# Brennan: Concurrence

Almost a century and a half ago, John Marshall, in *M'Culloch v. Maryland,* enjoined: ". . . we must never forget, that it is *a constitution* we are expounding." 4 Wheat. 316, 17 U. S. 407. The Court's historic duty to expound the meaning of the Constitution has encountered few issues more intricate or more demanding than that of the relationship between religion and the public schools. Since undoubtedly we are "a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson,* 343 U. S. 306, 343 U. S. 313, deep feelings are aroused when aspects of that relationship are claimed to violate the injunction of the First Amendment that government may make "no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom. Nevertheless it is this Court's inescapable duty to declare whether exercises in the public schools of the States, such as those of Pennsylvania and Maryland questioned here, are involvements of religion in public institutions of a kind which offends the First and Fourteenth Amendments. **[p. 231]** When John Locke ventured in 1689,

"I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other,[[1]](#footnote-1) "

he anticipated the necessity which would be thought by the Framers to require adoption of a First Amendment, but not the difficulty that would be experienced in defining those "just bounds." The fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. 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. The constitutional mandate expresses a deliberate and considered judgment that such matters are to be left to the conscience of the citizen, and declares as a basic postulate of the relation between the citizen and his government that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand. . . ."[[2]](#footnote-2)

I join fully in the opinion and the judgment of the Court. I see no escape from the conclusion that the exercises **[p. 232]** called in question in these two cases violate the constitutional mandate. The reasons we gave only last Term in *Engel v. Vitale,* 370 U. S. 421, for finding in the New York Regents' prayer an impermissible establishment of religion compel the same judgment of the practices at bar. The involvement of the secular with the religious is no less intimate here, and it is constitutionally irrelevant that the State has not composed the material for the inspirational exercises presently involved. It should be unnecessary to observe that our holding does not declare that the First Amendment manifests hostility to the practice or teaching of religion, but only applies prohibitions incorporated in the Bill of Rights in recognition of historic needs shared by Church and State alike. While it is my view that not every involvement of religion in public life is unconstitutional, I consider the exercises at bar a form of involvement which clearly violates the Establishment Clause.

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

## I

The First Amendment forbids both the abridgment of the free exercise of religion and the enactment of laws "respecting an establishment of religion." The two clauses, although distinct in their objectives and their applicability, emerged together from a common panorama of history. The inclusion of both restraints upon the power of Congress to legislate concerning religious matters shows unmistakably that the Framers of the First Amendment were not content to rest the protection of religious liberty exclusively upon either clause. "In assuring the free exercise of religion," Mr. Justice Frankfurter has said, **[p. 233]** "the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience. This protection of unpopular creeds, however, was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith. The battle in Virginia, hardly four years won, where James Madison had led the forces of disestablishment in successful opposition to Patrick Henry's proposed Assessment Bill levying a general tax for the support of Christian teachers, was a vital and compelling memory in 1789."

*McGowan v. Maryland,* 366 U. S. 420, 366 U. S. 464-465.

It is true that the Framers' immediate concern was to prevent the setting up of an official federal church of the kind which England and some of the Colonies had long supported. But nothing in the text of the Establishment Clause supports the view that the prevention of the setting up of an official church was meant to be the full extent of the prohibitions against official involvements in religion. It has rightly been said:

"If the framers of the Amendment meant to prohibit Congress merely from the establishment of a 'church,' one may properly wonder why they didn't so state. That the words *church* and *religion*were regarded as synonymous seems highly improbable, particularly in view of the fact that the contemporary state constitutional provisions dealing with the subject of establishment used definite phrases such as 'religious sect,' 'sect,' or 'denomination.' . . . With such specific wording in contemporary state constitutions, why was not a similar wording adopted for the First Amendment if its framers intended to prohibit nothing more than what the States were prohibiting? " **[p. 234]** Lardner, How Far Does the Constitution Separate Church and State? 45 Am.Pol.Sci.Rev. 110, 112 (1951).

Plainly, the Establishment Clause, in the contemplation of the Framers, "did not limit the constitutional proscription to any particular, dated form of state-supported theological venture."

"What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government's support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each. The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation. . . . The Establishment Clause 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."

*McGowan v. Maryland, supra,* at 366 U. S. 465-466 (opinion of Frankfurter, J.).

In sum, the history which our prior decisions have summoned to aid interpretation of the Establishment Clause permits little doubt that its prohibition was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief.

But an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems. The specific question before us has, for example, aroused vigorous dispute whether the architects of the First Amendment -- James Madison and Thomas Jefferson particularly -- understood the prohibition against any "law respecting an establishment of **[p. 235]** religion" to reach devotional exercises in the public schools.[[3]](#footnote-3) It may be that Jefferson and Madison would have held such exercises to be permissible -- although, even in Jefferson's case, serious doubt is suggested by his admonition against

"putting the Bible and Testament into the hands of the children at an age when their judgments are not sufficiently matured for religious inquiries. . . .[[4]](#footnote-4) "

But **[p. 236]** I doubt that their view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases. A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.[[5]](#footnote-5) Our task is to translate

"the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials **[p. 237]** dealing with the problems of the twentieth century. . . ."

*West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 319 U. S. 639.

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. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed.[[6]](#footnote-6) While it is clear to me that the Framers meant the Establishment Clause to prohibit more than the creation of an established federal church such as existed in England, I have no doubt that, in their preoccupation with the imminent question of established churches, they gave no distinct **[p. 238]** consideration to the particular question whether the clause also forbade devotional exercises in public institutions.

Second, the structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an "establishment" offer little aid to decision. 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 education pass largely to public officials.[[7]](#footnote-7) It would, therefore, **[p. 239]** hardly be significant if the fact was that the nearly universal devotional exercises in the schools of the young Republic did not provoke criticism; even today, religious ceremonies in church supported private schools are constitutionally unobjectionable. **[p. 240]** Third, our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today, the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.[[8]](#footnote-8) **[p. 241]** *See Torcaso v. Watkins,* 367 U. S. 488, 367 U. S. 495. In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices. By such a standard, I am persuaded, as is the Court, that the devotional exercises carried on in the Baltimore and Abington schools offend the First Amendment because they sufficiently threaten in our day those substantive evils the fear of which called forth the Establishment Clause of the First Amendment. It is "a constitution we are expounding," and our interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society.

Fourth, the American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall. The public schools are supported entirely, in most communities, by public funds -- funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely **[p. 242]** 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. *See Illinois ex rel. McCollum v. Board of Education,*333 U. S. 203. This is a heritage neither theistic nor atheistic, but simply civic and patriotic. *See Meyer v. Nebraska,* 262 U. S. 390, 262 U. S. 400-403.

Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. The choice which is thus preserved is between a public secular education, with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment, the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative -- either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one very much like the choice of whether or not to worship -- which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history -- drawn more from the experiences of other countries than from our own -- is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent. **[p. 243]**

## II

The exposition by this Court of the religious guarantees of the First Amendment has consistently reflected and reaffirmed the concerns which impelled the Framers to write those guarantees into the Constitution. It would be neither possible nor appropriate to review here the entire course of our decisions on religious questions. There emerge from those decisions, however, three principles of particular relevance to the issue presented by the cases at bar, and some attention to those decisions is therefore appropriate.

*First.* One line of decisions derives from contests for control of a church property or other internal ecclesiastical disputes. This line has settled the proposition that, in order to give effect to the First Amendment's purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide such questions. These principles were first expounded in the case of *Watson v. Jones,* 13 Wall. 679, which declared that judicial intervention in such a controversy would open up

"the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination. . . ."

13 Wall. at 80 U. S. 733. Courts above all must be neutral, for "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[[9]](#footnote-9) 13 Wall. at80 U. S. 728. This principle has recently **[p. 244]** been reaffirmed in *Kedroff v. St. Nicholas Cathedral,* 344 U. S. 94, and *Kreshik v. St. Nicholas Cathedral,* 363 U. S. 190.

The mandate of judicial neutrality in theological controversies met its severest test in *United States v. Ballard,* 322 U. S. 78. That decision put in sharp relief certain principles which bear directly upon the questions presented in these cases. Ballard was indicted for fraudulent use of the mails in the dissemination of religious literature. He requested that the trial court submit to the jury the question of the truthfulness of the religious views he championed. The requested charge was refused, and we upheld that refusal, reasoning that the First Amendment foreclosed any judicial inquiry into the truth or falsity of the defendant's religious beliefs. We said:

"Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views."

"Men may believe what they cannot **[p. 245]** prove. They may not be put to the proof of their religious doctrines or beliefs. . . . Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations."

322 U.S. at 322 U. S. 86-87.

The dilemma presented by the case was severe. While the alleged truthfulness of nonreligious publications could ordinarily have been submitted to the jury, Ballard was deprived of that defense only because the First Amendment forbids governmental inquiry into the verity of *religious* beliefs. In dissent, Mr. Justice Jackson expressed the concern that, under this construction of the First Amendment, "[p]rosecutions of this character easily could degenerate into religious persecution." 322 U.S. at 322 U. S. 95. The case shows how elusive is the line which enforces the Amendment's injunction of strict neutrality, while manifesting no official hostility toward religion -- a line which must be considered in the cases now before us.[[10]](#footnote-10) Some might view the result of the *Ballard* case as a manifestation of hostility -- in that the conviction stood because the defense could not be raised. To others, it **[p. 246]** might represent merely strict adherence to the principle of neutrality already expounded in the cases involving doctrinal disputes. Inevitably, insistence upon neutrality, vital as it surely is for untrammeled religious liberty, may appear to border upon religious hostility. But, in the long view, the independence of both church and state in their respective spheres will be better served by close adherence to the neutrality principle. If the choice is often difficult, the difficulty is endemic to issues implicating the religious guarantees of the First Amendment. Freedom of religion will be seriously jeopardized if we admit exceptions for no better reason than the difficulty of delineating hostility from neutrality in the closest cases.

*Second.* It is only recently that our decisions have dealt with the question whether issues arising under the Establishment Clause may be isolated from problems implicating the Free Exercise Clause. *Everson v. Board of Education,* 330 U. S. 1, is, in my view, the first of our decisions which treats a problem of asserted unconstitutional involvement as raising questions purely under the Establishment Clause. A scrutiny of several earlier decisions said by some to have etched the contours of the clause shows that such cases neither raised nor decided any constitutional issues under the First Amendment. *Bradfield v. Roberts,* 175 U. S. 291, for example, involved challenges to a federal grant to a hospital administered by a Roman Catholic order. The Court rejected the claim for lack of evidence that any sectarian influence changed its character as a secular institution chartered as such by the Congress.[[11]](#footnote-11)

*Quick Bear v. Leupp,* 210 U. S. 50, is also illustrative. The immediate question there was one of statutory construction, although the issue had originally involved the **[p. 247]** constitutionality of the use of federal funds to support sectarian education on Indian reservations. Congress had already prohibited federal grants for that purpose, thereby removing the broader issue, leaving only the question whether the statute authorized the appropriation for religious teaching of Treaty funds held by the Government in trust for the Indians. Since these were the Indians' own funds, the Court held only that the Indians might direct their use for such educational purposes as they chose, and that the administration by the Treasury of the disbursement of the funds did not inject into the case any issue of the propriety of the use of federal moneys.[[12]](#footnote-12) Indeed, the Court expressly approved the reasoning of the Court of Appeals that to deny the Indians the right to spend their own moneys for religious purposes of their choice might well infringe the free exercise of their religion:

"it seems inconceivable that Congress should have intended to prohibit them from receiving religious education at their own cost if they so desired it. . . ."

210 U.S. at 210 U. S. 82. This case forecast, however, an increasingly troublesome First Amendment paradox: that the logical interrelationship between the Establishment and Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be withheld in order to avoid infringement of rights of free exercise. That paradox was not squarely presented in *Quick Bear,* but the care taken by the Court **[p. 248]** to avoid a constitutional confrontation discloses an awareness of possible conflicts between the two clauses. I shall come back to this problem later, *infra,* pp. 374 U. S. 296-299.

A third case in this group is *Cochran v. Louisiana State Board,* 281 U. S. 370, which involved a challenge to a state statute providing public funds to support a loan of free textbooks to pupils of both public and private schools. The constitutional issues in this Court extended no further than the claim that this program amounted to a taking of private property for nonpublic use. The Court rejected the claim on the ground that no private use of property was involved; ". . . we cannot doubt that the taxing power of the State is exerted for a public purpose." 281 U.S. at 281 U. S. 375. The case therefore raised no issue under the First Amendment.[[13]](#footnote-13)

In *Pierce v. Society of Sisters,* 268 U. S. 510, a Catholic parochial school and a private but nonsectarian military academy challenged a state law requiring all children between certain ages to attend the public schools. This Court held the law invalid as an arbitrary and unreasonable interference both with the rights of the schools and with the liberty of the parents of the children who attended them. The due process guarantee of the Fourteenth Amendment "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 268 U. S. 535. While one of the plaintiffs was indeed a parochial school, the case obviously decided no First Amendment question, but recognized only the constitutional right to establish and patronize private schools -- including parochial schools -- which meet the state's reasonable minimum curricular requirements. **[p. 249]** *Third.* It is true, as the Court says, that the "two clauses [Establishment and Free Exercise] may overlap." Because of the overlap, however, our decisions under the Free Exercise Clause bear considerable relevance to the problem now before us, and should be briefly reviewed. The early free exercise cases generally involved the objections of religious minorities to the application to them of general nonreligious legislation governing conduct. *Reynolds v. United States,* 98 U. S. 145, involved the claim that a belief in the sanctity of plural marriage precluded the conviction of members of a particular sect under nondiscriminatory legislation against such marriage. The Court rejected the claim, saying:

"Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[[14]](#footnote-14) "

98 U.S. at 98 U. S. 166-167. **[p. 250]** *Davis v. Beason,* 133 U. S. 333, similarly involved the claim that the First Amendment insulated from civil punishment certain practices inspired or motivated by religious beliefs. The claim was easily rejected:

"It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society."

