaps even expecting and desiring that the courts will undo what they have done. After all, (federal) judges don't have to face the heat of periodic elections; let *them* pull the legislature's chestnuts out of the fire!

So judges are not necessarily doing an injustice to the legislature when they look behind the asserted purpose of a statute to see what it really *does*. That does not necessarily involve psychoanalyzing individual legislators to discern their motives, which is indeed "perilous" because largely unknowable, perhaps even to the legislators themselves. "Purpose" is not the same as "motivation"; it refers to a formal, collective, expressed objective of the legislative act. It is thus properly subject to assessment as to whether that stated objective is consonant with the act's actual or prospective operation. "Intent" is an intermediate term that has to do with the contemplated result of the enactment, which may not be formally articulated, but can be inferred from the most likely outcome(s) of the working of the legislative will. Thus the stated purpose of an act may be viewed as pretextual if the mechanism it erects does not achieve—and is not likely to achieve—that stated purpose, and the judicial analysis then can and should turn to the legislative *intent* to discern what the legislative body collectively was willing to accomplish instead of, in addition to, or in spite of its stated *purpose*.

Justice Scalia's engaging *tour de force* showing the impossibility of determining the *motivation* of individual legislators is a great, glistening red herring drawn across the trail of "purpose" to discredit it. But the quest for the "motive(s)" behind legislation is clearly distinguishable from its "purpose" or (a subcategory of "purpose") its "intent." It is a backward-viewing inquiry that asks *why* the legislators acted as they did, and is—as Justice Scalia clearly and unnecessarily explained—largely unascertainable, and—even if ascertained—is still beside the point. *Purpose* and *intent*, however, are forward-viewing inquiries that ask *what result the legislators sought to bring about by their action*, independent of what their various motives might have been. It may not be a simple or obvious search, but it is much more manageable than a sifting of motives, and to discredit the latter does not implicate the former.

The majority of the court did not find great difficulty in concluding that the formal "purpose" declared in the Act did not exhaust the subject because the prospective operation of the Act did not seem to them consistent with the declared purpose. They seemed to rely on a principle of the criminal law that—whatever a defendant *claims* as purpose (as in "I didn't mean to kill her")—a person must be assumed to have *intended* the natural, obvious and necessary consequences of his actions (as in delivering several strong blows with an axe to the head are not usually thought to be mere inadvertence). The majority did look to the consequences of the act to decipher its *intent*, and while that might be an exercise in inference, it was not an unreasonable

one, but an instance of *res ipsa loquitur,* the thing speaks for itself more plainly than the formal rationale of justification pasted on as a preamble. (Whether the majority or Justice Scalia rightly construed the meaning of protecting "academic freedom" is a closer inquiry, with the majority seeming to be closer to the usual usage; "academic freedom" in common parlance customarily applies to the *teaching* end of the process rather than to the *learning* end.)

It may be that, even if the "purpose" inquiry were to be dropped, as Justice Scalia urged, the Balanced Treatment Act would have fallen afoul of the "effect" prong of the *Lemon* test for some such reasons as those suggested above: that the resulting instruction would have the effect of introducing the implication, concept and character of a *creator* into the science curriculum and thereby producing the effect of advancing religion by legislative fiat. That was certainly the avowed desire of the proponents of "creation science" quoted in the majority and concurring opinions, and the court need not be blind to that desired outcome. Since the Act had been enjoined before it could be put into action, there was no evidence available to determine its effect, so application of the "effect" prong would necessarily have remained conjectural. Assessments of expected effect are rather like assessments of purpose, so it may not ultimately make too much difference which "prong" was being pursued, the upshot may be the same: the Act would inject religious elements (under whatever names) into the public school science curriculum and thus was an improper exercise of legislative power.

(7) *Crowley v. Smithsonian Institution* (1980). A curious footnote to the "creationism" controversy was provided by a 1980 lawsuit having nothing to do with public schools but still pertaining to the *inculcation* of beliefs contrary to the faith of various religious bodies. It was brought against the Smithsonian Institution—a governmentally sponsored agency of popular "education"—challenging its presentation of exhibits at the national Museum of Natural History illustrating the theory of evolution. Various creationists challenged the Institution's right to advance such exhibits with public funds, since the exhibits allegedly promulgated the teachings of the supposed "religion" of secular humanism to the disadvantage of those religions believing in a Divine Creation.

The plaintiffs contended that evolution was not a true science because it could not be observed or proved in the laboratory, but was a "*faith* position" advanced at public expense in derogation of other faith positions, and therefore violated the Establishment Clause. The U.S. Circuit Court of Appeals for the District of Columbia Circuit, in a unanimous opinion per Judge Louis F. Oberdorfer, Jr., disagreed with that claim.

> Assuming, *arguendo*,... the evolutionary theory cannot be proved "scientifically" in the laboratory and in that sense rests ultimately on "faith," such fact is not material because it would not establish as a matter of law that the exhibits in question establish any religion such as Secular Humanism.

> The fact that religions involve acceptance of some tenets on faith without scientific proof obviously does not mean that all beliefs and all theories which rest in whole or in part on faith are therefore elements of a religion as that term is used in the first amendment....
>
> Nor does it follow that government involvement in a subject that is also important to practitioners of a religion becomes, therefore, activity in support of religion.
>
> * * *
>
> Courts should be particularly sensitive to claims by groups that government is involved in their religion either by interfering with it, or by supporting a competing theology.... [But] [g]overnment, including its judicial branch, is cautioned not "to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[264] The constitution either by operation of the first amendment or the fourteenth, protects a citizen's right to receive information and to "acquire useful knowledge"....[265]
>
> Application of the Supreme Court's caution to this case necessarily requires a balance between appellants' freedom to practice and propagate their religious beliefs in creation without suffering government competition or interference and appellees' right to disseminate, and the public's right to receive, knowledge from government, through schools and other institutions such as the Smithsonian. This balance was long ago struck in favor of diffusion of knowledge based on responsible scientific foundations, and against special constitutional protection of religious believers from the competition generated by such knowledge diffusion.
>
> * * *
>
> The solid secular purpose of the [Smithsonian's] exhibits is apparent from their context and their elements. They did not materially advance the religious theory of Secular Humanism, or sufficiently impinge upon appellants' practice of theirs to justify interdiction. Except insofar as appellants have themselves entangled religion in the exhibits, there is no religious involvement....[266]

c. Textbooks and Other Materials and Activities. Evolution was only one subject that raised objections on constitutional grounds by patrons of public schools. Many other features of public school education were found unacceptable for religious reasons, and some of them led to new ramifications in the case law of church and state, several of which are treated here.

(1) *Palmer v. Board of Education* (1979) (Flag Salute). In this case, a probationary kindergarten teacher in Chicago, who was a member of Jehovah's Witnesses, challenged her discharge arising from her refusal to participate in the traditional pledge of allegiance to the flag, the singing of patriotic songs and the

264 . Citing *Epperson v. Arkansas*, 393 U.S. 97 (1968), discussed at § (2) above.

265 . Citing *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

266 . *Crowley v. Smithsonian Institution*, 636 F.2d 738 (CADC 1980).

observance of certain national holidays on the ground that such activities violated her religious convictions. The federal district court granted the defendant school board's motion for summary judgment in its favor, and the Seventh Circuit Court of Appeals affirmed in an opinion by Judge Harlington Wood.

> Plaintiff in seeking to conduct herself in accordance with her religious beliefs neglects to consider the impact on her students who are not members of her faith. Because of her religious beliefs, [she] would deprive her students of an elementary knowledge of our national heritage. She considers it to be promoting idolatry, it was explained during oral argument, to teach, for instance, about President Lincoln and why we observe his birthday. However, it would apparently not offend her religious views to teach about some of our past leaders less proudly regarded. There would only be provided a distorted and unbalanced view of our country's history. Parents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please. Plaintiff's right to her own religious views and practices remains unfettered, but she has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy. In this unsettled world, although we hope it will not come to pass, some of the students may be called upon in some way to defend and protect our democratic system and Constitutional rights, including [her] religious freedom. That will demand a bit of patriotism....
>
> [Her] religious freedom is not being extinguished. The Fourteenth Amendment does not create a protected interest, but if one is found to exist by reason of some independent source, the [Due Process Clause of the] Fourteenth Amendment protects it. No state statute or other rule or policy creates a protected interest for an untenured teacher in those circumstances. There is no claim that [she] has suffered a stigma by reason of her discharge. She should not and she has not.[267]

The same religious convictions seen here were encountered in *West Virginia Board of Education v. Barnette*,[268] where it was *students* of Jehovah's Witnesses' faith who objected to pledging allegiance to the flag, and were upheld in that refusal on free speech grounds by the Supreme Court. The same principle, *Palmer* shows, did not apply to one of the same faith who was in the position of a *teacher* and therefore had shouldered responsibilities as an agent of the state that could not be abandoned—while remaining a teacher—on religious freedom grounds.

(2) *Wiley v. Franklin* (1980) ("Bible Study"). From Tennessee came a case examining the constitutional propriety of a program that had operated in the public

---

267 . *Palmer v. Board of Education of City of Chicago*, 603 F.2d 1271 (1979).

268 . 319 U.S. 624 (1943), discussed at IVA6b.

schools of Chattanooga and environing Hamilton County for over half a century, in which elementary school students were instructed in a course of Bible study. Upon suit by students and parents of students challenging this arrangement, the federal district court found it unconstitutional,[269] but withheld a total ban.

> [I]n view of the uniform contention of all parties to the litigation and the uniform testimony of all witnesses introduced at the trial that a legally permissible secular Bible study course would be academically and educationally desirable, rather than enjoin all further efforts at establishing legally permissible Bible study courses, the Court proceeded to identify the legal guidelines for the structuring and teaching of such courses and afforded each party the opportunity, if they should so elect, to submit plans, policies and curricula changes in accordance with such guidelines. Proposals and counter proposals having been submitted by the parties, the Court considered those in a further opinion[270] and approved with modifications the plans and curricula submitted by the respective Boards of Education. Recognizing that the ultimate test of the constitutionality of any course of instruction founded upon the Bible must depend upon classroom performance, the Court retained jurisdiction over the parties and over the cases for the initial instructional year under the revised plans and curricula.[271]

Apparently the results were not totally satisfactory, for the plaintiffs moved the court either to monitor the Bible study courses or to enjoin them. The court then ordered the recording of not less than one regularly scheduled Bible class session in each of the three courses given in the Chattanooga schools and each of the ten courses given in Hamilton County schools. Tape recordings were made and transcribed, and the parties submitted evaluations of the tapes by academicians on both sides.

One bone of contention concerned the teachers, some of whom had taught the Bible study courses that were found to be unconstitutional in the first action. In that opinion, the court had disapproved the school boards' delegation of teacher selection and training to a private fund-raising agency, the Bible Study Committee, and required that in any further program of Bible study the teachers must be selected, employed and supervised by the school board(s) without regard to any religious test, profession of faith or religous affiliation and without the intervention of any private organization or entity. In its 1980 decision, the court determined that its guidelines had been followed, and that the several teachers who had been reemployed under the new regimen met those requirements. "To exclude persons from employment by reason of a particular faith or religious educational background would be as impermissible a religious test as to require such a faith or religious educational background," concluded the court.

---

269 . *Wiley v. Franklin*, 468 F.Supp. 133 (1979).
270 . *Wiley v. Franklin*, 474 F.Supp. 525 (1979).
271 . *Wiley v. Franklin*, 497 F.Supp. 390, 392 (1980).

The main controversy, however, centered on the more germane question of the content of the Bible study courses as actually taught. The court expressed appreciation for the numerous affidavits and counteraffidavits supplied by experts on both sides pertaining to the academic worth—or lack of worth—of the lessons, but found that aspect "beyond the scope of the Constitutional issue here presented and thus beyond the function of the Court in these lawsuits." The court reviewed the standards it had set in its previous opinions, which were based on the *Lemon* test of establishment,[272] and summarized as follows:

> If that which is taught seeks either to disparage or to encourage a commitment to a set of religious beliefs, it is constitutionally impermissible in a public school setting. If that which is taught avoids such religious instruction and is confined to objective and non-devotional instruction in biblical literature, biblical history and biblical social customs, all with the purpose of helping students gain `a greater appreciation of the Bible as a great work of literature' and source of `countless works of literature, art and music' or of assisting students [to] acquire `greater insight into the many historical events recorded in the Bible' or of affording students greater insight into the `many social customs upon which the Bible has had a significant influence,' all as proposed in the Curriculum Guide, no constitutional barrier would arise to such classroom instruction.[273]

The court reviewed the tapes of the three Bible classes taught in the city system to determine whether they met the constitutional standards thus set forth.

> One lesson was a narrative story told by the teacher to a third grade class of the Israelites' capture of the walled city of Jericho under the leadership of Joshua. The story was placed in a historical time frame and was told without Bible readings. The lesson was accompanied by the display of pictures of the city and by class participation in the making of a model of a walled city and the singing of the song "Joshua Fit the Battle of Jericho."
>
> The topic of the second lesson was the parable of the talents. The subject of the lesson was introduced to the third grade class by reference to one of Aesop's fables, with a parable being compared with the fable as a method of teaching. Jesus was identified as a teacher and the disciples were identified as his followers or his students. The Bible course teacher then recounted in narrative form the parable of the master who entrusted varying numbers of talents to his servants and who praised or condemned [them] in accordance with how they had used or concealed their talents. The lesson closed with the students participating in a re-enactment of the parable, with a concluding emphasis being placed upon the idea behind

272 . Derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at § D5 above, that test had three elements: a challenged state action must have a secular purpose, a primary effect that neither advanced nor inhibited religion, and not foster excessive entanglement between religion and government.

273 . 474 F.Supp. 525, 531.

> the parable that "practice makes perfect" and that a student's talents grow only as they are used.
>
> The third lesson was a narrative story told by the teacher to a fourth grade class about Saul and David. Once again the story was placed in a historical time frame and was told without Bible readings. As related, the story was a secular account of the establishment of the Kingdom of Israel, first under Saul, then under David, and of both the friendship and enmity between these early leaders of the Jewish nation. The lesson was accompanied by the display of a map of the area under discussion, with reference being made to the current efforts of modern day Israel to re-establish boundaries corresponding to those established by King David.
>
> From its review of the lessons from the Bible as taught by the teachers in the elementary schools of the City, the intent and purpose of the lessons appear to be secular. Their primary effect appears neither to advance nor inhibit religion. They appear to be non-devotional instruction in biblical history and biblical literature. The Court is accordingly of the opinion that the lessons include no Constitutionally impermissible religious instruction.

The primary effect of such teaching does indeed appear neither to advance religion or much of anything else. One wonders what the struggles over an obscure town in the Middle East (that no longer exists except in an artist's imaginative reconstruction) can offer to advance the general historical knowledge of third graders! Shorn of any religious significance, it lacks much of any other kind. The teacher evidently did not go into an analysis of why "the walls come a-tumblin' down," other than perhaps a conjecture about the sound waves generated by many trumpets. The parable of the talents is possibly of somewhat greater intrinsic merit, placing it in the same class with Aesop. The vicissitudes of ancient Hebrew history and the struggle between David and Saul might take on more secular significance in view of current events in the Middle East, but the finer geopolitical considerations would seem a bit advanced for fourth graders. And the the rendition of these lessons without readings from the Bible itself would seem to suggest that these particular lessons were not offered as instances of "the Bible as a great work of literature."

The main justification for including these relatively minor subjects in general elementary education was not their intrinsic importance for an understanding of the human condition (which might have been immense with respect to the one aspect sedulously omitted—their religious significance), but the fact that they served to showcase at least a token homage to a book considered sacred by many of the people of the school district but forbidden for use in public schools in any meaningful way pertinent to its sacred character. One wonders whether this carefully denatured treatment of the Bible was any great service to the religious interest of the parents and children involved, or whether they, too, preferred a denatured, token gesture as sufficient to discharge the duties of piety.

However, a similar project in the Hamilton County schools did not fare as well, not being denatured enough.

> One of the first grade lessons consisted of a narrative story of an episode from the book of Daniel. The episode related to the occasion upon which the Babylonian king, Belshazzar, called upon the Jewish exile, Daniel, to interpret the handwriting that mysteriously appeared upon a wall during the course of a royal celebration. As recounted in the lesson, Daniel instructed Belshazzar that his father, King Nebuchadnezzer, had been rendered a madman because of his wickedness, to be restored to sanity only when he acknowledged that the Supreme God controlled all kingdoms. Daniel then proceeded to instruct Belshazzar that he had not learned from this lesson, but had himself acted against the Lord of Heaven and had prayed to gods made of wood and stone and bronze, thus dishonoring the Supreme God, who determines whether people live or die. For this wickedness God had sent the hand to write upon the wall, the meaning of the writing being that God had numbered the days of Belshazzar[,] and his kingdom was to come to an end and be given unto the Persians and the Medes. The lesson concluded with Daniel's prophecy being fulfilled that very evening.

In this narrative, the children begin to get a whiff of the suggestion of a God of Judgment who holds earthly rulers accountable for their misdeeds, but that very quality raised constitutional warning flags in the judge's mind. The teacher might have adverted to the common phrase "the handwriting on the wall" or the musical classic "Belshazzar's Feast" to suggest that the story had contemporary resonance in secular culture, but the whole episode seemed a bit heavy for first graders.

> A second lesson consisted of a narrative story of an episode from the Book of Exodus given before a joint second and third grade class in which lesson it was explained that Moses received instructions from God as to the details of building and furnishing a tabernacle. The inner room of the tabernacle was to contain the ark of the covenant and to be the place where God dwelled among the Israelites. In the absence of Moses while receiving instructions from God, the Israelites resorted to the worship of a golden calf. For this idolatry God threatened to destroy them but was dissuaded from doing so by Moses. The lesson concluded with the suggestion that the children of Israel were good builders.
>
> A third lesson consisted of a narrative story from the Book of Genesis given before a first grade class in which lesson an account was given of Abraham and his nephew Lot, the story culminating in the destruction of Sodom and Gomorrah. After recounting that Abraham and Lot had separated due to the shortage of pasturage for their flocks, Lot settled in Sodom.... The lesson then continued by reciting that Abraham was visited by three angels in human form who advised Abraham that God was going to destroy Sodom and Gomorrah for their wickedness. Knowing that Lot lived in Sodom, Abraham interceded with God to spare the cities, to which God agreed provided as few as ten good people could be found in the cities. When the angels were unable to find even so few as ten righteous

> people in Sodom and Gomorrah, they succeeded only in getting Lot and his family to leave before the cities were destroyed by fire and brimstone. Contrary to God's direction, Lot's wife looked back as she was leaving Sodom, with the result that she was turned to a pillar of salt.
>
> From its review of the foregoing three lessons from the Bible..., the Court can only conclude that the intent and purpose of the lessons would be to convey a religious message rather than to convey a literary or historical message.... [I]t would appear that the primary effect of the lessons would be to promote religious beliefs, and not to convey biblical literary, historical, or social incidents, themes, or information in a non-religious or secular manner. The Court accordingly concludes that the lessons are Constitutionally impermissible in a public school setting in that they are a violation of the Establishment of Religion Clause in the First Amendment of the United States Constitution.[274]

Thus, the city's program of Bible study in public schools was approved, while the county's program of Bible study was disallowed. The court's review of these six lessons has been reported here in detail to suggest the difficult task of legally parsing religious from nonreligious content in an educational enterprise that is essentially at cross-purposes with itself. The understandable desire of parents and (some) educators that children should at least have the opportunity to gain an understanding of the religious dimension of history and culture as part of their general elementary learning is frustrated by the equally understandable prohibition against religious indoctrination by the state institutions of compulsory education. The facile formula of "teaching *about* religion without teaching religion" is something easier to say than do, especially throughout an entire year—or successive years—of curricular instruction.

The teacher of Bible study in a public school program is faced with two very difficult tasks. One is to find and adapt "stories" from the Bible for meaningful use with first, second, third, fourth, etc., graders—a task that is daunting enough for church-school teachers. The other task is to find and adapt such stories to the rather narrow aperture of "teaching *about* religion," which can bleed out whatever significance may have survived the first filter. Even in a culturally homogeneous community, such as Chattanooga and vicinity may be, it would be difficult over a period of time to find material in the Bible that could be studied without offending someone, either because the treatment could be criticized as "sectarian" or because it would be so vacuous as to offend the serious adherents of Biblical religion (Christian or Jewish), who might not want their children "vaccinated" with bowdlerized Bible "stories" against the real thing, if they should encounter it later in life.

It could almost be said that the Bible—by and large—is not a book for children. It has heights and depths, successive layers of meaning and labyrinthine cultural complexities, that are difficult enough to challenge—and confuse—adults. Simple and

274 . *Wiley v. Franklin*, 497 F.Supp. 390, *supra*.

straightforward elements can sometimes be sifted out for use with children, but their usefulness is primarily *religious*. To find simple, linear narratives that do not have religious significance is difficult, and to shallow out the religious significance of others is to dumb down the biblical material to pablum, which is the necessary quality of most "Bible study" in public schools. Chief Judge Frank W. Wilson of the Eastern District of Tennessee certainly gave the school districts a generous rein to try to come up with a constitutionally permissible program, but only one of the two districts succeeded, and one might legitimately wonder what the real payload for that one was.

