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subcontracting or seniority provisions when there is no express no-removal clause. Such an approach, as a rule of construction, would recognize in a mild way the policies discussed herein.

In conclusion, the thesis here is neither that the Board should altogether remove the runaway shop from the unfair labor practice category, nor that reasonable contractual safeguards against the impact and surprise of plant relocation should be declared void. Rather it is submitted only that fresh thinking on the subject, giving greater weight to contemporary economic realities and to enunciated national economic goals, must be undertaken.

E. WALTER BOWMAN

## Religion and the Public Schools

### I. INTRODUCTION

The first amendment to the United States Constitution contains a dual command with respect to governmental involvement with religion: government must "make no law respecting an establishment of religion or prohibiting the free exercise thereof." Although some have insisted that the first amendment requires a strict separation of church and state, the conclusion is inescapable that the two clauses were intended to operate together in harmony. It is apparent, therefore, that the conflicting policies of the "no establishment" clause and the "free exercise" clause must be balanced and reconciled. The United States Supreme Court has held that this balancing effort leads to a duty of neutrality—a duty which forbids the state either to advance or to inhibit religion. Although the neutrality concept will affect many different types of governmental activity, its greatest application would appear to be in the public school situation. It is the purpose of this paper to examine the various public school activities involving religious aspects in an effort to determine which ones constitute breaches of the duty of neutrality and which ones are permissible accommodations in the interest of religious liberty.

### II. APPLICATION OF THE NEUTRALITY CONCEPT BY THE UNITED STATES SUPREME COURT

#### A. *The Constitutional Command*

Although the great bulk of American colonists came to the New World in search of religious freedom, they were initially unable to resist the temptation to structure their political machinery so as to promote their own religious convictions. At the time of the Revolu-

tionary War, there were established churches in at least eight colonies, and the Protestant groups were given preferred treatment in at least four of the other five.<sup>1</sup> Following the Revolution, opposition to these establishment practices began to intensify. By 1784 the minority religious groups in Virginia had become an effective political force. Led by James Madison and Thomas Jefferson, they successfully opposed Patrick Henry's proposed tax levy for the support of the teachers in the Episcopal schools. Public support for Madison's thesis that true religion did not need the support of law swelled rapidly, and early in 1786 the Virginia legislature enacted the famous "Virginia Bill for Religious Liberty," by which all religious groups were placed on an equal footing.<sup>2</sup>

Pledged to establish religious freedom for the nation as he had done for Virginia, Madison proposed a constitutional amendment guaranteeing religious liberty shortly after taking his seat in the first Congress.<sup>3</sup> In its final form, the first article of the Bill of Rights declared that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."<sup>4</sup> Although it has been suggested that the congressional objective was merely to prevent the establishment of a national church,<sup>5</sup> the overwhelming weight of authority ascribes a much broader scope to the amendment.<sup>6</sup>

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1. The Church of England was the established church in Maryland, Virginia, North Carolina, South Carolina and Georgia. The Congregational Church was officially established in New Hampshire, Connecticut and Massachusetts. Although New York, New Jersey, Pennsylvania and Delaware had no established churches, they did discriminate against Catholics. See S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* 337-38, 408 (1902). See also *Engel v. Vitale*, 370 U.S. 421, 428 n.10 (1962).

2. The history of the Virginia episode is treated extensively in the opinions in *Everson v. Board of Educ.*, 330 U.S. 1 (1947). The Virginia statute provided "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . ." H. COMMAGER, *DOCUMENTS OF AMERICAN HISTORY* 125 (1944).

3. Madison's amendment read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Everson v. Board of Educ.*, 330 U.S. 1, 39 n.27 (1947) (Rutledge, J., dissenting). For a summary of the congressional history behind the first amendment, see Chief Justice Warren's opinion in *McGowan v. Maryland*, 366 U.S. 420, 440-45 (1961). See also Sky, *The Establishment Clause, The Congress and The Schools: An Historical Perspective*, 52 VA. L. REV. 1395 (1966).

4. U.S. CONST. amend. I.

5. J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 1874, 1877 (3d ed. 1858).

6. In his concurring opinion in the Sunday closing law case, Mr. Justice Frankfurter set forth his view of what the "no establishment" clause was intended to accomplish: "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

Inasmuch as the "no establishment" and "free exercise" clauses of the first amendment were not incorporated into the fourteenth amendment and applied to the states until 1940,<sup>7</sup> the major decisions construing these clauses have all come within the past twenty-four years. The first case to reach the United States Supreme Court involving "Religion and the Public Schools" was *West Virginia State Board of Education v. Barnette*.<sup>8</sup> There the public school authorities had expelled several pupils of the Jehovah's Witness faith for refusing to salute the United States flag and to recite the pledge of allegiance.<sup>9</sup> The Court held that this action by the school officials violated the first amendment's guarantees of freedom of speech and freedom of religion. Speaking for the Court, Mr. Justice Jackson said:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>10</sup>

The next major church-state case, and the first in which the Supreme Court was called upon to interpret the "no establishment" clause, was *Everson v. Board of Education*.<sup>11</sup> Speaking for the Court, Mr. Justice Black said:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, par-

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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*, 366 U.S. 420, 465-66 (1961).

7. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

8. 319 U.S. 624 (1943).

9. The beliefs of the Jehovah's Witnesses include a literal interpretation of *Exodus* 20:4-5, which commands: "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; Thou shalt not bow down thyself to them, nor serve them. . . ." They consider the flag to be a "graven image" within the meaning of this commandment; hence, they refuse to salute it.

10. 319 U.S. at 642.

11. 330 U.S. 1 (1947).

participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."<sup>12</sup>

Applying this test to the question of whether it was constitutional for New Jersey to reimburse parents for money expended in transporting children to parochial schools, the Court held (five to four) that New Jersey had not breached the "wall of separation." Although it appears that the Court would have disapproved the use of public funds for the support of parochial schools, the majority invoked the "child benefit" theory<sup>13</sup> to sustain this transportation reimbursement. The majority opinion emphasizes that New Jersey had done "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."<sup>14</sup>

### B. Released Time

The second major case which called for an application of the "no establishment" clause was that of *McCollum v. Board of Education*.<sup>15</sup> There the public school authorities of Champaign, Illinois, had co-

12. *Id.* at 15-16. The origin of the phrase "a wall of separation between church and State" generally is traced to Thomas Jefferson's letter of Jan. 1, 1802, to the Danbury Baptists. The letter is set forth in J. O'NEIL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 286 (1949).

13. Under the "child benefit" theory, governmental expenditures which give indirect aid to parochial schools are upheld on the ground that they are welfare measures designed primarily to benefit the pupils rather than to aid religion. For a discussion of the theory, see Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 337-49 (1950); La Noue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 J. PUB. L. 76 (1964). The theory has been used by a few state courts to sustain the use of public funds for transporting children to and from parochial schools. See *Fox v. Board of Educ.*, 93 N.J. Super. 544, 226 A.2d 471 (1967); *Rhoades v. School Dist.*, 424 Pa. 202, 226 A.2d 53 (1967); *Squires v. City of Augusta*, 155 Me. 151, 153 A.2d 80 (1959) (dictum); *Board of Educ. v. Wheat*, 174 Md. 134, 199 A. 628 (1938). However, a large number of state courts have repudiated the theory in the parochial bus situation. *E.g.*, *Board of Educ. v. Antone*, 384 P.2d 911 (Okla. 1963); *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 115 N.W.2d 761 (1962); *Matthews v. Quinton*, 362 P.2d 932 (Alas. 1961); *Snyder v. Town of Newton*, 147 Conn. 374, 161 A.2d 770 (1960); *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (1953); *Visser v. Nooksack Valley School Dist.*, 33 Wash. 2d 699, 207 P.2d 198 (1949); *Silver Lake Consol. School Dist. v. Parker*, 238 Iowa 984, 29 N.W.2d 214 (1947); *Opinion of the Justices*, 216 A.2d 668 (Del. 1966). The "child benefit" theory has also been used to sustain state laws which allow textbooks to be loaned to students attending parochial schools. See *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930); *Chance v. Mississippi State Textbook Rating & Purchasing Bd.*, 190 Miss. 453, 200 So. 706 (1941). Other courts, however, have refused to invoke the theory to uphold textbook loan laws. See *Dickman v. School Dist.*, 232 Ore. 238, 366 P.2d 533 (1961); *Haas v. Independent School Dist.*, 69 S.D. 303, 9 N.W.2d 707 (1943). For a discussion of the "child benefit" theory in the textbook situation, see 20 VAND. L. REV. 640 (1967).

14. 330 U.S. at 18.

15. 333 U.S. 203 (1948).

operated with a local association of churches in a released time program. Under the program, those pupils whose parents had signed request cards were permitted to attend religious instruction classes conducted by teachers furnished by the association. These classes were held during school hours in the school buildings. Students who did not choose to take the religious instruction were required to continue their regular secular studies. Expressly reiterating the principle announced in *Everson* that the state cannot pass laws which "aid one religion, aid all religions, or prefer one religion over another,"<sup>16</sup> the Court held the released time program unconstitutional because it amounted to a utilization of the public school system to aid religious groups in spreading their faith. Mr. Justice Black, once again speaking for the Court, said:

[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. . . . Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.<sup>17</sup>

In *Zorach v. Clauson*<sup>18</sup> the Court showed some retreat from the broad scope of the *Everson-McCollum* principle. Although the New York City released time program in issue in *Zorach* involved a cooperative effort between civil and ecclesiastical officials very similar to the Champaign plan, it was distinguished on two grounds: the religious instruction was conducted off the school premises, and there was no evidence that the school authorities had used coercion to foster attendance. The Court viewed the New York City plan as nothing more than an adjustment of the public school schedule to accommodate the religious needs of the children. Speaking for six members of the Court, Mr. Justice Douglas said:

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. . . . Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. . . . But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.<sup>19</sup>

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16. *Id.* at 210.

17. *Id.* at 212.

18. 343 U.S. 306 (1952).

19. *Id.* at 313-14.

Mr. Justice Black wrote a vigorous dissent in which he emphasized that the coercive power of the state was being used to aid religion. He concluded that "New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State."<sup>20</sup>

In light of the more recent school prayer and Bible reading cases, it does not appear that *Zorach* has undermined the *Everson-McCollum* principle to any great extent.<sup>21</sup> Yet *Zorach* has been cited frequently for the proposition that the establishment limitation must be balanced against the free-exercise principle and that a state may, in the interest of neutrality, choose to advance the free exercise of religion at some expense to the establishment limitation.<sup>22</sup>

### C. Prayer and Bible Reading

1. *The Historical Development.*—The practice of opening the school day with prayers and Bible readings has a long history. In 1684 the Rules of the New Haven Hopkins Grammar School required that the teacher "every morning begin his work with a short prayer for a blessing on his Laboures and their learning. . . ."<sup>23</sup> A 1682 contract with a Dutch schoolmaster in New York required four prayers during each school day.<sup>24</sup> Although public schools gradually supplanted the private academies between 1800 and 1850, morning devotional exercises were generally retained. Yet Eastern educators, whose schools were exposed to religious diversities as a result of swelling immigration, soon began to question the soundness of opening the school day with compulsory prayer or Bible reading. In 1843 the Philadelphia School Board declared that no pupils would be required to listen to the reading of the Bible if their parents were "conscientiously opposed thereto."<sup>25</sup> A decade later, the New York Superintendent of Schools issued a decree against prayers in the public schools and declared that Catholic students could not be compelled to listen to readings from the King James Bible.<sup>26</sup> An even bolder position was taken by the Cincinnati Board of Education; in 1869 it resolved that "religious

20. *Id.* at 318.

21. See A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 103 (1964).

22. See Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1049 (1963).

23. *Abington School Dist. v. Schempp*, 374 U.S. 203, 267-68 (1963) (Brennan, J., concurring).

24. *Id.* See also W. DUNN, *WHAT HAPPENED TO RELIGIOUS EDUCATION?* 21-22 (1958).

25. *Abington School Dist. v. Schempp*, 374 U.S. at 272.