133 U.S. at 133 U. S. 342. *See also Mormon Church v. United States,* 136 U. S. 1; *Jacobson v. Massachusetts,* 197 U. S. 11; *Prince v. Massachusetts,* 321 U. S. 158; *Cleveland v. United States,* 329 U. S. 14.

But we must not confuse the issue of governmental power to regulate or prohibit conduct *motivated by religious beliefs* with the quite different problem of governmental authority to compel behavior *offensive to religious principles.* In *Hamilton v. Regents of the University of California,* 293 U. S. 245, the question was that of the power of a State to compel students at the State University to participate in military training instruction against their religious convictions. The validity of the statute was sustained against claims based upon the First Amendment. But the decision rested on a very narrow principle: since there was neither a constitutional right nor a legal obligation to attend the State University, the obligation to participate in military training courses, **[p. 251]** reflecting a legitimate state interest, might properly be imposed upon those who chose to attend. Although the rights protected by the First and Fourteenth Amendments were presumed to include

"the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training,"

those Amendments were construed not to free such students from the military training obligations if they chose to attend the University. Justices Brandeis, Cardozo and Stone, concurring separately, agreed that the requirement infringed no constitutionally protected liberties. They added, however, that the case presented no question under the Establishment Clause. The military instruction program was not an establishment, since it in no way involved "instruction in the practice or tenets of a religion." 293 U.S. at 293 U. S. 266. Since the only question was one of free exercise, they concluded, like the majority, that the strong state interest in training a citizen militia justified the restraints imposed, at least so long as attendance at the University was voluntary.[[15]](#footnote-15)

*Hamilton* has not been overruled, although *United States v. Schwimmer,* 279 U. S. 644, and *United States v. Macintosh,* 283 U. S. 605, upon which the Court in *Hamilton* relied, have since been overruled by *Girouard v. United States,* 328 U. S. 61. But if *Hamilton* retains any vitality with respect to higher education, we recognized its inapplicability to cognate questions in the public primary and secondary schools when we held, in *West Virginia Board of Education v. Barnette, supra,* that a State had no power to expel from public schools students who refused on religious grounds to comply with a daily flag **[p. 252]** salute requirement. Of course, such a requirement was no more a law "respecting an establishment of religion" than the California law compelling the college students to take military training. The *Barnette* plaintiffs, moreover, did not ask that the whole exercise be enjoined, but only that an excuse or exemption be provided for those students whose religious beliefs forbade them to participate in the ceremony. The key to the holding that such a requirement abridged rights of free exercise lay in the fact that attendance at school was not voluntary but compulsory. The Court said:

"This issue is not prejudiced by the Court's previous holding that, where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. . . . *Hamilton v. Regents,*293 U. S. 245. In the present case, attendance is not optional."

319 U.S. at 319 U. S. 631-632. The *Barnette* decision made another significant point. The Court held that the State must make participation in the exercise voluntary for all students, and not alone for those who found participation obnoxious on religious grounds. In short, there was simply no need to "inquire whether nonconformist beliefs will exempt from the duty to salute," because the Court found no state "power to make the salute a legal duty." 319 U.S. at 319 U. S. 635.

The distinctions between *Hamilton* and *Barnette* are, I think, crucial to the resolution of the cases before us. The different results of those cases are attributable only in part to a difference in the strength of the particular state interests which the respective statutes were designed to serve. Far more significant is the fact that *Hamilton* dealt with the voluntary attendance at college of young adults, while *Barnette* involved the compelled attendance **[p. 253]** of young children at elementary and secondary schools.[[16]](#footnote-16) This distinction warrants a difference in constitutional results. And it is with the involuntary attendance of young school children that we are exclusively concerned in the cases now before the Court.

## III

No one questions that the Framers of the First Amendment intended to restrict exclusively the powers of the Federal Government.[[17]](#footnote-17) Whatever limitations that Amendment now imposes upon the States derive from the Fourteenth Amendment. The process of absorption of the religious guarantees of the First Amendment as protections against the States under the Fourteenth Amendment began with the Free Exercise Clause. In 1923 the Court held that the protections of the Fourteenth included at least a person's freedom "to worship God according to the dictates of his own conscience. . . .[[18]](#footnote-18)  *Meyer v. Nebraska,* 262 U. S. 390, 262 U. S. 399. *See also Hamilton v. Regents, supra,* at 293 U. S. 262. *Cantwell v. Connecticut,* 310 U. S. 296, completed in 1940 the process of absorption **[p. 254]** of the Free Exercise Clause and recognized its dual aspect: the Court affirmed freedom of belief as an absolute liberty, but recognized that conduct, while it may also be comprehended by the Free Exercise Clause, "remains subject to regulation for the protection of society." 310 U.S. at 310 U. S. 303-304. This was a distinction already drawn by *Reynolds v. United States, supra.* From the beginning, this Court has recognized that, while government may regulate the behavioral manifestations of religious beliefs, it may not interfere at all with the beliefs themselves.

The absorption of the Establishment Clause has, however, come later, and by a route less easily charted. It has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation "respecting an establishment of religion" is conceptually impossible, because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches.[[19]](#footnote-19) Whether or not such was the understanding of the Framers, and whether such a purpose would have inhibited the absorption of the Establishment Clause at the threshold of the Nineteenth Century, are questions not dispositive of our present inquiry. For it is **[p. 255]** clear on the record of history that the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments.[[20]](#footnote-20) Any such objective of the First Amendment, having become historical anachronism by 1868, cannot be thought to have deterred the absorption of the Establishment Clause to any greater degree than it would, for example, have deterred the absorption of the Free Exercise Clause. That no organ of the Federal Government possessed in 1791 any power to restrain the interference of the States in religious matters is indisputable. *See Permoli v. New Orleans,* 3 How. 589. It is equally plain, on the other hand, that the Fourteenth Amendment created a panoply of new federal rights for the protection of 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. **[p. 256]** 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. *See* Corwin, A Constitution of Powers in a Secular State (1951), 113-116. 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. The Free Exercise Clause "was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith." *McGowan v. Maryland, supra,* at 366 U. S. 464 (opinion of Fankfurter, J.).

Finally, it has been contended that absorption of the Establishment Clause is precluded by the absence of any intention on the part of the Framers of the Fourteenth Amendment to circumscribe the residual powers of the States to aid religious activities and institutions in ways which fell short of formal establishments.[[21]](#footnote-21) That argument relies in part upon the express terms of the **[p. 257]** abortive Blaine Amendment -- proposed several years after the adoption of the Fourteenth Amendment -- which would have added to the First Amendment a provision that "[n]o State shall make any law respecting an establishment of religion. . . ." Such a restriction would have been superfluous, it is said, if the Fourteenth Amendment had already made the Establishment Clause binding upon the States.

The argument proves too much, for the Fourteenth Amendment's protection of the free exercise of religion can hardly be questioned; yet the Blaine Amendment would also have added an explicit protection against state laws abridging that liberty.[[22]](#footnote-22) Even if we assume that the draftsmen of the Fourteenth Amendment saw no immediate connection between its protections against state action infringing personal liberty and the guarantees of the First Amendment, it is certainly too late in the day to suggest that their assumed inattention to the question dilutes the force of these constitutional guarantees in their application to the States.[[23]](#footnote-23) It is enough to conclude **[p. 258]** that the religious liberty embodied in the Fourteenth Amendment would not be viable if the Constitution were interpreted to forbid only establishments ordained by Congress.[[24]](#footnote-24) **[p. 259]** The issue of what particular activities the Establishment Clause forbids the States to undertake is our more immediate concern. In *Everson v. Board of Education,* 330 U. S. 1, 330 U. S. 15-16, a careful study of the relevant history led the Court to the view, consistently recognized in decisions since *Everson,* that the Establishment Clause embodied the Framers' conclusion that government and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.[[25]](#footnote-25) It **[p. 260]** has rightly been said of the history of the Establishment Clause that

"our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson, but also on the fervent sectarianism . . . of a Roger Williams."

Freund, The Supreme Court of the United States (1961), 84.

Our decisions on questions of religious education or exercises in the public schools have consistently reflected this dual aspect of the Establishment Clause. *Engel v. Vitale* unmistakably has its roots in three earlier cases which, on cognate issues, shaped the contours of the Establishment Clause. First, in *Everson,* the Court held that reimbursement by the town of parents for the cost of transporting their children by public carrier to parochial (as well as public and private nonsectarian) schools did not offend the Establishment Clause. Such reimbursement, by easing the financial burden upon Catholic parents, may indirectly have fostered the operation of the Catholic schools, and may thereby indirectly have facilitated the teaching of Catholic principles, thus serving ultimately a religious goal. But this form of governmental assistance was difficult to distinguish from myriad other incidental, if not insignificant, government benefits enjoyed by religious institutions -- fire and police protection, tax exemptions, and the pavement of streets and sidewalks, for example.

"The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from **[p. 261]** accredited schools."

330 U.S. at 330 U. S. 18. Yet even this form of assistance was thought by four Justices of the *Everson* Court to be barred by the Establishment Clause because too perilously close to that public support of religion forbidden by the First Amendment.

The other two cases, *Illinois ex rel. McCollum v. Board of Education,* 333 U. S. 203, and *Zorach v. Clauson,* 343 U. S. 306, can best be considered together. Both involved programs of released time for religious instruction of public school students. I reject the suggestion that *Zorach* overruled *McCollum* in silence.[[26]](#footnote-26) The distinction which the Court drew in *Zorach* between the two cases is, in my view, faithful to the function of the Establishment Clause.

I should first note, however, that *McCollum* and *Zorach* do not seem to me distinguishable in terms of the free exercise claims advanced in both cases.[[27]](#footnote-27) The nonparticipant in the *McCollum* program was given secular instruction in a separate room during the times his classmates had religious lessons; the nonparticipant in any *Zorach* program also received secular instruction, while his classmates repaired to a place outside the school for religious instruction.

The crucial difference, I think, was that the *McCollum* program offended the Establishment Clause, while the *Zorach* program did not. This was not, in my view, because of the difference in public expenditures involved. True, the *McCollum* program involved the regular use of school facilities, classrooms, heat and light and time from the regular school day -- even though the actual **[p. 262]** incremental cost may have been negligible. All religious instruction under the *Zorach* program, by contrast, was carried on entirely off the school premises, and the teacher's part was simply to facilitate the children's release to the churches. The deeper difference was that the *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.[[28]](#footnote-28) The *McCollum* program, **[p. 263]** in lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids. 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.

More recent decisions have further etched the contours of Establishment. In the *Sunday Law Cases,* we found in state laws compelling a uniform day of rest from worldly labor no violation of the Establishment Clause (*McGowan v. Maryland,* 366 U. S. 420). The basic **[p. 264]** ground of our decision was that, granted the Sunday Laws were first enacted for religious ends, they were continued in force for reasons wholly secular, namely, to provide a universal day of rest and ensure the health and tranquillity of the community. In other words, government may originally have decreed a Sunday day of rest for the impermissible purpose of supporting religion, but abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends.

Such was the evolution of the contours of the Establishment Clause before *Engel v. Vitale.* There, a year ago, we held that the daily recital of the state-composed Regents' Prayer constituted an establishment of religion because, although the prayer itself revealed no sectarian content or purpose, its nature and meaning were quite clearly religious. New York, in authorizing its recitation, had not maintained that distance between the public and the religious sectors commanded by the Establishment Clause when it placed the "power, prestige and financial support of government" behind the prayer. In *Engel,* as in *McCollum,* it did not matter that the amount of time and expense allocated to the daily recitation was small, so long as the exercise itself was manifestly religious. Nor did it matter that few children had complained of the practice, for the measure of the seriousness of a breach of the Establishment Clause has never been thought to be the number of people who complain of it.