(3) *Mozert v. Hawkins County Public Schools* (1987). More in continuity with the series of cases discussed above concerning evolution and creationism were objections on the part of parents to particular aspects of the public school curriculum they found offensive on religious grounds. Two remedies to this problem were possible: (1) that their children be excused from such content, or (2) that it not be taught in public schools at all. This case pursued the former remedy; the next case—*Smith v. Mobile County*—the latter.

Action was brought by fundamentalist Christian pupils and their parents against the school board of Hawkins County, Tennessee, seeking excusal of the pupils from compulsory use of the Holt, Rinehart & Winston basic reading series because its content was offensive for various reasons to the parents' religious beliefs. The school board responded that it was not feasible to fashion educational alternatives for various groups of objecting parents, and that doing so would violate the Establishment Clause by virtue of excessive state entanglement with religion.

The federal district court at first dismissed the case, but the Sixth Circuit Court of Appeals reversed and remanded.[275] The factual history of the case indicated that a number of pupils objecting to the Holt readers were permitted to use alternative reading material, but the School Board ordered this accommodation halted. The pupils then refused to read from the Holt readers and were suspended for several days, whereupon they again refused and were again suspended. After this experience, several of the pupils withdrew from public schools and were enrolled in private Christian schools.

The district court, Thomas Gray Hull, J., applied the two-step test of the Free Exercise Clause then in effect: (1) whether the government's action created a burden on the litigant's free exercise of religion, and (2) if so, whether the government could justify such burden by showing a compelling reason for its action and that it had used the least restrictive means of achieving that interest.[276] The school board insisted that the offended religious beliefs must be *central* to the objectors' religion, but the court held that no decision of the Supreme Court imposed such a requirement. The court

275. 579 F.Supp. 1051; 582 F.Supp. 201; 765 F.2d 75.

276. The trial court's paraphrase of the appellate court's remand in 765 F.2d 75, 78, citing also *Thomas v. Review Board*, 450 U.S. 707, 718 (1981), discussed at IVA5l.

concluded that the plaintiffs' religious beliefs were sincerely held and entitled to protection under the Free Exercise Clause.

The court explored the basis for their objection to the Holt series, noting that "there is no question that the reading texts teach more than just how to read."[277] The court observed that the series had a definite slant that permeated the various grade levels.

> For example, the Holt series contains a definite feminist theme, and the plaintiffs have a religious objection to stories that appear to denigrate the difference between the sexes.
>
> It appears to the Court that many of the objectionable passages in the Holt books would be rendered inoffensive, or less offensive, in a more balanced context. The problem... is one of degree. One story reinforces and builds upon the others throughout the individual texts and the series as a whole. The plaintiffs believe that, after reading the entire Holt series, a child might adopt the views of a feminist, a humanist, a pacifist, an anti-Christian, a vegetarian, or an advocate of a "one-world government."
>
> Plaintiffs sincerely believe that the repetitive affirmation of these philosophical viewpoints is repulsive to the Christian faith—so repulsive that they must not allow their children to be exposed to the Holt series. This is their religious belief. They have drawn a line, "and it is not for us to say that the line [they] drew was an unreasonable one."[278]
>
> * * *
>
> The Board has effectively required that [they] either read the offensive texts or give up their free public education.... Accordingly, the Court FINDS that [their] free exercise rights have been burdened by the school board policy.[279]

The court acknowledged that the state's interest in education was compelling; "Providing public schools ranks at the very apex of the functions of a state." But that did not necessarily settle the matter at all. There were several missing links between that lofty objective and the requirement that every student must read through the Holt series.

> However, in the instant case, the state, acting through its local school board, has chosen to further its legitimate and overriding interest in public

---

277 . *Mozert v. Hawkins County*, 647 F.Supp. 1194 (1986), n. 8.

278 . Quoting *Thomas v. Review Board, supra,* at 715.

279 . *Mozert, supra*. The court cited *Spence v. Bailey*, 465 F.2d 797 (CA6, 1972), in which a high school student had religious objections to state-required ROTC training, which were upheld by the Sixth Circuit, and *Moody v. Cronin*, 484 F.Supp. 270 (C.D.Ill. 1979), upholding Pentecostal children's religious objections to co-educational physical education classes requiring "immodest attire." Also cited was *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (CA9, 1985), cert. denied, 106 S.Ct. 85 (1985), in which a student objected on religious grounds to reading from "The Learning Tree" and was given an alternate book to read and was excused from class during discussion of the objectionable material; the student sought removal of the book from the school, but was denied on the ground that her objections had been accommodated by excusal.

> education by mandating the use of a single basic reading series.... [T]he defendants must show that the state's interest in the education of its children necessitates the uniform use of the Holt reading series—that this uniformity is essential to accomplishing the state's goals. Therefore, the Court must decide whether the state can achieve literacy and good citizenship for all students without forcing them to read the Holt series.
>
> It seems obvious that this question must be answered in the affirmative. The legislative enactments of this state admit as much. Although Tennessee has manifested its compelling interest in education through its compulsory education law, it has, by allowing children to attend private schools or to be taught at home, also acknowledged that its interest may be accomplished in other ways and may yield to the parental interest in a child's upbringing. Moreover, the fact that the state has approved several basic reading series for use in the Tennessee public schools tells us something of the expendability of any particular series.
>
> In insisting upon the necessity of uniformity, the defendants point to legitimate concerns about the difficulty of administering an alternate reading program. The Court agrees that uniformity would make the testing, grading, and teaching of reading more manageable. However, it is clear from the evidence at trial that the state's interest in uniformity is by no means absolute. Many of the expert educators who appeared at trial indicated that teaching is best accomplished through individualized instruction.
>
> The defendants also insist that any accommodation of the plaintiffs is impossible. ... [P]roof at trial demonstrated that accommodating the plaintiffs is possible without materially and substantially disrupting the educational process. The students at the middle school were provided with an alternative reading arrangement for a period of several weeks. There was no testimony at trial that those arrangements were detrimental.... In fact, those children still received above average grades for that period....
>
> A related concern of the defendants is that if plaintiffs are allowed an alternative, the Court will have "opened the floodgates" to a barrage of such requests.... While this is a very legitimate concern, such a scenario seems unlikely to occur.... Accommodating the beliefs of the small group of students involved in this case probably would not wreak havoc in the school system by initiating a barrage of requests for alternative materials.

The court had earlier observed, "The defendants may not justify burdening the plaintiffs' free exercise rights in this narrow case on the basis of what [they] might find objectionable in the future." That observation would seem to apply also to what *others* might find objectionable in the future.

> Accordingly, the Court FINDS further that, while the State of Tennessee has a compelling and overriding interest in the education of its citizens, this interest can be accomplished by less restrictive means. The uniform,

> compulsory use of the Holt series in the Hawkins County public schools is by no means essential to furthering the state's goals.

In fashioning a remedy, the court was concerned to avoid an Establishment Clause problem and came up with a unique solution.

> Given these findings, the Court must now consider the plaintiffs' demand that they be afforded alternative reading texts and the defendants' concern that such relief would violate the Establishment Clause. Evidence at trial indicated that providing alternative texts would require additional preparation by existing teachers or the hiring of part-time reading tutors. However, it was clear that this accommodation could be achieved without substantially disrupting the education process and without substantially inconveniencing either the plaintiff-students or the rest of the student body. Moreover, such an accommodation might promote a spirit of religious tolerance in the school system and impress upon the student body the high regard this society has for religious freedom.
>
> On the other hand, considerable evidence indicated that no single, secular reading series on the state's approved list would be acceptable to the plaintiffs without modifications. Reading assignments might have to be tailored to the plaintiffs' needs, and the average reading teacher might not readily recognize those portions of the texts which offend the plaintiffs' beliefs. The defendants are rightly concerned that any accommodation of the plaintiffs in the schools would have the effect of advancing a particular religion and would involve an excessive entanglement between the state and religion. It is hard to imagine any reading program for the plaintiffs offered at the schools which would not present Establishment Clause problems.
>
> Under these circumstances, the Court FINDS that a reasonable alternative which would accommodate the plaintiffs' religious beliefs, effectuate the state's interest in education, and avoid Establishment Clause problems, would be to allow the plaintiff-students to opt out of the school district's reading program. The State of Tennessee has provided a complete opt-out, a total curriculum alternative, in its home schooling statute. The Court perceives that this alternative could also work effectively for a single subject.... Although it will require extra effort on the part of the plaintiff-parents, [they] have demonstrated their willingness to make such an effort as the price of accommodation in the public school system.
>
> As the Court envisions the opt-out program, each of the student-plaintiffs would withdraw to a study hall or to the library during his or her regular reading period at school and would study reading with a parent later at home.... The child's reading proficiency would be rated by the standardized achievement tests used by the state. If deficiencies develop, the parents and school officials should confer to facilitate improvement. The Court finds that these children are bright and capable of completing such a program without serious detriment to their reading skills or citizenship....

> The home schooling opt-out does not contravene the Establishment Clause. There is neither state sponsorship, financial involvement, nor active involvement of the sovereign in religious activity.[280]

Thus was a system of "shared time" or "dual school enrollment" commanded by the trial court after extensive hearing and cogitation. The concept of permitting students to attend some classes in public schools and others in private schools (or at home) had been entertained in circles concerned about religion and its relationship to public education in the latter 1960s, and a policy statement favoring Dual School Enrollment had been adopted by the National Council of Churches, but the idea was not received with enthusiasm by either public or private school educators, who thought it onerous and chaotic. They preferred the existing system of requiring students to make an all-or-nothing choice among competing school systems without any mix-and-match. Apparently this solution to the problem in Hawkins County, Tennessee, did not commend itself to the school board, which appealed to the Sixth Circuit Court of Appeals, whose disposition will be considered next below. (Another factor in the appeal may have been the award of more than $50,000 in damages to the parents to be paid by the Hawkins County Board of Education.)

(4) *Mozert v. Hawkins County Board of Education* (1987), Appellate Decision. By the time the Sixth Circuit gave its attention to this case, it had attracted the interest of a number of parties sympathetic to one side or the other. Timothy Dyk of the Washington, D.C., firm of Wilmer, Cutler & Pickering argued the county board of education's case, and the Tennessee Commissioner of Education was admitted as an Intervening Defendant-Appellant on the county's side. The Plaintiffs-Appellees were represented by Michael Farris of Concerned Women for America. Burke Marshall of the Yale Law School entered a friend-of-the-court brief on behalf of the New York State Education Department. Another brief *amicus curiae* came in from the National Education Association, both supporting the school board. Friend-of-the-court briefs on the other side were presented by the American Jewish Committee and by the National Council of Churches (the latter written by Douglas Laycock of the University of Texas Law School).

The court's opinion was announced by Chief Judge Pierce Lively on August 24, 1987. Judge Lively recounted the history of the case that is familiar to readers of the trial court's opinion in the preceding section, but with one notable addition that was to play a significant part in the appellate court's holding.

> Like many school systems, Hawkins County schools teach "critical reading" as opposed to reading exercises that teach only word and sound recognition. "Critical reading" requires the development of higher order cognitive skills that enable students to evaluate the material they read, to

280. *Mozert, supra*, district court opinion. The court considered this relief consonant with *Spence, supra*, and *Moody, supra*.

> contrast the ideas presented, and to understand complex characters that appear in reading material.[281]

After reviewing in some detail the testimony at trial by plaintiffs about their objections to the Holt series, the Sixth Circuit posed the questions to be decided and proceeded to answer them.

> The first question to be decided is whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person's religion as forbidden by the First Amendment.... This is precisely the way the superintendent of the Hawkins County schools framed the issue in an affidavit.... "[P]laintiffs misunderstand the fact that exposure to something does not constitute teaching, indoctrination, opposition or promotion of the things exposed. While it is true that these textbooks expose the students to varying values and religious backgrounds, neither the textbooks nor the teachers teach, indoctrinate, oppose or promote any particular value or religion."...
>
> It is also clear that exposure to objectionable material is what the plaintiffs objected to albeit they emphasize the repeated nature of the exposure.... The plaintiffs did not produce a single student or teacher to testify that any student was ever required to affirm his or her belief or disbelief in any idea or practice mentioned in the various stories and passages contained in the Holt series. However, the plaintiffs appeared to assume that materials clearly presented as poetry, fiction and even "make-believe" in the Holt series were presented as facts which the students were required to believe. Nothing in the record supports this assumption....
> Proof that an objecting student was *required* to participate beyond reading and discussing assigned materials, or was disciplined for disputing assigned materials, might well implicate the Free Exercise Clause because the element of compulsion would then be present. But this was not the case either as pled or proved. The record leaves no doubt that the district court correctly viewed this case as one involving exposure to repugnant ideas and themes as presented by the Holt series.
>
> Vicki Frost [a leading plaintiff parent who had spent some 200 hours reading through the Holt series of readers] testified that an occasional reference to role reversal [as between men and women], pacifism, rebellion against parents, one-world government and other objectionable concepts would be acceptable, but she felt it was the repeated references to such subjects that created the burden....
>
> However, the plaintiffs' own testimony casts serious doubt on their claim that a more balanced presentation would satisfy their religious views. Mrs. Frost testified that it would be acceptable for the schools to teach her children about other philosophies and religions, but if the practices of other religions were described in detail, or if the philosophy

281 . *Mozert v. Hawkins County Bd. of Ed.*, 827 F.2d 1058, 1060 (CA6 1987).

> was "profound" in that it expressed a world view that deeply undermined her religious beliefs, then her children "would have to be instructed to [the] error [of the other philosophy]." It is clear that to the plaintiffs there is but one acceptable view—the Biblical view, as they interpret the Bible. Furthermore, the plaintiffs view every human situation and decision, whether related to personal belief and conduct or to public policy and programs, from a theological or religious perspective. Mrs. Frost testified that many political issues have theological roots and that there would be "no way" certain themes could be presented without violating her religious beliefs. She identified such themes as evolution, false supernaturalism, feminism, telepathy and magic as matters that could not be presented in any way without offending her beliefs. The only way to avoid conflict with the plaintiffs' beliefs in these sensitive areas would be to eliminate all references to the subjects so identified. However, the Supreme Court has clearly held that it violates the Establishment Clause to tailor a public school's curriculum to satisfy the principles or prohibitions of any religion.[282]
>
> * * *
>
> The parents in the present case want their children to acquire the skills required to live in modern society. They also want them excused from exposure to some ideas they find offensive. Tennessee offers two options to accommodate this latter desire. The plaintiff parents can either send their children to church schools or private schools, as many of them have done, or teach them at home. Tennessee prohibits any state interference in the education process of church schools.... Similarly the statute permitting home schooling by parents or other teachers prescribes nothing with respect to curriculum or the content of class work.
>
> * * *
>
> What we... hold is that the requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the Free Exercise Clause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion. There was no evidence that the conduct required of students was forbidden by their religion. Rather, the witnesses testified that reading the Holt series "could" or "might" lead the students to come to conclusions that were contrary to teachings of their and their parents' religious beliefs. This is not sufficient to establish an unconstitutional burden.[283]

This seems a wooden and disingenuous treatment of the plaintiffs' situation. "Proof that an objecting student was *required* to participate *beyond reading and discussing assigned materials*" (second emphasis added) "might well implicate the Free Exercise Clause." Reading and discussing repugnant material is a repugnant requirement, and when repugnant to one's deepest sensitivities, which religious

---

282 . Citing *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968), discussed at §3b(2) above.

283 . *Mozert,* 827 F.2d 1058, *supra*.

convictions are for people of plaintiffs' disposition, should deeply implicate the Free Exercise Clause. But the court insisted that the students were not required to *believe* what they read, as though schooling had become some kind of a spectator sport, with students simply gazing upon the passing parade of the curriculum! Students are often expected to retain—if not "believe in"—what they are "exposed to" long enough to be tested on it and are expected then to be able to recite it back again on demand. Is one expected to "believe in" the multiplication table or the periodic series? Then why not what goes by in the Holt series?

But reading was not enough, even on the court's denatured terms. The students must also involve themselves with the distasteful subject matter by *discussing* it with other students, bandying it about, holding it up for greater attention to ensure that no one might miss any of its objectionable aspects. Otherwise, they might not learn the currently touted art of "critical" thinking. At some point, most people do need to develop some skepticism about what they read or see or hear, but the early grades of schooling—which is where "exposure" to the Holt series was begun—seems premature, and the conjectures and suppositions of one's fellow pupils not the best vehicle of analysis and evaluation.

This case lifts up one of the dilemmas of modern American society. Is common schooling supposed to provide children with the basic skills for life or is it also supposed to instill in them approved ("politically correct"?) ideas and assumptions about the *good* life. The plaintiffs no doubt wanted their children to acquire the basic skills of reading, writing, arithmetic, etc., but did not want them indoctrinated with someone else's ideas about truth and falsity, vice and virtue, right and wrong. Some have criticized common schooling because it has been too far denatured of the latter, so that students are not required by the school to refrain from antisocial behavior such as cheating, while others complain that common schools are all too prone to assert some "politically correct" ideas of the moment as axiomatic. Probably no school in existence, subject to the innumerable cross-pressures and expectations of its publics, could satisfy both ends of this spectrum, and many do not satisfy either of them.

Perhaps, as the court indicated, the only solution to the plaintiffs' problem was to send their children to private schools or teach them at home. The district court had thought such a solution could be worked out on a less-than-all-or-nothing basis, but the appellate court concluded that there was no constitutionally cognizable burden and therefore no need for an injunctive remedy. Since there was no burden, there was no need for the state to demonstrate a compelling interest to justify it or to show why excusal of objectors would not be a less burdensome means of meeting the state's goals. One of the judges on the panel, Judge Cornelia G. Kennedy, in a concurring opinion, addressed that question, leaving no doubt as to where she would stand on the educational spectrum.

I agree with Chief Judge Lively's analysis and concur in his opinion. However, even if I were to conclude that requiring the use of the Holt series... constituted a burden on appellees' free exercise rights, I would find the burden justified by a compelling state interest.

[The school authorities] have stated that a principal educational objective is to teach the students how to think critically about complex and controversial subjects and to develop their own ideas and make judgments about these subjects. Several witnesses testified that the only way to achieve these objectives is to have the children read a basal reader, participate in class discussions, and formulate and express their own ideas and opinions about the materials presented in a basal reader. Thus, appellee students are required to read stories in the Holt series, make personal judgments about the validity of the stories, and to discuss why certain characters in the stories did what they did, or their values and whether those values were proper. Appellee parents testified that they object to their children reading the Holt readers, being exposed to controversial ideas in the classroom, and to their children making critical judgments and formulating their own ideas about anything for which they believe the Bible states a rule or a position....

In *Bethel School Dist. No. 403 v. Fraser*,[284] the Supreme Court stated: "The role and purpose of the American public school system was well described by two historians, saying `public education must prepare pupils for citizenship in the Republic.'" Additionally, the *Bethel School* Court stated that the state through its public schools must "inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[285] Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self-government as inculcating in the students the habits and manners of civility.

The evidence at trial demonstrated that mandatory participation in reading classes using the Holt series or some similar readers is essential to accomplish this compelling interest and that this interest could not be achieved any other way....

The state and Hawkins County School Board also have a compelling interest in avoiding disruption of the classroom. Hawkins County Schools utilize an integrated curriculum, designed to prepare students for life in a complex, pluralistic society, that reinforces skills and values taught in one subject in other areas.... For example, the students may discuss stories in the Holt readers dealing with evolution or conservation of natural resources in the science course.... This is particularly true in grades one through four where reading is taught throughout the school day, rather than in a particular period.... If the opt-out remedy were implemented, teachers in all grades would have to either avoid the students['] discussing

284 . 478 U.S. 675 (1986).

285 . Quoting "Charles and Mary Beard, *New Basic History of the United States*, (1968), p. 228."

> objectionable material contained in the Holt readers in non-reading classes or dismiss appellee students from class whenever such material is discussed. To do this the teachers would have to determine what is objectionable to appellees. This would either require that appellees review all teaching materials or that all teachers review appellees' extensive testimony. If the teachers concluded certain material fell in the objectionable classification but nonetheless considered it appropriate to have the students discuss this material, they would have to dismiss appellee students from these classes. The dismissal of appellee students from the classes would result in substantial disruption to the public schools.
>
> Additionally, Hawkins County Public Schools have a compelling interest in avoiding religious divisiveness. The Supreme Court has emphasized that the avoidance of religious divisiveness is nowhere more important than in public education, for "[t]he government's activities in this area can have a magnified impact on impressionable young minds...."[286] The opt-out remedy would permit appellee students to be released from a core subject every day *because* of their religion....
>
> The divisivenss and disruption caused by the opt-out remedy would be magnified if the schools had to grant other exemptions.... If the school district were required to accommodate exceptions and permit other students to opt-out of the reading program and other core courses with materials others found objectionable, this would result in a public school system impossible to administer....[287]

Judge Kennedy's touching faith in the schools' ability to teach critical thinking (in early grades!) and that this could be done only with the basal reader method was exceeded only by her conviction that this sort of teaching served a compelling interest of the state. These facile assumptions did not go unchallenged. The third member of the panel, Judge Danny J. Boggs, offered a sharp critique of his colleagues' conclusions and of the school authorities' pretensions.