26. *Id.*

instruction and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati. . . ."<sup>27</sup>

Although the overwhelming majority of state courts sustained devotional exercises in the public schools,<sup>28</sup> it is significant that six state supreme courts held such exercises to violate their respective state constitutions.<sup>29</sup> *Doremus v. Board of Education*<sup>30</sup> was the first Bible reading case to reach the United States Supreme Court. Apparently not yet ready to rule on the merits,<sup>31</sup> the Court dismissed for lack of standing.<sup>32</sup>

2. *State-Composed Prayers*.—A full decade passed before the Court said anything further concerning "Religion and the Public Schools." Finally, in 1962 the Court heard arguments in the case of *Engel v. Vitale*.<sup>33</sup> The New York State Board of Regents had composed a "non-sectarian" prayer and had recommended that it be recited daily in the New York public schools. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."<sup>34</sup> The Court held, by a six-to-one vote, that the use of the prayer violated the "no establishment" clause, even though the prayer was denominationally

27. *Id.*

28. See, e.g., *Carden v. Bland*, 199 Tenn. 665, 288 S.W.2d 718 (1956); *Kaplan v. Independent School Dist.*, 171 Minn. 142, 214 N.W. 18 (1927); *Wilkerson v. Rome*, 152 Ga. 762, 110 S.E. 895 (1922); *Church v. Bullock*, 104 Tex. 1, 109 S.W. 115 (1908); *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 87 S.W. 792 (1905); *Billard v. Board of Educ.*, 69 Kan. 53, 76 P. 422 (1904); *Pfeiffer v. Board of Educ.*, 118 Mich. 560, 77 N.W. 250 (1898); *Moore v. Monroe*, 64 Iowa 367, 20 N.W. 475 (1884).

29. *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); *Herold v. Parish Bd. of School Directors*, 136 La. 1034, 68 So. 116 (1915); *People ex rel. Ring v. Board of Educ.*, 245 Ill. 334, 92 N.E. 251 (1910); *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 91 N.W. 846 (1902); *State ex rel. Weiss v. District Bd.*, 76 Wis. 177, 44 N.W. 967 (1890). For a discussion of these cases, see D. BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS* 108-32 (1965); Harrison, *The Bible, the Constitution and Public Education*, 29 TENN. L. REV. 363, 386-89 (1962); Note, *Bible Reading in Public Schools*, 9 VAND. L. REV. 849 (1956).

30. 342 U.S. 429 (1952).

31. See R. DRINAN, *RELIGION, THE COURTS, AND PUBLIC POLICY* 93 (1963).

32. For a discussion of the standing question, see notes 210-16 *infra* and accompanying text.

33. 370 U.S. 421 (1962), noted in 16 VAND. L. REV. 205 (1962).

34. Dean Drinan observed that although the prayer is not trinitarian or Christian, it is "clearly theistic." He explained that the Regents justified this preference of one religion over another by making reference to the "spiritual heritage of the nation and the undeniable reality of a theistic commitment underlying the legal and moral institutions of the country." R. DRINAN, *supra* note 31, at 100. Although the prayer received strong support from most Protestant and Catholic church leaders, some charged that it was bound to deteriorate into empty formality and would be of little spiritual significance. A. STOKES & L. PFEFFER, *supra* note 21, at 377.



neutral and its observance on the part of the students was voluntary.<sup>35</sup> Once again speaking for the majority, Mr. Justice Black said:

There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. . . . [S]tate laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs.<sup>36</sup>

In answer to respondent's contention that the practice should be upheld because of its voluntary nature. Mr. Justice Black declared that government mental coercion is not a prerequisite to a violation of the "no establishment" clause. Rather, the clause is violated whenever "the power, prestige and financial support of government is placed behind a particular religious belief."<sup>37</sup>

3. *The Response to Engel*.—The *Engel* decision was greeted with a storm of protest. Bishop James A. Pike of the Episcopal Church declared that the Supreme Court had "deconsecrated" the nation, and he called for a constitutional amendment to reverse this "lockout of God."<sup>38</sup> Cardinal Spellman, after announcing that he was "shocked and frightened" by the decision, exclaimed that it "strikes at the very heart of the Godly tradition in which America's children have for so long been raised."<sup>39</sup> And evangelist Billy Graham referred to the decision as "another step toward the secularization of the United States" and observed that "the framers of our Constitution meant we were to have freedom of religion, not freedom from religion."<sup>40</sup>

Dean Erwin Griswold of the Harvard Law School attacked the decision for its use of a "fundamentalist theological" and "mechanically absolutist" approach. He would prefer to use a "comprehensive" or "integral" approach whereby all the provisions in the Constitution would be examined in a "living setting."<sup>41</sup> Under this approach he would sustain the use of the state-composed prayer as a means of teaching members of minority groups a lesson in tolerance.<sup>42</sup>

35. The petitioners, who were challenging the constitutionality of the Regents' prayer, included Jews, Unitarians, Ethical Culturalists and one nonbeliever. W. DOUGLAS, *THE BIBLE AND THE SCHOOLS* 17 (1966).

36. *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962).

37. *Id.* at 431.

38. W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 35-36 (1964).

39. *Id.*

40. A. STOKES & L. PFEFFER, *supra* note 21, at 378 (emphasis added).

41. Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167, 172-73 (1963).

42. *Id.* at 176-77. Dean Griswold reasoned as follows: "The child of a non-conforming or minority group is, to be sure, different in his beliefs. That is what

4. *Bible Reading and the Lord's Prayer*.—In the midst of this outburst of public dissent, the Supreme Court handed down another major church-state decision in the companion cases of *Abington School District v. Schempp* and *Murray v. Curlett*.<sup>43</sup> At issue in the *Schempp* case was the validity of a Pennsylvania law requiring the reading without comment of ten verses from the Holy Bible at the beginning of each school day.<sup>44</sup> The *Murray* case involved no statute; rather the petitioners were challenging the practice of daily Bible reading and recitation of the Lord's Prayer which the Baltimore school authorities had approved for the Baltimore public schools. After reaffirming the *Everson-McCollum* principle that government may not "aid one religion, aid all religions, or prefer one religion over another," the Court laid down a test for determining whether governmental activity violates the first amendment: governmental activity is unconstitutional if either its purpose or primary effect is the advancement or inhibition of religion.<sup>45</sup> By an eight-to-one vote, the Court held that the morning exercises in question were intended to advance the Christian religion; hence, there was a violation of the first amendment's command that "Government maintain strict neutrality, neither aiding nor opposing religion."<sup>46</sup> As in *Engel*, the Court held that the voluntary nature of the exercises was no defense to a challenge under the "no establishment" clause.<sup>47</sup> Neither was the Court impressed

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it means to be a member of a minority. Is it not desirable, and educational, for him to learn and observe this, in the atmosphere of the school—not so much that he is different, as that other children are different from him? And is it not desirable that, at the same time, he experiences and learns the fact that his difference is tolerated and accepted? No compulsion is put upon him. He need not participate. But he, too, has the opportunity to be tolerant. He allows the majority of the group to follow their own tradition, perhaps coming to understand and to respect what they feel is significant to them." *Id.* at 177.

43. 374 U.S. 203 (1963). The Court decided *Schempp* and *Murray* in a single opinion.

44. *Id.* The Pennsylvania statute was amended in 1959 to permit any child to be excused from the Bible reading exercises upon the written request of his parent or guardian. PA. STAT. ANN. tit. 24, § 15-1516 (1962).

45. 374 U.S. at 222. Professor Choper has proposed a slightly different test. He suggests that the "no establishment" clause is violated "when the state engages in what may be fairly characterized as *solely religious activity* that is likely to result in (1) *compromising* the student's religious or conscientious beliefs or (2) *influencing* the student's freedom of religion or conscientious choice." Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 330 (1963).

46. 374 U.S. at 225.

47. At the trial Edward Schempp explained why he had decided not to request that his children be excused from the morning exercises. The trial court summarized his testimony as follows: "He said that he thought his children would be 'labeled as 'odd balls'' before their teachers and classmates every school day; that children, like Roger's and Donna's classmates, were liable 'to lump all particular religious difference[s] or religious objections [together] as 'atheism'' and that today the word 'atheism' is often connected with 'atheistic communism,' and has 'very bad' connotations, such as 'un-American' . . . with overtones of possible immorality. Mr. Schempp pointed out that due to the events of the morning exercises following in rapid suc-

with the defense that the religious practices in question were only minor encroachments on the first amendment. Speaking for the majority, Mr. Justice Clark cautioned:

The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'<sup>48</sup>

Finally, the Court rejected the contention that the command of strict neutrality, which does not permit a state to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. Mr. Justice Clark declared:

While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs.<sup>49</sup>

5. *Compliance with Schempp*.—Once again the Supreme Court was inundated with a flood of criticism. An editorial in the *Wall Street Journal* declared that the Court had established atheism as "the one belief to which the State's power will extend its protection."<sup>50</sup> Bishop Pike commented that "[t]he result of the decision is not neutrality but an imposition upon the public school system of a particular perspective on reality, namely, secularism by default, which is as much an 'ism' as any other."<sup>51</sup> Cardinal McIntyre of Los Angeles stated that the decision "can only mean that our American heritage of philosophy, of religion and of freedom are being abandoned in imitation of Soviet philosophy, of Soviet materialism and of Soviet regimented liberty." Cardinal Cushing of Boston expressed the view that the Communists were no doubt taking great pleasure in the decision, and Cardinal Spellman of New York asserted that no one who believes in God could approve of such a holding.<sup>52</sup>

Other religious leaders hailed the *Schempp* ruling as a great bulwark to the preservation of religious liberty. The Right Reverend

cession, the Bible reading, the Lord's Prayer, the Flag Salute, and the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their 'homeroom' and that this carried with it the imputation of punishment for bad conduct." *Schempp v. School Dist.*, 201 F. Supp. 815, 818 (E.D. Pa. 1962).

48. 374 U.S. at 225.

49. *Id.* at 226.

50. W. KATZ, *supra* note 38, at 97.

51. *Id.*

52. A. STOKES & L. PFEFFER, *supra* note 21, at 381. Legal scholars have also dissented from the *Engel* and *Schempp* decisions. See, e.g., C. RICE, *THE SUPREME COURT AND PUBLIC PRAYER* (1964); Hanft, *The Prayer Decisions*, 42 N.C.L. REV. 567 (1964).

Arthur Lichtenberger, Presiding Bishop of the Episcopal Church, declared that the decision was in keeping with "the Court's sense of responsibility to assure freedom and equality to all groups of believers and non-believers as expressed in the First Amendment of the Constitution."<sup>53</sup> Dr. Eugene Carson Blake and Dr. Silas G. Kessler, executive officers of the United Presbyterian Church, issued a statement declaring that the decision had "underscored our firm belief that religious instruction is the sacred responsibility of the family and the Churches."<sup>54</sup> Similar thoughts were expressed by Rabbi Uri Miller, president of the Synagogue Council of America (which represents Orthodox, Conservative, and Reformed Judaism) and by the National Council of Churches.<sup>55</sup>

In the midst of this dialogue among theologians, many politicians were expressing their disapproval of the *Schempp* decision. State officials in at least four states announced that they would ignore the decision,<sup>56</sup> and rumblings of a constitutional amendment echoed through the halls of Congress.<sup>57</sup> This critical attitude even found expression in state courts in which church-state issues were pending. When requested to strike down the Florida Bible reading statute, the Florida Supreme Court boldly declared in *Chamberlin v. Dade County Board of Public Instruction*<sup>58</sup> that the *Schempp* neutrality command had not been breached. Inasmuch as the preamble to the statute made reference to "good moral training," "a life of honorable thought," and "good citizenship," the court concluded that the Bible reading practice was founded upon secular rather than sectarian considerations.<sup>59</sup> The United States Supreme Court was unimpressed with

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53. See D. BOLES, *supra* note 29, at 266.

54. *Id.*

55. *Id.* at 265-67. The National Council of Churches also issued the following statement: "The full treatment of some regular school subjects requires the use of the Bible as a source book. In such studies—including those related to character development—the use of the Bible has a valid educational purpose. But neither true religion nor good education is dependent upon the devotional use of the Bible in the public school program." Quoted in L. PFEFFER, *CHURCH, STATE AND FREEDOM* 474 (rev. ed. 1967).