We also held two Terms ago, in *Torcaso v. Watkins, supra,* that a State may not constitutionally require an applicant for the office of Notary Public to swear or affirm that he believes in God. The problem of that case was strikingly similar to the issue presented 18 years before in the flag salute case, *West Virginia Board of Education v. Barnette, supra.* In neither case was there any claim of establishment of religion, but only of infringement of[p. 265] the individual's religious liberty -- in the one case, that of the nonbeliever who could not attest to a belief in God; in the other, that of the child whose creed forbade in to salute the flag. But *Torcaso* added a new element not present in *Barnette.* The Maryland test oath involved an attempt to employ essentially religious (albeit nonsectarian) means to achieve a secular goal to which the means bore no reasonable relationship. No one doubted the State's interest in the integrity of its Notaries Public, but that interest did not warrant the screening of applicants by means of a religious test. The *Sunday Law Cases* were different in that respect. Even if Sunday Laws retain certain religious vestiges, they are enforced today for essentially secular objectives which cannot be effectively achieved in modern society except by designating Sunday as the universal day of rest. The Court's opinions cited very substantial problems in selecting or enforcing an alternative day of rest. But the teaching of both *Torcaso* and the *Sunday Law Cases* is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.[[29]](#footnote-29) **[p. 266]**

## IV

I turn now to the cases before us.[[30]](#footnote-30) The religious nature of the exercises here challenged seems plain. Unless *Engel v. Vitale* is to be overruled or we are to engage in wholly disingenuous distinction, we cannot sustain **[p. 267]** these practices. Daily recital of the Lord's Prayer and the reading of passages of Scripture are quite as clearly breaches of the command of the Establishment Clause as was the daily use of the rather bland Regents' Prayer in the New York public schools. Indeed, I would suppose that, if anything, the Lord's Prayer and the Holy Bible are more clearly sectarian, and the present violations of the First Amendment consequently more serious. But the religious exercises challenged in these cases have a long history. And, almost from the beginning, Bible reading and daily prayer in the schools have been the subject of debate, criticism by educators and other public officials, and proscription by courts and legislative councils. At the outset, then, we must carefully canvass both aspects of this history.

The use of prayers and Bible readings at the opening of the school day long antedates the founding of our Republic. The Rules of the New Haven Hopkins Grammar School required in 1684

"[t]hat, the Scholars being **[p. 268]** called together, the Mr. shall every morning begin his work with a short prayer for a blessing on his Laboures and their learning. . . .[[31]](#footnote-31) "

More rigorous was the provision in a 1682 contract with a Dutch schoolmaster in Flatbush, New York:

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

After the Revolution, the new States uniformly continued these long-established practices in the private and the few public grammar schools. The school committee of Boston in 1789, for example, required the city's several schoolmasters "daily to commence the duties of their office by prayer and reading a portion of the Sacred Scriptures. . . ."[[33]](#footnote-33) That requirement was mirrored throughout the original States, and exemplified the universal practice well into the nineteenth century. As the free public schools gradually supplanted the private academies and sectarian schools between 1800 and 1850, morning devotional exercises were retained with few alterations. Indeed, public pressures upon school administrators in many parts of the country would hardly have condoned abandonment of practices to which a century or more of private religious education had accustomed the American people.[[34]](#footnote-34) The controversy centered, in **[p. 269]** fact, principally about the elimination of plainly sectarian practices and textbooks, and led to the eventual substitution of nonsectarian, though still religious, exercises and materials.[[35]](#footnote-35)

Statutory provision for daily religious exercises is, however, of quite recent origin. At the turn of this century, there was but one State -- Massachusetts -- which had a law making morning prayer or Bible reading obligatory. Statutes elsewhere either permitted such practices or simply left the question to local option. It was not until after 1910 that 11 more States, within a few years, joined Massachusetts in making one or both exercises compulsory.[[36]](#footnote-36) The Pennsylvania law with which we are **[p. 270]** concerned in the *Schempp* case, for example, took effect in 1913, and even the Rule of the Baltimore School Board involved in the *Murray* case dates only from 1905. In no State has there ever been a constitutional or statutory prohibition against the recital of prayers or the reading of Scripture, although a number of States have outlawed these practices by judicial decision or administrative order. What is noteworthy about the panoply of state and local regulations from which these cases emerge is the relative recency of the statutory codification of practices which have ancient roots, and the rather small number of States which have ever prescribed compulsory religious exercises in the public schools.

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

"As a textbook of morals, the Bible is preeminent, and should have a prominent place in our schools, **[p. 271]** either as a reading book or as a source of appeal and instruction. Sectarianism, indeed, should not be countenanced in the schools; but the Bible is not sectarian. . . . The Scriptures should at least be read at the opening of the school, if no more. Prayer may also be offered with the happiest effects.[[38]](#footnote-38) "

Wisconsin's Superintendent of Public Instruction, writing a few years later in 1858, reflected the attitude of his eastern colleagues, in that he regarded

"with special favor the use of the Bible in public schools, as preeminently first in importance among textbooks for teaching the noblest principles of virtue, morality, patriotism, and good order -- love and reverence for God -- charity and good will to man.[[39]](#footnote-39) "

Such statements reveal the understanding of educators that the daily religious exercises in the schools served broader goals than compelling formal worship of God or fostering church attendance. The religious aims of the educators who adopted and retained such exercises were comprehensive, and in many cases quite devoid of sectarian bias -- but the crucial fact is that they were nonetheless religious. While it has been suggested, *see* pp. 374 U. S. 278-281, *infra* that daily prayer and reading of Scripture now serve secular goals as well, there can be no doubt that the origins of these practices were unambiguously religious, even where the educator's aim was not to win adherents to a particular creed or faith.

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 **[p. 272]** early entertained doubts about both the legality and the soundness of opening the school day with compulsory prayer or Bible reading. Particularly in the large Eastern cities, where immigration had exposed the public schools to religious diversities and conflicts unknown to the homogeneous academies of the eighteenth century, local authorities found it necessary even before the Civil War to seek an accommodation. In 1843, the Philadelphia School Board adopted the following resolutions:

"RESOLVED, that no children be required to attend or unite in the reading of the Bible in the Public Schools, whose parents are conscientiously opposed thereto: "

"RESOLVED, that those children whose parents conscientiously prefer and desire any particular version of the Bible, without note or comment, be furnished with same.[[40]](#footnote-40) "

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

"religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati, it being the true object and intent of this rule to allow the children of the parents of all sects and opinions, in matters of faith and worship, **[p. 273]** to enjoy alike the benefit of the common school fund.[[42]](#footnote-42) "

The Board repealed at the same time an earlier regulation which had required the singing of hymns and psalms to accompany the Bible reading at the start of the school day. And, in 1889, one commentator ventured the view that "[t]here is not enough to be gained from Bible reading to justify the quarrel that has been raised over it."[[43]](#footnote-43)

Thus, a great deal of controversy over religion in the public schools had preceded the debate over the Blaine Amendment, precipitated by President Grant's insistence that matters of religion should be left "to the family altar, the church, and the private school, supported entirely by private contributions."[[44]](#footnote-44) There was ample precedent, too, 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."[[45]](#footnote-45) The same principle appeared in the message of an Ohio Governor who vetoed a compulsory Bible reading bill in 1925:

"It is my belief that religious teaching in our homes, Sunday schools, churches, by the good **[p. 274]** mothers, fathers, and ministers of Ohio is far preferable to compulsory teaching of religion by the state. The spirit of our federal and state constitutions from the beginning. . . [has] been to leave religious instruction to the discretion of parents.[[46]](#footnote-46) "

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

Particularly relevant for our purposes are the decisions of the state courts on questions of religion in the public schools. Those decisions, while not, of course, authoritative in this Court, serve nevertheless to define the problem before us and to guide our inquiry. With the growth of religious diversity and the rise of vigorous dissent it was inevitable that the courts would be called upon to enjoin religious practices in the public schools which offended certain sects and groups. The earliest of such decisions declined to review the propriety of actions taken by school authorities, so long as those actions were within **[p. 275]** the purview of the administrators' powers.[[48]](#footnote-48) Thus, where the local school board required religious exercises, the courts would not enjoin them,[[49]](#footnote-49) and where, as in at least one case, the school officials forbade devotional practices, the court refused on similar grounds to overrule that decision.[[50]](#footnote-50) Thus, whichever way the early cases came up, the governing principle of nearly complete deference to administrative discretion effectively foreclosed any consideration of constitutional questions.

The last quarter of the nineteenth century found the courts beginning to question the constitutionality of public school religious exercises. The legal context was still, of course, that of the state constitutions, since the First Amendment had not yet been held applicable to state action. And the state constitutional prohibitions against church-state cooperation or governmental aid to religion were generally less rigorous than the Establishment Clause of the First Amendment. It is therefore remarkable that the courts of a half dozen States found compulsory religious exercises in the public schools in violation of their respective state constitutions.[[51]](#footnote-51) These **[p. 276]** courts attributed much significance to the clearly religious origins and content of the challenged practices, and to the impossibility of avoiding sectarian controversy in their conduct. The Illinois Supreme Court expressed in 1910 the principles which characterized these decisions:

"The public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its 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 that they should be taught to the youth of the State. The constitution and the law do not interfere with such teaching, but they do banish theological polemics from the 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. Instruction in religion must be voluntary."

*People ex rel. Ring v. Board of Education,* 245 Ill. 334, 349, 92 N.E. 251, 256 (1910). The Supreme Court of South Dakota, in banning devotional exercises from the public schools of that State, also cautioned that

"[t]he state as an educator must keep out of this field, and especially is this true in the common schools, where the child is immature, without fixed religious convictions. . . ."

*State ex rel. Finger v. Weedman,* 55 S.D. 343, 357, 226 N.W. 348, 354 (1929). **[p. 277]** Even those state courts which have sustained devotional exercises under state law[[52]](#footnote-52) have usually recognized the primarily religious character of prayers and Bible readings. If such practices were not for that reason unconstitutional, it was necessarily because the state constitution forbade only public expenditures for sectarian instruction, or for activities which made the schoolhouse a "place of worship," but said nothing about the subtler question of laws "respecting an establishment of religion."[[53]](#footnote-53) Thus, the panorama of history permits no **[p. 278]** other conclusion than that daily prayers and Bible readings in the public schools have always been designed to be, and have been regarded as, essentially religious exercises. Unlike the Sunday closing laws, these exercises appear neither to have been divorced from their religious origins nor deprived of their centrally religious character by the passage of time[[54]](#footnote-54)  *cf. McGowan v. Maryland, supra,* at 366 U. S. 442-445. On this distinction alone we might well rest a constitutional decision. But three further contentions have been pressed in the argument of these cases. These contentions deserve careful consideration, for if the position of the school authorities were correct in respect to any of them, we would be misapplying the principles of *Engel v. Vitale.*

### A

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

"places upon the children or those hearing the reading of this, and the atmosphere which goes on in the reading . . . one of the last vestiges of moral value **[p. 279]** that we have left in our school system."

The exercise thus affords, the Superintendent concluded, "a strong contradiction to the materialistic trends of our time." Baltimore's Superintendent of Schools expressed a similar view of the practices challenged in the *Murray* case, to the effect that

"[t]he acknowledgement of the existence of God as symbolized in the opening exercises establishes a discipline tone which tends to cause each individual pupil to constrain his overt acts and to consequently conform to accepted standards of behavior during his attendance at school."

These views are by no means novel, *see, e.g., Billard v. Board of Education,* 69 Kan. 53, 57-58, 76 P. 422, 423 (1904).[[55]](#footnote-55)

It is not the business of this Court to gainsay the judgments of experts on matters of pedagogy. Such decisions must be left to the discretion of those administrators charged with the supervision of the Nation's public schools. The limited province of the courts is to determine whether the means which the educators have chosen to achieve legitimate pedagogical ends infringe the constitutional freedoms of the First Amendment. The secular purposes which devotional exercises are said to serve fall into two categories -- those which depend upon an immediately religious experience shared by the participating children and those which appear sufficiently divorced from the religious content of the devotional material that they can be served equally by nonreligious **[p. 280]** materials. With respect to the first objective, much has been written about the moral and spiritual values of infusing some religious influence or instruction into the public school classroom.[[56]](#footnote-56) To the extent that only religious materials will serve this purpose, it seems to me that the purpose, as well as the means, is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause. The fact that purely secular benefits may eventually result does not seem to me to justify the exercises, for similar indirect nonreligious benefits could no doubt have been claimed for the released time program invalidated in *McCollum.*

The second justification assumes that religious exercises at the start of the school day may directly serve solely secular ends -- for example, by fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline. To the extent that such benefits result not from the content of the readings and recitation, but simply from the holding of such a solemn exercise at the opening assembly or the first class of the day, it would seem that less sensitive materials might equally well serve the same purpose. I have previously suggested that *Torcaso* and the *Sunday Law Cases* forbid the use of religious means to achieve secular **[p. 281]** ends where nonreligious means will suffice. That principle is readily applied to these cases. It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.[[57]](#footnote-57) Such substitutes would, I think, be unsatisfactory or inadequate only to the extent that the present activities do, in fact, serve religious goals. While I do not question the judgment of experienced educators that the challenged practices may well achieve valuable secular ends, it seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice.

### B

Second, it is argued that the particular practices involved in the two cases before us are unobjectionable **[p. 282]** because the prefer no particular sect or sects at the expense of others. Both the Baltimore and Abington procedures permit, for example, the reading of any of several versions of the Bible, and this flexibility is said to ensure neutrality sufficiently to avoid the constitutional prohibition. One answer, which might be dispositive, is that any version of the Bible is inherently sectarian, else there would be no need to offer a system of rotation or alternation of versions in the first place, that is, to allow different sectarian versions to be used on different days. The sectarian character of the Holy Bible has been at the core of the whole controversy over religious practices in the public schools throughout its long and often bitter history.[[58]](#footnote-58) To **[p. 283]** vary the version as the Abington and Baltimore schools have done may well be less offensive than to read from the King James version every day, as once was the practice. But the result even of this relatively benign procedure is that majority sects are preferred in approximate proportion to their representation in the community and in the student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided.