> It seems that the court's opinion rests first on the view that plaintiffs' objection is to any exposure to contrary ideas, and that no one's religious exercise can be burdened simply by compelled exposure. Second, the opinion rests on the view that no burden can exist here because plaintiffs were not compelled to engage in any conduct prohibited by, or refrain from any practice required by, their religious beliefs.
>
> I do not believe these attempted distinctions will survive analysis. If the situation of these children is not a burden on their religious exercise, it must be because of a principle applicable to all religious objectors to public school curricula.Thus, I believe a deeper issue is present here, is implicitly decided in the court's opinion, and should be addressed openly. The school board recognizes no limitation on its power to require any

286. Quoting *Grand Rapids v. Ball*, 473 U.S. 373, 383 (1985), discussed at §D7l below.

287. *Mozert,* 827 F.2d 1058, *supra*, Kennedy concurring opinion.

curriculum, no matter how offensive or one-sided, and to expel those who will not study it, so long as it does not violate the Establishment Clause. Our opinion today confirms that right....

Preliminarily, as my colleagues indicate, we make no judgment on the educational, political or social soundness of the school board's decision to adopt this particular set of books and this general curricular approach. This is not a case about fundamentalist Christians or any particular set of beliefs. For myself, I approach this case with a profound sense of sadness. At the classroom level, the pupils and teachers in these schools had in most cases reached a working accommodation. Only by the decisions of higher levels of political authority, and by more conceptualized presentations of the plaintiffs' positions, have we reached the point where we must decide these harsh questions today. The school board faced what must have seemed a prickly and difficult group of parents, however dedicated to their children's welfare. In a similar situation, the poet Edwin Markham described a solution:

> He drew a circle that shut me out—
> Heretic, Rebel, a thing to flout.
> But Love and I had the wit to win:
> We drew a circle that took him in!

As this case now reaches us, the school board rejects any effort to reach out and take in these children and their concerns. At oral argument, the board specifically argued that it was better for both plaintiffs' children and other children that they not be in the public schools, despite the children's obvious desire to obtain some of the benefits of public schooling. Though the board recognized that their allegedly compelling interests in shaping the education of Tennessee children could not be served at all if they drove the children from the school, the board felt it better not to be associated with any hybrid program.

Plaintiffs' requests were unusual, but a variety of accommodations in fact were made, with no evidence whatsoever of bad effects. Given the masses of speculative testimony as to the hypothetical future evils of accommodating plaintiffs in any way, had there been any evidence of bad effects from what actually occurred, the board surely would have presented it. As we ultimately decide here, on the present state of constitutional law, the school board is indeed entitled to say, "my way or the highway." But in my view the school board's decision here is certainly not required by the Establishment Clause.

II

Returning to the treatment of plaintiffs' free exercise claim, I believe this is a more difficult case than outlined in the court's opinion. I disagree with the first proposition in the court's opinion, that plaintiffs object to any exposure to any contrary idea. I do not believe we can define for plaintiffs their belief as to what is religiously forbidden to be so comprehensive, where both they and the district court have spoken to the contrary. A reasonable reading of plaintiffs' testimony shows they object to the overall

effect of the Holt series, not simply to any exposure to any idea opposing theirs....

Ultimately, I think we must address plaintiffs' claims as they actually impact their lives: it is their belief that they should not take a course of study which, on balance, to them, denigrates and opposes their religion, and which the state is compelling them to take on pain of forfeiting other benefits of public education.

Their view may seem silly or wrong-headed to some, but it is a sincerely held religious belief. By focussing narrowly on references that make plaintiffs appear so extreme that they could never be accommodated, the court simply leaves resolution of the underlying issues to another case, when we have plaintiffs with a more sophisticated understanding of our own and Supreme Court precedent, and a more careful and articulate presentation of their own beliefs.

Under the court's assessment of the facts, this is a most uninteresting case. It is not the test case sought, or feared, by either side. The court reviews the record and finds that the plaintiffs actually want a school system that affirmatively teaches the correctness of their religion, and prevents other students from mentioning contrary ideas. If that is indeed the case, then it can be very simply resolved. It would obviously violate the Establishment Clause for any [public] school system to agree to such an extravagant view.

It should be noted and emphasized that if such is the holding, this decision is largely irrelevant to the national legal controversy over this case. The extent to which school systems may constitutionally require students to use educational materials that are objectionable to, contrary to, or forbidden by their religious beliefs is a serious and important issue. The question of exactly how terms such as "contrary," "objectionable," and "forbidden," are to be assessed in the context of religious beliefs is a subtle and interesting one. But this decision, as I understand it, addresses none of those questions. When a case arises with more sophisticated or cagey plaintiffs, or less skillful cross-examination, that true issue must be faced anew, with little guidance from this decision.... The trial strategies of the two sides were clear. The plaintiffs understood that the more thoroughgoing and extensive their objections, the less possible it would be to accommodate them within the bounds of the Constitution....

The defendants equally clearly sought to depict plaintiffs' objections in the most constitutionally offensive terms. By skillful cross-examination, they did elicit on some occasions the statements on which the court relies. I believe these two lines of apparently contradictory testimony can be reconciled by recognizing the different meanings or usage of the same words or phrases such as "objectionable," "want," or "opposed to." These words can cover a gamut from mild objection or desire to constitutional insistence. Something may be "objectionable," in the sense that one would rather it did not happen, but it is something that must be endured. Conversely, it may be "objectionable" in the sense that it should not be permitted or one should not be required to endure it. Thus, I may find

Muzak on buses, or in-flight movies, "objectionable," but that's life. However, one might find the display of pornographic material in either location "objectionable" to the point that a relatively captive audience legally should not be subjected to it.

Similarly, plaintiffs may "want" a school system tailored exactly to their religious beliefs (that is why many people choose religious education), but they very well know that that is constitutionally impermissible. They "want" a particular type of accommodation that they have sought in this law suit, and they believe that they are constitutionally entitled to that. Judge Hull, who sat through eight days of trial testimony over these very issues, came to the same conclusion I do, expressed it in the form of a finding, and should not be overturned unless that finding is clearly erroneous. In my reading of the testimony, the judge's finding is not only not clearly erroneous, but it can only be reversed by a failure to recognize a distinction between the ideal education the parents want, and that level of accommodation and education which they believe is constitutionally required and which they "want" here. Thus, I believe we must take plaintiffs' claims as they have stated them—that they desire the accommodation of an opt-out, or alternative reading books, and no more. That is all they have ever asked for in their pleadings, in the arguments at trial and in appellate briefing and argument.

III

I also disagree with the court's view that there can be no burden here because there is no requirement of conduct contrary to religious belief. That view both slights plaintiffs' honest beliefs that studying the full Holt series would be conduct contrary to their religion, and overlooks other Supreme Court Free Exercise cases which view "conduct" that may offend religious exercise at least as broadly as do plaintiffs.

On the question of exposure to, or use of, books as conduct, we may recall the Roman Catholic Church's *"Index Librorum Prohibitorum."* This was a list of those books the reading of which was a mortal sin, at least until the second Vatican Council in 1962. I would hardly think it can be contended that a school requirement that a student engage in an act (the reading of the book) which would specifically be a mortal sin under the teaching of a major organized religion would be other than "conduct prohibited by religion," even by the court's fairly restrictive standard. Yet, in what constitutionally important way can the situation here be said to differ from that?...

While this argument would seem persuasive that studying objectionable material would be "conduct" contrary to religious belief, the court's opinion attempts to distinguish our case from *Thomas v. Review Board*,[288] by emphasizing that the plaintiff there was asked to "engage in a practice" forbidden by his religion, and the plaintiffs here are not. I do not believe that distinction bears up under scrutiny. Thomas had to hook up chains to a conveyor in a factory. For Thomas, there was no commandment against

288 . 450 U.S. 707 (1981), discussed at IVA5l.

hooking up chains. He asserted that this would be "aiding in the manufacture of items used in the advancement of war," because it was in a tank turret line, but he had also said that he would work in a steel factory that might ultimately sell to the military. (A fellow Witness was willing to work in the turret line.) This distinction appears as convoluted as plaintiffs' distinctions may seem to some. Nevertheless, Thomas drew his line, and the Supreme Court respected it and dealt with it. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."

Here, plaintiffs have drawn their line as to what required school activities, what courses of study, do and do not offend their beliefs to the point of prohibition. I would hold that if they are forced over that line, they are "engaging in conduct" forbidden by their religion.... The plaintiffs provided voluminous testimony of the conflict (in their view) between reading the Holt readers and their religious views, including extensive Scripture references.... I would think it could hardly be clearer that they believe their religion commands, not merely suggests, their course of action....

* * *

I have given considerable thought to Judge Kennedy's opinion discussing the importance of the state's interest in "critical reading" and noting the plaintiffs' objection to such instruction.... I disagree with the idea that such a teaching of "critical reading" would constitute a compelling state interest which entitles the school board to deny plaintiffs the accommodation they seek. The school board argues that "critical reading" is something so special that in the words of [Dr.] Farr [the state's expert on the teaching of reading], "it would be almost impossible to [teach critical reading consistent with the plaintiffs' religious objections]." This notion seems difficult to support. The simple answer to such a claim would seem to be the type of testing which is mandated for all non-public school students in Tennessee. Plaintiffs are quite confident of their ability to pass any consistent tests propounded by the state. Perhaps because of these facts, the state seems unwilling to rest its claims to educational damage on any such tests, and expounds a particularly slippery standard for "critical reading." In particular, when Farr is asked (on direct examination, by the school board's own attorney) if plaintiffs' children, who are getting good grades, must be learning what the state wants them to, he replies, "It's very difficult to measure evaluative and critical reading.... It would be very difficult to know... if that youngster is making adequate progress."

It seems to me to be extremely difficult, not to say unfair, to rest a compelling state interest on the asserted failure of plaintiffs to learn something which defendants are apparently unable to define and unwilling to test for.... Their view seems to be that if we are teaching it in the state classrooms, critical reading must be happening, but if plaintiffs are learning reading outside that class (and testing as well as, or better

> than, the average state student), it must not be happening. I cannot agree with any such analysis of the state's interest in "critical reading."
>
> In any event, the test for a compelling interest is quite strict, and requires far more than this or other speculations on possible future evils.
>
> * * *
>
> There remains the question of which religious conduct may not be burdened (and thus must be accommodated unless a compelling interest justifies it), by government action.... For me, the key fact is that the [Supreme] Court has almost never interfered with the prerogative of school boards to set curricula, based on free exercise claims....
>
> From a common sense view of the word "burden," *Sherbert [v. Verner]*[289] and *Thomas* are very strong cases for plaintiffs. In any sensible meaning of a burden, the burden in our case is greater than in *Thomas* or *Sherbert*. Both of those cases involved workers who wanted unemployment compensation because they gave up jobs based on their religious beliefs. Their actual losses that the Court made good, the actual burden that the Court lifted, was one or two thousand dollars at most. Although this amount of money was certainly important to them, the Court did not give them their jobs back. The Court did not guarantee that they would get any future job. It only provided them access to a sum of money equally with those who quit work for other "good cause" reasons.
>
> Here, the burden is many years of education, being required to study books that, in plaintiffs' view, systematically undervalue, contradict and ignore their religion. I trust it is not simply because I am chronologically somewhat closer than my colleagues to the status of the students involved here that I interpret the choice forced upon the plaintiffs here as a "burden."

After uttering more than a hundred column-inches of creative and critical writing, Judge Boggs (gratuitously reminding his colleagues that they were much older than he) seemed about to conclude by announcing a ringing dissent, but such was not the case. Instead he wound up concurring in the result reached by the other two members of the panel reversing the court below.

> However, constitutional adjudication, especially for a lower court, is not simply a matter of common sense use of words.... I do not support an extension of the principles of *Sherbert* and *Thomas* to cover this case, even though there is a much stronger economic compulsion exercised by public schooling than by any unemployment compensation system. I think the constitutional basis for those cases is sufficiently thin that they should not be extended blindly. The exercise there was of a narrow sort, and did not explicitly implicate the purposes or methods of the program itself.
>
> Running a public school system of today's magnitude is quite a different proposition. A constitutional challenge to the content of instruction... is a challenge to the notion of a politically-controlled school system. Imposing

289 . 374 U.S. 398 (1963), discussed at IVA7c.

on school boards the delicate task of satisfying the "compelling interest" test to justify failure to accommodate pupils is a significant step. [Footnote: I do not think there is any evidence that actually accommodating pupils in practice need be as difficult as the state contends. Indeed, the state espouses a theory of rigidity (and finds alleged experts to support it) that seems a bit ludicrous in this age of individualized attention to many kinds of student language and interest. There was no evidence of actual confusion or disruption from the accommodations that did take place.]
It is a substantial imposition on the schools to *require* them to justify each instance of not dealing with students' individual, religiously compelled, objections (as opposed to *permitting* a local, rough and ready, adjustment), and I do not see that the Supreme Court has authorized us to make such a requirement.

Our interpretation of those key phrases of our Bill of Rights in the school context is certainly complicated by the fact that the drafters of the Bill of Rights never contemplated a school system that would be the most pervasive benefit of citizenship for many, yet which would be very difficult to avoid.... Had the Founders recognized the possibility of state intervention of this magnitude, they might have written differently. However, it is difficult for me to see that the words "free exercise of religion," at the adoption of the Bill of Rights, implied a freedom from state teaching, even of offensive material, when some alternative was legally permissible.[290]

Therefore, I reluctantly conclude that under the Supreme Court's decisions as we have them, school boards may set curricula bounded only by the Establishment Clause, as the state contends. Thus, contrary to the analogy plaintiffs suggest, pupils may indeed be expelled if they will not read from the King James Bible, so long as it is only used as literature, and not taught as religious truth.[291] Contrary to the position of *amicus* American Jewish Committee, Jewish students may not assert a burden on their religion if their reading materials [in public schools] overwhelmingly provide a negative view of Jews or factual or historical issues important to Jews, so long as such materials do not assert any propositions as religious truth, or do not otherwise violate the Establishment Clause.

The court's opinion well illustrates the distinction between the goals and values that states may try to impose and those they cannot, by distinguishing between teaching *civil* toleration of other religions, and teaching *religious* toleration of other religions. It is an accepted part of public schools to teach the former, and plaintiffs do not quarrel with that. Thus, the state may teach that all religions have the same civil and political rights, and must be dealt with civilly in civil society. The state itself

290. Citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the "Magna Carta" of private schooling, discussed at § B1b above.

291. Citing *Abington School Dist. v. Schempp*, 374 U.S. 203, 224-5 (1963), discussed at § C2b(2) above, and *Donahoe v. Richards*, 38 Me. 379, 61 Am.Dec. 256 (1854), discussed at § 2a(1) above.

> concedes it may not do the latter. It may not teach as truth that the religions of others are just as correct *as religions* as plaintiffs' own.
>
> It is a more difficult question when, as here, the state presents materials that plaintiffs sincerely believe preach religious toleration of religions by consistent omission of plaintiffs' religion and favorable presentation of opposing views.
>
> [Footnote: For example, they noted that of 47 stories referring to, or growing out of, religions (including Islam, Buddhism, American Indian religion and nature worship), only 3 were Christian, and none Protestant.]
>
> Our holding requires plaintiffs to put up with what they perceive as an unbalanced public school curriculum, so long as [it] does not violate the Establishment Clause. Every other sect or type of religion is bound by the same requirement.... Rather, unless the Supreme Court chooses to extend the principles of *Thomas* to schools, the democratic principle must prevail.
>
> [Footnote: Plaintiffs are, of course, free to work politically and by education to change the school curriculum, just as others worked and succeeded in making the changes to which plaintiffs object.]
>
> Schools are very important, and some public schools offend some people deeply. That is one major reason private schools of many denominations—fundamentalist, Lutheran, Jewish—are growing. But a response to that phenomenon is a political decision for the schools to make.... It may well be that we would have a better society if children and parents were not put to the hard choice posed by this case. But our mandate is limited to carrying out the commands of the Constitution and the Supreme Court.[292]

Judge Boggs was clearly wrestling with a central question of this volume: how a rising generation should be protected from the inculcation by the common schools with faiths and values alien to their parents. He regretfully came to the conclusion that it was not a problem that he—or the lower courts—could resolve, but it continues to arise in various forms, as other cases demonstrate.

(5) *Smith v. Mobile County* (1987). In the same year a case was decided in Alabama with a fact-setting similar to *Mozert*—opposition by parents to textbooks being used in the public schools their children attended—but which sought another remedy. Rather than merely gaining excusal for their children from use of the objectionable books, the plaintiffs in the Alabama case sought removal of the books from the public schools entirely. How that all came about was a curious sequence of events.

This case was a sort of spin-off from *Jaffree v. Wallace*, which the Supreme Court ultimately reviewed and decided that an Alabama statute requiring a moment of silence in all public school classrooms for "silent meditation *or prayer*" was

292 . *Mozert,* 827 F.2d 1058, *supra*, Boggs opinion.

unconstitutional.[293] That case originated in the courtroom of Chief Judge W. Brevard Hand, who admitted as intervenor-defendants a number of parents who contended that if prayer was to be excluded from the classroom, as plaintiff Ishmael Jaffree desired, their rights to the free exercise of religion would be violated. Judge Hand ruled that his federal district court lacked jurisdiction over the issues because the Constitution had not been amended to apply the First Amendment to the states, and the courts did not have power to make that application. The issues raised by Jaffree, et al., were cognizable by state constitutions and laws and should be litigated in state courts, if at all.[294]

Judge Hand's unique—one might even say quixotic—view was forthwith rejected by the Eleventh Circuit Court of Appeals, which reversed the dismissal and remanded the case with instructions to issue an injunction prohibiting the prayer practices complained of.[295] That disposition was appealed to the Supreme Court, which upheld the Eleventh Circuit's ruling, including the reminder that the lower courts are bound by the doctrine of *stare decisis*—that the application of the First Amendment to the states had already long been settled, and the lower courts were bound by it.

Judge Hand then "realigned" the parties, making the previous intervenor-defendants the plaintiffs to reassert their complaint as a cause of action under the Establishment Clause, in effect announcing that if all theistic religion was barred from the public school classroom, then all nontheistic religion should be also, by which the (new) plaintiffs meant the "religions" of secularism, humanism, evolution, materialism, agnosticism, atheism and others. He summarized those contentions as follows:

> At least half of the original trial dealt with textbooks and, though this was not an issue on appeal, it was an issue squarely presented to the Court. One of the positions the original 624 intervenors, now plaintiffs, took was that humanism is being advanced in the textbooks. It is a religion and therefore should be excluded as have other religious beliefs.... Another area of contention deals with the inhibition of religion. The plaintiffs content that when the tenets of only one faith are advanced it inhibits other religions. When facts about a religion are regularly censored or excluded from textbooks, that equally inhibits that religion.... The plaintiffs contend that they can demonstrate that the textbooks leave out all meaningful discussion of the part that Christianity and Judaism have played in the history of the United States, and when you do this you relegate those religions to a position of insignificance.

---

293 . *Wallace v. Jaffree*, 472 U.S. 38 (1985), discussed at § C2d(8) above.

294 . *Jaffree v. Board of School Comissioners of Mobile County*, 554 F.Supp. 1104 (1983). This rejection of the "incorporation" of the Religion Clauses of the First Amendment into the Due Process Clause of the Fourteenth Amendment, thus making them applicable to the states, was directly counter to decisions of the Supreme Court in 1943, 1947 and reiterated in 1963, as discussed at IIA2a.

295 . 705 F.2d 1526 (1983).

The plaintiffs go on to say that they are not asking that their beliefs be imposed upon anyone, just the opposite. Taxpayers, including themselves, should not be forced to support a system that works against their efforts to pass on their faith to their children....

The response of the state defendants... [is that the state has adopted no ideological or antagonistic approach to religion of any sort in any of its textbooks....

The state does admit that a lack of reference to the historical contributions and roles of religion in the development of this country represents poor scholarship, and agrees that it is appropriate that the state superintendent take steps to correct this deficiency. For this reason, these omissions of historical fact in the textbooks cannot be a legitimate basis for the granting of any relief. Any defalcation by the state simply by omitting certain facts from its books cannot be found to create a burden on the free exercise of the plaintiffs' religion.

The state defendants further contend that the evidence will not show the establishment of any religion by the actions of the state when you apply the *Lemon v. Kurtzman* tests.[296] Secondarily, they argue that secular humanism is not a religion and, if in fact it is, it is a religion established by the Constitution itself.

The [new] defendant-intervenors are parents of students attending the Mobile County public school system.... [They] joined this case to defend the textbooks against the charges of the plaintiffs that these books unconstitutionally espoused the religion of secular humanism and unconstitutionally inhibited the religion of Christianity because they don't say enough about it. These defendants contend that the textbooks are doing neither of these things and that secular humanism is not a religion. It is their stated position that secular humanism is nothing more than a convenient label that attaches to opinions and facts that do not comport with religious world views; that where the textbooks do, in fact, contain statements consistent with the beliefs of some secular humanists, they likewise contain statements that are consistent with the beliefs of some Christians. This fact does not mean that these textbooks establish a religion or unconstitutionally inhibit anyone's free exercise of their religion.... There is no constitutional prohibition against poorly written passages in history textbooks, and even if some of the passages are offensive to Christians, they have no appreciable effect on the spiritual life of the children who read them. Also, any isolation or alienation that can be shown cannot be the result of the textbook passsages questioned, but are almost inevitably the result of clashes between views of biblical literalists and our modern society. In other words, the intervenors say, this is not a religious case, but a case about clashes of culture.[297]

---

296. Reference is to the three-prong test of establishment in 403 U.S. 602 (1971), discussed at § D5.

297. *Smith v. Board of School Commissioners of Mobile County*, 655 F.Supp. 939 (S.D.Ala., 1987).