56. See C. RICE, *supra* note 52, at 7. Gov. George Wallace of Alabama boldly declared: "I want the Supreme Court to know we are not going to conform to any such decision." He further stated that, if the courts rule that the Bible cannot be read in an Alabama school, "I'm going to that school and read it myself." Beaney & Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. L. 475, 486 (1964).

57. Over ninety congressmen introduced constitutional amendments designed to overturn the *Schempp* decision. See A. STOKES & L. PFEFFER, *supra* note 21, at 382.

58. 160 So. 2d 97 (Fla. 1964).

59. *Id.* The Florida court relied on *McGowan v. Maryland*, 366 U.S. 420 (1961), wherein the Supreme Court upheld a Sunday closing statute on the ground that its purpose and effect were not to aid religion, but to set aside a day of rest and recreation.

this attempt to distinguish the Florida practice from those presented in the *Schempp* case, and it reversed per curiam.<sup>60</sup>

Although several states sought to justify the continuance of Bible reading in the public schools on the theory that the *Schempp* decision applied only to legislative enactments and not to "local custom,"<sup>61</sup> other states made a dedicated effort to comply without any "chicanery."<sup>62</sup> In New Jersey and Pennsylvania, for example, the governors threatened local school districts with the loss of state aid if they did not comply. And in at least two instances state officials obtained injunctions to force compliance by defiant school districts.<sup>63</sup>

### III. CONTINUATION OF RELIGIOUS EXERCISES IN AN ALTERED FORM

#### A. *Teacher-Sponsored Prayers*

Suppose a kindergarten teacher has her pupils recite the following prayer each morning prior to their partaking of milk and cookies:

God is Great, God is Good  
And we thank Him for our Food, Amen.

And suppose that before afternoon classes begin the children recite this "thank you" verse:

Thank You for the world so sweet  
Thank You for the food we eat  
Thank You for the birds that sing  
Thank You God for everything.

Further, suppose that the board of education orders the teacher to discontinue the prayers. Do the parents of any of the kindergarten children have any grounds for complaint?

These were the facts in *Stein v. Oshinsky*,<sup>64</sup> in which a group of parents alleged that their children had been denied the free exercise of religion and asked that the school officials be ordered to afford

60. *Chamberlin v. Dade County Bd. of Pub. Instruction*, 377 U.S. 402 (1964). Other Bible reading statutes have been summarily invalidated by lower federal and state courts. See *Johns v. Allen*, 231 F. Supp. 852 (D. Del. 1964); *Adams v. Engelking*, 232 F. Supp. 666 (D. Idaho 1964); *Attorney Gen. v. School Comm.*, 347 Mass. 775, 199 N.E.2d 553 (1964); *Sills v. Board of Educ.*, 42 N.J. 351, 200 A.2d 615 (1964).

61. See *Beaney & Beiser*, *supra* note 56, at 488-89.

62. *Id.*

63. *Id.* Of the twenty-nine states which reported Bible reading in their public schools before the *Schempp* decision, only five have completely abolished the practice, according to a 1965 survey. In fourteen, Bible reading exists in scattered areas; and in six, it continues as it did before the decision. Katz, *Patterns of Compliance with the Schempp Decision*, 14 J. Pub. L. 396, 403 (1965).

64. 24 F. Supp. 757 (E.D.N.Y. 1963). The case at the district court level is discussed in 32 *FORDHAM L. REV.* 852 (1964) and 1964 *U. ILL. L.F.* 465.

their children "an opportunity to express their love and affection to Almighty God each day. . . ." <sup>65</sup> Finding that participation in the prayers was completely voluntary and that the exercise was not prescribed by any law, <sup>66</sup> the United States District Court for the Eastern District of New York granted the injunction. The United States Court of Appeals for the Second Circuit reversed on the ground that the "free exercise" clause does not require a state to tolerate prayers of any type in its public schools. <sup>67</sup> Speaking for the court, Judge Friendly said:

After all that the states have been told about keeping the "wall between church and state . . . high and impregnable," it would be rather bitter irony to chastise New York for having built the wall too tall and too strong. <sup>68</sup>

Since the petitioners were fighting "for" rather than "against" these kindergarten prayers, the court was not called upon to decide the "no establishment" question. It would seem clear, however, that the *Engel* holding extends to teacher-sponsored prayers, since the teacher is an agent of the state. <sup>69</sup>

The "no establishment" question was presented in *Despain v. Dekalb County Community School District*. <sup>70</sup> There the kindergarten teacher used the familiar "thank you" verse, but she deleted the word "God" so that the last line read "We thank you for everything." When the pupils recited the verse, they were required to fold their hands in their laps; and there was evidence that some of the pupils voluntarily said "Amen" or crossed themselves as they concluded the recitation. At the trial, Episcopal and Presbyterian theologians testified that the verse constituted a prayer, with or without the word

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65. 224 F. Supp. at 757.

66. The court apparently was trying to distinguish these "teacher-sponsored" prayers from the "state-composed" prayer of *Engel*.

67. *Stein v. Oshinsky*, 348 F.2d 999, 1002 (2d Cir. 1965), cert. denied, 382 U.S. 957 (1965). The case at the circuit court level is discussed in 46 B.U.L. REV. 106 (1966) and 17 SYRACUSE L. REV. 745 (1966). One writer has argued that in prohibiting any manifestation of a theistic belief, New York took action with the purpose and primary effect of advancing Secular Humanism; hence, in denying relief to the petitioners, the court inadvertently sanctioned an establishment of religion. Note, *Church-State—Religious Institutions and Values: A Legal Survey—1964-66*, 41 NOTRE DAME LAW. 681, 707 (1966).

68. *Stein v. Oshinsky*, 348 F.2d 999, 1002 (2d Cir. 1965). Judge Friendly justified this wide discretion placed in the school officials as follows: "Against the desire of these parents that their children [be given an opportunity to pray], the [school] authorities were entitled to weigh the likely desire of other parents not to have their children present at such prayers, either because the prayers were too religious or not religious enough." Likewise the school authorities would be entitled to consider "the wisdom of having public educational institutions stick to education and keep out of religion, with all the bickering that intrusion into the latter is likely to produce." *Id.*

69. See Ladd, *Public Education and Religion*, 13 J. PUB. L. 310, 325 (1964).

70. 255 F. Supp. 655 (N.D. Ill. 1966).

"God."<sup>71</sup> The court, nevertheless, upheld the use of the verse on the ground that the purpose was not to inculcate religion, but "to instill in the children an appreciation of and gratefulness for the world about them."<sup>72</sup>

It would seem obvious that a devotional attitude accompanied the recitation of this verse. Although the word "God" has been removed, there remains a four-fold "We thank *you*." Clearly, the "you" is intended to refer to someone who is thought to provide everything, and such connotations would seemingly be offensive to non-theists. Kindergarten verses, it is submitted, should not stand or fall merely by reference to terminology. Rather the test should be whether the purpose or primary effect is to aid or oppose religion. Whatever the purpose, the primary effect (as demonstrated by the devotional attitude) was surely to prefer theism over non-theism; hence, use of the verse is a breach of the duty of neutrality.

### B. *Student-Initiated Prayers*

The *Engel* and *Schempp* decisions would not appear to forbid truly student-initiated prayers during school hours, as long as they are conducted in a manner which does not interfere with the regular school activities<sup>73</sup> and which does not infringe upon the rights of children having no desire to participate.<sup>74</sup>

1. *The Reed Plan*.—Such an "accommodation" approach was utilized by the United States District Court for the Western District of Michigan in *Reed v. Van Hoven*.<sup>75</sup> There the court formulated a plan designed to insure the neutrality of the public school officials with respect to religion, while at the same time protecting both the rights of students desiring to manifest their religious beliefs and the rights of those preferring to refrain from such activity. The plan included four basic elements: (1) students who wish to say a prayer or read scripture either before the school day begins or after it ends should be permitted to do so, provided that there is a general commingling of the entire student body as the students finish the morning exercise and head for class;<sup>76</sup> (2) such exercises must be completed

71. Dr. John E. Burkhart of the McCormick Theological Seminary said: "It does not stop being a prayer when the word 'God' is removed, since the children . . . use it and understand it as a prayer. So, in common context it is a prayer which has simply been modified, but has not lost its prayer connotation or meaning." *Id.* at 658.

72. *Id.* at 664.

73. See Pfeffer, *Court, Constitution and Prayer*, 16 *RUTGERS L. REV.* 735, 749-50 (1962).

74. See Note, *supra* note 67, at 708.

75. 237 F. Supp. 48 (W.D. Mich. 1965).

76. The court suggested that the students desiring to participate in the morning exercises meet in a room other than their regular homerooms; hence, a commingling of students at the close of the exercise would be assured.

at least five minutes before the start of the regularly scheduled school day or must not begin until at least five minutes after completion of the regularly scheduled school day;<sup>77</sup> (3) no bells should be sounded to indicate either the beginning or ending of these devotional periods; (4) if a teacher is present at the pre-school or post-school sessions, his only function should be to maintain discipline.

Although it can be argued that, under the *Reed* plan, the school officials breach their duty of neutrality in permitting the use of public property for the advancement of religion, it can also be argued that the refusal to allow such student-initiated prayers gives rise to an inference of state hostility toward religion.<sup>78</sup> Since *Schempp* commands that the state refrain from either inhibiting or advancing religion, the *Reed* plan would seem to be an acceptable accommodation as long as it does not operate to discriminate among "religions."<sup>79</sup>

2. *Prayer Rooms*.—The designation of one particular room as a "prayer room" should not affect the legality of the plan; it would merely be for the convenience of the supervisory personnel charged with keeping order in the school building. It would be inadvisable, however, to decorate the room with religious symbols or altars. Such permanent items, even though purchased with private funds, could easily be the basis for an establishment of religion charge, inasmuch as they would probably discriminate in favor of the majority religion. Even if those who would be offended by the religious symbols would never have any reason to go near the prayer room, the mere fact that the symbols were there would be strongly suggestive of an attempt to advance religion.

3. *Period of Silence*.—The *Engel* and *Schempp* decisions would not appear to forbid the school officials from setting aside a period of silence at the beginning of each school day.<sup>80</sup> There is a difference between prescribing religious practices and allowing opportunity for them. To give students an opportunity to meditate or pray would not appear to constitute an advancement of religion; rather it would ap-

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77. The time gap was thought necessary in order to insure that those students who participate in the exercises are separated from the official activity of the school.

78. In explaining the command of neutrality in the *Schempp* case, Mr. Justice Clark said that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" 374 U.S. at 225.

79. The term "religion" apparently encompasses non-theistic and philosophical beliefs. See *Torcaso v. Watkins*, 367 U.S. 488 (1961), where a requirement that an appointee to the office of notary public declare his belief in the existence of God was held to violate the "free exercise" clause.

80. See Mr. Justice Brennan's concurring opinion in *Abington School Dist. v. Schempp*, 374 U.S. 203, 281 (1963). See also P. FREUND & R. ULICH, *RELIGION AND THE PUBLIC SCHOOLS* 23 (1965).



pear to be a permissible accommodation in the interest of religious liberty.<sup>81</sup>

The period of silence may also be justified on the ground that it has a valid secular purpose.<sup>82</sup> Children frequently engage in games or noisy conversation as they journey to the schoolhouse, and school officials might well determine that a period of silence at the beginning of the school day is a useful expedient for calming the students so that they are prepared to undertake their studies seriously. Any reverent attitude which would prevail during the silent period would be merely incidental to the secular purpose of quieting the students.<sup>83</sup>

4. *Grace before Lunch.*—The state has clearly violated its duty of neutrality if a public school teacher says grace before the noon meal. Since such conduct would be “necessarily sectarian,”<sup>84</sup> it would amount to the advancement of religion. For the same reason, it would be improper for school officials to place prayer cards on the lunchroom tables.