The argument contains, however, a more basic flaw. There are persons in every community -- often deeply devout -- to whom any version of the Judaeo-Christian Bible is offensive.[[59]](#footnote-59) There are others whose reverence for the Holy Scriptures demands private study or reflection, and to whom public reading or recitation is sacrilegious, as one of the expert witnesses at the trial of the *Schempp* case explained. To such persons, it is not the fact of using the Bible in the public schools, nor the content of any particular version, that is offensive, but only the manner in **[p. 284]** which it is used.[[60]](#footnote-60) For such persons, the anathema of public communion is even more pronounced when prayer is involved. Many deeply devout persons have always regarded prayer as a necessarily private experience.[[61]](#footnote-61) One Protestant group recently commented, for example: "When one thinks of prayer as sincere outreach of a **[p. 285]** human soul to the Creator, 'required prayer' becomes an absurdity."[[62]](#footnote-62) There is a similar problem with respect to comment upon the passages of Scripture which are to be read. Most present statutes forbid comment, and this practice accords with the views of many religious groups as to the manner in which the Bible should be read. However, as a recent survey discloses, scriptural passages read without comment frequently convey no message to the younger children in the school. Thus, there has developed a practice in some schools of bridging the gap between faith and understanding by means of "definitions," even where "comment" is forbidden by statute.[[63]](#footnote-63) The present practice, therefore, poses a difficult dilemma: while Bible reading is almost universally required to be without comment, since only by such a prohibition can sectarian interpretation be excluded from the classroom, **[p. 286]** the rule breaks down at the point at which rudimentary definitions of Biblical terms are necessary for comprehension if the exercise is to be meaningful at all.

It has been suggested that a tentative solution to these problems may lie in the fashioning of a "common core" of theology tolerable to all creeds but preferential to none.[[64]](#footnote-64) But as one commentator has recently observed, "[h]istory is not encouraging to" those who hope to fashion a "common denominator of religion detached from its manifestation in any organized church." Sutherland, Establishment According to *Engel,* 76 Harv.L.Rev. 25, 51 (1962). Thus, the notion of a "common core" litany or supplication offends many deeply devout worshippers who do not find clearly sectarian practices objectionable.[[65]](#footnote-65) Father Gustave Weigel has recently expressed **[p. 287]** a widely shared view:

"The moral code held by each separate religious community can reductively be unified, but the consistent particular believer wants no such reduction.[[66]](#footnote-66) "

And, as the American Council on Education warned several years ago,

"The notion of a common core suggests a watering down of the several faiths to the point where common essentials appear. This might easily lead to a new sect -- a public school sect -- which would take its place alongside the existing faiths and compete with them.[[67]](#footnote-67) "

*Engel* is surely authority that nonsectarian religious practices, equally with sectarian exercises, violate the Establishment Clause. Moreover, even if the Establishment Clause were oblivious to nonsectarian religious practices, I think it quite likely that the "common core" approach would be sufficiently objectionable to many groups to be foreclosed by the prohibitions of the Free Exercise Clause.

### C

A third element which is said to absolve the practices involved in these cases from the ban of the religious guarantees of the Constitution is the provision to excuse or exempt students who wish not to participate. Insofar as these practices are claimed to violate the Establishment **[p. 288]** Clause, I find the answer which the District Court gave after our remand of *Schempp* to be altogether dispositive:

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

201 F.Supp. at 819. Thus, the short, and to me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims through the use of public school facilities during the school day.

The more difficult question, however, is whether the availability of excusal for the dissenting child serves to refute challenges to these practices under the Free Exercise Clause. While it is enough to decide these cases to dispose of the establishment questions, questions of free exercise are so inextricably interwoven into the history and present status of these practices as to justify disposition of this second aspect of the excusal issue. The answer is that the excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused. We have held in *Barnette* and *Torcaso,* respectively, that a State may require neither public school students nor candidates **[p. 289]** for an office of public trust to profess beliefs offensive to religious principles. By the same token, the State could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention. And apart from *Torcaso* and *Barnette,* I think *Speiser v. Randall,* 357 U. S. 513, suggests a further answer. We held there that a State may not condition the grant of a tax exemption upon the willingness of those entitled to the exemption to affirm their loyalty to the Government, even though the exemption was itself a matter of grace, rather than of constitutional right. We concluded that to impose upon the eligible taxpayers the affirmative burden of proving their loyalty impermissibly jeopardized the freedom to engage in constitutionally protected activities close to the area to which the loyalty oath related. *Speiser v. Randall* seems to me to dispose of two aspects of the excusal or exemption procedure now before us. First, by requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused.[[68]](#footnote-68) Thus, the excusal **[p. 290]** provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.

Such reluctance to seek exemption seems all the more likely in view of the fact that children are disinclined at this age to step out of line or to flout "peer-group norms." Such is the widely held view of experts who have studied the behaviors and attitudes of children.[[69]](#footnote-69) This is also **[p. 291]** the basis of Mr. Justice Frankfurter's answer to a similar contention made in the *McCollum* case:

"That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an **[p. 292]** outstanding characteristic of children. The result is an obvious pressure upon children to attend."

333 U.S. at 333 U. S. 227. Also apposite is the answer given more than 70 years ago by the Supreme Court of Wisconsin to the argument that an excusal provision saved a public school devotional exercise from constitutional invalidation:

". . . 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 disadvantage in many ways with respect to the others."

*State ex rel. Weiss v. District Board of School District No. 8,* 76 Wis. 177, 200, 44 N.W. 967, 975. And, 50 years ago, a like answer was offered by the Louisiana Supreme Court:

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

*Herold v. Parish Board of School Directors,* 136 La. 1034, 1049-1050, 68 So. 116, 121. *See also Tudor v. Board of Education,* 14 N.J. 31, 48-52, **[p. 293]** 100 A.2d 857, 867-868; *Brown v. Orange County Board of Public Instruction,* 128 So.2d 181, 185 (Fla.App.).

*Speiser v. Randall* also suggests the answer to a further argument based on the excusal procedure. It has been suggested by the School Board, in *Schempp,* that we ought not pass upon the appellees' constitutional challenge at least until the children have availed themselves of the excusal procedure and found it inadequate to redress their grievances. Were the right to be excused not itself of constitutional stature, I might have some doubt about this issue. But we held in *Speiser* that the constitutional vice of the loyalty oath procedure discharged any obligation to seek the exemption before challenging the constitutionality of the conditions upon which it might have been denied. 357 U.S. at 357 U. S. 529. Similarly, we have held that one need not apply for a permit to distribute constitutionally protected literature, *Lovell v. Griffin,* 303 U. S. 444, or to deliver a speech, *Thomas v. Collins,* 323 U. S. 516, before he may attack the constitutionality of a licensing system of which the defect is patent. Insofar as these cases implicate only questions of establishment, it seems to me that the availability of an excuse is constitutionally irrelevant. Moreover, the excusal procedure seems to me to operate in such a way as to discourage the free exercise of religion on the part of those who might wish to utilize it, thereby rendering it unconstitutional in an additional and quite distinct respect.

To summarize my views concerning the merits of these two cases: the history, the purpose and the operation of the daily prayer recital and Bible reading leave no doubt that these practices, standing by themselves, constitute an impermissible breach of the Establishment Clause. Such devotional exercises may well serve legitimate nonreligious purposes. To the extent, however, that such purposes **[p. 294]** are really without religious significance, it has never been demonstrated that secular means would not suffice. Indeed, I would suggest that patriotic or other nonreligious materials might provide adequate substitutes -- inadequate only to the extent that the purposes now served are indeed directly or indirectly religious. Under such circumstances, the States may not employ religious means to reach a secular goal unless secular means are wholly unavailing. I therefore agree with the Court that the judgment in *Schempp,* No. 142, must be affirmed, and that, in *Murray,* No. 119, must be reversed.

## V

These considerations bring me to a final contention of the school officials in these cases: that the invalidation of the exercises at bar 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. While it is not, of course, appropriate for this Court to decide questions not presently before it, I venture to suggest that religious exercises in the public schools present a unique problem. For not every involvement of religion in public life violates the Establishment Clause. Our decision in these cases does not clearly forecast anything about the constitutionality of other types of interdependence between religious and other public institutions.

Specifically, I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, **[p. 295]** are 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. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers -- as much to church as to state -- which the Framers feared would subvert religious liberty and the strength of a system of secular government. On the other hand, there may be myriad forms of involvements of government with religion which do not import such dangers, and therefore should not, in my judgment, be deemed to violate the Establishment Clause. Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives -- that religious differences among Americans have important and pervasive implications for our society. Likewise, nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs. Surely the Framers would never have understood that such a construction sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose.

The line between permissible and impermissible forms of involvement between government and religion has already been considered by the lower federal and state courts. I think a brief survey of certain of these forms of accommodation will reveal that the First Amendment commands not official hostility toward religion, but only a strict neutrality in matters of religion. Moreover, it may serve to suggest that the scope of our holding today **[p. 296]** is to be measured by the special circumstances under which these cases have arisen, and by the particular dangers to church and state which religious exercises in the public schools present. It may be helpful for purposes of analysis to group these other practices and forms of accommodation into several rough categories.

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.[[70]](#footnote-70) Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example.[[71]](#footnote-71) **[p. 297]** The like provision by state and federal governments for chaplains in penal institutions may afford another example.[[72]](#footnote-72) It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the opportunity **[p. 298]** to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be. Such a principle might support, for example, the constitutionality of draft exemptions for ministers and divinity students[[73]](#footnote-73)  *cf. Selective Draft Law Cases,* 245 U. S. 366, 245 U. S. 389-390; of the excusal of children from school on their respective religious holidays, and of the allowance by government of temporary use of public buildings by religious organizations when their own churches have become unavailable because of a disaster or emergency.[[74]](#footnote-74)

Such activities and practices seem distinguishable from the sponsorship of daily Bible reading and prayer recital. For one thing, there is no element of coercion present in the appointment of military or prison chaplains; the soldier or convict who declines the opportunities for worship would not ordinarily subject himself to the suspicion or obloquy of his peers. Of special significance to this distinction is the fact that we are here usually dealing **[p. 299]** with adults, not with impressionable children as in the public schools. Moreover, the school exercises are not designed to provide the pupils with general opportunities for worship denied them by the legal obligation to attend school. The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others. The situation of the school child is therefore plainly unlike that of the isolated soldier or the prisoner.

The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood. I do not say that government must provide chaplains or draft exemptions, or that the courts should intercede if it fails to do so.

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.[[75]](#footnote-75) Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial **[p. 300]** exercises without incurring any penalty, direct or indirect. It may also be significant that, at least in the case of the Congress, Art. I, § 5, of the Constitution makes each House the monitor of the "Rules of its Proceedings" so that it is at least arguable whether such matters present "political questions" the resolution of which is exclusively confided to Congress. *See Baker v. Carr,* 369 U. S. 186, 369 U. S. 232. Finally, there is the difficult question of who may be heard to challenge such practices. *See Elliott v. White,* 23 F.2d 997.

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.[[76]](#footnote-76) To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not. We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be

"to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing **[p. 301]** and serving highly localized groups which not only differ from each other, but which themselves from time to time change attitudes."

*Illinois ex rel. McCollum v. Board of Education, supra,* at 333 U. S. 237.

We do not, however, in my view, usurp the jurisdiction of school administrators by holding, as we do today, that morning devotional exercises in any form are constitutionally invalid. But there is no occasion now to go further and anticipate problems we cannot judge with the material now before us. Any attempt to impose rigid limits upon the mention of God or references to the Bible in the classroom would be fraught with dangers. If it should sometime hereafter be shown that, in fact, religion can play no part in the teaching of a given subject without resurrecting the ghost of the practices we strike down today, it will then be time enough to consider questions we must now defer.

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. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups.[[77]](#footnote-77) There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God. And as **[p. 302]** among religious beneficiaries, the tax exemption or deduction can be truly nondiscriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject, as well as those which accept, a belief in God.[[78]](#footnote-78)

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 partially 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.

The inescapable flaw in the argument, I suggest, is its quite unrealistic view of the aims of the Establishment Clause. The Framers were not concerned with the effects of certain incidental aids to individual worshippers which come about as by-products of general and nondiscriminatory welfare programs. If such benefits serve to make **[p. 303]** easier or less expensive the practice of a particular creed, or of all religions, it can hardly be said that the purpose of the program is in any way religious, or that the consequence of its nondiscriminatory application is to create the forbidden degree of interdependence between secular and sectarian institutions. I cannot therefore accept the suggestion, which seems to me implicit in the argument outlined here, 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.

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. As we said in *McGowan v. Maryland,* 366 U. S. 420, 366 U. S. 442,

"the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."

This rationale suggests that the use of the motto "In God We Trust" on currency, on documents and public buildings and the like may not offend the clause. It is not that the use of those four words can be dismissed as "*de minimis*" -- for I suspect there would be intense opposition to the abandonment of that motto. The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.