Thus the court characterized the conflicting understandings of the case, which summarized the general dispute arising from the clash of "cultures" encountering each other in the common school, the basic institution of civilizing in the contemporary American society. Following this introduction, the court reviewed in great detail the testimony of leading academic authorities—Russell Kirk, Paul Kurtz, Timothy Smith, James Hitchcock, Delos McKown, James Davison Hunter and others—who appeared in the courtroom and testified at length about scholarly understandings of education, religion, "humanism," etc. The court then issued its Conclusions of Law.

> It must first be noted that this case is not about returning prayer to the schools.... Neither does this case represent an attempt of narrow-minded or fanatical pro-religionists to force a public school system to teach only those opinions and facts they find digestible. Finally, this case is not an attempt by anyone to censor materials deemed undesirable, improper or immoral. What this case *is* about is the allegedly improper promotion of certain religious beliefs, thus violating the constitutional prohibitions against the establishment of religion, applicable to the states through the Fourteenth Amendment....
>
> ... The Court finds that the plaintiffs herein seek objective education, not partisan indoctrination. The plaintiff-witnesses did not complain of simple exposure to improper ideas, but of systematic indoctrination. All contended that a man-centered belief-system, which they know by the appellation "secular humanism," is promoted in the public schools to the detriment of their children's first amendment right of free exercise, all in violation of the establishment clause.
>
> [Footnote: The [defendants] have argued that the plaintiffs could not point to a specific instance of infringement on their, or their children's, free exercise. This misses the point. Any establishment clause violation *per se* infringes the rights of every adherent to a belief other than that established, and, arguably, the rights of the "favored" adherents as well.]

The court spent many pages wrestling with the Supreme Court's religion clause decisions and then sought to apply the principles derived therefrom to the case at hand.

> Any definition of religion must not be limited... to traditional religions, but must encompass systems of belief that are equivalent to them for the believer.... The Constitution exists to establish a government to effectively preserve the rights of people. The first amendment religion clauses further one aspect of that goal: the *people's* religious freedom. Religion must therefore be defined, for first amendment purposes, in a way that protects the people's right to define their religious beliefs, yet leaves the people's government leeway to regulate activities to protect other rights and privileges that are unrelated to religion....
>
> [A]ll religious beliefs may be classified by the questions they raise and the issues they address. Some of these matters overlap with non-religious

governmental concerns. A religion, however, approaches them on the basis of certain fundamental assumptions with which governments are unconcerned. These assumptions may be grouped as about:

1) the existence of supernatural and/or transcendent reality;

2) the nature of man;

3) the ultimate end, or goal or purpose of man's existence, both individually and collectively;

4) the purpose and nature of the universe....

Whenever a belief system deals with fundamental questions of the nature of reality and man's relationship to reality, it deals with essentially religious questions. A religion need not posit a belief *in* a deity, or a belief *in* supernatural existence. A religious person adheres to some position on whether supernatural and/or transcendent reality exists at all, and if so, how, and if not, why. A mere "comprehensive world-view" or "way of life" is not by itself enough to identify a belief system as religious. A world-view may be merely economic, or sociological, and a person might choose to follow a "way of life" that ignores ultimate issues addressed by religions. Describing a belief as comprehensive is too vague to be an effective definition under the religion clauses; some religious persons may consider some issues as peripheral that others find central to their beliefs. Diet is one example of this.... Equating comprehensiveness with religion results in an overinclusive definition. A religious system should thus be comprehensive, but only in that the potential exists to resolve as yet unasked moral questions....

In the present case, the plaintiffs contend that a particular belief system fits within the first amendment definition of religion.... All of the experts, and the class representatives, agreed that this belief system is a religion which:

makes a statement about supernatural existence a central pillar of its logic;

defines the nature of man;

sets forth a goal or purpose for individual and collective human existence;

defines the nature of the universe, and thereby delimits its purpose.

It purports to establish a closed definition of reality; not closed in that adherents know everything, but in that everything is knowable: can be recognized by the human intellect aided only by the devices of that intellect's own creation or discovery. The most important belief of this religion is its denial of the transcendent and/or supernatural: there is no God, no creator, no divinity. By force of logic, the universe is thus self-existing, completely physical and hence, essentially knowable. Man is the product of evolutionary, physical, forces. He is purely biological and has no supernatural or transcendent spiritual component or quality. Man's individual purpose is to seek and obtain personal fulfillment by freely developing every talent and ability, especially his rational intellect, to the highest level. Man's collective purpose is to seek the good life by the

increase of every person's freedom and potential for personal development.

In addition, humanism, as a belief system, erects a moral code and identifies the source of morality. This source is claimed to exist in humans and the social relationship of humans. Again, there is no spiritual or supernatural origin for morals: man is merely physical, and morals, the rules governing his private and social conduct, are founded only on man's actions, situation, and environment. In addition to a moral code, certain attitudes and conduct are proscribed since they interfere with personal freedom and fulfillment. In particular any belief in a deity or adherence to a religious system that is theistic in any way is discouraged.

Secular humanism, or humanism in the sense of a religious belief system (as opposed to humanism as just an interest in the humanities), has organizational characteristics. Some groups are more structured and heirarchical [*sic*], others less so. These include the American Humanist Association, the Counsel [*sic*] for Democratic and Secular Humanism, and the Fellowship of Religious Humanists. These organizations proselytize and preach their theories with the avowed purpose of persuading non-adherents to believe as they do....

... For first amendment purposes, the commitment of humanists to a non-supernatural and non-transcendent analysis, even to the point of hostility toward and outright attacks on all theistic religions, prevents them from maintaining the fiction that this is a non-religious discipline.... Secular humanism is religious for first amendment purposes because it makes statements based on faith-assumptions.

To say that science is only concerned with data collected by the five senses as enhanced by technological devices of man's creation is to define *science's* limits.... However, to claim that there is nothing real beyond observable data is to make an assumption based not on science, but on faith, faith that observable data is all that is real. A statement that there is no transcendent or supernatural reality is a *religious* statement....

To demand that there be physical proof of the supernatural, and to claim that an apparent lack of proof means the supernatural cannot be accepted, is to create a religious creed. It is not scientific to say that because there is no physical proof of the supernatural, we must base moral theories on disbelief and skepticism. If there is no evidence, the theory, one way or the other, has nothing to do with science. Religious persons can and do conduct rational and systematic debate on matters of *faith*. The physical sciences do not preclude religion and religious faith. They examine other areas of inquiry, and are unconcerned, yet compatible with, religious inquiry. The Court is holding that the promotion and advancement of a religious system occurs when one faith-theory is taught to the exclusion of others[,] and this is prohibited by the first amendment religion clauses.... For purposes of the first amendment, secular humanism is a religious belief system, entitled to the protection of, and subject to the prohibitions

> of, the religion clauses. It is not a mere scientific methodology that may be promoted and advanced in the public schools.

Remarkably, the court—while dutifully rehearsing the roster of most of the Supreme Court's religion cases—mentioned one in passing in which the Supreme Court asserted in a footnote the precise point Judge Hand was laboriously seeking to establish, but he did not cite it for that purpose: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, *Secular Humanism* and others."[298] Of course, since that statement was not essential to the holding that an atheist could not be denied a position as notary public, it is *dicta*, and perhaps sub*dicta* at that, but it is surprising that Judge Hand did not mention it to bulwark his plausible but vulnerable conclusions.

The final step of the court's lengthy labors was to determine whether the textbooks in question impermissibly advanced the "religion" of secular humanism.

> ... [T]he Supreme Court has declared that teaching religious tenets in such a way as to promote or encourage a religion violates the religion clauses. This prohibition is not implicated by mere coincidence of ideas with religious tenets. Rather, there must be systematic, whether explicit or implicit, promotion of a belief system as a whole. The facts showed that the State of Alabama has on its state [approved] textbook list certain volumes that are being used by [public] school systems in this state, which engage in such promotion....
>
> The virtually unanimous conclusion of the numerous witnesses, both expert and lay, party and non-party, was that textbooks in the fields examined were poor from an educational perspective. Mere rotten and inadequate textbooks, however, have not yet been determined to violate any constitutional provision, much less the religion clauses.... As to the history books, Dr. Smith and Dr. Vitz testified that all of them omitted numerous significant *facts about* religion and religious contributions to American history. Some of the books were worse than others.., but none were good....
>
> The pattern in these books is the omission of religious aspects to significant American events. The religious significance of much of the history of the Puritans is ignored. The Great Awakenings are generally not mentioned. Colonial missionaries are either not mentioned or represented as oppressors of native Americans. The religious influence on the abolitionist, women's suffrage, temperance, modern civil rights and peace movements is ignored or diminished to insignificance. The role of religion in the lives of immigrants and minorities, especially southern blacks, is rarely mentioned. After the Civil War, religion is given almost no play.... [T]hey were a matter of writing the facts with a tone and attitude ignoring or denigrating religion....

298 . *Torcaso v. Watkins*, 367 U.S. 488 (1961) (emphasis added), discussed at VB2.

> ...To what extent can omissions constitute a violation of the first amendment religion clauses?
>
> First, the Supreme Court has recognized a right to not be prevented from learning material if it was excluded for religious reasons and there is a legitimate secular or non-religious (as opposed to anti-religious or irreligious) reason for teaching the material.[299] Thus an omission can constitute a first amendment violation. Second, a number of commentators contend that *sufficient* omissions violate religious freedom.[300]... Omissions, if sufficient, do affect a person's ability to develop religious beliefs and exercise that religious freedom guaranteed by the Constitution. Do the omissions in these history books cross that threshold? For some of them, yes. In addition to omitting particular historical events with religious significance, these books uniformly ignore the religious aspect of most American culture. The vast majority of Americans, for most of our history, have lived in a society in which religion was a part of daily life. This aspect was not something that most people even thought about, or had to; it was a given, it was axiomatic, just as telephones, automobiles and fast food are a given of current culture. For many people, religion is still this important. One would never know it by reading these books. Religion, where treated at all, is generally represented as a private matter, only influencing American public life at some extraordinary moments. This view of religion is one humanists have been seeking to instill for fifty years. These books assist that effort by perpetuating an inaccurate historical picture. This Court cannot define with absolute precision the way in which a history book should be written to cure these problems, nor would that be desirable. What this Court can and does say is that its independent perusal of these books forces it to agree in general with the conclusions of Dr. Smith and Dr. Vitz. These history books discriminate against the very concept of religion, and theistic religions in particular, by omissions so serious that a student learning history from them would not be apprised of relevant facts about America's history. Even where the factor of religion is included, as in statements that some colonies were founded to obtain religious freedom, there is rarely an explanation of Christianity's involvement. The student would reasonably assume, absent other information, that theistic religion is, at best, extraneous to an intelligent

---

299 . *Epperson v. Arkansas*, 393 U.S. 97 (1968), discussed at § C3b(2) above.

300 . Here followed a litany of articles laying the foundation for the court's thesis:
McGarry, "The Unconstitutionality of Exclusive Government Support of Entirely Secularist Education," 28 *Cath.Law* 1 (1983); Nielsen, "The Advancement of Religion Versus Teaching About Religion in the Public Schools," 26 *J.Ch.& St.* 105 (1984); Note, "The Myth of Religious Neutrality by Separation in Education," 71 *Va.L.Rev.* 127 (1985); Horn, "Secularism and Pluralism in Public Education," 7 *Harv.J.L.& Pub.* 177 (1984); Louisell, "Does the Constitution Require a Purely Secular Society?" 26 *Cath.U.L.Rev.* 20 (1976); Toscano, "A Dubious Neutrality: The Establishment of Secularism in the Public Schools," 1979 *B.Y.U.L.Rev.* 177; Whitehead and Conlan, "The Establishment of the Religion of Secular Humanism and Its First Amendment Implications," 10 *Tex.Tech.L.Rev.* 1 (1978); Comment, "Secularism in the Law: The Religion of Secular Humanism," 8 *Ohio N.U.L.Rev.* 329 (1981).

> understanding of this country's history. The texts reviewed are not merely bad history, but lack so many facts as to equal ideological promotion. The Court notes that... [defendants] did not even conduct a rearguard action to ward off the assault on these deplorable history texts....
>
> The fifth grade social studies books are all elementary grade American history texts. They suffer defects worse than those of the high school books. References to religion are isolated[,] and the integration of religion in the history of American society is ignored.
>
> ... Although the role and significance of religion in American life has altered over the years, the picture portrayed by these series of books[301] relegates religion to *other* cultures, *other* times and *other* places. These books teach that this is how people *are*: that people's actions, behaviors, jobs, schooling, their very lives are based on anything but religion. The factual inaccuracies are so grave as to rise to a constitutional violation....

The court then turned to the textbooks used in "home economics," concerning which the defendants had mounted their "heaviest artillery" of defense (as the court viewed it). These were books dealing with moral and behavioral questions and were based on certain psychological schools of thought that the court attributed to John Dewey, Carl Rogers, Abraham Maslow and other writers much in vogue in recent decades.

> According to humanistic psychology, as with humanism generally, man is the center of the universe and all existence. Morals are a matter of taste, dependent upon whether the consequences of actions satisfy human "needs." These needs are always defined as purely temporal and non-supernatural. Moreover, the books imply strongly that a person uses the same process in deciding a moral issue that he uses in choosing one pair of shoes over another. The books do not state that this is *a theory* of the way humans make choices, they teach the student that things *are* this way. This claim, according to Dr. Coulson, Dr. Baer, Dr. Strike, and even Dr. Kurtz, is not a legitimate scientific claim, but a faith-statement: an assumption based on a particular vision of human nature unrelated to science.
>
> The books teach that the student must determine right and wrong based only on his own experience, feelings and "values." These "values" are described as originating within. A description of the origin of morals must be based on a faith-assumption: a religious dogma. The books are not simply claiming that a moral rule must be internally accepted before it becomes meaningful, because that is true of *all* facts *and* beliefs. The books require the student to accept that the validity of a moral choice is only to be decided by the student. The requirement is not stated explicitly. Instead, the books repeat, over and over, that the decision is "yours alone," or is "purely personal" or that "only you can decide." The emphasis and overall approach implies, and would cause any reasonable, thinking student to infer, that the book is teaching that moral choices are just a

301 . This reference is to the remaining social studies texts, reviewed by Dr. Hunter.

matter of preference, because, as the books say, "You are the most important person in your life." This highly relativistic and individualistic approach constitutes the promotion of a fundamental faith claim opposed to other religious faiths. Such a relativistic claim can only be made on the basis of a faith assumption. This faith assumes that self-actualization is the goal of every human being, that man has no supernatural attributes or component, that there are only temporal and physical consequences for man's actions, and that these results, alone, determine the morality of an action. This belief strikes at the heart of many theistic religions' beliefs that certain actions are in and of themselves immoral, *whatever the consequences*, and that, in addition, actions will have extra-temporal consequences....

The Court is not holding that high school home economics books must not discuss various theories of human psychology. But it [*sic*] must not present faith based systems to the exclusion of other faith based systems, it must not present one as true and the other as false, and it *must* use a comparative approach to withstand constitutional scrutiny.

The Court therefore proceeds to consider what relief is appropriate in light of its findings that use of these texts violates the religion clauses of the first amendment.

The question arises how public schools can deal with topics that overlap with areas covered by religious belief. Mere coincidence between a statement in a textbook and a religious belief is not an establishment of religion. However, some religious beliefs are so fundamental that the act of denying them will completely undermine that religion. In addition, denial of *that* belief will result in affirmance of a contrary belief and result in the establishment of an opposing religion.

The state may teach that lying is wrong, as a social and civil regulation, but if, in doing so it advances a reason for the rule, the possible different reasons must be explained evenhandedly....

Teaching that moral choices are purely personal and can only be based on some autonomous, as yet undiscovered and unfulfilled, inner self is a sweeping fundamental belief that must not be promoted by the public schools. The state can, of course, teach the law of the land, which is that each person is responsible for, and will be held to account for, his actions. There is a distinct practical consequence between this fact, and the religious belief promoted, whether explicitly or implicitly, by saying "only you can decide what is right and wrong." With these books, the state of Alabama has overstepped its mark, and must withdraw to perform its proper non-religious functions.

The Court, having concluded that the challenged textbooks violate the establishment clause of the First Amendment,... is thus compelled to grant plaintiffs their requested relief barring the further advancement of the tenets of the religion of secular humanism. The Court will enter an order and judgment granting an injunction against all parties defendant... to

> prohibit further use of the books listed therein and set out as Appendix M to this opinion....[302]

Judge Hand could usefully have characterized the pervasive viewpoint of the textbooks as "sectarian." His decision was greeted by intense indignation and umbrage among the *literati*, academia, the media and the public educational establishment. It was lauded by conservatives, Christian fundamentalists and proponents of private education. The author was portrayed by the former as a red-neck "cracker" obscurantist encouraging ignorance and fanaticism at the expense of the forces of science and enlightenment and by the latter as a sagacious and devout solon defending the rights of faithful Christians beset by state-empowered infidels. Both descriptions were excessive.

(6) *Smith v. Mobile County*: Appellate Decision (1987). The "clash of cultures" escalated as the decision again went up to the Eleventh Circuit Court of Appeals. National organizations lined up to assist the appellate court with their wisdom in friend-of-the-court briefs. On one side appeared the National Education Association (and its Alabama counterpart), the American Jewish Committee, the American Jewish Congress, the American Humanist Association, the Council for Democratic and Secular Humanism, the American Library Association, the Anti-Defamation League, the Association of American Publishers and the Freedom to Read Foundation, the American Federation of Teachers (AFL-CIO), the National School Boards Association (and its Alabama counterpart), the New York State School Boards Association and The Ad Hoc Coalition for Public Education, urging reversal. On the other side appeared The Association for Public Justice, The Christian Legal Society and the Catholic League for Religious and Civil Rights, The Committee on the American Founding, The Ad Hoc Committee to Oppose the Establishment of Humanism and the Rabbinical Alliance of America, urging affirmance. The plaintiffs (Smith et al.) were represented by the National Legal Foundation of Virginia Beach (a project launched by Pat Robertson), while the (new) intervenor-defendants were represented by the American Civil Liberties Union.

The Circuit Court's decision was announced by Judge Frank M. Johnson, Jr., for a unanimous panel including Circuit Judge Thomas A. Clark, and Senior District Judge for the Southern District of Florida Joe Eaton, sitting by designation. That decision turned on the sole issue of "whether the use of the challenged textbooks had the primary effect of either advancing or inhibiting religion." (The court assumed, for purposes of argument, that secular humanism was a religion.)

> The district court found that the home economics, history, and social studies textbooks both advanced secular humanism and inhibited theistic religion. Our review of the record in this case reveals that these conclusions were in error. As discussed below, use of the challenged

302 . *Smith v. Mobile County, supra*.

textbooks has the primary effect of conveying information that is essentially neutral in its religious content to the school children who utilize the books; none of these books convey a message of governmental approval of secular humanism or governmental disapproval of theism.

* * *

[With respect to the home economics textbooks], [e]xamination of the contents of these textbooks..., in the context of the books as a whole and the undisputedly nonreligious purpose sought to be achieved by their use, reveals that the message conveyed is one of a governmental attempt to instill in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making. This is an entirely appropriate secular effect.... It is true that the textbooks contain ideas that are consistent with secular humanism; the textbooks also contain ideas consistent with theistic religion. However,... mere consistency with religious tenets is insufficient to constitute unconstitutional advancement of religion.

Nor do these textbooks evidence an attitude antagonistic to theistic belief. The message conveyed by these textbooks with regard to theistic religion is one of neutrality: the textbooks neither endorse theistic religion as a system of belief, nor discredit it. Indeed, many of the books specifically acknowledge that religion is one source of moral values and none preclude that possibility....

It is obvious that Appellees find some of the material in these textbooks offensive. That fact, however, is not sufficient to render use of this material in the public schools a violation of the establishment clause. "The state has no legitimate interest in protecting any or all religions from views distasteful to them."[303] The district court erred in concluding that the challenged home economics books advanced secular humanism and inhibited theistic religion.

The district court's conclusion that the history and social studies textbooks violated the establishment clause was based on its finding that these books failed to include a sufficient discussion of the role of religion in history and culture....

It is clear on the record of this case that, assuming one tenet of secular humanism is to downplay the importance of religion in history and in American society, any benefit to secular humanism from the failure of the challenged history and social studies books to contain references to the religious aspects of certain historical events or to adequately integrate the place of religion in modern American society is merely incidental. There is no doubt that these textbooks were chosen for the secular purpose of education in the areas of history and social studies, and we find that the primary effect of the use of these textbooks is consistent with that stated purpose. We do not believe that an objective observer could conclude from the mere omission of certain historical facts regarding religion or the

303 . Quoting *Epperson v. Arkansas*, 339 U.S. 97, 107 (1968), discussed at § 3b(2) above, quoting *Burstyn v. Wilson*, 343 U.S. 495, 505 (1952), discussed at VB1.