On the other hand, it would be entirely appropriate for the students to say their own private prayers before eating. Furthermore, it would appear to be permissible for the school officials to set aside a few moments of silence at the beginning of the lunch hour, and any students desiring to say grace could do so during this period.<sup>85</sup>

### C. Patriotic Ceremonies

1. *Patriotic Songs.*—In a footnote to the majority opinion in the *Engel* case, Mr. Justice Black indicated that it was permissible for public school students to sing “officially espoused anthems which include the composer’s professions of faith in a Supreme Being. . . .”<sup>86</sup> It has been generally agreed that the “Star Spangled Banner”<sup>87</sup> is such

81. See P. KAUPER, RELIGION AND THE CONSTITUTION 94-95 (1964).

82. See Choper, *supra* note 45, at 371.

83. Cf. *McGowan v. Maryland*, *supra* note 59. There the Supreme Court held that any assistance which Sunday closing laws might give to religion would be merely incidental to the secular purpose of setting aside a day of rest and recreation.

84. See Harrison, *supra* note 29, at 415.

85. In the *Reed* case, Judge Fox approved a private meditation period at the beginning of the lunch hour, 237 F. Supp. at 55-56.

86. The entire footnote reads as follows: “There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer’s professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.” *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962).

87. The “Star Spangled Banner” was declared the national anthem in 1931. 36 U.S.C. § 170 (1964).

an "officially espoused anthem" even though the third stanza expresses some of the same sentiments found in the New York Regents' prayer.<sup>88</sup> The singing or recitation of "America" would also appear to be proper despite the fact that the fourth stanza is in essence a prayer.<sup>89</sup> Apparently there will be no objection to the inclusion of religious elements in a patriotic ceremony where the patriotic purpose is paramount and the religious reference only incidental.<sup>90</sup>

Although it has been suggested that patriotic songs should be used only on a voluntary basis,<sup>91</sup> Mr. Justice Black's footnote does not say that it would be unconstitutional to make participation mandatory. It is to be observed, however, that he speaks of school officials' "encouraging" students to sing patriotic songs.

If participation in a certain patriotic song would violate a student's religious beliefs, it would obviously be improper for the school officials to impose a sanction for non-participation. Hence, the action of a principal in expelling Jehovah's Witnesses for their refusal to stand for the singing of the National Anthem constitutes an unreasonable infringement upon the right of free exercise of religion.<sup>92</sup>

2. *Flag Salute*.—In 1954 the Congress amended the pledge of allegiance to the flag to read: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation *under God*, indivisible, with liberty and justice for all."<sup>93</sup> Whether the insertion of the words "under God" renders the pledge improper for use in the public schools has been a question of considerable debate since *Engel* and *Schempp*.<sup>94</sup> It has been argued that

88. See R. DRINAN, *supra* note 31, at 112; Choper, *supra* note 45, at 411; Kauper, *supra* note 22, at 1052. The third stanza of the "Star Spangled Banner" reads: "Blest with victory and peace, may the heav'n rescued land Praise the Power that hath made and preserved us a nation! Then conquer we must, when our cause it is just, And this be our motto—'In God is our Trust.'"

89. See Ramsey, *How Shall We Sing the Lord's Song in a Pluralistic Land?*, 13 J. PUB. L. 353, 395 (1964). See also Choper, *supra* note 45, at 411; Pfeffer, *supra* note 73, at 750. The fourth stanza of "America" reads: "Our fathers' God, to Thee, Author of Liberty, to Thee we sing. Long may our land be bright with freedom's holy light, protect us by Thy might, great God our King." The Board of Education of New York City decided not to use the prayer recommended by the State Board of Regents; instead, it directed the city schools to open the school day with a recitation of the fourth stanza of "America." Pfeffer, *supra* note 73, at 737.

90. See *Sheldon v. Fannin*, 221 F. Supp. 766, 774 (D. Ariz. 1963); Kauper, *supra* note 22, at 1052; Note, *The Supreme Court, the First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 96-97 (1963).

91. *Reed v. Van Hoven*, *supra* note 75, at 56.

92. *Sheldon v. Fannin*, *supra* note 90. The Jehovah's Witnesses support their refusal to stand by reference to *Daniel* 3:13-28. There three Hebrews (Shadrach, Meshach, and Abednego) refused to bow down at the sound of musical instruments playing patriotic music throughout the land at the order of King Nebuchadnezzar of ancient Babylon.

93. 36 U.S.C. § 172 (1964) (emphasis added).

94. See Note, *supra* note 90, at 97.

the congressional action in inserting the words "under God" had no purpose or effect other than the advancement of religion.<sup>95</sup> Without attempting to examine the congressional purpose the New York courts upheld the recitation of the amended pledge in *Lewis v. Allen*<sup>96</sup> on the ground that participation was voluntary. The Supreme Court's denial of certiorari<sup>97</sup> has been interpreted by some to mean that its holdings in *Engel* and *Schempp* will not be extended.<sup>98</sup> It would seem more likely, however, that the Court denied certiorari because it considers the pledge of allegiance to be a patriotic ceremony within the meaning of Mr. Justice Black's footnote in *Engel*. Surely it is just as patriotic to pledge allegiance to the flag as it is to sing the National Anthem. The patriotic purpose being paramount, incidental references to religion should not be a ground for attack as long as participation is voluntary.<sup>99</sup>

3. *Readings from Historical Documents.*—Mr. Justice Black's footnote in the *Engel* case also speaks of encouraging public school students "to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity. . . ."<sup>100</sup> Other historical documents which have been judicially approved for use in the schools include the Northwest Ordinance, Abraham Lincoln's Gettysburg Address, John F. Kennedy's inaugural address and the various Presidential Thanksgiving proclamations.<sup>101</sup> Although certain passages in these documents emphasize the nation's religious heritage and although they may well have the effect of "working in" the love of God,<sup>102</sup> their use is apparently justified on the ground that they are not "distinctively religious" documents.<sup>103</sup> Once again, a certain amount of aid to religion appears to be permissible if it is incidental to a lawful secular purpose.

Readings from the writings of the world's great philosophers or from the works of noted poets and playwrights would probably meet the "historical document" test as long as neither the purpose nor primary effect is the advancement of religion. Poetry which is constructed on

95. See Note, *supra* note 67, at 710.

96. 5 Misc. 2d 68, 159 N.Y.S.2d 807 (Sup. Ct. 1957), *aff'd*, 11 App. Div. 2d 447, 207 N.Y.S.2d 862 (3d Dep't 1960), *aff'd per curiam*, 14 N.Y.2d 867, 200 N.E.2d 767, 252 N.Y.S.2d 80 (1964).

97. 379 U.S. 923 (1964).

98. See Wall St. J., Nov. 24, 1964, at 2, col. 2. The article began with the following statement: "Although it didn't put anything in writing, the Supreme Court appears to have signaled that there are limits to its demand of separation of church and state."

99. See *Reed v. Van Hoven*, *supra* note 75, at 56.

100. For the full footnote see note 86 *supra*.

101. *Reed v. Van Hoven*, *supra* note 75, at 55.

102. See *Ramsey*, *supra* note 89, at 395-96.

103. See *Kauper*, *supra* note 22, at 1052.

a religious theme or which makes repeated references to the workings of God would not be permissible. Also improper would be readings from purely religious drama.<sup>104</sup>

#### D. Bible Stories

The use of Bible stories for the purpose of instilling religious values in the students would certainly fall into the same category as Bible reading and would thus be unconstitutional.<sup>105</sup> Although one court has held that public school teachers may tell no Bible stories of any type,<sup>106</sup> it has been suggested that stories with "low religious impact" and "high human interest" would withstand the aid to religion test.<sup>107</sup> It has been further suggested that there is an important distinction between telling Bible stories about the life of Christ from an historical standpoint and telling stories about the miracles of Christ from a religious standpoint.<sup>108</sup> Whether the constitutional command of neutrality would permit such a distinction is at present an open question. The dilemma which a teacher would face, however, in selecting only stories of "low religious impact" and in presenting them from an historical standpoint would appear to mitigate against the practice. Moreover, in situations where parents have complained about the use of Bible stories, school officials probably would be inclined to adopt a complete prohibition against such stories rather than become entangled in the difficult task of determining which stories would and which stories would not violate the duty of neutrality.

#### E. Teaching Morality and Virtue

The public school shares with the home and the church the tasks of building and strengthening the moral character of the nation's children. These tasks may be accomplished by the reading aloud of works of "edification" at the beginning of the school day,<sup>109</sup> or they may be accomplished by classroom discussions on such topics as morality, ethics, or good citizenship.<sup>110</sup> Even in the absence of any

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104. The use of sacred documents would be proper in connection with a course in comparative religion. See note 185 *infra* and accompanying text.

105. See Harrison, *supra* note 29, at 414.

106. Reed v. Van Hoven, *supra* note 75, at 56. Judge Fox also suggested that themes should not be assigned on such topics as "Why I believe or disbelieve in religious devotions."

107. Ladd, *supra* note 69, at 339.

108. Harrison, *supra* note 29, at 414.

109. RAMSEY, TEACHING "VIRTUE" IN THE PUBLIC SCHOOLS, 1963 RELIGION AND THE PUBLIC ORDER 336 (Giannella ed. 1964).

110. Note, *Humanistic Values in the Public School Curriculum: Problems in Defining an Appropriate "Wall of Separation,"* 61 Nw. U.L. REV. 795, 809-13 (1966). Professor Kauper has suggested that it would be entirely proper for the public schools

formal presentation, the teacher may well have ample opportunity to stress moral values. In the course of a school day, the teacher may frequently find himself in a position to exemplify such qualities as justice, love, kindness, idealism, humility, honesty, responsibility, temperance and respect for authority.<sup>111</sup> Although the teacher must not engage in religious indoctrination as he endeavors to teach morality and virtue,<sup>112</sup> the duty of neutrality would not appear to prohibit reference to the fact that moral values and religious principles often coincide.<sup>113</sup> Any religious atmosphere that would thereby be created would be merely incidental to the secular purpose of building good moral character.

#### IV. VALIDITY OF OTHER PRACTICES CONTAINING REFERENCES TO RELIGION

##### A. Observance of Holy Days

1. *Pageants and Programs*.—Public school observance of holy days is clearly an unconstitutional activity if conducted in a devotional setting.<sup>114</sup> That allowance is made for joint religious observances, such as Christmas-Hanukah and Easter-Passover, does not cure the infirmity, for the Constitution prohibits the states from aiding one religion, aiding all religions, or preferring some religions over others.<sup>115</sup> The suggestion that Christmas and Easter have lost their religious significance<sup>116</sup> and have become national holidays in the same category as Thanksgiving Day and Washington's Birthday<sup>117</sup> would surely be disputed by the nation's religious leaders.

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to "afford opportunity for exploration and discussion of ethical issues and permit a child to give expression to ethical insights derived from his own faith." P. KAUPER, *supra* note 81, at 97.

111. See L. PFEFFER, *supra* note 55, at 366; Choper, *supra* note 45, at 377-78.

112. While an Illinois statute demands that "Every public school teacher shall teach the pupils honesty, kindness, justice and moral courage for the purpose of lessening crime and raising the standard of good citizenship," the legislature has declared that the statute "shall not be construed as requiring religious or sectarian teaching." ILL. REV. STAT. ch. 122, §§ 27-12, 27-16 (Smith-Hurd 1962).

113. It has been suggested that the students adhering to theistic beliefs might be deprived of their free exercise of religion if the discussions concerning moral values excluded the possibility that God is the "fountainhead from which moral principles spring." Note, *supra* note 110, at 813.

114. *Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So. 2d 21 (Fla. 1962); Pfeffer, *supra* note 73, at 750; Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 572 (1961).

115. See A. STOKES & L. PFEFFER, *supra* note 21, at 383-84; Choper, *supra* note 45, at 411-13; Rosenfield, *supra* note 114, at 572. For a discussion of various instances where public school observance of holy days has given rise to community turmoil see PFEFFER, *supra* note 55, at 479-96.