This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been **[p. 304]** their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus, reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.

The principles which we reaffirm and apply today can hardly be thought novel or radical. They are, in truth, as old as the Republic itself, and have always been as integral a part of the First Amendment as the very words of that charter of religious liberty. No less applicable today than they were when first pronounced a century ago, one year after the very first court decision involving religious exercises in the public schools, are the words of a distinguished Chief Justice of the Commonwealth of Pennsylvania, Jeremiah S. Black:

"The manifest object of the men who framed the institutions of this country, was to have a *State without religion,* and a *Church without politics* -- that is to say, they meant that one should never be used as an engine for any purpose of the other, and that no man's rights in one should be tested by his opinions about the other. As the Church takes no note of men's political differences, so the State looks with equal eye on all the modes of religious faith. . . . 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."

Essay on Religious Liberty, in Black, ed., Essays and Speeches of Jeremiah S. Black (1886), 53. **[p. 305]**

1. Locke, A Letter Concerning Toleration, in 35 Great Books of the Western World (Hutchins ed.1952), 2. [↑](#footnote-ref-1)
2. Representative Daniel Carroll of Maryland during debate upon the proposed Bill of Rights in the First Congress, August 15, 1789, I Annals of Cong. 730. [↑](#footnote-ref-2)
3. See Healey, Jefferson on Religion in Public Education (1962); Boles, The Bible, Religion, and the Public Schools (1961), 16-21; Butts, The American Tradition in Religion and Education (1950), 119-130; Cahn, On Government and Prayer, 37 N.Y.U.L.Rev. 981 (1962); Costanzo, Thomas Jefferson, Religious Education and Public Law, 8 J.Pub.Law 81 (1959); Comment, The Supreme Court, the First Amendment, and Religion in the Public Schools, 63 Col.L.Rev. 73, 79-83 (1963). [↑](#footnote-ref-3)
4. Jefferson's caveat was, in full:

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

2 Writings of Thomas Jefferson (Memorial ed.1903), 204. Compare Jefferson's letter to his nephew, Peter Carr, when the latter was about to begin the study of law, in which Jefferson outlined a suggested course of private study of religion, since "[y]our reason is now mature enough to examine this object." Letter to Peter Carr, August 10, 1787, in Padover, The Complete Jefferson (1943), 1058. Jefferson seems to have opposed sectarian instruction at any level of public education, see Healey, Jefferson on Religion in Public Education (1962), 206-210, 256, 264-265. The absence of any mention of religious instruction in the projected elementary and secondary schools contrasts significantly with Jefferson's quite explicit proposals concerning religious instruction at the University of Virginia. His draft for "A Bill for the More General Diffusion of Knowledge," in 1779, for example, outlined in some detail the secular curriculum for the public schools, while avoiding any references to religious studies. See Padover, supra, at 1048-1054. The later draft of an "Act for Establishing Elementary Schools" which Jefferson submitted to the Virginia General Assembly in 1817 provided that

"no religious reading, instruction or exercise, shall be prescribed or practiced inconsistent with the tenets of any religious sect or denomination."

Padover, supra, at 1076. Reliance upon Jefferson's apparent willingness to permit certain religious instruction at the University seems, therefore, to lend little support to such instruction in the elementary and secondary schools. Compare, e.g., Corwin, A Constitution of Powers in a Secular State (1951), 104-106; Costanzo, Thomas Jefferson, Religious Education and Public Law, 8 J.Pub.Law 81, 100-106 (1959). [↑](#footnote-ref-4)
5. Cf. Mr. Justice Rutledge's observations in Everson v. Board of Education, 330 U. S. 1, 330 U. S. 53-54 (dissenting opinion). See also Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis.L.Rev. 427, 428-429; Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt.L.Rev. 561, 569 (1961); MacKinnon, Freedom? -- or Toleration? The Problem of Church and State in the United States, [1959] Pub.Law 374. One author has suggested these reasons for cautious application of the history of the Constitution's religious guarantees to contemporary problems:

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

Beth, The American Theory of Church and State (1958), 88. [↑](#footnote-ref-5)
6. See generally, for discussion of the early efforts for disestablishment of the established colonial churches, and of the conditions against which the proponents of separation of church and state contended, Sweet, The Story of Religion in America (1950), c. XIII; Cobb, The Rise of Religious Liberty in America (1902), c. IX; Eckenrode, Separation of Church and State in Virginia (1910); Brant, James Madison -- The Nationalist, 1780-1787 (1948), c. XXII; Bowers, The Young Jefferson (1945), 193-199; Butts, The American Tradition in Religion and Education (1950), c. II; Kruse, The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 Washburn L.J. 65, 79-83 (1962). Compare also Alexander Hamilton's conception of "the characteristic difference between a tolerated and established religion" and his grounds of opposition to the latter, in his remarks on the Quebec Bill in 1775, 2 Works of Alexander Hamilton (Hamilton ed. 1850), 133-138. Compare, for the view that contemporary evidence reveals a design of the Framers to forbid not only formal establishment of churches, but various forms of incidental aid to or support of religion, Lardner, How Far Does the Constitution Separate Church and State? 45 Am.Pol.Sci.Rev. 110, 112-115 (1951). [↑](#footnote-ref-6)
7. The origins of the modern movement for free state supported education cannot be fixed with precision. In England, the Levellers unavailingly urged in their platform of 1649 the establishment of free primary education for all, or at least for boys. See Brailsford, The Levellers and the English Revolution (1961), 534. In the North American Colonies, education was, almost without exception, under private sponsorship and supervision, frequently under control of the dominant Protestant sects. This condition prevailed after the Revolution and into the first quarter of the nineteenth century. See generally Mason, Moral Values and Secular Education (1950), c. II; Thayer, The Role of the School in American Society (1960), c. X; Greene, Religion and the State: The Making and Testing of an American Tradition (1941), 120-122. Thus, Virginia's colonial Governor Berkeley exclaimed in 1671:

"I thank God there are no free schools nor printing, and I hope we shall not have them these hundred years; for learning has brought disobedience, and heresy, and sects into the world. . . ."

(Emphasis deleted.) Bates, Religious Liberty: An Inquiry (1945), 327.

The exclusively private control of American education did not, however, quite survive Berkeley's expectations. Benjamin Franklin's proposals in 1749 for a Philadelphia Academy heralded the dawn of publicly supported secondary education, although the proposal did not bear immediate fruit. See Johnson and Yost, Separation of Church and State in the United States (1948), 26-27. Jefferson's elaborate plans for a public school system in Virginia came to naught after the defeat in 1796 of his proposed Elementary School Bill, which found little favor among the wealthier legislators. See Bowers, The Young Jefferson (1945), 182-186. It was not until the 1820's and 1830's, under the impetus of Jacksonian democracy, that a system of public education really took root in the United States. See 1 Beard, The Rise of American Civilization (1937), 810-818. One force behind the development of secular public schools may have been a growing dissatisfaction with the tightly sectarian control over private education, see Harner, Religion's Place in General Education (1949), 29-30. Yet the burgeoning public school systems did not immediately supplant the old sectarian and private institutions; Alexis de Tocqueville, for example, remarked after his tour of the Eastern States in 1831 that "[a]lmost all education is entrusted to the clergy." 1 Democracy in America (Bradley ed.1945) 309, n. 4. And compare Lord Bryce's observations, a half century later, on the still largely denominational character of American higher education, 2 The American Commonwealth (1933), 734-735.

Efforts to keep the public schools of the early nineteenth century free from sectarian influence were of two kinds. One took the form of constitutional provisions and statutes adopted by a number of States forbidding appropriations from the public treasury for the support of religious instruction in any manner. See Moehlman, The Wall of Separation Between Church and State (1951), 132-135; Lardner, How Far Does the Constitution Separate Church and State? 45 Am.Pol.Sci.Rev. 110, 122 (1951). The other took the form of measures directed against the use of sectarian reading and teaching materials in the schools. The texts used in the earliest public schools had been largely taken over from the private academies, and retained a strongly religious character and content. See Nichols, Religion and American Democracy (1959), 640; Kinney, Church and State, The Struggle for Separation in New Hampshire, 1630-1900 (1955), 150-153. In 1827, however, Massachusetts enacted a statute providing that school boards might not thereafter

"direct any school books to be purchased or used, in any of the schools . . . which are calculated to favour any particular religious sect or tenet."

2 Stokes, Church and State in the United States (1950), 53. For further discussion of the background of the Massachusetts law and difficulties in its early application, see Dunn, What Happened to Religious Education? (1958), c. IV. As other States followed the example of Massachusetts, the use of sectarian texts was in time as widely prohibited as the appropriation of public funds for religious instruction.

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

"It is pertinent to remind that the establishment of this principle of Separation in the field of education was not due to any decline in the religious beliefs of the people. Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor 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 nonsectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered."

Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, 333 U. S. 216. [↑](#footnote-ref-7)
8. The comparative religious homogeneity of the United States at the time the Bill of Rights was adopted has been considered in Haller, The Puritan Background of the First Amendment, in Read ed., The Constitution Reconsidered (1938) , 131, 133-134; Beth, The American Theory of Church and State (1958), 74; Kinney, Church and State, The Struggle for Separation in New Hampshire, 1630-1900 (1955), 155-161. However, Madison suggested in the Fifty-first Federalist that the religious diversity which existed at the time of the Constitutional Convention constituted a source of strength for religious freedom, much as the multiplicity of economic and political interests enhanced the security of other civil rights. The Federalist (Cooke ed.1961), 351-352. [↑](#footnote-ref-8)
9. See Comment, The Power of Courts Over the Internal Affairs of Religious Groups, 43 Calif.L.Rev. 322 (1955); Comment, Judicial Intervention in Disputes Within Independent Church Bodies, 54 Mich.L.Rev. 102 (1955); Note, Judicial Intervention in Disputes Over the Use of Church Property, 75 Harv.L.Rev. 1142 (1962). Compare 43 U. S. Girard's Executors, 2 How. 127. The principle of judicial nonintervention in essentially religious disputes appears to have been reflected in the decisions of several state courts declining to enforce essentially private agreements concerning the religious education and worship of children of separated or divorced parents. See, e.g., Hackett v. Hackett, 78 Ohio Abs. 485, 150 N.E.2d 431; Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289; Friedman, The Parental Right to Control the Religious Education of a Child, 29 Harv.L.Rev. 485 (1916); 72 Harv.L.Rev. 372 (1958); Note, 10 West. Res.L.Rev. 171 (1959).

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

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

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

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

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

"(d) to administer such property in accordance with law."

See 1 Chaudhri, Constitutional Rights and Limitations (1955), 875. This Article does not, however, appear to have completely foreclosed judicial inquiry into the merits of intradenominational disputes. See Gledhill, Fundamental Rights in India (1955), 101-102. [↑](#footnote-ref-9)
10. For a discussion of the difficulties inherent in the Ballard case, see Kurland, Religion and the Law (1962), 75-79. This Court eventually reversed the convictions on the quite unrelated ground that women had been systematically excluded from the jury, Ballard v. United States, 329 U. S. 187. For discussions of the difficulties in interpreting and applying the First Amendment so as to foster the objective of neutrality without hostility, see, e.g., Katz, Freedom of Religion and State Neutrality, 20 U. of Chi.L.Rev. 426, 438 (1953); Kauper, Church, State, and Freedom: A Review, 52 Mich.L.Rev. 829, 842 (1954). Compare, for an interesting apparent attempt to avoid the Ballard problem at the international level, Article 3 of the Multilateral Treaty between the United States and certain American Republics, which provides that extradition will not be granted, inter alia, when "the offense is . . . directed against religion." Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed.1949), 316. [↑](#footnote-ref-10)
11. See Kurland, Religion and the Law (1962), 32-34. [↑](#footnote-ref-11)
12. Compare the treatment of an apparently very similar problem in Article 28 of the Constitution of India:

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

"(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution."

1 Chaudhri, Constitutional Rights and Limitations (1955), 875-876, 939. [↑](#footnote-ref-12)
13. See Kurland, Religion and the Law (1962), 231; Fellman, Separation of Church and State in the United State: A Summary View, 1950 Wis.L.Rev. 427, 442. [↑](#footnote-ref-13)
14. This distinction, implicit in the First Amendment, had been made explicit in the original Virginia Bill of Rights provision that

"all men should enjoy the fullest toleration in the exercise of religion according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under color of religion, any man disturb the peace, the happiness, or safety of society."

See Cobb, The Rise of Religious Liberty in America (1902), 491. Concerning various legislative limitations and restraints upon religiously motivated behavior which endangers or offends society, see Manwaring, Render Unto Caesar: The Flag-Salute Controversy (1962), 412. Various courts have applied this principle to proscribe certain religious exercises or activities which were thought to threaten the safety or morals of the participants or the rest of the community, e.g., State v. Massey, 229 N.C. 734, 51 S.E.2d 179; Harden v. State, 188 Tenn. 17, 216 S.W.2d 708; Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972; cf. Sweeney v. Webb, 33 Tex.Civ.App. 324, 76 S.W. 766.