> absence of a more thorough discussion of its place in modern American society that the State of Alabama was conveying a message of approval of the religion of secular humanism. Indeed, the message that reasonably would be conveyed to students and others is that the education officials, in the exercise of their discretion over school curriculum, chose to use these particular textbooks because they deemed them more relevant to the curriculum, or better written, or for some other nonreligious reason found them to be best suited to their needs....
>
> Nor can we agree with the district court's conclusion that the omission of these facts causes the books to "discriminate against the very concept of religion." Just as use of these books does not convey a message of governmental approval of secular humanism, neither does it convey a message of government disapproval of theistic religion merely by omitting certain historical facts concerning them.... While these textbooks may be inadequate from an educational standpoint, the wisdom of an educational policy or its efficiency from an educational point of view is not germane to the constitutional issue of whether that policy violates the establishment clause....
>
> What is required of the states under the establishment clause is not "comprehensive identification of state with religion," but *separation* from religion. Yet implicit in the district court's opinion is the assumption that what the establishment clause actually requires is "equal time" for religion.... The district court's opinion in effect turns the establishment clause requirement of "lofty neutrality" on the part of the public schools into an obligation to speak about religion. Such a result clearly is inconsistent with the requirements of the establishment clause.[304]

The Circuit Court reversed the district court and remanded the case "for the sole purpose" of "dissolving the injunction and terminating this litigation." Clearly the Circuit Court did not want to have it bobbing up again in some new form. The appellate court had disposed of it by little more than assertion and reassertion of its conclusion that the district court's analysis was incorrect. Though the lower court's contentions were quoted at length, there was little effort to rebut them other than to announce they were mistaken, woodenly reciting various dicta from Supreme Court decisions in support of that conclusion. The systematic disembodiment of religion from the awareness of public school students, producing an almost total religious illiteracy in much of the population, was not addressed, nor was the Supreme Court quoted in its recognition that public schools can prevent that condition by including objective information about religious elements in history and other subjects without violating the Establishment Clause:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is

304 . *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (CA11 1987).

> worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[305]

The Supreme Court's statement that "one's education is not complete" without some knowledge of the religious dimension of human experience does not, of course, create an obligation in the authorities responsible for designing and effectuating public education to produce such a complete education nor a cause of action against them for failure to do so. The agreement by the State of Alabama in the court below that the history books were very inadequate in this regard could have been a step in the direction of correcting that shortcoming, but the reversal of that court by the appellate process probably enabled the state education establishment to conclude that nothing radical need be done, which probably meant a continuation of business as usual.

The appellate court's failure, however, to come to grips with the lower court's serious effort to examine the truncated education available in public schools, perhaps in part because of overreaction to Establishment Clause concerns, was disappointing. The appellate court could have said the problem should be dealt with through the political process rather than the judicial, but it simply denied that there was a problem. It could have said that if there is a pervasive and systematic vanishment of religion evident in the textbooks and the curriculum of public education, that does not constitute the establishment of a religion of secular humanism or any other religion. It could have developed the contentions of the defendants-appellants that secular humanism is not a religion and therefore could not be "established" anyway, whatever the shortcomings of public education. Any of these lines of analysis could have advanced understanding of the very real and not unreasonable dissatisfactions about public education explored at great length by the court below and their relation, if any, to the religion clauses. But instead the appellate court merely uttered a string of truisms that avoided serious wrestling with the issues, which will not go away.

In recent years there has been a rising tide of criticism of the inadequacy of public school textbooks with respect to their omission of objective references to religion. Some efforts have recently been made by textbook publishers to remedy that defect in their products. There is reason for dissatisfaction with the average public school graduate's grasp of history in general, not to mention religious history, but the flaw is not a *constitutional* one.

Rather it is a product of certain economic circumstances. Textbook publishers are largely dependent upon the adoption of their publications by public school administrators, especially in some states (like Texas), where adoptions are on a statewide level and can make or break a particular title, even though produced at great expense. Public school administrators, to the degree that they give attention to such

---

305 . *Abington v. Schempp*, 374 U.S. 203, 225 (1963), discussed at § 2b(2).

details, are apt to prefer to avoid subject matter in textbooks that is likely to cause controversy. Religion is a subject that is very significant to some people—for and against particular ideas or interpretations of events—and thus they are apt to take umbrage at what they conceive to be misrepresentations of such ideas or events, so the line of least resistance is to avoid giving offense by simply omitting such sensitive material, even though that might result in a less well-rounded treatment of the subject matter. Litigation such as *Mozert* or *Smith* only tends to make public school administrators and textbook publishers more gun-shy than they already are, with the result that their preferred materials are ever more pallid pablum and their consumers ever less educated.

(7) *Fleischfresser v. Directors of School Dist. 200* (1994). Seven years later a very similar complaint was litigated in the Seventh Circuit. Parents in Wheaton, Illinois, objected to the use of a supplemental reading program using Impressions Reading Series on the grounds that it violated both the Establishment and Free Exercises Clauses of the First Amendment through portrayal of "wizards, sorcerers, giants and unspecified creatures with supernatural powers." These portrayals were alleged to "foster[] a religious belief in the existence of superior beings exercising power over human beings by imposing rules of conduct, with the promise and threat of future rewards and punishments." The charge was also made that the use of this series "indoctrinates children in values directly opposed to their Christian beliefs by teaching tricks, despair, deceit, parental disrespect and by denigrating Christian symbols and holidays." (At a later stage, the parents attempted to add the charge that the students were required "to prepare and cast chants and spells and to practice being witches," but the appellate court declined to entertain that tardy allegation.)

The court considered whether the parents had personal standing to invoke its jurisdiction in their own names rather than in the names of their children and concluded that, because the actions complained of would impair their right to direct the religious training of their children, the parents had standing to invoke both the Free Exercise and the Establishment Clauses of the First Amendment. Noting that "[c]ourts have not been inclined to find a violation of the First Amendment... with respect to the use of certain books in a public school curriculum,"[306] the court first sought to determine whether there was even an issue of establishment present.

> While the parents and their children may be sincerely offended by some passages in the reading series, they raise a constitutional claim only if the use of the series establishes a *religion*. The parents insist that the reading series presents religious concepts found in paganism and branches of witchcraft and satanism; this hardly sounds like the establishment of a coherent religion.

306. Citing *Smith v. Board of School Comm'rs*, 827 F.2d 1528 (CA11 1987), discussed immediately above, and *Mozert v. Hawkins County*, 827 F.2d 1058 (CA6 1987), discussed at § 3c(2),(3) above, as well as *Grove v. Mead School Dist.*, 753 F.2d 1528 (CA9 1985).

> [Footnote: The parents even attempt to include in these "religions" a tenet of what the parents call "parental disrespect." Even as we give wide latitude to the parents in construing the religion requirement in this case, we cannot abide the argument that the inclusion of "humorous stories" in which "a child outwits a parent" serves to establish these religions.]
>
> Notwithstanding our skepticism, we hold that even if this allegation suffices to raise a colorable claim of an Establishment Clause violation with respect to the religion requirement, the [school] directors are entitled to judgment as a matter of law.
>
> * * *
>
> In this case... we have before us a party claiming that the use of a collection of stories, a very few of which resonate with beliefs held by some people, somewhere, of some religion, has established this religion in a public school. This allegation of some amorphous religion becomes so much speculation as to what some people might believe. This amorphous character makes it difficult for us to reconcile the parents' claim with the purpose of the Establishment Clause.
>
> In addition, this "religion" that is allegedly being established seems for all the world like a collection of exercises in "make-believe" designed to develop and encourage the use of imagination and reading skills in children that are the staple of traditional public elementary school education.... This reading series includes works of C.S. Lewis, A.A. Milne, Dr. Seuss, Ray Bradbury, L. Frank Baum, Maurice Sendak and other noted authors of fiction. Further, these works, and so many others that are part of any elementary classroom experience have one important characteristic in common; they all involve fantasy and make-believe to a significant degree. The parents would have us believe that the inclusion of these works in an elementary school curriculum represents the impermissible establishment of pagan religion. We do not agree. After all, what would become of elementary education, public or private, without works such as these and scores and scores of others that serve to expand the minds of young children and develop their sense of creativity?[307]

While elementary education might not stand or fall on the basis of the use of fictional stories to expand the minds of the young and develop their sense of creativity, the court rightly found the parents' claims a bit farfetched. The court then applied the three elements of the *Lemon* test of establishment[308] and, not surprisingly, found that the use of the Impressions readers met all three. The court then undertook to determine whether the readers violated the parents' free exercise rights to determine the religious training of their children, using the test that a

---

307. *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680, 687-688 (CA7 1994).

308. To pass this test, a governmental action must (1) have a secular purpose, (2) have a primary effect that neither advances nor hinders religion, and (3) not foster excessive entanglement between government and religion. The test was first enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), discussed at § D5 below.

substantial burden on the parents' religious practice must be justified by a compelling state interest.

> The burden to the parents in this case is, at most, minimal. The [school] directors are not precluding the parents from meeting their religious obligation to instruct their children. Nor does the use of the [Impressions] series compel the parents or children to do or refrain from doing anything of a religious nature. Thus, no coercion exists, and the parents' free exercise of their religion is not substantially burdened.
>
> Even if we were to find that the parents' free exercise rights were somehow substantially burdened, we would find that the government interest outweighed such a burden.... We have discussed that the Impressions Reading Series is used to build and enhance students' reading skills and develop their senses of imagination and creativity. These skills are fundamental to children of this age, and it is critical that the directors select the best tools available to them to teach these skills. Having done this, they have properly performed the government's function of providing quality public school education.... [W]e find that the government's interest in providing a well-rounded education would be critically impeded by accommodation of the parents' wishes, and we hold that this interest is sufficient to override the burden on the parents' free exercise of religion.[309]

This last thought seemed a bit of judicial overkill. It was sufficient to conclude that the parents' free exercise of religion was not burdened by the various wisps of miscellaneous make-believe woven into the readers, and that the choice of reading material was within the discretion of the school directors as long as they did not seek to impose some kind of a clearly religious regimen on the pupils or their parents. To go beyond that to vindicating the choices made by the school directors of "the best tools" was to engage in micromanaging the profession of pedagogy and endorsing one particular set of perhaps debatable reading selections. The court completely omitted the last and most important part of the free-exercise test: whether the government had used the least burdensome means of achieving its important objective, which in this instance would be the excusal of objectors from the burdensome requirement. Perhaps because the parents had not sought that relief, the court did not deal with it. But in reaching out for the superfluous question of compelling state interest, the court should have considered the usual corollary of whether that interest required the use of the offensive means chosen.

There is at least one other stategy of pedagogy that would contend that the primary task of the latency period of child development is not to indulge the fantasies of earlier years but to encourage rationality, the ability to concentrate, extension of attention span, and persistence of effort, for which the overstimulation of imagination might be counterproductive. But courts are no better equipped than

309 . *Fleischfresser, supra*.

this author to make such choices, and to embrace the particular choice made by this school board as being the essential way of achieving the state's undoubtedly important function of education seemed to go beyond the court's competence.

(8) *Roberts v. Madigan* (1989) (Teacher's Bible Reading). Further to the wars over religion in the public schools, Adams County, Colorado, produced a case involving the constitutional propriety of the use of the Bible and religious books in the classroom by a teacher and of the responses by the teacher's supervisor. Kenneth Roberts was a teacher of fifth-grade students who had a custom of keeping a Bible on his desk and reading silently in it during an independent reading period. He also had placed in the library in his classroom two volumes entitled *The Bible in Pictures* and *The Story of Jesus*, which were the only religious titles among some 230 volumes and were not part of the curriculum approved for the fifth grade. He also had a poster on the wall that depicted a mountain scene with the inscription: "You have only to open your eyes to see the hand of God."

The school principal, Kathleen Madigan, had observed him reading the Bible and directed him to keep it in his desk while school was in session. This occurred a second time, and at that time also she received a complaint from a parent of one of his pupils about the two religious books in the classroom library. She directed him to remove them from that library and to take down the poster, which he did. Later he asked her whether he should be required to "hide" his Bible in his desk and asked her for written guidelines about what types of materials he could keep in his classroom. After consulting with higher officials and legal counsel of the school district, the principal issued the following directive to Roberts:

> The law is clear that religion may not be taught in a public school. To avoid the appearance of teaching religion, I have given you this directive. Failure to comply with this directive will be considered insubordination and could result in disciplinary action.

While a bit short on substance, this directive did make clear what the teacher should have known all along and put the force of authority behind it. Shortly thereafter, the teacher and several parents of children in the school brought suit seeking injunctive relief against the principal and the school district. At some time during this series of events, the Bible was removed from the school library. The teacher contended the principal removed it, which she denied. The school system did not seriously contest the replacement of the Bible in the school library, but at time of trial the Bible had yet to be replaced.

Decision was given by Chief Judge Sherman G. Finesilver, who dismissed the parents as plaintiffs because none had children currently in Mr. Roberts' fifth grade classroom. The court outlined the issues to be decided as follows: (1) whether Roberts' actions violated the Establishment Clause, and (2) whether the school district's actions violated Roberts' rights of free speech and academic freedom. But first the court reviewed the several incidents that had occurred.

The Bible in the School Library

Of particular importance in this litigation is the legal propriety of keeping the Bible in a school library. The Supreme Court has described the library as "a mighty resource in the marketplace of ideas."[310] A school library "is a place dedicated to quiet, to knowledge, and to beauty"... where "students must always remain free to inquire, to study and to evaluate, to gain maturity and understanding."[311]

The school library is a mirror of the human race, a repository of the works of scientists, leaders, and philosophers. It is the locus where the past meets tomorrow, embellished by the present. The school library offers the student a range of knowledge, from the world's great novels and plays to books on hobbies and how-to-do-it projects. The importance of the school library is summed up by the inscription above the entry to the University of Colorado's Norlin library: "Who knows only his own generation remains always a child."

In this age of enlightenment, it is inconceivable that the Bible should be excluded from a school library. The Bible is regarded by many to be a major work of literature, history, ethics, theology, and philsophy. It has a legitimate, if not necessary, place in the American public school library. In this central location, it is available for voluntary perusal and study by young students possessing inquisitive minds.... To deprive a public school library's collection of the Bible would, in the language of Justice Robert Jackson, render the educational process "eccentric" and incomplete.[312]

The Establishment Clause does not require that religious books be removed from the shelves of school libraries. Public school libraries may include Bibles and other religiously oriented books provided that no one sect is favored in the library and their inclusion in the library's collection does not show any preference for religious works in general. We find that the... library [in this case] does not show any preference for a particular religion, or religion in general. The Bible has a legitimate place in its collection.

Religious Books in the Classroom Library

The Bible must be distinguished from secondary religious books such as those in Roberts' classroom library. Whereas the Bible is considered a major historical and literary work, *The Bible in Pictures* and *The Story of Jesus* are specifically written to provide children with a better religious understanding of the Christian interpretation of the Bible.... [T]he Bible has many secular uses as a primary work and a source of reference. The books in question do not possess the same secular qualities.

Similarly, the school library must be distinguished from the classroom library.... In the school library, a student may go directly to the religious section where he or she will find an assortment of books on various religions. The student selects books according to personal curiosity, out of

310 . *Abrams v. U.S.*, 250 U.S. 616 (1919), Holmes, J.

311 . *Bd. of Ed. v. Pico*, 457 U.S. 853, 868-869 (1981).

312 . *McCollum v. Bd. of Ed.*, 333 U.S. 203, 235 (1949), discussed at § C1a.

the glare of teacher supervision and peer pressure. The voluntary nature of choice, combined with the variety and number of books, provides the student with protection against undue religious indoctrination. Roberts' classroom library does not afford the student the same protection and opportunity for individuality.

Attendance is compulsory in the classroom. The teacher stands in a position of power as disciplinarian, role model, and educator. Students are constantly in the presence of their peers, who may observe their every action. The students are, in a real sense, a captive audience vulnerable to even silent forms of religious indoctrination.... The danger of indoctrinating students with, or unduly exposing them to, religious beliefs is much greater in the classroom than in the [school] library.

[The Establishment Clause]

Roberts alleges that the District's purpose in removing the two religious books from his classroom was to "disapprove religious books in that school." The record reflects, however, that the District's action was prompted by a secular, non-religious purpose.... We are persuaded that the District's purpose was to promote religious neutrality according to the mandates of the Establishment Clause.

The record shows that the District's actions as to Roberts' reading of the Bible and his leaving it in open view on his desk were motivated by a secular purpose. [They] were not seeking to advance other religions over Roberts', but were merely performing their "affirmative duty to ensure that individual teachers are not, through their classroom conduct, violating the guidelines of the Establishment Clause."[313]

Madigan, as principal of [the school] and Roberts' direct superior, is empowered to regulate Roberts' classroom conduct. We do not find an improper, non-secular purpose behind her decision that Roberts should have been teaching instead of reading during the independent reading period. As to her order that he keep the Bible out of view of the students during the day, there is nothing in the record to suggest that her purpose went beyond that of insulating the students from undue exposure to Roberts' religious beliefs.

In light of the record, it is Roberts' conduct which appears to be motivated by religious purposes.... Roberts never claimed that his personal use of the Bible was non-religious. The record contains nothing to suggest that Roberts had a non-religious purpose in placing the books in the classroom library, or in reading the Bible during classroom hours. In light of these circumstances, we conclude that there was an improper religious purpose behind Roberts' use of the Bible and the presence of the religious books in his classroom library.

The primary effect of the District's actions was neither to advance nor inhibit religion. Roberts claims that the District's actions are a showing of hostility toward religion which, in effect, is a furtherance of the "religion of secularism." This argument is not persuasive.... The District refrained from

313 . Quoting *Levitt v. PEARL*, 413 U.S. 472 (1973), discussed at § D7c below.

any action which could be interpreted as an endorsement of religion or non-religion. Roberts' reading of the Bible was restricted only in the classroom setting. The primary effect of the District's actions was not to further the interests of those who believe in no religion, but to insulate students from undue exposure to Roberts' religion.

* * *

Roberts argues that he is not actively engaged in teaching the Bible during the independent reading period. However, in our view, a teacher can be actively engaged in teaching students regardless of whether verbal interaction takes place. Roberts testified that he was reading to set an example for the children of an adult reading. We find that Roberts' choice of reading material is no less an example than his act of reading. When reading religious material in the classroom, the teacher must exercise great care so as not to advance a religious view. Taken in their totality, Roberts' reading of the Bible and the religious books and poster in his classroom present the appearance that Roberts is seeking to advance his religious views.

We are not persuaded that a teacher's discrete, inconspicuous, and silent reading of the Bible in the classroom would necessarily expose students to undue religious influence. We do not assume the anomalous position of prohibiting in the classroom the inconspicuous reading of a book which is available in the school library. Roberts' silent reading of the Bible thus presents a closer question and a more difficult balance of First Amendment rights. When a teacher's silent reading of the Bible provokes students' curiosity about the Bible's religious teachings, prompts questions from students of a religious nature, or is a subterfuge or a vehicle for advancing a particular religious view, that balance falls definitely in favor of the students and renders the presence of the Bible constitutionally impermissible.

A teacher's silent reading of the Bible does not in every instance result in a constitutional violation. Where the Bible serves as a secular educational reference, is related to an approved curriculum, or is read in such a manner that students are insulated from undue religious influnce or indoctrination, then school officials may not prohibit its use or presence in the classroom.

When part of a secular course of study, use of the Bible withstands constitutional scrutiny. A study of American history would be incomplete without reference to the Bible. The American revolution and the founding of our country cannot be taught without a discussion of religious freedom and occasional reference to the Bible. [Footnote: For example, the Liberty Bell is inscribed with the following Biblical verse: “Proclaim Liberty Throughout All The Land Unto All The Inhabitants Thereof.” (Leviticus XXV-X).] Likewise, it would be impossible to understand the civil rights movement of the 1960's without reference to religious groups and their beliefs in Christianity and the Bible.

The study of literary works, such as Shakespeare, Milton, and Dante, is greatly enhanced by reference to the Bible. A study of the evolution of

agricultural practices finds that Biblical law prescribed giving the land a rest every seventh year (Exodus 23), an accepted practice in today's agricultural science. An inquiry into the roots of our modern day privilege against self-incrimination would be incomplete without reference to the Bible.... Such a broad range of secular uses is not to be found in the two religious books in question....

It is within the sound discretion of school officials to make an objective determination of whether a teacher's use of a Bible is consistent with a secular purpose or constitutes undue religious influence. Our ruling does not limit the power of school officials to prescribe rules of classroom conduct for their teachers. For example, Roberts does not have a constitutional right to read the Bible when the District's rules require him to be engaged in teaching his students.

Roberts argues that because he is allowed to teach American Indian religion, he should be allowed to resume his reading of the Bible and replace his books in the classroom library. Roberts' argument underscores the difference between teaching *about* religion, which is acceptable, and teaching religion, which is not. Roberts' teaching of Americna Indian religion is teaching *about* religion. It is but a part of a secular, historical course of study approved by the District as part of the curriculum for fifth grade students. The students' exposure to Roberts' religious books and Bible cannot be deemed teaching about religion in the same way. We find that exposure to the tenets of a little known religion, such as those followed in American Indian culture, is far less influential on young students than exposure to a modern day, widely observed religion which is a recognizable part of our society....

Freedom of Speech/Academic Freedom

Roberts asserts that his First Amendment rights to freedom of speech and academic freedom were violated when he was ordered to remove the two religious books and to refrain from reading the Bible in his classroom. It is beyond question that teachers are entitled to First Amendment freedoms in the public schools. However, these rights do not "require the government to open the use of its facilities as a public forum to anyone desiring to use them."[314]

The teacher's right to academic freedom is far from absolute. In the public school context, an individual's free speech rights may be limited if the exercise of that right substantially interferes with the rights of others. The Supreme Court has never held that a teacher has a constitutional right to teach what he sees fit, nor to pre-empt parents' decisions regarding what courses their children should take....