116. See Harrison, *supra* note 29, at 416.

117. See A. STOKES & L. PFEFFER, *supra* note 21, at 383.

It is submitted, therefore, that the schools should refrain from any "celebration" of religious holidays. There should be no worship services of any type, no religious pageants,<sup>118</sup> and no exhibition of films which are primarily religious in nature.<sup>119</sup>

On the other hand, it would appear to be entirely appropriate for public school teachers to "acknowledge and explain" the various holy days.<sup>120</sup> In fact, the American Association of School Administrators has recently recommended that the public schools recognize religious holidays "in the spirit of exposition of the differing rites and customs of families, cultures, and creeds—each with deep meaning for its adherents, and in sum revealing the many different religious, philosophical, and cultural practices and beliefs held by Americans."<sup>121</sup>

2. *Sacred Music.*—The constitutional command of neutrality clearly prohibits the use of religious hymns in a devotional setting. They may, however, be sung as a part of a course in music appreciation since this is a secular activity.<sup>122</sup> School choirs and orchestras may properly make use of religious music, including Christmas carols, as long as their performances do not take place in a devotional setting. Although the duty of neutrality would not appear to forbid public school officials from setting aside a period of silence at the beginning of the school day, the period could well be turned into a devotional setting if sacred music were played over the public address system. It is submitted, therefore, that it would be improper to use sacred music in connection with the period of silence. On the other hand, religious music would appear to be unobjectionable as a part of a musical assembly if the primary purpose is to entertain—not to indoctrinate.<sup>123</sup>

3. *Religious Symbols.*—Although it has been suggested that it is proper for public school teachers to acknowledge and explain re-

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118. See Ladd, *supra* note 69, at 325.

119. See Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21 (Fla. 1962). Professor Choper has noted that the occasional showing of motion pictures depicting religious happenings may be of considerable educational value. Choper, *supra* note 45, at 413. It seems doubtful, however, that he would sanction the use of religious films for devotional purposes; he would very likely restrict their use to history classes or to objective religion courses.

120. In 1963 the General Assembly of the United Presbyterian Church adopted a lengthy report on church-state relations. Among other things, the report recommended that "Religious holidays be acknowledged and explained, but never celebrated religiously, by public schools or their administrators. . . ." Quoted in PFEFFER, *supra* note 55, at 492. See also *Church-State Report*, Presbyterian Life, June 15, 1963, at 10; Rosenfield, *supra* note 114, at 573.

121. Quoted in L. PFEFFER, *supra* note 55, at 492. For a more detailed discussion of the recommendations of the association see BOLES, *supra* note 29, at 292-95.

122. See Choper, *supra* note 45, at 413; Pfeffer, *supra* note 73, at 750.

123. See Harrison, *supra* note 29, at 415.

ligious holidays,<sup>124</sup> such explanations should not be accompanied by a display of religious symbols or pictures. It is indisputable that the presence of a Crucifix or a Star of David would tend to create a religious atmosphere. The display of such symbols, even on a temporary basis, would appear, therefore, to violate the school's duty of neutrality. Pictures of distinctively religious events and placards containing the Ten Commandments<sup>125</sup> or other sectarian mottoes would also tend to create a religious atmosphere; hence, their presence in public school classrooms would appear to be just as unconstitutional as the presence of religious symbols.<sup>126</sup> On the other hand, there would probably be no objection to such seasonal decorations as pine trees, wreaths, bells, candles, poinsettias, lilies, colored eggs or rabbits, as these items merely reflect the joy and good will of the season and have only incidental religious connotations.<sup>127</sup>

References to religious painting, sculpture and architecture in an art class would appear to be beyond question. Many of the world's great artistic accomplishments are centered on religious themes, yet the religious element is definitely incidental to the artistic qualities.<sup>128</sup>

Whether an art teacher may assist his students in creating religious symbols which would violate the aid to religion test if placed on display by the school officials is a more difficult question. It is likely that the answer will turn on the purpose and primary effect of such activity. If the purpose is to teach students to paint or draw or sculpture, then the fact that the creation is a religious symbol should be of no consequence. On the other hand, if the purpose is to construct a religious display for use in the school lobby, then the art room activity takes on aid-to-religion characteristics.<sup>129</sup>

4. *Nativity Scenes.*—The erection of nativity scenes on public school premises generally has been held constitutional on the ground that it constitutes a mere "passive accommodation of religion."<sup>130</sup> The courts have emphasized that the scenes were displayed only during the school's Christmas recess and at no expense to the school district.<sup>131</sup>

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124. See note 120 *supra* and accompanying text.

125. A North Dakota statute requires "a placard containing the ten commandments of the Christian religion to be displayed in a conspicuous place in every schoolroom, classroom, or other place where classes convene for instruction." N.D. CENT. CODE § 15-47-10 (1960).

126. See Choper, *supra* note 45, at 408-09.

127. *Id.* at 412.

128. *Id.* at 386.

129. *But see* Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 35 (Fla. 1962), where the court refused to enjoin a display of religious symbols because it was a work of art created by the students and was set up only on a temporary basis.

130. Lawrence v. Buchmueller, 40 Misc. 2d 300, 243 N.Y.S.2d 87, 91 (Sup. Ct. 1963).

131. *Id.*; Baer v. Kolmorgen, 181 N.Y.S.2d 230 (Sup. Ct. 1958).

It also has been suggested that permission for religious displays on public property should be granted on a non-discriminatory basis.<sup>132</sup> The conclusion is inescapable, however, that the mere presence of a nativity scene constitutes a dedication of the premises to the Christian faith.<sup>133</sup> The scene probably would be offensive to Jews and other non-Christians, and undoubtedly some Christians would look upon it as a place of worship.<sup>134</sup> That the school district granted permission for the erection of religious displays on a non-discriminatory basis, that they were erected only during the holiday recess, and that the costs were borne by the sponsoring church are not determinative of the constitutional question. The question is whether the action of the school district has the purpose or primary effect of aiding one religion, aiding all religions, or preferring one religion over another. The answer is obvious. By sanctioning the use of its property for the display of a nativity scene, the school district aids the Christian religion in general;<sup>135</sup> if the sponsoring church attaches its name to the scene, it aids one sect in particular; finally, it prefers the Christian religion over non-Christian beliefs. Patently, then, the presence of a nativity scene on public school property constitutes an establishment of religion.

### B. Baccalaureate Services

The practice of holding baccalaureate services in connection with graduations falls in the same category as the celebration of religious holidays. If the baccalaureate service is held under public school sponsorship or auspices, whether in the school or elsewhere, it is clearly unconstitutional.<sup>136</sup> And the infirmity is not cured by making attendance voluntary.<sup>137</sup> Neither is it cured by the use of an "inter-faith" approach.<sup>138</sup> The mere holding of the service violates the com-

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132. See *Church-State Report*, *supra* note 120, at 10.

133. See A. STOKES & L. PFEFFER, *supra* note 21, at 384.

134. In *State ex rel. Singelmann v. Morrison*, 57 So. 2d 238 (La. App. 1952), the court decided that a statute or monument erected on public property violated the "no establishment" clause if it was designed and used as a public shrine or place of worship, if it was used for the propagation of a religious belief, if it was intended to hold some other religious group in public contempt and ridicule, or if it was designed to cause religious strife and antagonisms.

135. The plaintiff's brief in *Lawrence v. Buchmueller*, *supra* note 130, at 90, stated that "objection is made . . . not on the basis of any religious antagonism with the creche as a symbol—but, rather, precisely because it is symbolic of a basic tenet of the Church and, as such, has no place in a secular atmosphere. . . ."

136. See *Rosenfield*, *supra* note 114, at 573.

137. See *Choper*, *supra* note 45, at 407.

138. Some school districts have felt that baccalaureate services are unassailable if clergy from the Protestant, Roman Catholic, Jewish and Greek Orthodox communities are invited to participate.



mand of neutrality, for the purpose and primary effect is manifestly the advancement of religion.<sup>139</sup>

Baccalaureate programs were challenged in the *Chamberlin* case, but the Florida courts held that the plaintiffs had no standing to present the issue because none of them had children of high school age.<sup>140</sup> The United States Supreme Court, Justices Black and Douglas dissenting, affirmed this portion of the *Chamberlin* holding under the *Doremus* doctrine.<sup>141</sup> The issue will surely arise again and will be resolved, it is submitted, under the *Schempp* "purpose or primary effect" test.

If a local religious group undertakes to sponsor a baccalaureate service in one of the local churches and invites all members of the graduating class to attend, there could be no objection because the activity does not have public school sponsorship.<sup>142</sup> This practice is free from attack, however, only where school officials (board members, principals and teachers) refrain from participation in any way. In other words, the principal should not make any remarks; in fact, it would be advisable that he not even sit on the platform.

The fact that the holding of baccalaureate services in public schools appears to be unconstitutional does not preclude the schools from inviting members of the clergy to speak at assembly programs or commencement exercises. Clergymen, like educators and politicians and scientists, have much knowledge that would be beneficial to students. When speaking in the public schools, however, the clergyman should be careful not to say things that would tend to advance his particular religion; neither should he speak derisively about other sects or other religions.<sup>143</sup> Where the clergyman's remarks deal with a theme having a secular purpose, and where the references to religious ideals are only incidental, there would appear to be no objection. Likewise, it would be proper for a clergyman to present an objective history of his faith.<sup>144</sup> Only when a visiting clergyman attempts to impart sectarian ideas to the students should his remarks be considered an advancement of religion.

The practice of having members of the clergy ask invocations and pronounce benedictions at commencement exercises could be attacked

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139. Some schools cancelled baccalaureate services at the same time that they discontinued Bible reading. See Lowry, *The Case for the Traditional American Middle Way in Church and State*, 13 J. PUB. L. 447, 457-58 (1964); Trueblood, *The Paradox of the School Decision*, Presbyterian Life, May 1, 1964, at 14.

140. *Chamberlin v. Dade County Bd. of Pub. Instruction*, 160 So. 2d 97 (Fla. 1964).

141. 377 U.S. 402 (1964). See *Doremus v. Board of Educ.*, 342 U.S. 429 (1952) (taxpayer lacks standing to challenge religious exercises in public schools), discussed in text accompanying note 12 *supra*.

142. See D. BOLES, *supra* note 29, at 293; Choper, *supra* note 45, at 407.

143. See Harrison, *supra* note 29, at 417.

144. Such lectures would no doubt be very appropriate in connection with the objective religion courses. See note 185 *infra* and accompanying text.

as advancing religion in that it tends to create a devotional setting. If, however, these prayers are constructed with an emphasis on the nation's religious heritage, with only incidental reference to the Deity, they may well come within the Historical Document exception.<sup>145</sup>

### C. *Distribution of Bibles*

When a New Jersey school board authorized the distribution of Gideon Bibles<sup>146</sup> to students whose parents had given permission, a group of Jews and Catholics protested. The New Jersey Supreme Court held, in a unanimous opinion, that this action was unconstitutional in that it amounted to a preference of Protestantism over other religions.<sup>147</sup> Speaking for the court, Chief Justice Vanderbilt said:

To permit the distribution of the King James version of the Bible in the public schools of this State would be to cast aside all the progress made in the United States and throughout New Jersey in the field of religious toleration and freedom. We would be renewing the ancient struggles among the various religious faiths to the detriment of all. This we must decline to do.<sup>148</sup>

New Jersey clearly has taken the correct approach.<sup>149</sup> Not only is the avowed purpose of the practice the advancement of the Christian faith, but also it constitutes a preference of the Protestant denominations. The breach of the school district's duty of neutrality is obvious.

The dissemination of religious pamphlets and devotional booklets would appear to be just as much a preference of one religion over others as is the distribution of Bibles.<sup>150</sup> It is submitted, therefore, that the public schools should refrain from distributing religious liter-

145. See note 86 *supra* and accompanying text. See also Professor Choper's comment that "Research has not revealed that listening to the invocation is contrary to anyone's religious or conscientious beliefs." Choper, *supra* note 45, at 408.

146. The goal of the Gideons is "to win men and women for the Lord Jesus Christ, through . . . (c) placing the Bible, God's Holy Word—or portions thereof in hotels, hospitals, schools, institutions, and also through the distribution of same for personal use." Quoted from the constitution of Gideons International in L. PFEFFER, *supra* note 55, at 456.

147. *Tudor v. Board of Educ.*, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954).

148. *Id.* at 52, 100 A.2d at 868.