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

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

Quoted in Hook, The Paradoxes of Freedom (1962), 23. [↑](#footnote-ref-14)
15. With respect to the decision in Hamilton v. Regents, compare two recent comments: Kurland, Religion and the Law (1962), 40, and French, Comment, Unconstitutional Conditions: An Analysis 50 Geo.L.J. 234, 246 (1961). [↑](#footnote-ref-15)
16. See generally as to the background and history of the Barnette case, Manwaring, Render Unto Caesar: The Flag-Salute Controversy (1962), especially at 252-253. Compare, for the interesting treatment of a problem similar to that of Barnette, in a nonconstitutional context, Chabot v. Les Commissaires D'Ecoles de Lamorandiere, [1957] Que.B.R. 707, noted in 4 McGill L.J. 268 (1958). [↑](#footnote-ref-16)
17. See Barron v. Baltimore, 7 Pet. 243; Permoli v. New Orleans, 3 How. 589, 44 U. S. 609; cf. 46 U. S. Ohio,5 How. 410, 46 U. S. 434-435; Withers v. Buckley, 20 How. 84, 61 U. S. 89-91. As early as 1825, however, at least one commentator argued that the guarantees of the Bill of Rights, excepting only those of the First and Seventh Amendments, were meant to limit the powers of the States. Rawle, A View of the Constitution of the United States of America (1825), 120-130. [↑](#footnote-ref-17)
18. In addition to the statement of this Court in Meyer, at least one state court assumed as early as 1921 that claims of abridgment of the free exercise of religion in the public schools must be tested under the guarantees of the First Amendment, as well as those of the state constitution.Hardwick v. Board of School Trustees, 54 Cal.App. 696, 704-705, 205 P. 49, 52. See Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal.L.Rev. 751, 772 (1962). Even before the Fourteenth Amendment, New York State enacted a general common school law in 1844 which provided that no religious instruction should be given which could be construed to violate the rights of conscience "as secured by the constitution of this state and the United States." N.Y.Laws, 1844, c. 320, § 12. [↑](#footnote-ref-18)
19. See, e.g., Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash.U.L.Q. 371, 373-394; Kruse, The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 Washburn L.J. 65, 84-85, 127130 (1962); Katz, Religion and American Constitutions, Address at Northwestern University Law School, March 20, 1963, pp.6-7. But see the debate in the Constitutional Convention over the question whether it was necessary or advisable to include among the enumerated powers of the Congress a power "to establish an University, in which no preferences or distinctions should be allowed on account of religion." At least one delegate thought such an explicit delegation "is not necessary," for "[t]he exclusive power at the Seat of Government will reach the object." The proposal was defeated by only two votes. 2 Farrand, Records of the Federal Convention of 1787 (1911), 616. [↑](#footnote-ref-19)
20. The last formal establishment, that of Massachusetts, was dissolved in 1833. The process of disestablishment in that and other States is described in Cobb, The Rise of Religious Liberty in America (1902), c. X; Sweet, The Story of Religion in America (1950), c. XIII. The greater relevance of conditions existing at the time of adoption of the Fourteenth Amendment is suggested in Note, State Sunday Laws and the Religious Guarantees of the Federal Constitution, 7 Harv.L.Rev. 729, 739, n. 79 (1960). [↑](#footnote-ref-20)
21. See Corwin, A Constitution of Powers in a Secular State (1951), 111-114; Fairman and Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan.L.Rev. 5 (1949); Meyer, Comment, The Blaine Amendment and the Bill of Rights, 64 Harv.L.Rev. 939 (1951); Howe, Religion and Race in Public Education, 8 Buffalo L.Rev. 242, 245-247 (1959). Cf. Cooley, Principles of Constitutional Law (2d ed. 1891), 213-214. Compare Professor Freund's comment:

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

Freund, The Supreme Court of the United States (1961), 58-59. [↑](#footnote-ref-21)
22. The Blaine Amendment, 4 Cong.Rec. 5580, included also a more explicit provision that

"no money raised by taxation in any State for the support of public schools or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination. . . ."

The Amendment passed the House but failed to obtain the requisite two-thirds vote in the Senate. See 4 Cong.Rec. 5595. The prohibition which the Blaine Amendment would have engrafted onto the American Constitution has been incorporated in the constitutions of other nations; compare Article 28(1) of the Constitution of India ("No religious instruction shall be provided in any educational institution wholly maintained out of State funds"); Article XX of the Constitution of Japan (". . . the State and its organs shall refrain from religious education or any other religious activity"). See 1 Chaudhri, Constitutional Rights and Limitations (1955), 875, 876. [↑](#footnote-ref-22)
23. Three years after the adoption of the Fourteenth Amendment, Mr. Justice Bradley wrote a letter expressing his views on a proposed constitutional amendment designed to acknowledge the dependence of the Nation upon God, and to recognize the Bible as the foundation of its laws and the supreme ruler of its conduct:

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

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

". . . Religion, as the basis and support of civil government, must reside not in the written Constitution, but in the people themselves. And we cannot legislate religion into the people. It must be infused by gentler and wiser methods."

Miscellaneous Writings of Joseph P. Bradley (1901), 357-359. For a later phase of the controversy over such a constitutional amendment as that which Justice Bradley opposed, see Finlator, Christ in Congress, 4 J. Church and State 205 (1962). [↑](#footnote-ref-23)
24. There is no doubt that, whatever "establishment" may have meant to the Framers of the First Amendment in 1791, the draftsmen of the Fourteenth Amendment three quarters of a century later understood the Establishment Clause to foreclose many incidental forms of governmental aid to religion which fell far short of the creation or support of an official church. The Report of a Senate Committee as early as 1853, for example, contained this view of the Establishment Clause:

"If Congress has passed, or should pass, any law which, fairly construed, has in any degree introduced, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars -- endowment at the public expense, peculiar privileges to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communions -- such law would be a 'law respecting an establishment of religion,' and, therefore, in violation of the constitution."

S.Rep. No. 376, 32d Cong., 2d Sess. 1-2.

Compare Thomas M. Cooley's exposition in the year in which the Fourteenth Amendment was ratified:

"Those things which are not lawful under any of the American constitutions may be stated thus:"

"1. Any law respecting an establishment of religion. . . ."

"2. Compulsory support, by taxation or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary."

Cooley, Constitutional Limitations (1st ed. 1868), 469. [↑](#footnote-ref-24)
25. Compare, e.g., Miller, Roger Williams: is Contribution to the American Tradition (1953), 83, withMadison, Memorial and Remonstrance Against Religious Assessments, reprinted as an Appendix to the dissenting opinion of Mr. Justice Rutledge, Everson v. Board of Education, supra at 330 U. S. 63-72. See also Cahn, On Government and Prayer, 37 N.Y.U.L.Rev. 981, 982-985 (1962); Jefferson's Bill for Establishing Religious Freedom, in Padover, The Complete Jefferson (1943), 946-947; Moulton and Myers, Report on Appointing Chaplains to the Legislature of New York, in Blau, Cornerstones of Religious Freedom in America (1949), 141-156; Bury, A History of Freedom of Thought (2d ed.1952), 75-76. [↑](#footnote-ref-25)
26. See, e.g., Spicer, The Supreme Court and Fundamental Freedoms (1959), 83-84; Kauper, Church, State, and Freedom: A Review, 52 Mich.L.Rev. 829, 839 (1954); Reed, Church-State and the ZorachCase, 27 Notre Dame Lawyer 529, 539-541 (1952). [↑](#footnote-ref-26)
27. See 343 U.S. at 343 U. S. 321-322 (Frankfurter, J., dissenting); Kurland, Religion and the Law (1962), 89. I recognize that there is a question whether, in Zorach, the free exercise claims asserted were, in fact, proved. 343 U.S. at 343 U. S. 311. [↑](#footnote-ref-27)
28. Mr. Justice Frankfurter described the effects of the McCollum program thus:

"Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. . . . As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process, sharpens the consciousness of religious differences, at least among some of the children committed to its care."

333 U.S. at 333 U. S. 227-228.

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

"Then, all through the school hours, these teachers . . . were before the children as object lessons of the order and church of which they were members. It is within our common observation that young children . . . are very susceptible to the influence of their teachers and of the kind of object lessons continually before them in schools conducted under these circumstances and with these surroundings."

O'Connor v. Hendrick, 109 App.Div. 361, 371-372, 96 N.Y.Supp. 161, 169. See also Commonwealth v. Herr, 229 Pa. 132, 78 A. 68; Comment, Religious Garb in the Public Schools -- A Study in Conflicting Liberties, 22 U. of Chi.L.Rev. 888 (1955). Also apposite are decisions of several courts which have enjoined the use of parochial schools as part of the public school system, Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609; or have invalidated programs for the distribution in public school classrooms of Gideon Bibles, Brown v. Orange County Board of Public Instruction, 128 So.2d 181 (Fla.App.); Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 857. See Note, The First Amendment and Distribution of Religious Literature in the Public Schools, 41 Va.L.Rev. 789, 803-806 (1955). In Tudor, the court stressed the role of the public schools in the Bible program:

". . . the public school machinery is used to bring about the distribution of these Bibles to the children. . . . In the eyes of the pupils and their parents, the board of education has placed its stamp of approval upon this distribution and, in fact, upon the Gideon Bible itself. . . . This is more than mere 'accommodation' of religion permitted in the Zorach case. The school's part in this distribution is an active one, and cannot be sustained on the basis of a mere assistance to religion."

14 N.J. at 51-52, 100 A.2d at 868. The significance of the teacher's authority was recognized by one early state court decision:

"The school being in session, the right to command was vested in the teacher, and the duty of obedience imposed upon the pupils. Under such circumstances, a request and a command have the same meaning. A request from one in authority is understood to be a mere euphemism. It is, in fact, a command in an inoffensive form."

State ex rel. Freeman v. Scheve, 65 Neb. 876, 880, 93 N.W. 169, 170. [↑](#footnote-ref-28)
29. See, for other illustrations of the principle that, where First Amendment freedoms are or may be affected, government must employ those means which will least inhibit the exercise of constitutional liberties, Lovell v. Griffin, 303 U. S. 444; Schneider v. State, 308 U. S. 147, 308 U. S. 161; Martin v. Struthers, 319 U. S. 141; Saia v. New York, 334 U. S. 558; Shelton v. Tucker, 364 U. S. 479,364 U. S. 488-489; Bantam Books, Inc., v. Sullivan, 372 U. S. 58, 372 U. S. 66, 372 U. S. 69-71. See alsoNote, State Sunday Laws and the Religious Guarantees of the Federal Constitution, 73 Harv.L.Rev. 729, 743-745 (1960); Freund, The Supreme Court of the United States (1961), 86-87; 74 Harv.L.Rev. 613 (1961). And compare Miller v. Cooper, 56 N.M. 355, 244 P.2d 520 (1952), in which a state court permitted the holding of public school commencement exercises in a church building only because no public buildings in the community were adequate to accommodate the ceremony. [↑](#footnote-ref-29)
30. No question has been raised in these cases concerning the standing of these parents to challenge the religious practices conducted in the schools which their children presently attend. Whatever authority Doremus v. Board of Education, 342 U. S. 429, might have on the question of the standing of one not the parent of children affected by the challenged exercises is not before us in these cases. Neither in McCollum nor in Zorach was there any reason to question the standing of the parent plaintiffs under settled principles of justiciability and jurisdiction, whether or not their complaints alleged pecuniary loss or monetary injury. The free exercise claims of the parents alleged injury sufficient to give them standing. If, however, the gravamen of the lawsuit were exclusively one of establishment, it might seem illogical to confer standing upon a parent who -- though he is concededly in the best position to assert a free exercise claim -- suffers no financial injury, by reason of being a parent, different from that of the ordinary taxpayer, whose standing may be open to question. See Sutherland, Establishment According to Engel, 76 Harv.L.Rev. 25, 41-43 (1962). I would suggest several answers to this conceptual difficulty. First, the parent is surely the person most directly and immediately concerned about and affected by the challenged establishment, and to deny him standing either in his own right or on behalf of his child might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment -- even though no special monetary injury could be shown. See Schempp v. School District of Abington Township, 177 F.Supp. 398, 407; Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . . ," 1962 Supreme Court Review 1, 22. Second, the complaint in every case thus far challenging an establishment has set forth at least a colorable claim of infringement of free exercise. When the complaint includes both claims, and neither is frivolous, it would surely be overtechnical to say that a parent who does not detail the monetary cost of the exercises to him may ask the court to pass only upon the free exercise claim, however logically the two may be related. Cf. Pierce v. Society of Sisters, supra; Truax v. Raich, 239 U. S. 33, 239 U. S. 38-39; NAACP v. Alabama ex rel. Patterson, 357 U. S. 449 458-460; Bell v. Hood, 327 U. S. 678; Bantam Books, Inc., v. Sullivan, 372 U. S. 58, 372 U. S. 64, n. 6. Finally, the concept of standing is a necessarily flexible one, designed principally to ensure that the plaintiffs have

"such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. . . ."

