# Harlan: Concurrence

MR. JUSTICE HARLAN, concurring.

I think it deplorable that this case should have come to us with such an opaque opinion by the State's highest court. With all respect, that court's handling of the **[p. 115]** case savors of a studied effort to avoid coming to grips with this anachronistic statute, and to "pass the buck" to this Court. This sort of temporizing does not make for healthy operations between the state and federal judiciaries. Despite these observations, I am in agreement with this Court's opinion that, the constitutional claims having been properly raised and necessarily decided below, resolution of the matter by us cannot properly be avoided. \* *See, e.g., Chicago Life Insurance Co. v. Needles,* 113 U. S. 74, 113 U. S. 579 (1885).

I concur in so much of the Court's opinion as holds that the Arkansas statute constitutes an "establishment of religion" forbidden to the States by the Fourteenth Amendment. I do not understand, however, why the Court finds it necessary to explore at length appellants' contentions that the statute is unconstitutionally vague and that it interferes with free speech, only to conclude that these issues need not be decided in this case. In the process of not deciding them, the Court obscures its otherwise straightforward holding, and opens its opinion to possible implications from which I am constrained to disassociate myself.

\* Short of reading the Arkansas Supreme Court's opinion to have proceeded on the premise that it need not consider appellants' "establishment" contention, clearly raised in the state courts and here, in view of its holding that the State possesses plenary power to fix the curriculum in its public schools, I can perceive no tenable basis for remanding the case to the state court for an explication of the purpose and meaning of the statute in question. I am unwilling to ascribe to the Arkansas Supreme Court any such quixotic approach to constitutional adjudication. I take the first sentence of its opinion (*ante* at 393 U. S. 101, n. 7) to encompass an overruling of appellants' "establishment" point, and the second sentence to refer only to their "vagueness" claim.