149. Chief Justice Vanderbilt's reasoning has been followed by the Florida courts. *Brown v. Orange County Bd. of Pub. Instruction*, 128 So. 2d 181 (Fla. App. 1960), *aff'd per curiam*, 155 So. 2d 371 (Fla. 1963). The attorneys general of Pennsylvania, California, Washington, Colorado and Arizona have reached similar conclusions. L. PFEFFER, *supra* note 55, at 460. See also Choper, *supra* note 45, at 405-06.

150. See *Miller v. Cooper*, 56 N.M. 355, 244 P.2d 520 (1952), where distribution of religious pamphlets by public schools was held to violate the duty of neutrality. See also Note, *The First Amendment and Distribution of Religious Literature in the Public Schools*, 41 VA. L. REV. 789, 807 (1955).

ature of any type, including announcements of revival services or vacation Bible schools.<sup>151</sup>

The Bible, as well as other religious books, would, of course, be appropriate in school libraries.<sup>152</sup> To place religious materials on the library shelves is not to prefer one religion over another, nor to aid religion in general; it is merely a part of the school's duty to make knowledge of all types available for "academic investigation."<sup>153</sup>

#### D. Wearing of Religious Garb by Public School Teachers

The wearing of religious garb by public school teachers has been challenged on numerous occasions, usually on the ground that it violates state constitutional prohibitions against sectarian influence in the public schools. In the absence of evidence that the nuns have injected religious dogma into their teaching, most of the courts have declined to enjoin the wearing of religious garb in the public schools.<sup>154</sup> It scarcely could be denied, however, that such distinctive garb tends to create a religious atmosphere in the classroom.<sup>155</sup> Furthermore, in view of the fact that the garb serves as a constant reminder of the teacher's religious affiliation, and that children develop impressions just as much from what they see as from what they hear,<sup>156</sup> it would not be difficult to conclude that the wearing of religious garb constitutes sectarian influence. Although such influence may fall short of sectarian "teaching," it would appear to have a "propagandizing ef-

151. See Harrison, *supra* note 29, at 416.

152. See Ladd, *supra* note 69, at 329.

153. See Choper, *supra* note 45, at 362 n.205. In *Schempp v. School Dist.*, 201 F. Supp. 815 (E.D. Pa. 1962), the court enjoined the Abington Township school officials from continuing the Bible reading exercises. Judge Biggs went on to state, however, that "nothing herein shall be construed as interfering with or prohibiting the use of any books or works as educational, source, or reference material." *Id.* at 820-21.

154. See, e.g., *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956); *New Haven v. Torrington*, 132 Conn. 194, 43 A.2d 455 (1945); *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940); *Gerhardt v. Heid*, 66 N.D. 444, 267 N.W. 127 (1936); *Hysong v. Gallitzin Borough School Dist.*, 164 Pa. 629, 30 A. 482 (1894). After the Pennsylvania decision was rendered, the legislature quickly passed a law prohibiting public school teachers from wearing religious garb. This law was held constitutional in *Commonwealth v. Herr*, 229 Pa. 132, 78 A. 68 (1910). Administrative regulations banning the wearing of religious garb and religious insignia also have been upheld. See *Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951); *O'Connor v. Hendrick*, 184 N.Y. 421, 77 N.E. 612 (1906).

155. In his dissenting opinion in the *Rawlings* case, Judge Hogg emphasized the fact that religious garb generates a religious atmosphere. He stated: "The distinctive garbs, so exclusively peculiar to the Roman Catholic Church, create a religious atmosphere in the schoolroom. They have a subtle influence upon the tender minds being taught and trained by the nuns. In and of themselves they proclaim the Catholic Church and the representative character of the teachers in the schoolroom. They silently promulgate sectarianism." *Rawlings v. Butler*, *supra* note 154, at 809.

156. See Note, *Religious Garb in the Public Schools—A Study in Conflicting Liberties*, 22 U. CHI. L. REV. 888, 892-93 (1955).

fect,"<sup>157</sup> especially where the garb includes rosaries or other religious insignia.<sup>158</sup> Practices which tend to create a reverent atmosphere and which contain suggestions of a proselytizing purpose probably would constitute sufficient sectarian influence to violate the constitutional command of neutrality. Hence, the practice of wearing religious garb in the public schools would appear to be an unconstitutional advancement of religion.

The argument that the wearing of religious garb is protected by the "free exercise" clause can be answered in two ways. First, the religious liberty of one person may not be exercised so as to limit the freedom of others.<sup>159</sup> Second, a prohibition against religious garb in the public schools does not in any way interfere with a teacher's freedom of belief; it merely means that during the period in which she is employed as an agent of the state she cannot practice those beliefs which constitute sectarian influence.<sup>160</sup>

One court has disqualified all nuns from teaching in the public schools, apparently on the ground that their lives are dedicated to the teaching of religion.<sup>161</sup> It is unlikely, however, that the employment of nuns or ministers as teachers would violate the neutrality concept if they wear no religious garb or insignia and if they take care that their classroom comments contain no sectarian implications.<sup>162</sup> The fact that these nuns or ministers contribute their salaries to religious purposes should have no bearing on the validity of their

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157. In *Zellers v. Huff*, *supra* note 154, the court said: "Not only does the wearing of religious garb and insignia have a propagandizing effect for the church, but by its very nature it introduced sectarian religion into the school." 55 N.M. at 525, 236 P.2d at 964.

158. Speaking of teachers wearing religious garb, Justice Williams of the Pennsylvania Supreme Court stated: "Wherever they go, this garb proclaims their church, their order, and their separation from the secular world, as plainly as a herald could do if they were constantly attended by such a person." *Hysong v. Gallitzin Borough School Dist.*, 164 Pa. 629, 659, 30 A. 482, 485 (1894) (dissenting opinion).

159. *See* Note, *supra* note 156, at 892. *See also* *Commonwealth v. Herr*, *supra* note 154, where the court stated: "The right of the individual to clothe himself in whatever garb his taste, his inclination, the tenets of his sect, or even his religious sentiments may dictate is no more absolute than his right to give utterance to his sentiments, religious or otherwise." 229 Pa. at 143-44, 78 A. at 72.

160. *Cf.* *Reynolds v. United States*, 98 U.S. 145 (1878), where the Court refused to allow a religious belief as a defense against a polygamy prosecution. Speaking for the Court, Mr. Chief Justice Waite stated: "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." *Id.* at 166. The North Dakota decision allowing the wearing of religious garb in the public schools, *supra* note 154, was abrogated by a public referendum in 1948. Thereafter, the Catholic bishops of the state announced that the nuns would be permitted to wear "modest dress" while teaching; hence, they have continued in their employment. *See* L. PFEFFER, *supra* note 55, at 497-98. It would appear, therefore, that the wearing of religious garb is not nearly so vital to a nun's freedom of religion as the "free exercise argument" suggests.

161. *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (1942).

162. *See* *Harrison*, *supra* note 29, at 416.

employment.<sup>163</sup> No inquiry is made concerning the manner in which other public school teachers dispose of their salaries, and there is no reason why a different approach should be taken in regard to nun-teachers or minister-teachers. Indeed, it is possible that any inquiry concerning a teacher's disposition of his salary would violate the "free exercise" clause.<sup>164</sup>

#### E. Use of Public School Buildings for Religious Meetings

The use of public school buildings for religious meetings during non-school hours has given rise to considerable litigation. Where state statutes authorize school officials to make school premises available for religious meetings<sup>165</sup> or for non-school purposes,<sup>166</sup> the courts have generally sustained the use of public school buildings by religious groups. Where there is no such statutory authorization, most of the decisions have turned on a regular-temporary distinction. In those instances where religious groups have been making regular and repeated use of the public school premises, the courts have generally held such use unlawful<sup>167</sup> or unconstitutional.<sup>168</sup> On the other hand, the courts have generally sustained religious use of public school premises where such use is only infrequent or on a temporary basis.<sup>169</sup>

Clearly the "free exercise" clause would not compel a school district to make its facilities available to religious groups. Even those courts which have declined to enjoin religious use of school premises

163. See Choper, *supra* note 45, at 404.

164. In *Gerhardt v. Heid*, *supra* note 154, the court said: "The fact that the teachers contributed a material portion of their earnings to the religious order of which they are members is not violative of the Constitution. A person in the employ of the state or any of its subdivisions is not inhibited from contributing money, which he or she has earned by service so performed, for the support of some religious body of which he or she is a member. To deny the right to make such contribution would in itself constitute a denial of that right of religious liberty which the Constitution guarantees." 66 N.D. at 460, 267 N.W. at 135.

165. *E.g.*, *Nichols v. School Directors*, 93 Ill. 61 (1879); *State v. Kessler*, 136 Mo. App. 236, 117 S.W. 85 (1909).

166. *E.g.*, *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (Fla. 1959); *Hurd v. Walters*, 48 Ind. 148 (1874); *Townsend v. Hagan*, 35 Iowa 194 (1872).

167. *E.g.*, *Dorton v. Hearn*, 67 Mo. 301 (1878); *Spencer v. Joint School-Dist.*, 15 Kan. 202 (1875); *Scofield v. Eighth School Dist.*, 27 Conn. 498 (1858); *Baggerly v. Lee*, 37 Ind. App. 139, 73 N.E. 921 (1905).

168. *Bender v. Streabich*, 182 Pa. 251, 37 A. 853 (1897).

169. In *Southside Estates Baptist Church v. Board of Trustees*, *supra* note 166, the Florida Supreme Court held that a school district "has the power to exercise a reasonable discretion to permit the use of school buildings during non-school hours for any legal assembly which includes religious meetings, subject, of course, to judicial review should such discretion be abused to the point that it could be construed as a contribution of public funds in aid of a particular religious group or as the promotion or establishment of a particular religion." 115 So. 2d at 700-01. See also *State ex rel. Gilbert v. Dilley*, 95 Neb. 527, 145 N.W. 999 (1914); *Nichols v. School Directors*, *supra* note 165; *Davis v. Boget*, 50 Iowa 11 (1878).

are quick to uphold a school district's refusal to allow its property to be used for religious purposes.<sup>170</sup> The question, therefore, is whether the action of a school district in granting permission to religious groups to use school premises has the purpose or primary effect of aiding one religion, aiding all religions, or preferring one religion over others. It is argued that the school district is not aiding religion if the religious groups are permitted to use the school premises only during non-school hours and if they pay reasonable rent. Yet the prohibition against the preference of one religion over others would seem to require that permission for the use of school premises be granted on a non-discriminatory basis. If the school district complies with this third prerequisite, it is indeed possible that religious groups would end up utilizing the school facilities more hours a week than would the students. Not only would such a situation be likely to interfere with the extra-curricular activities of student groups, but also it likely would give rise to charges that the school district is creating a religious atmosphere. At this point it becomes much more difficult to say that the school district is not aiding religion. Where religious groups are permitted to use public school premises on a permanent or indefinite basis, it would appear that the school district has violated its duty of neutrality.<sup>171</sup>

The aid to religion argument is less compelling, however, where religious groups are permitted to use public school premises only on an emergency basis. If the religious group faced with the emergency pays reasonable rent for the use of the school facilities, if permission for such use is limited to hours when the facilities are not being used for student activities, and if the school district is willing to grant similar permission to other religious groups faced with similar emergencies, the courts may well be reluctant to find a breach of the duty of neutrality. Indeed, it is possible that it would be considered an acceptable accommodation between the first amendment's overlapping protections for a school district to make its facilities available to religious groups faced with an emergency.<sup>172</sup>

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170. See, e.g., *McKnight v. Board of Pub. Educ.*, 365 Pa. 422, 76 A.2d 207 (1950); *School Directors v. Toll*, 149 Ill. App. 541 (1909); *Boyd v. Mitchell*, 69 Ark. 202, 62 S.W. 61 (1901); *Eckhardt v. Darby*, 118 Mich. 199, 76 N.W. 761 (1898); *State ex rel. Greisinger v. Grand Rapids Bd. of Educ.*, 88 Ohio App. 364, 100 N.E.2d 294 (1949).