Baker v. Carr, 369 U. S. 186, 369 U. S. 204. It seems to me that even a cursory examination of the complaints in these two cases and the opinions below discloses that these parents have very real grievances against the respective school authorities which cannot be resolved short of constitutional adjudication. See generally Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit, 12 Buffalo L.Rev. 35 (1962); Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv.L.Rev. 1265 (1961); Sutherland, Due Process and Disestablishment, 62 Harv.L.Rev. 1306, 1327-1332 (1949); Comment, The Supreme Court, the First Amendment, and Religion in the Public Schools, 63 Col.L.Rev. 73, 94, n. 153 (1963). [↑](#footnote-ref-30)
31. Quoted in Dunn, What Happened to Religious Education? (1958), 21. [↑](#footnote-ref-31)
32. Quoted id. at 22 [↑](#footnote-ref-32)
33. Quoted in Hartford, Moral Values in Public Education: Lessons From the Kentucky Experience (1958), 31. [↑](#footnote-ref-33)
34. See Culver, Horace Mann and Religion in the Massachusetts Public Schools (1929), for an account of one prominent educator's efforts to satisfy both the protests of those who opposed continuation of sectarian lessons and exercises in public schools, and the demands of those who insisted upon the retention of some essentially religious practices. Mann's continued use of the Bible for what he regarded as nonsectarian exercises represented his response to these cross-pressures. See Mann, Religious Education, in Blau, Cornerstones of Religious Freedom in America (1949), 163-201 (from the Twelfth Annual Report for 1848 of the Secretary of the Board of Education of Massachusetts). See also Boles, The Bible, Religion, and the Public Schools (1961), 22-27. [↑](#footnote-ref-34)
35. See 2 Stokes, Church and State in the United States (1950), 572-579; Greene, Religion and the State: The Making and Testing of an American Tradition (1941), 122-126. [↑](#footnote-ref-35)
36. E.g., Ala.Code, Tit. 52, § 542; Del.Code Ann., Tit. 14, §§ 4101-4102; Fla.Stat.Ann. § 231.09(2); Mass.Ann.Laws, c. 71, § 31; Tenn.Code Ann. § 49-1307(4). Some statutes, like the recently amended Pennsylvania statute involved in Schempp, provide for the excusal or exemption of children whose parents do not wish them to participate. See generally Johnson and Yost, Separation of Church and State in the United States (1948), 33-36; Thayer, The Role of the School in American Society (1960), 374-375; Beth, The American Theory of Church and State (1958), 106-107. Compare with the American statutory approach Article 28(3) of the Constitution of India:

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

See 1 Chaudhri, Constitutional Rights and Limitations (1955), 876, 939. [↑](#footnote-ref-36)
37. See note 34, supra. [↑](#footnote-ref-37)
38. Quoted from New Hampshire School Reports, 1850, 31-32, in Kinney, Church and State: The Struggle for Separation in New Hampshire, 1630-1900 (1955), 157-158. [↑](#footnote-ref-38)
39. Quoted in Boyer, Religious Education of Public School Pupils in Wisconsin, 1953 Wis.L.Rev. 181, 186. [↑](#footnote-ref-39)
40. Quoted in Dunn, What Happened to Religious Education? (195), 271. [↑](#footnote-ref-40)
41. Quoted in Butts, The American Tradition in Religion and Education (1950), 135-136. [↑](#footnote-ref-41)
42. See Board of Education v. Minor, 23 Ohio St. 211; Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed.1949), 864. [↑](#footnote-ref-42)
43. Report of the United States Commissioner of Education for the Year 1888-1889, part I, H.R.Exec.Doc. No. 1, part 5, 51st Cong., 1st Sess. 627. [↑](#footnote-ref-43)
44. Quoted in Illinois ex rel. McCollum v. Board of Education, supra at 333 U. S. 218 (opinion of Frankfurter, J.). See also President Grant's Annual Message to Congress, Dec. 7, 1875, 4 Cong.Rec. 175 et seq., which apparently inspired the drafting and submission of the Blaine Amendment. SeeMeyer, Comment, The Blaine Amendment and the Bill of Rights, 64 Harv.L.Rev. 939 (1951). [↑](#footnote-ref-44)
45. Theodore Roosevelt to Michael A. Schaap, Feb. 22, 1915, 8 Letters of Theodore Roosevelt (Morison ed.1954), 893. [↑](#footnote-ref-45)
46. Quoted in Boles, The Bible, Religion, and the Public Schools (1961), 238. [↑](#footnote-ref-46)
47. E.g., 1955 op. Ariz. Atty.Gen. 67; 26 Ore.Op.Atty.Gen. 46 (1952); 25 Cal.Op.Atty.Gen. 316 (1955); 1948-1950 Nev. Atty.Gen. Rep. 69 (1948). For a 1961 opinion of the Attorney General of Michigan to the same effect, see 63 American Jewish Yearbook (1962) 189. In addition to the Governor of Ohio, see note 46, supra, a Governor of Arizona vetoed a proposed law which would have permitted "reading the Bible, without comment, except to teach Historical or Literary facts." See 2 Stokes, Church and State in the United States (1950), 568. [↑](#footnote-ref-47)
48. See Johnson and Yost, Separation of Church and State in the United States (1948), 71; Note, Bible Reading in Public Schools, 9 Vand.L.Rev. 849, 851 (1956). [↑](#footnote-ref-48)
49. E.g., Spiller v. Inhabitants of Woburn, 12 Allen (Mass.) 127 (1866); Donahoe v. Richards, 38 Maine 376, 413 (1854); cf. Ferriter v. Tyler, 48 Vt. 444, 471-472 (1876). [↑](#footnote-ref-49)
50. Board of Education v. Minor, 23 Ohio St. 211 (1873). [↑](#footnote-ref-50)
51. People ex rel. Ring v. Board of Education, 245 Ill. 334, 92 N.E. 251 (1910); Herold v. Parish Board of School Directors, 136 La. 1034, 68 So. 116 (1915); State ex rel. Weiss v. District Board, 76 Wis. 177, 44 N.W. 967 (1890); State ex rel. Finger v. Weedman, 55 S.D. 343, 226 N.W. 348 (1929); State ex rel. Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918); cf. State ex rel. Clithero v. Showalter, 159 Wash. 519, 293 P. 1000 (1930); State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902), modified,65 Neb. 876, 93 N.W.169 (1903). The cases are discussed in Boles, The Bible, Religion, and the Public Schools (1961), c. IV; Harrison, The Bible, the Constitution and Public Education, 29 Tenn.L.Rev. 363, 386-389 (1962). [↑](#footnote-ref-51)
52. Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884); Hackett v. Brooksville Graded School District, 120 Ky. 608, 87 S.W. 792 (1905); Billard v. Board of Education, 69 Kan. 53, 76 P. 422 (1904); Pfeiffer v. Board of Education, 118 Mich. 560, 77 N.W. 250 (1898); Kaplan v. School District, 171 Minn. 142, 214 N.W. 18 (1927); Lewis v. Board of Education, 157 Misc. 520, 285 N.Y. Supp. 164 (Sup.Ct.1935), modified on other grounds, 247 App.Div. 106, 286 N.Y. Supp. 174 (1936), appeal dismissed, 276 N.Y. 490, 12 N.E.2d 172 (1937); Doremus v. Board of Education, 5 N.J. 435, 75 A.2d 880 (1950), appeal dismissed, 342 U. S. 429; Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908); People ex rel. Vollmar v. Stanley, 81 Colo. 276, 255 P. 610 (1927); Wilkerson v. City of Rome, 152 Ga. 762, 110 S.E. 895 (1922); Carden v. Bland, 199 Tenn. 665, 288 S.W.2d 718 (1956); Chamberlin v. Dade County Board of Public Instruction, 143 So.2d 21 (Fla.1962). [↑](#footnote-ref-52)
53. For discussion of the constitutional and statutory provisions involved in the state cases which sustained devotional exercises in the public schools, see Boles, The Bible, Religion, and the Public Schools (1961), c. III; Harrison, The Bible, the Constitution and Public Education, 29 Tenn.L.Rev. 363, 381-385 (1962); Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis.L.Rev. 427, 45452; Note, Bible Reading in Public Schools, 9 Vand.L.Rev. 849, 854-859 (1956); Note, Nineteenth Century Judicial Thought Concerning Church-State Relations, 40 Minn.L.Rev. 672, 675-678 (1956). State courts appear to have been increasingly influenced in sustaining devotional practices by the availability of an excuse or exemption for dissenting students. See Cushman, The Holy Bible and the Public Schools, 40 Cornell L.Q. 475, 477 (1955); 13 Vand.L.Rev. 552 (1960). [↑](#footnote-ref-53)
54. See Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt.L.Rev. 561, 571-572 (1961); Harrison, The Bible the Constitution and Public Education, 29 Tenn.L.Rev. 363 399-400 (1962); 30 Ford.L.Rev. 801, 803 (1962); 45 Va.L.Rev. 1381 (1959). The essentially religious character of the materials used in these exercises is, in fact, strongly suggested by the presence of excusal or exemption provisions, and by the practice of rotating or alternating the use of different prayers and versions of the Holy Bible [↑](#footnote-ref-54)
55. In the Billard case, the teacher whose use of the Lord's Prayer and the Twenty-third Psalm was before the court testified that the exercise served disciplinary, rather than spiritual, purposes:

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

When asked again if the purpose were not at least partially religious, the teacher replied, "[i]t was religious to the children that are religious, and to the others it was not." 69 Kan. at 57-58, 76 P. at 423. [↑](#footnote-ref-55)
56. See, e.g., Henry, The Place of Religion in Public Schools (1950); Martin, Our Public Schools -- Christian or Secular (1952); Educational Policies Comm'n of the National Educational Assn., Moral and Spiritual Values in the Public Schools (1951), c. IV; Harner, Religion's Place in General Education (1949). Educators are by no means unanimous, however, on this question. See Boles, The Bible, Religion, and the Public Schools (1961), 223-224. Compare George Washington's advice in his Farewell Address:

"And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle."

35 Writings of George Washington (Fitzpatrick ed.1940), 229. [↑](#footnote-ref-56)
57. Thomas Jefferson's insistence that, where the judgments of young children

"are not sufficiently matured for religious inquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history,"

2 Writings of Thomas Jefferson (Memorial ed.1903), 204, is relevant here. Recent proposals have explored the possibility of commencing the school day "with a quiet moment that would still the tumult of the playground and start a day of study," Editorial, Washington Post, June 28, 1962, § A, p. 22, col. 2. See also New York Times, Aug. 30, 1962, § 1, p. 18, col. 2. For a consideration of these and other alternative proposals see Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn.L.Rev. 329, 370-371 (1963). See also 2 Stokes, Church and State in the United States (1950), 571. [↑](#footnote-ref-57)
58. The history, as it bears particularly upon the role of sectarian differences concerning Biblical texts and interpretation, has been summarized in Tudor v. Board of Education, 14 N.J. 31, 36-44, 100 A.2d 857, 859-864. See also State ex rel. Weiss v. District Board, 76 Wis. 177, 190-193, 44 N.W. 967, 972-975. One state court adverted to these differences a half century ago:

"The Bible, in its entirety, is a sectarian book as to the Jew and every believer in any religion other than the Christian religion, and, as to those who are heretical or who hold beliefs that are not regarded as orthodox . . . , its use in the schools necessarily results in sectarian instruction. There are many sects of Christians, and their differences grow out of their differing constructions of various parts of the Scriptures -- the different conclusions drawn as to the effect of the same words. The portions of Scripture which form the basis of these sectarian differences cannot be thoughtfully and intelligently read without impressing the reader, favorably or otherwise, with reference to the doctrines supposed to be derived from them."

People ex rel. Ring v. Board of Education, 245 Ill. 334, 347-348, 92 N.E. 251, 255. But see, for a sharply critical comment, Schofield, Religious Liberty and Bible Reading in Illinois Public Schools, 6 Ill.L.Rev. 17 (1911), See also Dunn, What Happened to Religious Education? (1958), 268-273; Dawson, America's Way in Church, State, and Society (1953), 53-54; Johnson and Yost, Separation of Church and State in the United States (1948), c. IV; Harpster, Religion, Education and the Law, 36 Marquette L.Rev. 24, 445 (1952); 20 Ohio State L.J. 701, 702-703 (1959). [↑](#footnote-ref-58)
59. See Torcaso v. Watkins, supra, at 367 U. S. 495, n. 11; Cushman, The Holy Bible and the Public Schools, 40 Cornell L.Q. 475, 480-483 (1955); Note, Separation of Church and State: Religious Exercises in the Schools, 31 U. of Cinc.L.Rev. 408, 41112 (1962). Few religious persons today would share the universality of the Biblical canons of John Quincy Adams:

"You ask me what Bible I take as the standard of my faith -- the Hebrew, the Samaritan, the old English translation, or what? I answer, the Bible containing the sermon upon the mount -- any Bible that I can read and understand. . . . I take any one of them for my standard of faith. If Socinus or Priestley had made a fair translation of the Bible, I would have taken that, but without their comments."

John Quincy Adams to John Adams, Jan. 3, 1817, in Koch and Peden, Selected Writings of John and John Quincy Adams (1946), 292. [↑](#footnote-ref-59)
60. Rabbi Solomon Grayzel testified before the District Court,

"In Judaism, the Bible is not read, it is studied. There is no special virtue attached to a mere reading of the Bible; there is a great deal of virtue attached to a study of the Bible."