In the instant case, we must balance Roberts' right of free speech against his students' right to be free of religious influence or indoctrination in the classroom. We find that the balance lies in the students' favor.... Families entrust public schools with the education of their children, but condition

314. Citing *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969), discussed at § E1a below, for both propositions.

> that trust on the understanding that the classroom will not be purposely used to advance religious views that may conflict with the private beliefs of the student and his or her family. The state and public education must therefore take great care to see that the coercive power which they possess through mandatory attendance and teacher role models does not serve to advance religion.[315]

The court dismissed the plaintiffs' action, but ordered the school district to restore the Bible to the school library and not to remove it again.

(9) *Berger v. Rensselaer Central School Corp.* (1993) (Gideon Bible Distribution). This case concerned a different kind of religious incursion in public schools—the distribution of Gideon Bibles in fifth-grade classrooms. This practice was challenged by a parent, Allen H. Berger, on behalf of his two children, Moriah and Joshua, who were pupils in the public schools. The district court "threw out the Bergers' suit on summary judgment," and they appealed to the Court of Appeals for the Seventh Circuit, whose opinion was announced by Judge Walter J. Cummings.

> People are accustomed to finding Gideon Bibles tucked in the drawers of their hotel rooms; much less frequently do they find them stashed in the desks of their public school classrooms. In Rensselaer, Indiana, however, representatives of Gideon International have distributed Bibles in the public schools—usually in classrooms—for so many years that no one can seem to remember when the practice began....
>
> When the Gideons did distribute Bibles, they sent two representatives who came once a year after clearing a date with the principal. There was no set method of distribution. However, the men usually went to each of five classrooms of fifth graders, always during regular school hours. They spoke for a minute or two about their organization... and offered up a painful pun that the books, the covers of which were red, were meant to be read. We take this to mean that the Gideons made at least some statements to students encouraging them to read the Bible. After the presentation, the students were instructed to take a Bible from a stack of Bibles placed on a table or desk.... The teachers, though present, did not participate in handing out the Bibles. At times the principal also attended. The students were frequently told to take the publications home to their mothers and fathers and to return the books to their teachers if their parents objected. For some years the school asked students to obtain signed permission of a parent before accepting a Bible. This practice ended several years ago. Neither the principal nor superintendent gave a reasoned explanation for abandoning permission forms. Apparently school officials did not expend much energy thinking about how the Gideons were to distribute Bibles, or the implications of that distribution. Indeed, a school board member told Mr. Berger that it had never occurred to him anyone might object, and indeed no one other than Mr. Berger ever complained about the relationship between Rensselaer schools and the Gideons.... By all

315 . *Roberts v. Madigan*, 702 F.Supp. 1505 (D.Colo. 1989).

accounts, the Bibles were not used for pedagogical purposes. The teachers did not discuss religion in conjunction with the distribution, and the Bibles were not studied for their historical or literary value. They were presented simply as a gift from the Gideons to be read daily for personal enrichment.

* * *

Attempting a definitional coup, defendants tell us... that this is not, after all, a case about the Establishment Clause but a case about free speech. The issue is said to be the right of Gideons to freely express themselves by handing out Bibles to schoolchildren. Specifically, the Corporation suggests that Rensselaer schools created a designated public forum[316] by issuing an open invitation to speakers in the community to address schoolchildren. Having opened otherwise non-public property to expressive activity, the government is supposedly obliged to treat all speakers equally. To exclude the Gideons, then, would be to discriminate based on the content of their message....

This approach suffers from two failings: it distorts the facts and misconstrues the law. It is factually wrong on two counts. First, the free speech argument presumes that the Corporation did not participate in the Bible distribution. In essence, this is an argument that the distribution of Gideon Bibles lacked state action. Under this view, the Corporation was merely a conduit or neutral non-participant through whose doors ideas could pass without changing or being changed by the schools' participation. Several key facts belie the schools' non-involvement. The Bibles were distributed by Gideons—it is true—but in public schools, to young children, in classrooms, during instructional time, each year for several decades, in the presence of the teacher and often the principal, with instructions to return unwanted books not to the Gideons but to teachers. [The school] carefully notes that the distribution sometimes occurred in an auditorium as evidence that it was not part of a state-sponsored effort to indoctrinate students in the ways of the New Testament, presumably because distribution in auditoriums, as against distribution in classrooms, is less suggestive of state-sponsored Bible study. Yet the image of hundred of students being marched into an auditorium for the yearly distribution of Bibles cannot but leave the imprimatur of state involvement.... It would be naive in the extreme to draw any conclusion in these circumstances other than that the Corporation was intimately involved if not downright interested in seeing that each student left at the end of the day with a Gideon Bible in his or her pocket.

The free speech argument also errs factually by depicting the Rensselaer schools as truly open fora for community speech. After combing the history of Rensselaer schools for example of such speech, [they] could find just a few isolated, irregular talks by groups such as the Boy Scouts, the 4-H Club and a sorority. Moreover, the record is barren of addresses or literary distributions by political or religious organizations other than the

316 . Citing *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37.

Gideons.... [I]t is clear that Rensselaer schools were not overrun with members of other religions vying for the students' faith. It is dubious whether public schools could or should be used for such purposes, but the salient point here is that Rensselaer school classrooms were not, in fact, open and active fora for competing ideas, contrary to assertions by the Corporation....

[The school] offers *Widmar v. Vincent*[317] for the proposition that, having unlocked its classrooms for public use, it is required to keep the invitation open to all, including the Gideons. In *Widmar*, the Supreme Court held that a university could not exclude a religious organization from after-school use of its facilities after allowing non-religious groups similar access. Yet *Widmar* differs from this case in one critical respect: the religious group in *Widmar* sought access to classrooms after school; the Gideons seek access to classrooms during school. In other words, the organization in *Widmar* sought access to public school *facilities*. The Gideons, by contrast, are not particularly interested in public school classrooms for their physical properties; indeed, it is doubtful that they would seek access to classrooms were they not populated by young children. There was no captive audience in *Widmar*—the classrooms were empty. In Rensselaer schools, however, children have no choice but to sit through the Gideons' presentation and distribution of Bibles.... [The school] does not discuss this issue in its brief, and at no point in the record does any school official suggest that students were free to leave the room during the Gideons' talk or to skip the school assemblies at which Bibles were distributed.

The only reason the Gideons find schools a more amenable point of solicitation than, say, a church or local mall, is ease of distribution, since all children are compelled by law to attend school and the vast majority attend public schools. [Footnote 7: It may be that the Gideons also prefer schools because it gives the Bible distribution an official quality. Some students may be confused and think that Bible reading is a homework assignment (though, given what we know about children of middle school age, it is uncertain whether this would make students more or less likely to read the Scripture.)] That the Gideons seek access to children and not facilities... is self-evident. It is all the more odd, then, to analyze this case in terms of public forum jurisprudence. A designated public forum is a place. Children, of course, are not. Nor does it follow that, having opened a child's mind to one "use," the child's mind must be open to all uses. Even the slightest consideration should yield the conclusion that public school officials entrusted with the education of youngsters can never give up total control over the content of what transpires in classrooms, not least because the children are a captive audience. If they don't like what they see or hear, they are most assuredly not free to get up and leave.... We do not expect young children to put cotton in their ears and scrunch up their eyes to avoid overtly religious message by the state....

317 . 454 U.S. 263 (1981), discussed at § E3b below.

> The analogous decision is not *Widmar* but *Illinois ex rel. McCollum v. Board of Education*,[318] in which non-school employees made use of the public schools to further religious doctrine.... The Court struck down the practice, saying:
>
> > Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.
>
> ....As in *McCollum*, the Gideons used Rensselaer's tax-supported public schools, relying on the state's compulsory public school machinery, to disseminate religious material to fifth graders.
>
> [The school] is also wrong as a matter of law that the First Amendment interest in free expression automatically trumps the First Amendment prohibition on state-sponsored religious activity. The reverse is true in the coercive context of public schools.... First Amendment jurisprudence is densely populated with cases that subordinate free speech rights to Establishment Clause concerns.[319].... [T]he First Amendment is intended to restrict religious activity not by individuals but by the government.... It is only where individuals seek to observe their religion in ways that unduly involve the government that their expressive rights may be circumscribed....[320]

The court noted that this case had been delayed for eighteen months while awaiting the Supreme Court's decision in *Lee v. Weisman* (1992), and that both parties and numerous *amici* on each side had expected that the Supreme Court would use that occasion to reconsider its current and much-criticized *Lemon* test of establishment, but it had not done so. Instead, the court struck down the use of prayers at public school graduation exercises under a "coercion" test without resort to, or modification of, *Lemon*. The Seventh Circuit panel therefore took its cue from *Lee* as well as *Lemon* in judging the constitutionality of the Gideons case.

> In *Lee*, the Supreme Court held that public school principals may not invite clergy to offer invocation and benediction prayers at formal graduation ceremonies for high schools and middle schools without offending the First Amendment. The Corporation's practice of assisting Gideons in distributing Bibles for non-pedagogical purposes is a far more glaring offense to First Amendment principles than a nonsectarian graduation prayer....
>
> The invocation and benediction in *Lee* was nonsectarian; the Gideon Bible is unabashedly Christian. In permitting distribution of "The New Testament of Our Lord and Savior Jesus Christ" along with limited

---

318 . 333 U.S. 203 (1948), discussed at § C1a above.

319 . Citing *Abington v. Schempp*, 374 U.S. 203 (1963); *McCollum, supra*; *Engel v. Vitale*, 370 U.S. 421 (1962); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980).

320 . *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160 (CA7 1993).

> excerpts from the Old Testament, the schools affront not only non-religious people but all those whose faiths, or lack of faith, does not encompass the New Testament. If the government may not promote a nonsectarian prayer in the Judeo-Christian tradition, then surely it may not promote the religious views of one sect.
>
> Attendance at the graduation ceremony in *Lee* was voluntary; attendance at Rensselaer schools during the Gideon distribution was mandatory.... Unlike the students in *Lee* who had at least a Hobson's choice [of skipping their graduation], the fifth graders in Rensselaer schools had no choice at all. The record does not indicate whether students were told when the Gideons would address them. Even if they were, the Constitution cannot tolerate a policy that forces conscientious objectors to skip their lessons, break mandatory attendance rules, and evade truant officers....
>
> The prayer in *Lee* occurred during an after-school extracurricular event; the Gideons distributed Bibles during instructional time. This distinction is critical because it is likely that youngsters in Rensselaer were confused about whether the Corporation endorsed the Gideons' beliefs. This is so because one does not ordinarily associate public schools with Bible distributions. Graduation exercises, by contrast, are the sort of public gatherings that traditionally commence with a prayer or invocation. The students in *Lee* had undoubtedly attended other ceremonies outside of school which had been preceded by prayers, and the fact that the schools invited clergy of different faiths made it less likely that the graduates would be uncertain whether the school district agreed with the rabbi's message. The Gideons, however, were the sole religious group ever to address Rensselaer students and their version of the Bible was the only one distributed. That the Gideons made this appearance annually in no way softens the perception that the Corporation endorsed the Gideons' views.
>
> *Lee* leaves little room for public schools to teach or promote religion, and the distribution of Gideon Bibles cannot fit in these restrictive confines.[321]

(10) *Sherman v. Wheeling* (1993) (Boy Scouts an Establishment?). Also from the Seventh Circuit came a case seeking to follow in the path of *Berger, supra*. Richard Sherman was a student in the fifth grade at the James Whitcomb Riley School in Wheeling Township, Illinois, when the Boy Scouts of America offered a Cub Scout program at the school to which Richard and his father, Robert, objected because both were atheists. They contended that the Boy Scouts of America (BSA) was a religiously discriminatory organization because it required that members affirm a belief in God. They had sought to enroll in the Cub Scout program, Richard as a scout and his father as an adult volunteer, and they were accepted and enrolled in a "pack" and "den" until the BSA discovered their refusal to abide by the provision in the Scout oath that required belief in God, whereupon their membership was

321 . Ibid.

revoked. Thereupon the Shermans protested to the school principal, the school district superintendent and the school board seeking to have the scouting program disqualified from use of school facilities, but without success, so they took the matter to federal court, which dismissed their complaint. They appealed to the Seventh Circuit Court of Appeals, which issued a unanimous opinion per Judge Kenneth F. Ripple.

The schools of the district were available for use by community groups under long-standing policies that included several categories of usage. "School activities" enjoyed priority of scheduling, while a second category of "youth recreational... activities... such as scouts, campfire groups, Indian guides, etc." could use the facilities on a first-come, first-served basis, also without charge. All other community nonprofit organizations fell into a third category that was charged a minimal rental fee. The BSA also availed itself of the school's policy of distributing flyers to students and affixing posters announcing scouting activities in designated display areas, according to generalized criteria applicable to many organizations serving youth in the community. Many religious and nonreligious organizations had utilized the school facilities and advertised their programs in these ways.

> The Shermans allege that the school district... violated the Establishment Clause by endorsing the religious message of the BSA. Furthermore, they claim that the BSA's requirement of belief in God, and the school district's support of this discriminatory policy, violate the the Sherman's right to equal protection of the laws.... [Under the first charge,] the Shermans contend that the school district favors religion over nonreligion because it allows the BSA to use the school premises free of charge; it permits the BSA to hang recruitment posters; and it recruits school teachers to hand out membership solicitations to grade school children.... [They] argue that the very structure of the facilities policy affords the BSA special treatment as a "school connected activity" and thus endorses the "anti-atheist" message of the organization. We disagree. First, it is clear from the policy that the BSA is not a "school connected" activity; this label is appended to groups such as parent teacher organizations. The BSA is a "youth recreational" activity along with Indian guides and campfire groups. Second, the Board's policy does not differentiate between the BSA and nonreligious "youth groups." All youth organizations are afforded the same status and are treated even-handedly.
>
> This even-handed treatment of religous and nonreligious youth groups makes the school district's policy indistinguishable from situations presented to the Supreme Court in both *Board of Education v. Mergens*[322] and *Lamb's Chapel v. Center Moriches*....[323] In *Mergens*, Justice O'Connor, writing for a plurality, rejected the argument that the Establishment Clause mandated exclusion of a Christian group from school facilities. "To

322 . 496 U.S. 226 (1990), discussed at § E3g below.

323 . 508 U.S. 384 (1993), discussed at § Eh below.

the extent that a religious club is merely one of many different student-related voluntary clubs, students should perceive no message of government endorsement of religion." Similarly, in *Lamb's Chapel*, the Court held that a church could not be excluded from school facilities, open to other groups, on the basis of an alleged Establishment Clause violation.... "[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."

The Shermans do not limit their challenge to the facilities policy; they also contend that the school district violates the Establishment Clause by allowing the BSA to distribute its literature during school hours and to hang its posters on school grounds. The flyers are given to students by their teachers... during school hours. Furthermore, there is some element of coercion present; students are required to take the flyers, even if they choose not to read them.... Based on these factors, the Shermans suggest that children will confuse the actions of the organization for the actions of the school[,] and therefore the school can be said to endorse the religious tenets of the BSA.

These factors, however, cannot be evaluated standing alone. Several factors are present here that significantly mitigate any Establishment Clause concerns. Flyers from all organizations are distributed to the students at one time during the week. The information on the flyers is not discussed in the classroom. It is not incorporated into the curriculum, nor is it made part of the day's learning activities. The same is true with respect to the display of posters. Many organizations, meeting the policy criteria, have displayed posters at Riley School. The front doors of Riley School are not used for a promotional campaign for the Boy Scouts, but are used as a community bulletin board, on which all qualified organizations may announce their upcoming events....

[I]n *Berger [v. Rensselaer School Dist.]*, this court struck down a district's practice of allowing the Gideons to make a presentation in the classroom and distribute Bibles. The Gideons were allowed to address fifth grade students and to give their message, which usually urged students to study the New Testament. At the end of the presentation, children were encouraged to come to the front of class to receive a Bible of their own. The court concluded that these activities had the effect of endorsing the Gideons' beliefs.

Here, by contrast, dissemination of the religious message of the BSA is sufficiently divorced from the workings of the school to obviate the possibility of the students' confusing the two. The school district does not provide the organizations, including the BSA, with content guidelines for its handouts, posters, or meetings; the school district does not evaluate substantively the message of the BSA. The only time the students encounter the BSA is when they are also encountering the messages of other groups as part of the dissemination of literature about a variety of events. No special attention is drawn to the organizations or activities announced in the flyers. The BSA never has the students' undivided

> attention to promote its religious message.... Because there is not a direct association between the school and the BSA—only the school and multiple community organizations—and because the students encounter nothing overtly religious in the BSA's flyers or posters, the potential for confusion between the state and the BSA, even in younger children, is greatly diminished.
>
> We conclude, therefore, that the school district has not violated the Establishment Clause.
>
> * * *
>
> The Shermans also allege that the BSA and the school district have violated their right to equal protection of the laws. The Equal Protection Clause of the Fourteenth Amendment is violated only if there is "state action."... We first turn to the question whether the discriminatory policy of the BSA can be attributed to the school district.... Only if the government were to "ration" facilities in favor of [discriminatory] groups, or were to provide additional benefits to such groups, would a constitutional violation arise.
>
> Here, the facilities were available to all on a first come first serve basis. These facilities were available to all youth organizations on the same terms and conditions; the BSA merely took advantage of what was available to all organizations of its class.... The Shermans have not alleged that non-religious or atheistic organizations have been denied access to facilities because of the BSA's use.... We conclude, therefore, that the BSA's policy and action cannot be attributed to the school district, and consequently, that the school district cannot be held liable for an Equal Protection violation....
>
> For these reasons, the judgment of the district court is affirmed.[324]

This case presented a contrasting counterpart to *Berger*, *supra*. Here there was genuinely equal access to a limited open forum, with consequent lack of endorsement of religious selectivity by the state. There have been other suits against the Boy Scouts of America for having the temerity to be selective in their choice of leaders, equally without success by the plaintiffs.[325] A closer question would be presented if the school district itself was the actual sponsor of the Boy Scout troop, as is probably the case in some localities, which would lend the element of state action that was missing in this instance. But perhaps those localities are not yet furnished with litigious atheists seeking to stamp out religious selectivity in suspect groups like the Boy Scouts of America.

---

324 . *Sherman v, Wheeling, supra*.

325 . See, e.g., *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 29 Cal. Rptr. 2d 580 (Cal. Ct. App. 1994) (freedom of association protects right of BSA to identify people who constitute the association and to limit membership to those people only; thus BSA can refuse to accept a homosexual man as a scoutmaster). But see *Randall v. Orange County Council, BSA*, 22 Cal.App.4th 1526 (Cal.Ct.App. 1994) (BSA cannot bar atheist boys from membership because religious discrimination is forbidden under California's Unruh Act, which applies to BSA as a "business organization"—a characterization the *Curran* court said was trumped by freedom of association).

Another "forum" case involved the question whether "peace" activists could participate in "Career Days" and other vocational-guidance forums to counter the promotion of careers in the Army by military recruiters. After a five-year struggle, the Atlanta Peace Alliance finally prevailed on most issues. The case did not involve any explicit religious claims, however, and so is not treated here.[326]

(11) *Clayton v. Place* (1989) (Dancing Prohibited). Books were not the only bone of religious contention in the operation of public schools. Extracurricular activities were sources of controversy as well. In one case arising in a small rural community in Missouri, it was not a matter of a religious faction in the community attempting to require the public school to meet their demands but of a faction attempting to loose restrictions in the public schools that they considered expressive of religious beliefs. The Purdy public school district had long had a rule stating, "School dances are not authorized[,] and school premises shall not be used for purposes of conducting a dance." A group of students, parents and taxpayers brought suit seeking to set aside the no-dancing rule on the ground that it embodied the religious convictions of other Purdy residents in violation of the Establishment Clause.

This action followed a dispute within the community in which some citizens attempted to prevail upon the school board to change the rule, while others resisted such change. Two religious bodies within the community held tenets opposed to social dancing, and several ministers mobilized the ministerial association and many church members to apprise the school board of their views. A large crowd of several hundred attended the next board meeting, where one minister spoke against the change and asked those in the audience who agreed with him to stand. An "overwhelming majority" of those present rose, and the board, going into closed session, unanimously agreed to leave things as they were and long had been. Those seeking change then took the matter to court.

The federal district court found in favor of the plaintiffs on the ground that the rule against social dancing in the school violated the Establishment Clause by imposing the requirements of a religious belief on nonadherents. (It was not as though social dancing were completely outlawed throughout the community of Purdy; many dances were held from time to time away from school premises.) On appeal, decision was reached by the Eighth Circuit Court of Appeals, per Judge George G. Fagg.

> First, plaintiffs conceded at oral argument... that extracurricular dancing is a wholly secular activity. Further, the rule [against such dancing] carries within its text absolutely no religious component, and there is no record evidence of any actual religious purpose connected with the rule's enactment or its textual requirements. In our view, the rule on its face thus satisfies the first prong of the *Lemon* analysis [in having a secular purpose].

326 . *Searcey v. Crim*, 681 F.Supp. 821 (N.D.Ga. 1988).