171. In *Southside Estates Baptist Church v. Board of Trustees*, *supra* note 166, the Florida Supreme Court cautioned that it would not allow a church to use public school premises for a prolonged period of time unless there was evidence of "an immediate intention on the part of the Church to construct its own building." The court then stated that "it could hardly be contemplated that the public school system or its property could be employed in the permanent promotion of any particular sect or denomination." 115 So. 2d at 700.

172. In his concurring opinion in the *Schempp* case, Mr. Justice Brennan suggests that it would not constitute a violation of the duty of neutrality for a state to

As long as the emergency theory is invoked only in a true emergency (as where a local congregation is permitted to use the school auditorium for Sunday services while fire damage to its sanctuary is being repaired<sup>173</sup>), it may withstand a constitutional attack. The theory will become vulnerable, however, if it is expanded to assist new congregations or out-of-town religious groups in attracting followers.

In situations where religious groups are using public school premises for educational, cultural, or social (as opposed to religious) purposes, it is unlikely that the courts would find a breach of the neutrality concept.<sup>174</sup> When the religious groups do not create a devotional atmosphere and do not pursue religious purposes while making use of the school premises, it is indeed difficult to say that the school district is guilty of advancing religion.

#### F. Rental of Church Buildings for Public School Purposes

Population growth, changes in economic conditions and other factors have brought about unexpected increases in public school enrollment in many areas. In order to alleviate the overcrowded conditions in the public schools, the school officials frequently rent additional classroom space in buildings owned by churches and synagogues. Although it has been suggested that the school district should be required to show that the church buildings were the "best available facilities,"<sup>175</sup> most of the state courts have approved the rental of church premises for public school purposes as long as the public school officials have control over the instruction.<sup>176</sup>

It would appear that the federal standard will require something more than a mere showing of control over instruction. The constitutional command of neutrality would surely require the school district to remove all pictures, statues, or other religious symbols from the leased premises. Also, where the leased premises are connected to the church sanctuary, arrangements should be made for access to the classrooms other than through the sanctuary. In fact, it would be preferable if the passageways between the leased premises and the sanc-

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extend "temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood." 374 U.S. at 299.

173. Cf. *Lewis v. Mandeville*, 201 Misc. 120, 107 N.Y.S.2d 865 (Sup. Ct. 1951), where permission for a religious group to use the fire hall auditorium for religious services while its place of worship was being repaired was held constitutional.

174. See *County of Los Angeles v. Hollinger*, 200 Cal. App. 2d 877, 19 Cal. Rptr. 648 (1962) (Verdi's opera "Nabucco" held not a religious work).

175. See Choper, *supra* note 45, at 414.

176. E.g., *New Haven v. Torrington*, 132 Conn. 194, 43 A.2d 455 (1945); *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940); *Crain v. Walker*, 222 Ky. 828, 2 S.W.2d 654 (1928); *Millard v. Board of Educ.*, 121 Ill. 297, 10 N.E. 669 (1887). See also D. BOLES, *supra* note 29, at 164-67.

tuary were blocked during school hours. It is uncertain whether the neutrality concept would require the school district to show that it is making plans to erect additional public school facilities and that the rental of church premises is only temporary. Even if a temporary-permanent distinction is made, it would seem that "temporary" rental could continue for two or three years without question. The problems which a school district faces in planning and financing new facilities are necessarily complex, and the lapse of time between the initial planning stage and the completion of construction could well be considerable.

It is true that the pupils assigned to these leased classrooms will see the cross on the adjoining church or the six-pointed star on the adjoining synagogue. Yet it is very unlikely that the duty of neutrality would require the school district to insulate pupils from religious symbols located on adjoining property.<sup>177</sup> The duty of neutrality does not forbid a school district from erecting a public school next to a church or from explaining to the children that religious groups commonly have distinctive symbols; it merely forbids the school district to display religious symbols on public school property.<sup>178</sup>

### G. Religious Tests for Teachers

When a school district asks prospective teachers whether or not they believe in God, it might not be violating the "no establishment" clause.<sup>179</sup> On the other hand, it seems clear that such a question violates the "free exercises" clause. In *Torcaso v. Watkins*,<sup>180</sup> the United States Supreme Court struck down a Maryland law requiring a public official to declare his belief in the existence of God on the ground that it "unconstitutionally invades the appellant's freedom of belief

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177. In *Brown v. Heller*, 51 Misc. 2d 660, 273 N.Y.S.2d 713, 717 (Sup. Ct. 1966), the court said: "It may be doubted that the constitutional requirement obligates the school authorities to insulate the pupils so carefully as to prevent them from seeing religious emblems on other properties. Such a ruling would lead to strange results. Public schools could then only be built out of sight and beyond earshot of churches and other religious structures. School buildings would have to be torn down if a church should later be constructed next door or on an adjoining block. School buses would have to be routed so as not to pass a church on the way to and from school."

178. See notes 126 & 127 *supra* and accompanying text.

179. In *Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So. 2d 21 (Fla. 1962), it was alleged that school officials asked each applicant for a teaching position the question "Do you believe in God?" In the brief filed on behalf of the plaintiffs, Leo Pfeffer argued that the question violated the "no establishment" clause because it favored religion over irreligion and preferred theistic religions over non-theistic religions. See R. DRINAN, *supra* note 31, at 66. The constitutionality of the question was not determined because none of the plaintiffs was a teacher. *Chamberlin v. Dade County Bd. of Pub. Instruction*, 160 So. 2d 97 (Fla. 1964).

180. 367 U.S. 488 (1961).



and religion."<sup>181</sup> Although the *Torcaso* holding invalidated religious tests for "public officials," it seems to be agreed that it would be equally applicable to religious tests for teachers.<sup>182</sup> It is recognized, of course, that any teacher taking advantage of his position to proselytize for his particular religion or against all religion would properly be subject to discipline or dismissal.<sup>183</sup>

#### H. *Religious Census Among Students*

A religious census among pupils would fall in the same category as a religious test for teachers.<sup>184</sup> It need not be decided whether such a census would have the effect of advancing religion, for it is evident that it would violate the "free exercise" clause. By calling upon the children to place themselves in one of the religious categories, the school officials are inquiring about a personal matter which the children may not wish to discuss. While the teachers and officials in the public schools may properly explore with the students the important religious events of history, it is not their function to ask the students to declare themselves for or against religious principles of any type.

### V. NEW IDEAS FOR "ACCOMMODATION"

#### A. *Objective Religion Courses*

The constitutional command of neutrality does not require the elimination from public education of all teaching about religion and religious differences. In fact, in the majority opinion in the *Schempp* case, Mr. Justice Clark said:

[O]ne's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.<sup>185</sup>

181. *Id.* at 496.

182. See R. DRINAN, *supra* note 31, at 66-67; A. STOKES & L. PFEFFER, *supra* note 21, at 396.

183. Plaintiff's brief in the *Chamberlin* case stated: "It is important to note that we are not challenging the right of the school authorities to dismiss or otherwise discipline a teacher who uses or abuses his office to promote atheistic doctrines. All we challenge is their right to refuse to engage an otherwise qualified teacher simply because he will not assert that he believes in God." Quoted in R. DRINAN, *supra* note 31, at 66-67.

184. The religious census question was raised in the *Chamberlin* case, but it was not decided because plaintiffs had not shown that their children had been questioned in that connection. *Chamberlin v. Dade County Bd. of Pub. Instruction*, 160 So. 2d 97 (Fla. 1964).

185. *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963). See also the concurring opinion of Mr. Justice Brennan at 300-01.

Since the *Schempp* decision, many secondary schools have instituted "objective religion courses."<sup>186</sup> Some of these courses are taught by English teachers and emphasize the literary qualities of the Bible.<sup>187</sup> Some are taught by history teachers and emphasize the historical qualities of the Bible. Still others are taught by philosophy teachers and emphasize the comparative or phenomenological aspects of religion. Such courses are, of course, offered on an elective basis. Although some schools have asked local religious groups to supply teachers for their religion courses,<sup>188</sup> most have deemed it preferable to delegate the task to members of the secular faculty.<sup>189</sup>

Because of the possibility that the study of religion may result in some indoctrination, some have suggested that the objective religion courses should be limited to the upper high school grades—a level where students would have sufficient maturity to distinguish between indoctrination and academic discussion.<sup>190</sup> Others would see no problem with an objective presentation of religion in the elementary grades, provided that the teacher does not emphasize any one belief over others.<sup>191</sup> Objective religion courses, apparently for the entire school system, were commended at a recent session of the general assembly of the National Council of Churches. Dr. Arthur S. Fleming, the newly-installed president, declared:

I believe every school child should have the opportunity to find out about religion, just as he has the opportunity to find out about economics, politics, and other fairly controversial areas. . . . Religious illiteracy is rampant in this country, and it is time we launched a frontal attack on it.<sup>192</sup>

### B. *More Released Time*

Along side the *Engel* and *Schempp* holdings forbidding the use of the public school program for the promotion of religious exercises and religious indoctrination, there is the *Zorach* accommodation principle. Some have insisted that *Zorach* is clearly wrong.<sup>193</sup> Some have said

186. See W. KATZ, *supra* note 38, at 50-56; Phenix, *Religion in American Public Schools*, 1965 RELIGION AND THE PUBLIC ORDER 82-109 (Giannella ed. 1966).

187. Professor William Lyon Phelps of Yale University lauded the literary qualities of the Bible. He explained: "The Bible has within its pages every single kind of literature that any proposed list of English classics contains. It has narrative, descriptive, poetical, dramatic, and oratorical passages. . . . Priests, atheists, skeptics, devotees, agnostics and evangelists are all agreed that the Bible is the best example of English composition that the world has ever seen. It contains the noblest prose and poetry with the utmost simplicity of diction." Quoted in D. BOLES, *supra* note 29, at 276.

188. Harrison, *supra* note 29, at 406-07.

189. Phenix, *supra* note 186, at 109.

190. See P. FREUND & R. ULICH, *supra* note 80, at 42-45.

191. See Choper, *supra* note 45, at 379-86.

192. Nashville Tennessean, Dec. 10, 1966, at 5, col. 4.

193. See Choper, *supra* note 45, at 387-400; Pfeffer, *Released Time and Religious Liberty: A Reply*, 53 MICH. L. REV. 91 (1954); Note, *Released Time Reconsidered:*

that the two approaches are consistent only if the released time program is of a "dismissed time" nature (that is, those not choosing to attend the religious instruction classes would be free to go home).<sup>194</sup> Still others have drawn a careful distinction between a state's promotion of religious faith by means of state-composed prayers or Bible reading in the public schools and the state's willingness to excuse students from the regular school program for an hour a week in order that they may attend Bible classes in the local churches.<sup>195</sup>

This third viewpoint, known as the accommodation approach, appears to be the one which will prevail. There is a major difference between a state-sponsored religious exercise as a part of the public school program and the accommodation of the public school program to the religious needs of the community.<sup>196</sup> If the student body includes Moslems, surely the school officials would permit them to leave the classrooms at the appointed hour to say their prayers toward Mecca; in fact, a refusal to make such an accommodation might very well be a violation of the "free exercise" clause.<sup>197</sup> Similar "free exercise" considerations surround the released time accommodation. Furthermore, the schools regularly allow students to miss classes in order to attend religious services which have special

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*The New York Plan Is Tested*, 61 YALE L.J. 405 (1952). Although Professor Choper argues that the Zorach-type plan violates the "no establishment" clause, he would allow public schools to release students for a limited period of time each week "on condition that they attend one of a group of extra-curricular education classes—for example, classes in music, art, religion, drama. . . ." Choper, *supra* note 45, at 394.

194. See W. KATZ, *supra* note 38, at 49-50. See also Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 354-56 (1950); Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROB. 92, 93 (1949); Note, *The Constitution and Released Time*, 52 COLUM. L. REV. 1033 (1952).

195. See Kauper, *supra* note 22, at 1045. See also Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 838-42 (1954); Kauper, *Released Time and Religious Liberty: A Further Reply*, 53 MICH. L. REV. 233 (1954).