"See Boles, The Bible, Religion, and the Public Schools (1961), 208-218; Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn.L.Rev. 39, 372-375 (1963). One religious periodical has suggested the danger that"

"an observance of this sort is likely to deteriorate quickly into an empty formality with little, if any, spiritual significance. Prescribed forms of this sort, as many colleges have concluded after years of compulsory chapel attendance, can actually work against the inculcation of vital religion."

Prayers in Public Schools Opposed, 69 Christian Century, Jan. 9, 1952, p. 35. [↑](#footnote-ref-60)
61. See Cahn, On Government and Prayer, 37 N.Y.U.L.Rev. 981, 993-994 (1962). A leading Protestant journal recently noted:

"Agitation for removal of religious practices in public schools is not prompted or supported entirely by Jews, humanists, and atheists. At both local and national levels, many Christian leaders, concerned both for civil rights of minorities and for adequate religious education, are opposed to religious exercises in public schools. . . . Many persons, both Jews and Christians, believe that prayer and Bible reading are too sacred to be permitted in public schools, in spite of their possible moral value."

Smith, The Religious Crisis In Our Schools, 128 The Episcopalian, May 1963, pp. 12-13. See, e.g., for other recent statements on this question, Editorial, Amending the Amendment, 108 America, May 25, 1963, p. 736; Sissel, A Christian View: Behind the Fight Against School Prayer, 27 Look, June 18, 1963, p.25. It should be unnecessary to demonstrate that the Lord's Prayer, more clearly than the Regents' Prayer involved in Engel v. Vitale, is an essentially Christian supplication. See, e.g., Scott, The Lord's Prayer: Its Character, Purpose, and Interpretation (1951), 55; Buttrick, So We Believe, So We Pray (1951), 142; Levy, Lord's Prayer, in 7 Universal Jewish Encyclopedia (1948), 19-193. [↑](#footnote-ref-61)
62. Statement of the Baptist Joint Committee on Public Affairs, in 4 J. Church and State 144 (1962). [↑](#footnote-ref-62)
63. See Harrison, The Bible, the Constitution and Public Education, 29 Tenn.L.Rev. 363, 397 (1962). The application of statutes and regulations which forbid comment on scriptural passages is further complicated by the view of certain religious groups that reading without comment is either meaningless or actually offensive. Compare Rabbi Grayzel's testimony before the District Court that "the Bible is misunderstood when it is taken without explanation." A recent survey of the attitudes of certain teachers disclosed concern that "refusal to answer pupil questions regarding any curricular activity is not educationally sound," and that reading without comment might create in the minds of the pupils the impression that something was "hidden or wrong." Boles, The Bible, Religion, and the Public Schools (1961), 235-236. Compare the comment of a foreign observer:

"In no other field of learning would we expect a child to draw the full meaning from what he reads without accompanying explanatory comment. But comment by the teacher will inevitably reveal his own personal preferences, and the exhibition of preferences is what we are seeking to eliminate."

MacKinnon, Freedom? -- or Toleration? The Problem of Church and State in the United States, [1959] Pub.Law 374, 383. [↑](#footnote-ref-63)
64. See Abbott, A Common Bible Reader for Public Schools, 56 Religious Education 20 (1961); Note, 22 Albany L.Rev. 156-157 (1958); 2 Stokes, Church and State in the United States (1950), 501-506 (describing the "common denominator" or "three faiths" plan and certain programs of instruction designed to implement the "common core" approach). The attempts to evolve a universal, nondenominational prayer are by no means novel. See, e.g., Madison's letter to Edward Everett, March 19, 1823, commenting upon a

"project of a prayer . . . intended to comprehend & conciliate College Students of every [Christian] denomination, by a Form composed wholly of texts & phrases of scripture."

9 Writings of James Madison (Hunt ed.1910), 126. For a fuller description of this and other attempts to fashion a "common core" or nonsectarian exercise, see Engel v. Vitale, 18 Misc.2d 659, 660-662, 191 N.Y.S.2d 453, 459-460. [↑](#footnote-ref-64)
65. See the policy statement recently drafted by the National Council of the Churches of Christ:

". . . neither true religion nor good education is dependent upon the devotional use of the Bible in the public school program. . . . Apart from the constitutional questions involved, attempts to establish a 'common core' of religious beliefs to be taught in public schools for the purpose of indoctrination are unrealistic and unwise. Major faith groups have not agreed on a formulation of religious beliefs common to all. Even if they had done so, such a body of religious doctrine would tend to become a substitute for the more demanding commitments of historic faiths."

Washington Post, May 25, 1963, § A, p. 1, col. 4. See also Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn.L.Rev. 329, 341, 368-369 (1963). See also Hartford, Moral Values in Public Education: Lessons from the Kentucky Experience (1958), 261-262; Moehlman, The Wall of Separation Between Church and State (1951), 158-159. Cf. Mosk, "Establishment Clause" Clarified, 22 Law in Transition 231, 235-236 (1963). [↑](#footnote-ref-65)
66. Quoted in Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . . ,"1962 Supreme Court Review (1962), 1, 31. [↑](#footnote-ref-66)
67. Quoted in Harrison, The Bible, the Constitution and Public Education, 29 Tenn.L.Rev. 363, 417 (1962). See also Dawson, America's Way in Church, State, and Society (1953), 54. [↑](#footnote-ref-67)
68. See the testimony of Edward L. Schempp, the father of the children in the Abington schools and plaintiff appellee in No. 142, concerning his reasons for not asking that his children be excused from the morning exercises after excusal was made available through amendment of the statute:

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

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

A recent opinion of the Attorney General of California gave as one reason for finding devotional exercises unconstitutional the likelihood that

"[c]hildren forced by conscience to leave the room during such exercises would be placed in a position inferior to that of students adhering to the State-endorsed religion."

25 Cal.Op.Atty.Gen. 316, 319 (1955). Other views on this question, and possible effects of the excusal procedure, are summarized in Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt.L.Rev. 561, 581-585 (1961); Note, Separation of Church and State: Religious Exercises in the Schools, 31 U. of Cinc.L.Rev. 408, 416 (1962); Note, 62 W.Va.L.Rev. 353, 358 (1960). [↑](#footnote-ref-68)
69. Extensive testimony by behavioral scientists concerning the effect of similar practices upon children's attitudes and behaviors is discussed in Tudor v. Board of Education, 14 N.J. 31, 50-52, 100 A.2d 857, 867-868. See also Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn.L.Rev. 329, 344 (1963). There appear to be no reported experiments which bear directly upon the question under consideration. There have, however, been numerous experiments which indicate the susceptibility of school children to peer group pressures, especially where important group norms and values are involved. See, e.g., Berenda, The Influence of the Group on the Judgments of Children (1950), 26-33; Argyle, Social Pressure in Public and Private Situations, 54 J. Abnormal & Social Psych. 172 (1957); cf. Rhine, The Effect of Peer Group Influence Upon Concept-Attitude Development and Change, 51 J. Social Psych. 173 (1960); French, Morrison and Levinger, Coercive Power and Forces Affecting Conformity, 61 J. Abnormal and Social Psych. 93 (1960). For a recent and important experimental study of the susceptibility of students to various factors in the school environment, see Zander, Curtis and Rosenfeld, The Influence of Teachers and Peers on Aspirations of Youth (U.S. Office of Education Cooperative Research Project No. 451, 1961), 24-25, 78-79. It is also apparent that the susceptibility of school children to prestige suggestion and social influence within the school environment varies inversely with the age, grade level, and consequent degree of sophistication of the child, see Pated and Gordon, Some Personal and Situational Determinants of Yielding to Influence, 61 J. Abnormal and Social Psych. 411, 417 (1960).

Experimental findings also shed some light upon the probable effectiveness of a provision for excusal when, as is usually the case, the percentage of the class wishing not to participate in the exercises is very small. It has been demonstrated, for example, that the inclination even of adults to depart or dissent overtly from strong group norms varies proportionately with the size of the dissenting group -- that is, inversely with the apparent or perceived strength of the norm itself -- and is markedly slighter in the case of the sole or isolated dissenter. See, e.g., Asch, Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority (Psych. Monographs No. 416, 1956), 69-70; Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, in Cartwright and Zander, Group Dynamics (2d ed.1960), 189-199; Luchins and Luchins, On Conformity With True and False Communications, 42 J. Social Psych. 283 (1955). Recent important findings on these questions are summarized in Hare, Handbook of Small Group Research (1962), c. II. [↑](#footnote-ref-69)
70. See, on the general problem of conflict and accommodation between the two clauses, Katz, Freedom of Religion and State Neutrality, 20 U. of Chi.L.Rev. 426, 429 (1953); Griswold, Absolute Is In the Dark, 8 Utah L.Rev. 167, 176-179 (1963); Kauper, Church, State, and Freedom: A Review, 52 Mich.L.Rev. 829, 833 (1954). One author has suggested that the Establishment and Free Exercise Clauses must be

"read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden."

Kurland, Religion and the Law (1962), 112. Compare the formula of accommodation embodied in the Australian Constitution, § 116:

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

Essays on the Australian Constitution (Else-Mitchell ed.1961), 15. [↑](#footnote-ref-70)
71. There has been much difference of opinion throughout American history concerning the advisability of furnishing chaplains at government expense. Compare, e.g., Washington's order regarding chaplains for the Continental Army, July 9, 1776, in 5 Writings of George Washington (Fitzpatrick ed.1932), 244, with Madison's views on a very similar question, letter to Eduard Livingston, July 10, 1822, 9 Writings of James Madison (Hunt ed.1910), 100-103. Compare also this statement by the Armed Forces Chaplains Board concerning the chaplain's obligation:

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

Builders of Faith (U.S. Department of Defense 1955), ii. It is interesting to compare in this regard an express provision, Article 140, of the Weimar Constitution: "Necessary free time shall be accorded to the members of the armed forces for the fulfillment of their religious duties." McBain and Rogers, The New Constitutions of Europe (1922), 203. [↑](#footnote-ref-71)
72. For a discussion of some recent and difficult problems in connection with chaplains and religious exercises in prisons, see, e.g., Pierce v. La Vallee, 293 F.2d 233; In re Ferguson, 55 Cal.2d 663, 361 P.2d 417; McBride v. McCorkle, 44 N.J.Super. 468, 130 A.2d 881; Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791; discussed in Comment, 62 Col.L.Rev. 1488 (1962); 75 Harv.L.Rev. 837 (1962).Compare Article XVIII of the Hague Convention Regulations of 1899:

"Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities."

Quoted in Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed.1949), 313. [↑](#footnote-ref-72)
73. Compare generally Sibley and Jacob, Conscription of Conscience: The American State and the Conscientious Objector, 1940-1947 (1952), with Conklin, Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins, 51 Geo.L.J. 252 (1963). [↑](#footnote-ref-73)
74. See, e.g., Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 697 (Fla.); Lewis v. Mandeville, 201 Misc. 120, 107 N.Y.S.2d 865; cf. School District No. 97 v. Schmidt, 128 Colo. 495, 263 P.2d 581 (temporary loan of school district's custodian to church). A different problem may be presented with respect to the regular use of public school property for religious activities, State ex rel. Gilbert v. Dilley, 95 Neb. 527, 145 N.W. 999; the erection on public property of a statue of or memorial to an essentially religious figure, State ex rel. Singelmann v. Morrison, 57 So.2d 238 (La.App.); seasonal displays of a religious character, Baer v. Kolmorgen, 14 Misc.2d 1015, 181 N.Y.S.2d 230; or the performance on public property of a drama or opera based on religious material or carrying a religious message, cf. County of Los Angeles v. Hollinger, 200 Cal.App.2d 877, 19 Cal.Rptr. 648. [↑](#footnote-ref-74)
75. Compare Moulton and Myers, Report on Appointing Chaplains to the Legislature of New York, in Blau, Cornerstones of Religious Freedom in America (1949), 141-156; Comment, 63 Col.L.Rev. 73, 97 (1963) [↑](#footnote-ref-75)
76. A comprehensive survey of the problems raised concerning the role of religion in the secular curriculum is contained in Brown, ed., The Study of Religion in the Public Schools: An Appraisal (1958). See also Katz, Religion and American Constitutions, Lecture at Northwestern University Law School, March 21, 1963, pp. 37-41; Educational Policies Comm'n of the National Education Assn., Moral and Spiritual Values in the Public Schools (1951), 49-80. Compare, for a consideration of similar problems in state supported colleges and universities, Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal.L.Rev. 751 (1962). [↑](#footnote-ref-76)
77. See generally Torpey, Judicial Doctrines of Religious Rights in America (1948), c. VI; Van Alstyne, Tax Exemption of Church Property, 20 Ohio State L.J. 461 (1959); Sutherland, Due Process and Disestablishment, 62 Harv.L.Rev. 1306, 1336-1338 (1949); Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal.L.Rev. 751, 773-780 (1962); 7 De Paul L.Rev. 206 (1958); 58 Col.L.Rev. 417 (1958); 9 Stan.L.Rev. 366 (1957). [↑](#footnote-ref-77)
78. See, e.g., Washington Ethical Society v. District of Columbia, 101 U.S.App.D.C. 371, 249 F.2d 127; Fellowship of Humanity v. County of Alameda, 153 Cal.App.2d 673, 315 P.2d 394. [↑](#footnote-ref-78)