Second, the record does not fairly demonstrate that any religious doctrine is principally or primarily advanced by the Boards' enforcement of the no-dancing rule. No student is prohibited from engaging in or refraining from extracurricular dancing should they choose to do so. Any arguably religious effect of the rule is indirect, remote, and incidental. To the extent plaintiffs contend the rule impermissibly endorses or conveys a message of governmental preference for a particular religious viewpoint concerning social dancing..., we find nothing in the rule to suggest the District has "take[n] a position on questions of religious belief or * * * ma[d]e adherence to a religion relevant in any way to a person's standing in the political community."[327]

Finally, there is no showing the rule fosters excessive government entanglement in religious affairs. If anything, the rule promotes less, rather than more, school involvement in what plaintiffs contend is a religiously significant activity.... For these reasons, we conclude the District's no-dancing rule on its face satisfies the controlling *Lemon* standards. We turn now to the core of plaintiffs' additional argument challenging the rule.

Plaintiffs contend Board members acted in accordance with the religious beliefs of a majority of patrons attending the March Board meeting and in conformity with their own faiths when they acted to retain the no-dancing rule. Based on this premise, plaintiffs argue the Board's action was religiously motivated and, consequently, should result in nullification of the rule as a violation of the establishment clause. We reject this argument.

* * *

Initially, we observe the district court found a number of the Board members had at some time expressed the view that their individual religious backgrounds favored the rule. In addition, the court found that[,] to the extent Board members testified [that] moral, educational, or fiscal concerns, and not religion, influenced their decisions, their testimony was not credible. While we have no occasion to disagree with these findings, we believe plaintiffs' and the district courts' reliance on them in this case is misplaced.

We readily acknowledge that under the record in this case, the no-dancing rule may be characterized as compatible with the sincerely held religious beliefs of a vocal segment of the Purdy community. The mere fact that a governmental body takes action that coincides with the principles or desires of a particular religious group, however, does not transform the action into an impermissible establishment of religion.

We also find no support for the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action.... To make government action assailable solely on the grounds plaintiffs suggest would destabilize governmental action that is otherwise neutral....

---

327 . Quoting *Allegheny County v. ACLU*, 492 U.S. 573 (1989), discussed at VE2i.

> We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards. In addition to its unrealistic nature, this approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions. In this case, the district court recognized "[r]eligious groups * * * have an absolute right to make their views known and to participate in public discussion of issues." Nevertheless, the court held "those views may not prevail," even though these groups have long been legitimate participants in secular community debate.
>
> At bottom, the proper remedy for plaintiffs' disenchantment with a Board that refused to change a rule that is compatible with *Lemon* is found at the ballot box and not in the Constitution.[328]

The court may have been a bit disingenuous to assert that the school board's action in retaining the no-dancing rule had not made "adherence to a religion relevant in any way to a person's standing in the political community." It clearly indicated where the effective political power in the community lay—with those who opposed social dancing in the public schools. Those who wanted to change that rule were thereby shown to be lacking in political power and of lower standing in the political community.

No effort was made in the appellate opinion to identify one or more secular purposes for the no-dancing rule. The facts that "extracurricular dancing is a wholly secular activity" and that students were not prohibited by the school board from holding social dances when they were outside the purview of the board did not make the board's action religiously neutral. While school board members do not have to check their religous convictions at the door when they enter a board meeting, they do have to render decisions that are religiously neutral. Such neutrality requires that they have at least some nonreligious reasons for their action in addition to reasons that may coincide with their own religious views or others' religious views. (That is the thrust of the "secular purpose" prong of the *Lemon* test of establishment.) There are probably a number of such nonreligious reasons that could have been adduced, such as that social dancing may encourage sexual promiscuity, or that having to pay custodians overtime for evening work and extra cleanup is diversionary of public school resources and energies from the inculcation of the three R's, or that the preponderance of opinion among voters in the district was against it, but none was cited by the court. In fact, the board, as such, gave *no* reason for its action (or lack of action). Various individual members of the board testified as to what "influenced" their decision, but the district court did not find their nonreligious concerns "credible."

---

328 . *Clayton v. Place*, 884 F.2d 376 (CA8 1989).

(12) Secular or Religious Purpose? Opposition to social dancing as a public school activity is not solely a *religious* view, and advancement of that policy is not necessarily advancement of religion. Common as that activity may be in public schools throughout the land, one school district was marching to a different drum. But whose drum was it? The ministers were active in seeking to lead the opposition to change of the long-standing rule, as they had every right as citizens to be. Did their leadership taint the cause, as the district court believed? Are church people entitled to crusade for what they believe is right—so long as they do not succeed? If they succeed, is the cause lost because of their religious motivations or convictions?

The Supreme Court has been reluctant to find an absence of secular purpose for governmental actions, even where religious influences were at work. In *McGowan v. Maryland*,[329] the court noted that Sunday closing laws may originally have had a religious purpose, but that such purpose had long been superseded by secular considerations such as securing one day's *rest* in seven. In *Harris v. McRae*, the court observed that

> it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." That the Judeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. The Hyde Amendment... is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion.[330]

In *Walz v. Tax Commission*,[331] the court explained:

> The legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for non-payment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.

---

329 . 366 U.S. 420 (1961), discussed at IVA7a.

330 . *Harris v. McRae*, 448 U.S. 297 (1980), quoting *McGowan, supra*.

331 . 397 U.S. 644 (1970), discussed at VC6b(3).

The fact that nonreligious as well as religious organizations benefited from the policy of property tax exemption thus indicated a secular rather than a religious legislative purpose. A similar logic convinced the court in *Bowen v. Kendrick*[332] that the inclusion of religious groups and institutions as participants or grantees in the Adolescent Family Life Act did not violate the Establishment Clause because they were but one of a broad range of groups and institutions to be enlisted by Congress in achieving the purposes of the Act.

The court went even further in *Corporation of the Presiding Bishop v. Amos*[333] in finding that Congress did not have an impermissible purpose in permitting religious organizations *alone* to employ their own members in preference to others (under §702 of the Civil Rights Act of 1964), since "`This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'"[334] Protecting the free exercise of religion could be a permissible secular purpose.

> [I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.... A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects"... it must be fair to say that the *government itself* has advanced religion through its own activities and influence. [emphasis in original]

In each of these instances (and others) the Supreme Court rejected the claim that a law did not have a secular purpose. In none of them (except perhaps *McRae*) was there evidence that the law in question had been the product of religious agitation to affect the legislation. On the other hand, there are Supreme Court cases where such agitation or pressure was a more prominent element, and for that reason or some other, they went the other way. The court struck down *per curiam* the posting of the Ten Commandments on public school classroom walls in Kentucky as having no secular purpose.[335] Similarly, in *Epperson v. Arkansas*[336] a law forbidding the teaching of evolution in public schools was held unconstitutional as having no secular purpose, and in *Edwards v. Aguillard*[337] a law requiring "equal time" for the teaching of "creation science" in public schools was held to violate the Establishment Clause because it had no secular purpose. In the school prayer cases, from *Abington Township v. Schempp*[338] to *Wallace v. Jaffree*,[339] a secular purpose was found to be

---

332 . 487 U.S. 589 (1988), discussed at IID2d.
333 . 483 U.S. 327 (1987), discussed at ID4b.
334 . *Amos, supra,* quoting *Hobbie v. Florida*, 480 U.S. 136 (1987), discussed at IVA7i.
335 . *Stone v. Graham*, 449 U.S. 39 (1980), discussed at § C3a above.
336 . 393 U.S. 97 (1968), discussed at § C3b(2) above.
337 . 482 U.S. 578 (1987), discussed at § C3b(6) above.
338 . 374 U.S. 203 (1963), discussed at § C2b(2) above.
339 . 472 U.S. 38 (1985), discussed at § C2d(8) above.

lacking, despite the claims of such purpose proffered by the state(s), which was found to be pretextual (over the vehement objections of Justices Rehnquist or Scalia, who would have accepted the stated purpose at face value).

It may be pertinent that these latter were all state cases, and the court may have been less reluctant to find fault with the purpose of state legislatures than it was with Congress, which passed the laws upheld in *McRae, Kendrick* and *Amos*. On the other hand, more germane than whether of state or federal origin or whether accompanied by religious agitation or not, may be the fact that the decisions finding no secular purpose involved *inculcation of arguably religious subject matter or state sponsorship of religious practices in public schools*, whereas the decisions reaching the opposite result involved primarily *secular matters unconnected with public education*, such as closing of stores, paying for abortions via Medicaid, tax exemption of property, discouraging teen-age pregnancy and discrimination in employment.

In no event did unconstitutionality turn on religious agitation in the electorate (except possibly *Stone v. Graham*, where the court took note of a private group's sponsoring and providing the placards bearing the Ten Commandments, though that alone did not seem dispositive). Where no secular purpose was found, the court sometimes quoted leading legislators' expressions of their reasons for advancing the legislation at issue (Alabama Senator Donald Holmes quoted in answer to the question whether he had any purpose other than returning prayer to public schools, "No, I did not have no other purpose in mind."[340]), but did not impute their non-secular purpose(s) to pressure from the electorate. The legislators' zeal for the challenged legislation may indeed have been the result of such pressure, but they did not explain their actions in that way, or at least were not quoted by the court as so saying.

Would an acceptable secular purpose be to oblige the wishes of the citizenry or some vocal segment thereof, such as the crowd that objected to any change in the rule about no social dancing in public schools, *supra*? The answer should turn on the subject of the legislation and its effect rather than on who or how many of the citizenry were for (or against) the action. Constitutionality should not turn on counting noses of those for and against, lest what is constitutional one day should be unconstitutional the next, following a shift in the tides of public opinion.[341]

Social dancing, as stated earlier, is not essentially a religious (or antireligious) activity. If a majority of the decision-making body (in this instance, the school board) determined that it should not be part of the program or extracurricular activity in the public schools, that was not on its face a proreligious (or antireligious) conclusion,

340. Cited in ibid.

341. See the Supreme Court's thoughts on a similar subject in *Mueller v. Allen*, 463 U.S. 388 (1983), discussed at § D7j below, where it rejected the contention that constitutionality should turn on what proportion of the beneficiaries of an aid-to-education tax deduction attended parochial schools.

and the agitation of vocal citizens (some of whom were clergy) did not make it so. On the other hand, a legislative body instituting prayers or banning the teaching of evolution in public schools at the insistence of a majority of the electorate would not be able to avoid the strictures of the Establishment Clause on plea of merely following the democratic process.

(13) *Ware v. Valley Stream High School District* (1989) (AIDS Instruction). New York State's Commissioner of Education required all primary and secondary school students in the state to receive instruction about Acquired Immune Deficiency Syndrome (AIDS). Members of a small religious group known as the Plymouth Brethren, having 140 members in Valley Stream and 120 in Rochester, requested that their children be excused from this instruction. The statewide regulation provided for excusal from some of the more explicit parts of the AIDS instruction, but not from all of it. The Valley Stream High School District replied negatively to their request, saying it was not able to grant such total excusal, and the Plymouth Brethren took the matter to court, claiming that their right to free exercise of religion was violated. The Supreme Court (New York's lowest court of record) granted the school board's motion for summary judgment, and the Appellate Division affirmed. The state's highest court, the Court of Appeals, issued its decision per Judge Judith S. Kaye.

> The individual plaintiffs are members of the Plymouth Brethren, a religious organization of approximately 35,000 adherents worldwide, 2,000 of whom live in the United States.... [T]he Brethren are a devoutly religious group established in the 1820's by Irish Christians who had become disenchanted with the established churches of the period.
>
> * * *
>
> [Their] factual allegations may be summarized as follows:
>
> *First*, the Plymouth Brethren are an identifiable religious group with a long history of maintaining a cohesive community separated and insulated from society. Members—who have been accorded "conscientious objector" status by the Selective Service—are strongly moral and principled individuals practicing and reinforcing personal purity and other exemplary moral behavior. Apart from the practical necessity for this very small group to attend public school and earn a livelihood in the community, members' associations are limited to other Brethren.
>
> *Second*, plaintiffs' children are not permitted to socialize with nonmember children after school, or even to eat with them at school. The Brethren do not allow television or radio, and they do not see movies or read magazines. Their lives are spent in worship, or in social activities limited to association with other members under the constant moral guidance of parents and other community adults in an "extended family."
>
> *Third*, insistence upon rigorous morality is interwoven with the group's strong sense of separateness. The central principle of the Brethren's religion is the obligation to "separate from evil." Even to know the details of evil is regarded as subversive....

Fourth, in that the Brethren condemn all sexual relations outside of marriage as evil and the details of that evil as subversive, "[t]he religious tenets of its members flatly * * * forbid exposure to instruction concerning sexual relations and moral teachings other than those imparted by members of the community to members of the community." Consequently, plaintiffs believe that their children's exposure to the contents of the AIDS curriculum is inimical to their religous, moral, ethical and personal well-being. In plaintiffs' own words, "to expose our children to the details of evil amplified in the entire sex, drug and AIDS curriculum would undermine the moral foundations of our faith and scar the moral values which have been instilled into our children from their very earliest days and could even jeopardize their place in the holy fellowship of God's Son, our Lord Jesus Christ, if they were diverted from a path of righteousness."

Fifth, exposure to the AIDS curriculum would undermine the Brethren's ability to guide their children's moral lives in accordance with their faith. In short, as plaintiffs affirmed, such exposure "carries with it the very real threat of undermining our religious community and religious practice."

Sixth,... no public health risk will result from the exemption. Whatever the
failings of society at large in educating children to avoid the dangerous and unhealthy practices by which AIDS is transmitted, in Brethren society such instruction is successful.

Finally, Brethren "children have been exposed to school disciplinary sanction by reason of their justified refusal to participate in mandatory AIDS-related instruction."

Defendants separately cross-moved for summary judgment, arguing that plaintiffs' free exercise rights would not be violated by merely exposing their children to the information contained in the AIDS curriculum; they urged, moreover, that the State has a compelling interest in educating its citizens to protect them from the dangers of AIDS. Defendants particularly disputed plaintiffs' allegation that they are part of an isolated community, pointing to the degree that they are "mixed-in" and "integrated" with the general community. Defendants alleged that the need to educate plaintiffs' children about AIDS is further underscored by the possibility—however remote—that disaffected members may leave or be expelled from the confines of the faith.

* * *

While the Supreme Court has been less than clear in defining just how much a State requirement need burden religion in order to violate the Free Exercise Clause, plainly governmental action that merely offends religious beliefs does not implicate First Amendment values.[342] This is particularly so in the context of school curriculum decisions, where important policy concerns dictate deference to education authorities.

342 . Citing *Joseph Burstyn v. Wilson*, 343 U.S. 495 (1952) (film deemed "sacrilegious" cannot be banned because distasteful to religious group), discussed at VB1.

It is generally acknowledged that mere exposure to ideas that contradict religious beliefs does not impermissibly burden the free exercise of religion. The First Amendment does not stand as a guarantee that a school curriculum will offend no religious group. Moreover, parents have no constitutional right to tailor public school programs to individual preferences, including religious preferences.[343]

Plaintiffs accept that the Constitution offers no protection against exposure to ideas that offend their religion. They maintain, however, that the Supreme Court recognized an exception to the "mere exposure" rule in *Wisconsin v. Yoder*[344], and that they fall squarely within that exception....

The Supreme Court in *Yoder* held Wisconsin could not require the Amish to send their children to public school after eighth grade. In finding an impermissible burden on free exercise, the Supreme Court examined Amish life and culture in some detail, ultimately concluding that what was in issue were long-standing beliefs shared by an organized group, that the beliefs related to religious principles and pervaded and regulated Amish daily life, and that the State law threatened the continuing existence of the Old Order Amish community.

The reach of *Yoder* is plainly limited. The Supreme Court itself made that clear in cautioning that its holding would apply to "probably few other religious groups or sects" and that "courts must move with great circumspection in performing the sensitive and delicate taask of weighing a State's legitimate social concern when faced with religious claims for exemption from generally appplicable educational requirements."...

Nevertheless, the present case bears some striking similarities to *Yoder*. As in *Yoder*, plaintiffs seek a religious exemption from exposure to ideas that are not merely offensive but allegedly abhorrent to their central religious beliefs. And like *Yoder*, governmental action purportedly compels them to participate in instruction that is at odds with a fundamental tenet of their religious belief—remaining simple from evil. The Brethren assert, like the Amish in *Yoder*, that these are entrenched religious beliefs, not the product of "a way of life and mode of education by a group claiming to have recently discovered some `progressive' or more enlightened process for rearing children for modern life." Their adherence to "the Principle of Separation," they say, also stems from "a sustained faith pervading and regulating [their] entire mode of life."

Thus, on this record we cannot agree with the sweeping conclusions reached by the Trial Judge in granting summary judgment that the mandated AIDS curriculum is neither contrary to the Brethren's religious beliefs nor destructive of the community as a whole.... But it is as much plaintiffs' alleged differences from the Amish in *Yoder* as their similarities that give pause and persuade us that further factual development is required before a conclusion can be reached—either way—on the question whether the free exercise of sincerely held religious beliefs is burdened by

343 . Citing *Epperson v. Arkansas*, 393 U.S. 97 (1968), discussed at § 3b(2) above.

344 . 406 U.S. 205 (1972), discussed at § B2 above.

> compulsory AIDS education.... The trial record in *Yoder* is replete with fact, scholarly and expert testimony that has no parallel in the present record.
>
> * * *
>
> Even religious rights must bow to the compelling interest of the State, pursued by the least restrictive means. If plaintiffs succeed in establishing that exposure to the AIDS curriculum substantially burdens their religious practice, defendants' refusal to grant the exemption will be then subject to "strict scrutiny." Both the trial court and the Appellate Division were satisfied that the State's interest in AIDS education on its face was so compelling that it necessarily would override plaintiffs' free exercise rights. While that conclusion may ultimately prove correct, it was error to reach it on the present record.
>
> As a blanket proposition, the State has a compelling interest in controlling AIDS, which presents a public health concern of the highest order. Nor can there be any doubt as to the blanket proposition that the State has a compelling interest in educating its youth about AIDS....
>
> But the Education Law and regulations themselves provide for exemptions from the prescribed curriculum. Moreover, history teaches that constitutional protections do not readily yield to blanket assertions of exigency. As with other grave risks we have faced during the past two centuries, the threat of AIDS cannot summarily obliterate this Nation's fundamental values.[345] That compelling public interests underlie the mandate for AIDS education thus does not, in and of itself, end all inquiry as to whether 35 Brethren children must be denied an exemption.
>
> Where burden is established, the State must show with "particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to [these children]."[346] On the present record, the State has not made the showing required to support summary judgment in its favor.
>
> * * *
>
> In short, while the spread of AIDS heightens and intensifies the public interest in education, it does not overrun other cherished values that may not require sacrifice. To be sure, plaintiffs must meet a high threshold of proof, but at this juncture we cannot summarily brush aside the passionate assertion of a longstanding, highly individual—if not unique—religious group in this State that exposure to defendants' AIDS curriculum could alone destroy the foundations of their faith and "jeopardize their place in the holy fellowship of God's Son."[347]

Thus New York's highest court wrestled with the intersecting of two important public values—controlling a public health epidemic and protecting the free exercise of religion. Its task would have been much easier a year later, after the Supreme Court

---

345. Citing Orland and Wise, "The AIDS Epidemic: A Constitutional Conundrum," 14 *Hofstra L.Rev.* 137, 150 (discussing *Korematsu v. U.S.*, 323 U.S. 214, Japanese relocation during WWII).

346. Quoting *Wisconsin v. Yoder*, 406 U.S. at 236.

347. *Ware v. Valley Stream High School District*, 550 N.E.2d 420 (NY 1989).

had virtually nullified the force of the Free Exercise Clause against laws of "general applicability." (That "strict scrutiny" standard was reinstated by the Religious Freedom Restoration Act of 1993.) The court commendably called on the state to do more than simply assert in general terms its public-health concern without showing how the excusal of thirty-five children would defeat its entire project. Four members of the court joined Judge Kaye's opinion. Two judges did not. They both dissented on the ground that remand for further fact-finding was not necessary. The case could and should have been decided on summary judgment. They differed only as to which party was entitled to that judgment. Judge Vito Titone was convinced that the Plymouth Brethren were entitled to win. Judge Joseph Bellacosa was equally convinced that the state should win. Between them they sharpened the points at issue in this instructive case.

Judge Titone thought there was little that the trial court could learn beyond what the parties had already submitted through affidavits without probing into the particulars of the religious group's beliefs and practices to a degree he thought impermissible. He also entertained some healthy doubts as to the efficacy of the state's educational program, since the persons most at risk were also those least accessible to education. He also objected to the majority's viewing this case and *Yoder* as exceptions to the "mere exposure" principle. In his view, both cases involved, not just exposure to objectionable material, but requiring objectors to engage in *conduct* prohibited by their religion.

> [A]s I read the record, [the schools'] conclusory submissions do not rise to the level of proof that is required successfully to oppose summary relief.... [P]laintiffs have submitted substantial documentation of the manner in which their insularity is preserved.... This documentation is sufficient to establish, at least prima facie, the genuineness of [their] claim that separation from society and avoidance of exposure to the "details of evil" are essential features of their religious practice.
>
> In opposition to [their] claims on this point, [the schools] have come forward with no specific contradictory facts or proof, in affidavit form, that plaintiffs' separatist practices are not what they have represented. Instead, defendants merely make note of the fact that plaintiffs are not totally isolated and do have some contact with the larger community through their attendance at school and work. Based upon these "facts," defendants then ask the court to infer that plaintiffs' religious exercise would not necessarily be compromised by exposure to the AIDS curriculum....
>
> The suggestion that a factual dispute exists concerning the extent of [the religious group's] actual isolation from the mainstream of society implies questions about... the extent to which their beliefs actually do require the near-complete isolation that their papers allege.... It is difficult to imagine, however, how a court could ever engage in such an inquiry without running afoul of the well-established rule that the judiciary may not

become the arbiter of what a particular religious group truly believes.[348] Yet, that is precisely what the majority declares should be done here.

The same infirmity exists [with respect to] an inquiry into whether "the AIDS curriculum poses any threat to the continued existence of the Brethren as a church community." [They] have squarely alleged that their religion forbids instruction on matters of morality and physical intimacy other than that given by members of their own community.... Furthermore, both common sense and an overview of [their] submissions suggest that the success of the separatism that is so central to their creed depends upon their ability to shield their children from the larger community's more permissive values and ideas on matters of sexuality.

Once again, there is nothing concrete in [the schools'] submissions that calls these assertions into question, apart, that is, from some conclusory assertions that plaintiffs' children would suffer no irreversible harm from exposure to the speacial AIDS curriculum. [Footnote: Indeed, during oral argument in this court, the attorney for defendant school district himself demonstrated the legitimacy of plaintoffs' concern when he asserted that an important goal of the AIDS curriculum was to inculcate tolerance and teach children that AIDS victims are not "bad people." While that message is obviously a correct and worthwhile one, it is plainly inimical to plaintiffs' core beliefs. In fact, such value-laden instruction based on the beliefs of the surrounding community strikes at the very heart of the isolationist principles upon which plaintiffs' religious practices are built.] Further, even if [the schools'] submissions on the issue were not so sparse, a serious question would exist as to what kind of further proof [they] could conceivably muster. Will the trial court be called upon to consider expert testimony concerning the relative importance of various aspects of the Brethren's separatist views? Will conflicting testimony by coreligionists be accepted, either to refute or to explain these plaintiffs' assertions about the centrality of the religious principle requiring that they remain "simple of the details of evil"? If so, will the court be called upon to decide whose position is most credible, whose views represent the true Brethren faith...? How can such an inquiry be conducted consistent with the rule that there is no "right of civil authorities to examine the creed and theology of [a c]hurch and to factor out what in its * * * considered judgment are the peripheral * * * aspects."[349]...

Furthermore, I cannot agree that the question whether there is a "threat to the continued existence" of the sect as a religious community is a legally significant issue precluding summary relief.... Nothing in the *Yoder* opinion suggests that the Free Exercise Clause's protections are limited to

348 . Quoting the Court of Appeals' own decision in *Holy Spirit Association v. Tax Commission*, 435 N.E.2d 662 (1981): "[t]he articulation of the Supreme Court in foreclosing judicial inquiry into the truth or falsity of religious beliefs is equally applicable to judicial inquiry as to the content of religious beliefs.... Neither the courts nor the administrative agencies of the State * * * may go behind the declared content of religious beliefs."

349 . Quoting *Holy Spirit Association, supra*.

State requirements that threaten the very existence of the religion and/or the religious community. Indeed, if that were the test for invoking the First Amendment's protective mantle, the State could, for example, require Jewish or Muslim school children whose families observe special religious dietary laws to eat pork-based food products, since such "minor" breaches of those groups' religious practices could not be said to threaten the vitality of the religious community itself. Plainly, that is not, and cannot be, the law.[350]

The majority apparently... believes... plaintiffs' claim falls within the line of cases denying relief to sects seeking to avoid even the mere exposure to ideas that offend their religious principles. *Yoder, supra*, is then treated in the majority's analysis as an "exception" to this line of cases, with all of the rigid, fact-specific limitations that ordinarily accompany exceptions to well-established, well-regarded legal rules. It is this characterization of the issue in the present case, as well as of the significance of the *Yoder* decision, that lies at the heart of our disagreement.

In my view, neither this case, nor *Yoder*, is simply an example of a religious sect's effort to obtain First Amendment protection from the "mere exposure" to inimical ideas. Instead, this case, like *Yoder*, is an attempt by plaintiffs to secure a judicial dispensation from having to perform an affirmative act that their religion forbids. Although the gist of what plaintiffs seek to avoid is, indeed, "exposure" to a certain category of information, [they] are motivated not merely by a desire to steer clear of offensive or contradictory ideas but rather by a religious precept that requires them, and their children, to remain innocent of "the details of evil." In a sense, plaintiffs are forbidden by their religious beliefs to eat of the tree of secular knowledge on the subject of AIDS in the same way that some observant Jewish and Muslim individuals are forbidden to eat pork—and in the same way that the Amish individuals in *Yoder* were forbidden to send their teen-age children to public high school, thereby removing them from the traditional farm community at a time that was critical to their spiritual development. Accordingly, plaintiffs are entitled to the same protection, without regard to whether the continuing vitality of their religous community has been threatened.

The final "fact question" that the majority identifies concerns the importance of the State's interest that is sought to be vindicated here. In this regard, I agree with the majority that although society's interest in controlling the spread of AIDS is compelling, it does not necessarily follow that the State's interest in furnishing widespread AIDS education provides a compelling basis for overriding the religious beliefs of school children's parents. Where the majority and I differ is, once again, on the questions of the sufficiency of the State's submissions in opposition to summary

350. Citing *People v. Lewis*, 502 N.E.2d 988 (N.Y. 1986) (where state interest can be satisfied in other ways, prisoner may not be required to submit to an act that would "impinge upon" his sincerely held religious beliefs).

judgment and the likelihood that a further hearing will reveal additional, legally relevant facts....

Here, although the State has submitted a substantial amount of background material concerning the need for AIDS education, its submissions do not explain with the necessary specificity why an exception should not be granted to this small and insular religious group. As in *Yoder*, the defendants' observations that Brethren occasionally withdraw from the sect and that outsiders are occasionally invited to join are too speculative to constitute a "compelling" State interest, at least in the absence of some factual showing that such movement between the Brethren and the larger community is statistically significant....

Finally, as a matter of common sense and experience, I have difficulty crediting any claim by the State that its interests would be seriously impaired by granting an exemption to these plaintiffs.... [W]e should not lose sight sight of the fact that [education] is not the equivalent of a serum that would insure immunity. To the contrary, the efficacy of education in this context might well be questioned, since the individuals who are most at risk, such as intravenous drug users, are also among those least susceptible to the influence of educators. Furthermore, given the nature of this disease and the manner in which it is spread, it seems clear that prevention depends upon a combination of factors, only one of which involves clinical knowledge. Equally critical are such factors as an individual's choice of life-style and sense of self-esteem—precisely the areas which the Brethren's moral and spiritual training addresses.

In the final analysis, the continued existence of our pluralistic society depends not only upon our commitment to tolerating minority viewpoints, but also upon our willingness to *accommodate* them. Further, I believe that we jeopardize an important element of our social structure when we too readily displace the moral and spiritual guidance that may be derived from family and church with the secular and purportedly value-neutral instruction that our public schools are equipped to provide. While I share the abhorrence of ignorance that characterizes much of western culture, I cannot overlook the fact that our contemporary faith in the power of secular education has not immunized us from such social ills as rampant drug abuse, an inordinately high drop-out rate, family dissolution and spiritual demoralization, as well as socially transmitted diseases such as AIDS. Accordingly, like the *Yoder* court, I am most reluctant to assume that today's prevailing culture, which places its faith in objective knowledge, is "right" while plaintiffs and others like them, who place their faith in moral and spiritual guidance, are "wrong."[351]

Judge Bellacosa was equally certain—if not a bit bellicose—that the case should be decided for the state and against the religious objectors.

351 . *Ware v. Valley Stream, supra*, Titone dissent.

> The Commissioner's mandatory AIDS Health Education Program, approved by the State Board of Regents, is vital and valid....
>
> The majority recognizes... that *Yoder* is an extraordinarily exceptional dispensation from the primacy of a universal public educational curriculum—in this case, a primacy enhanced by the urgency of a rampant public health problem, thus far apparently controllable by educational means. Fragmentation of the curriculum, especially in this area, and segmentation of the students population are not warranted[,] and plaintiffs have not advanced sufficient proof... to withstand the defendant Commissioner's record presentation of a dominant, compelling State interest....
>
> Denominating [the objectors'] claims as fact issues, however, cannot so facilely justify this inconclusive procedural remedy not even sought by plaintiffs, because the claims are facially and evidentially... belied by the realities and the record. The Brethren's conceded participation in the community, especially in the core relevant category of the students' otherwise full involvement in their public school education, is substantial, not "minimal." Moreover, these primary attributes of community, i.e., work, school and dwelling, cannot be diminished or denied just because the Brethren find it "not feasible * * * to do otherwise." The facts are the facts for whatever reason—and if undeniable, they are not triable. Indeed, some categories of cases are... particularly suitable to summary judgment resolution. This is such a case and such a category, and the record supports only that relief in my view.
>
> In complete context, the plaintiff Brethren's quest... cannot therefore prevail on this record because no genuine, triable issues of fact are evident. Plaintiffs are not entitled to the trial the majority affords them, nor the summary judgment which Judge Titone would grant. Rather, the constitutionality of the State Education Commissioner's AIDS Education Program should be upheld as both lower courts have ruled and the children should get on with their full and necessary education.[352]

The majority sailed majestically on down the ways with an outrigger on each side to confirm its course. The plaintiffs were not put to the test, however. When the matter arose in the trial court on remand, the state consented to a temporary injunction exempting the Plymouth Brethren's children from all AIDS instruction, both in Valley Stream and in Rochester, provided that the state could return to court on ninety days' notice to seek termination of the injunction and a trial. The state has not invoked that provision, and the "temporary" injunction has remained in effect while several cohorts of Brethren have graduated from high school without undergoing the AIDS instruction. Their attorney surmised that the state did not wish to go to trial on the evidence that he had obtained by deposition of high school health teachers as to the actual content of the AIDS instruction, some of which, he said, was

352 . Ibid., Bellacosa dissent.

so clinical and explicit that he was actually embarassed by it. Some of the twenty-two hours of instruction, he said, seemed to be devoted to free-flowing classroom discussion among the more sexually active teen-agers, interspersed with displays of literature furnished by various "gay" men's groups on how to avoid AIDS by "safe" sex.[353] This might be a range of educational curriculum that some parents—not just Plymouth Brethren—would not choose for their children. Indeed, controversies over this program raged through some of the Community School Boards of New York City, especially in Queens.

The AIDS epidemic represented a genuine public-health peril that perplexed policy-makers at all levels, and the urgency of finding a remedy engendered almost a hysteria in some quarters. Once again the public schools were pressed into service to solve a serious and complex problem that the adult community had not found a way to resolve, and once again the public schools, far from performing miracles, took a sweeping and rigid "one-size-fits-all" approach to this difficult task, despite the obvious fact—as Judge Titone observed—that "the individuals who are most at risk... are least susceptible to the influence of educators." Compared to the immense and virtually insoluble problems that would occupy the best skills and resources of the state and city, the Plymouth Brethren could have been viewed with relief rather than resentment as a pocket on the plus side—a tiny but blessedly self-policing group that would not require the attentions of the vast legal machinery of the state.

(14) *Alfonso v. Fernandez* (1993) (Condom Distribution). A similar case arose in the City of New York, which had an even more acute problem: New York City teenagers, who comprised only 3 percent of the nation's teenagers, were said to account for 20 percent of the reported cases of adolescent AIDS in the United States! In 1990, Joseph Fernandez, then chancellor of the New York City Board of Education, added to the already operating state-mandated HIV/AIDS education a program of free distribution of condoms to high school students.

> Public high schools are to establish health resource rooms where trained professionals are to dispense condoms to students who request them. A student to whom condoms are dispensed must be given personal health guidance counselling involving the proper use of condoms, and the consequences of their use or misuse. Students are not required to participate in this component of the [HIV/AIDS] program and no sanction is imposed on a student who does not do so. Most importantly, this component of the [school] program does not include a provision for parental consent or opt-out.[354]

---

353 . Conversation with Robert M. Calica of Garden City, N.Y., August 25, 1994. The distribution through the schools of free literature provided by outside organizations to promote their own interests and perspectives may be viewed in the context of the *Berger* case of distribution of Gideon Bibles, at §(9), *supra*. It also suggests a broader perspective on the question of various kinds of "evangelism" in public schools, discussed under § E3, Equal Access, below.

354 . *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (1993).

A group of parents took the matter to court in Staten Island, where their complaint was dismissed. On appeal, they fared somewhat better, in a decision of the Second Department of the Appellate Division, per Justice Vincent Pizzuto. A cluster of *amici* including the Planned Parenthood Federation of America, the New York Civil Liberties Foundation and the AIDS Project of the American Civil Liberties Foundation joined to urge affirmance of the dismissal. The appeal addressed only the free condom distribution program.

> Intense controversy has surrounded the expanded HIV/AIDS education program. The impetus for the program is a deadly health threat of epidemic proportions.... The supporters of the condom availability component of the plain [plan?] view it as a legitimate and necessary part of public school health education directed at control of a public health crisis. On the other hand, many persons are concerned that the condom availability component of the plan is tantamount to condoning promiscuity and sexual permissiveness, and that the exposure to condoms and their ready availability may encourage sexual relations among adolescents at an early age and/or with more frequency, thereby weakening their moral and religious values. They doubt the wisdom or the desirability of a public school system engaging in what they view as a controversial social program peripheral to the immediate task of educating children....
>
> At common law it was for parents to consent or withhold their consent to the rendition of health services to their children.... Public Health Law § 2504, which was enacted in 1972, codified some but not all of the common-law exceptions to the general incapacity of minors..., none of which are applicable here.... The [parents] argue that the distribution of condoms to high school students is a health service, that such distribution does not fall within any of the exceptions..., and therefore, that parental consent is required. [The chancellor and Board of Education] argue that the distribution is not a "health service" but merely an "adjunct to an education program" or an "aspect of instruction in disease prevention."...
>
> The condom availability... program is not merely education, but is a health service to prevent disease by protecting against HIV infection.... The distribution of condoms is not, as contended by the [chancellor], an aspect of education in disease prevention, but rather is a means of disease prevention. Supplying condoms to students upon request has absolutely nothing to do with education, but rather is a health service occurring after the educational phase has ceased. Although the program is not intended to promote promiscuity, it is intended to encourage and enable students to use condoms if and when they engage in sexual activity. This is clearly a health service for the prevention of disease which requires parental consent.... The Legislature has not acted to authorize the provision of such a service without parental consent. Thus, the cited [education] regulations which authorize condom distribution without prior parental consent or opt-out are contrary to the common law and of no effect.... It is for the Congress or the Legislature, not the courts—and certainly not the State

> Commissioner of Education or a Board of Education—to provide exceptions to parental consent requirements.
>
> The *amici* argue that "the [condom availability component of the] Program is * * * consistent with the practice of health providers in this state, who routinely prescribe and distribute contraceptives... to minors on the basis of their own consent." The *amici* miss the point. The primary purpose of the Board of Education is not to serve as a health provider. Its reason for being is education. No judicial or legislative authority directs or permits teachers and other public school educators to dispense condoms to minor, unemancipated students without the knowledge or consent of their parents. Nor do we believe that they have any inherent authority to do so.
>
> The... parents are being compelled by State authority to send their children into an environment where they will be permitted, even encouraged, to obtain a contraceptive device, which the parents disfavor as a matter of private belief. Because the Constitution gives parents the right to regulate their children's sexual behavior as best they can, not only must a compelling State interest be found supporting the need for the policy at issue, but that policy must be essential to serving that interest as well. We do not find that the policy is essential. No matter how laudable its purpose, by excluding parental involvement, the condom availability component of the program impermissibly trespasses on the [parents'] rights by substituting the [schools] in loco parentis, without a compelling necessity therefore.[355]

Justice Pizzuto was joined in this holding by Presiding Justice Vincent R. Balletta, Jr., and Justice John Copertino. But Justice Eiber dissented, siding with the schools.

> Although the Board [of Education] considered the possibility of allowing parents who disapprove of the distribution of condoms to opt out of the voluntary program, the Board concluded that an opt-out provision would be unwise because students whose parents disapprove of premarital sexual relations may especially "be in need of a place where they can obtain condoms without having to account for any expenditures of funds or having to identify themselves in order to get the condoms." Moreover, the [Board was] concerned that a parental opt-out provision, which would require students to identify themselves before they could be given a condom, "would so seriously limit participation in the program as to make it ineffective in reaching many of those students who most need it."

If there were any doubt that the Board of Education thought that it knew better what students needed than did their parents, and that it was determined to supply them with devices to enable them to engage, without their parents' knowledge or consent, in sexual promiscuity with reduced fears of contracting disease or

---

355. *Alfonso v. Fernandez, supra*, majority opinion, citing *Mozert v. Hawkins County*, 827 F.2d 1058 (1987), discussed at § c(3) above.

pregnancy, these quotations from the Board's deliberations should have removed them. This was but another of many instances of the public schools' willingness to preempt the role and responsibility of parents in the upbringing of children and one of the factors in the deterioration of public schools and the corresponding increase in private and church-related schools.[356] Justice Eiber, however, thought that the current crisis justified this policy.

> [T]he spread of AIDS has reached alarming proportions giving rise to a compelling state interest to halt the growth of the epidemic. Clearly, many parents, such as the petitioners, are seeking to provide guidance to their children and to protect their health and morality. The majority [of this court] overlooks the unfortunate reality that many children lack such interested parents. Many children have no parents to provide guidance and discipline or who are even available to consent to the child's participation in the program should an "opt-out" be mandated. Since the consequence of contracting AIDS is death, providing practical protection against the spread of the virus which causes it, to a high-risk population, in my view, outweighs the minimal intrusion into the parent/child relationship of the more protected, more fortunate portion of the adolescent population of New York City.[357]

This dissent was joined by Justice Sondra Miller, who also wrote a separate dissent, noting that "some students who have interested parents are beyond their practical control in matters of sexuality." All of the rationales for the broadside distribution of free condoms to anonymous high school students on request assumed that it was an effective means of reducing the transmission of HIV, which was not necessarily true. It was equally likely that for some students picking up free condoms was a kind of fad or game that resulted in their use as balloons, either for air or water (in the latter case to be dropped out of windows on the heads of passersby), rather than for their intended purpose. As for that purpose, the boys most likely to need them (and least likely to use them) were often actors on impulse and opportunity, for whom prudence and planning were unknown elements unlikely to be instilled by anything of an instructional nature encountered at school. But the hope springs eternal in the minds of educational theorists that such abstract instruction, plus free condoms, will produce a hitherto unknown form of responsible behavior in unreflective and predatory adolescents of the type portrayed in the motion picture *Kids!*

---

356. See the speech by New York City Mayor Rudolph W. Giuliani reported in *New York Times*, Aug. 15, 1995, p. 1, contending that the public school system of the city was "close to collapse," and comparing public schools to Catholic schools, which have higher graduation rates and higher test scores than the public schools of the city. (Of course, there are many factors contributing to this result, but there is no question about the direction of flow.)

357. *Alfonso v. Fernandez, supra*, Eiber dissent.

That there are students and/or parents who do not need the public schools to teach about sexual morality (when the schools' net contribution to learning in that area is more apt to be in the opposite direction) is all the more reason for an opt-out provision to enable them to try to control a little of the school-induced damage to what morality they have attained. It is not an argument for subjecting them to the undifferentiated school regime that—according to Mayor Giuliani, *supra*, has not done too distinguished a job at less demanding kinds of education.

4. A Governmental Guide

In August 1955, U.S. Secretary of Education Richard W. Riley sent a notice to all the public schools in the country entitled "Religious Expression in Public Schools" that sought to provide guidance on what the law actually did and did not allow in the subject-matter areas covered in this volume. It was accompanied by a covering letter that explained, "President Clinton directed the Secretary of Education, in consultation with the Attorney General, to provide every school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools." As he acknowledged in the letter, the statement relied heavily upon guidelines developed earlier by a broad coalition of religious, educational and civic groups. Many of these experts disagreed strongly with one another on what the situation *ought* to be, but they were able to reach a remarkably firm consensus on what the law actually *was*, and this became the foundation for the government's document. The Secretary's letter was headed by a quotation from the President: "Nothing in the First Amendment converts our public schools into religion-free zones." This communication may have been intended in part to defuse agitation for a constitutional amendment to restore state-sponsored prayer to public schools. In any event, it provides a useful summary of subjects treated in this volume.

> RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS
>
> **Student prayer and religious discussion:** The Establishment Clause of the First Amendment does not prohibit purely private speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable non-disruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.
>
> Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that

normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or group of students.

Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such events.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureate: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endoresement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach *about* religion, including the Bible or other scripture; the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the

secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submission. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals: Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. School officials may neither encourage nor discourage students from availing themselves of an excusal option. Under the Religious Freedom Restoration Act, if it is proved that particular lessons substantially burden a student's free exercise of religion and if the school cannot prove a compelling interest in requiring attendance, the school would be legally required to excuse the student.

Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtues, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable message. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages. When wearing particular attire, such as yarmulkes and head scarves, during the school day is part of students' religious

> practice, under the Religious Freedom Restoration Act schools generally may not prohibit the wearing of such items.

The statement continued with a page pertaining to the Equal Access Act, which will be reproduced at the end of Section E below.