196. There is apparently some difference of opinion among educators and religious leaders concerning the effectiveness of the released time program. For a discussion of the arguments for and against released time see L. PFEFFER, *supra* note 55, at 368-435. Professor Kauper has suggested that the program might be improved by moving the emphasis from religion to ethics and morality. In addition, he feels that such a change in scope would bolster the constitutional argument. He reasons: "If the state has an appropriate interest in character building and promotion of good citizenship, it should be appropriate for the public school system to permit release of children for the kind of instruction, whether religious or not, which the parents feel most relevant for this purpose." P. KAUPER, *supra* note 81, at 97-98.

197. In *Stein v. Oshinsky*, 348 F.2d 999, 1001-02 (2d Cir. 1965), Judge Friendly said: "We are not here required to consider such cases as that of a Moslem, obliged to prostrate himself five times daily in the direction of Mecca, or of a child whose beliefs forbade his partaking of milk and cookies without saying the blessings of his faith. . . . So far as appears, the school authorities might well permit students to withdraw momentarily for such necessary observances—or to forego the milk and cookies, just as they excuse children on holidays important to their religions."

significance to their beliefs. To release students on a mass basis so that those who wish to obtain religious instruction may do so would appear to be no different than excusing students on an individual basis.<sup>198</sup>

It is to be cautioned, however, that a released time program will run afoul of the "no establishment" clause if public school officials do anything to coerce the students to attend the religion classes.<sup>199</sup> Likewise, a released time arrangement will be invalid if there is a commingling of religious and secular instruction. If the religion classes are held in a building which directly adjoins the building used for secular classes and if the religious instruction is given by the secular teachers, a commingling has occurred and the plan must be struck down.<sup>200</sup>

### C. Shared Time

Under the "shared time" plan, a student would spend half of his school day in a parochial school and half in a public school.<sup>201</sup> At the parochial school he would be taught such value-laden subjects as history, literature and the social sciences. At the public school he would receive instruction in such religiously neutral subjects as mathematics, physics, chemistry, languages, physical education, industrial arts and home economics.

Some have defended the shared time plan as "released time in reverse."<sup>202</sup> Since any child has a constitutional right to attend a parochial school,<sup>203</sup> and since it is constitutional for public schools to excuse students who wish to participate in off-the-premises religious instruction,<sup>204</sup> it is argued that it would surely be constitutional for

198. In *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), the Supreme Court stated: "A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act."

199. See W. DOUGLAS, *THE BIBLE AND THE SCHOOLS* 10-11 (1966); Kauper, *supra* note 195, at 842; Note, *supra* note 194, at 1037-39.

200. *Moore v. Board of Educ.*, 4 Ohio Misc. 257, 212 N.E.2d 833 (C.P. 1965).

201. The shared time concept is not new. In 1822 Thomas Jefferson invited religious groups to establish schools adjacent to the University of Virginia so that their students could attend the secular classes at the University and have the use of the University library. Jefferson's letter is quoted in Sky, *The Establishment Clause, The Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1455 (1966).

202. See W. KATZ, *supra* note 38, at 78-79; L. PFEFFER, *supra* note 55, at 578-79.

203. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

204. *Zorach v. Clauson*, *supra* note 198.

the public schools to enroll parochial school students on a part-time basis. Others have defended the dual enrollment arrangement on the ground that every child has a right to a public education. For a school district to permit students to exercise only half of that right so that they may also attend classes in parochial schools is considered an acceptable accommodation in the interest of religious liberty.<sup>205</sup>

Although it can be argued that the shared time plan constitutes aid to religion in that it relieves the parochial schools of the necessity of purchasing expensive laboratory, gymnasium and manual training equipment, it is doubtful whether this is the type of aid which would violate the "no establishment" clause. The purpose of the plan is not to advance religion, but to accommodate the public school schedule to meet the religious needs of the students. Any advantages which might accrue to the parochial school as a result of the plan would be incidental to the valid accommodation purpose.<sup>206</sup> It is submitted, therefore, that as long as the shared time plan is made available to all private and parochial school students on a non-discriminatory basis, there would be no violation of the public school's duty of neutrality.

There are, of course, administrative problems to be worked out if the plan is to operate effectively and efficiently,<sup>207</sup> but many writers consider that shared time plans hold great promise for reconciling the felt needs for religious instruction with the secular limitations placed on the public schools.<sup>208</sup> In fact, a National Education Association survey in 1964 showed that a total of thirty-five states had one or more school systems with a shared time program in operation.<sup>209</sup>

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205. See *Morton v. Board of Educ.*, 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966); Katz, *Note on the Constitutionality of Shared Time*, 1964 RELIGION AND THE PUBLIC ORDER, 85, 89 (Giannella ed. 1965); Sky, *supra* note 201, at 1453-54. Cf. *Commonwealth ex rel. Wehrle v. School Dist.*, 241 Pa. 224, 88 A. 481 (1913) (sustaining admission of parochial school students to public school manual training program).

206. See Katz, *supra* note 205, at 89.

207. See A. STOKES & L. PFEFFER, *supra* note 21, at 389-95, for a discussion of the Philadelphia shared time arrangement. For a discussion of other shared time plans see Powell, *Shared Time, 1964: A Turning Point?*, 1964 RELIGION AND THE PUBLIC ORDER 62 (Giannella ed. 1965). The arguments for and against shared time are summarized in L. PFEFFER, *supra* note 55, at 574-76, and in DUKER, *THE PUBLIC SCHOOLS AND RELIGION* 221-24 (1966). See generally LYNN, *PROTESTANT STRATEGIES IN EDUCATION* (1964).

208. See Kauper, *supra* note 22, at 1067; Powell, *supra* note 207, at 83-84. The National Council of Churches recently issued the following statement: "We believe that boys and girls now limited by the resources of some religious day schools will be benefited by the equipment and program offerings for the portion of the time they attend public school. We believe that benefits will ensue for all children if those now enrolled in separate systems have the opportunity to associate with each other through dual school enrollment. We believe that this association and intermingling of the children in the school will result in a broadened support for public education and will serve to unify our now partially divided communities." Quoted in L. PFEFFER, *supra* note 55, at 576-77.

209. See A. STOKES & L. PFEFFER, *supra* note 21, at 390; Powell, *supra* note 207, at

## VI. STANDING TO SUE

The question of standing was not mentioned at all in *Everson* and was passed over quickly in *McCollum*. Yet in *Doremus v. Board of Education*<sup>210</sup> the Supreme Court refused to review the New Jersey ruling upholding Bible reading in the public schools because the petitioner lacked standing. Although the Court mentioned that the petitioner's child had graduated prior to the taking of the appeal, the holding appears to rest on the ground that the petitioner had not presented a "good-faith pocketbook action."<sup>211</sup>

Since the petitioners in *Engel* alleged neither loss of tax revenue nor coercion on the part of school officials, their action would not appear to meet the "pocketbook test" laid down in *Doremus*. Nevertheless, the Supreme Court reached the merits without any discussion of standing. It appears that the mere status of the petitioners as parents of school children was deemed a sufficient basis for standing.<sup>212</sup>

It is this parental status which the Court used in *Schempp* to justify the petitioners' attack on Bible reading. Mr. Justice Clark, who wrote the majority opinion, gives no indication that plaintiff-parents must prove any "adverse" effect on their children; he merely states that "the parties here . . . are *directly* affected by the laws and practices against which their complaints are directed," and concludes that "[t]hese interests surely suffice to give the parties standing to complain."<sup>213</sup>

Although the *Doremus* "pocketbook test" has not been expressly overruled,<sup>214</sup> the *Engel* and *Schempp* decisions appear to say that an

73-75. The Elementary & Secondary Education Act of 1965 includes "dual enrollment" among the services for which federal funds may be used. It is very likely, therefore, that the shared time arrangement will become more popular in the future. For a discussion of the various aspects of the 1965 Act see Sky, *supra* note 201, at 1441-66; Note, *The Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 IND. L.J. 302 (1966).

210. 342 U.S. 429 (1952).

211. The Court reiterated the condition set forth in *Massachusetts v. Mellon*, 262 U.S. 447 (1923), that there must be a direct dollars-and-cents injury before a taxpayer has standing to challenge governmental conduct.

212. See Drinan, *Standing to Sue in Establishment Cases*, 1965 RELIGION AND THE PUBLIC ORDER 161, 180-81 (Giannella ed. 1966). See generally Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 15-31.

213. *Abington School Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963). Mr. Justice Brennan discusses the standing question in his concurring opinion. Among other things, he suggests that "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." *Id.* at 266 n.30.

214. It has been suggested that the *Doremus* case has been overruled "sub silentio." Drinan, *supra* note 212, at 180; Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 35 (1962).

alleged violation of the "no establishment" clause in and of itself creates a right in a parent to challenge public school activity.<sup>215</sup> The *Chamberlin* case merely limits a parent's challenge to practices prevailing at the grade level in which his child is enrolled. In situations where parents are reluctant to challenge "no establishment" clause violations because of social or economic pressure, it is possible that the Court will extend standing to other interested persons.<sup>216</sup>

#### VII. CONSTITUTIONAL AMENDMENT

Within a few months of the *Schempp* decision, over one hundred proposals for a constitutional amendment were introduced in the Congress.<sup>217</sup> Because Congressman Frank Becker (R-N.Y.) threatened to use a discharge petition if the House Judiciary Committee did not hold hearings, his proposal received dominant attention. The Becker Amendment read as follows:

Section 1. Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place.

Section 2. Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place, or upon any coinage, currency, or obligation of the United States.

Section 3. Nothing in this Article shall constitute an establishment of religion.<sup>218</sup>

At the hearings, which were held from April 22 through June 3, 1964, over one hundred congressmen expressed their support for the amendment. Yet there was a solid front of opposition. Expressing their distaste for the amendment were such distinguished church leaders as Dr. Eugene Carson Blake, chief executive officer of the United Presbyterian Church; Dr. Edwin Tuller, general secretary of the American Baptist Convention; Dr. Fredrik Schiotz, president of the American Lutheran Church; Presiding Bishop Arthur Lichtenberger of the Protestant Episcopal Church; and Bishop John Wesley Lord of the Methodist Church.<sup>219</sup> United Church of Christ, Unitarian,

215. See Drinan, *supra* note 212, at 181-83.

216. Professor Choper argues that every citizen has "the 'right' to be free from social pressures to conform to the majority's religious practices that are governmentally sponsored," and he contends that the standing rules must be liberalized if this right is to be adequately protected. Choper, *supra* note 45, at 364-67.

217. See Katz, *supra* note 63, at 398.

218. H.R.J. Res. 693, 88th Cong., 1st Sess. (1963).

219. See Beaney & Beiser, *supra* note 56, at 499.

Seventh Day Adventist and Jewish officials also opposed the amendment.<sup>220</sup>

Equally impressive, and perhaps more significant, was the parade of legal scholars who testified against the amendment. Included in this group were professors Paul A. Freund of Harvard, Philip B. Kurland of Chicago, Paul E. Kauper of Michigan, Wilbur G. Katz of Wisconsin, James C. Kirby of Vanderbilt and Jefferson B. Fordham of Pennsylvania. In addition, a statement of opposition signed by 223 law school deans and professors was presented to the committee near the close of the hearings.<sup>221</sup>

As political observers had predicted, the Becker Amendment was never reported out of committee.

In 1966 Senator Everett M. Dirksen (R-Ill.) took up the prayer cause and introduced a constitutional amendment aimed at "clarifying" the Supreme Court decisions. His proposal, which was much less sweeping than the Becker Amendment, read as follows:

Nothing contained in this Constitution shall prohibit the authority administering any school, school system, educational institution or other public building supported in whole or in part through the expenditure of public funds from providing for or permitting the voluntary participation by students or others in prayer. Nothing contained in this article shall authorize any such authority to prescribe the form or content of any prayer.<sup>222</sup>

Senator Dirksen's amendment drew criticism from the National Council of Churches and a large number of Protestant church leaders. When the Senate voted in September of 1966, Senator Dirksen found himself nine votes short of the required two-thirds majority.<sup>223</sup>

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220. See D. BOLES *supra* note 29, at 299-300.

221. The statement read in part as follows: "American liberties have been secure in large measure because they have been guaranteed by a Bill of Rights which the American people have until now deemed practically unamendable. If now, for the first time, an amendment to 'narrow its operation' is adopted, a precedent will have been established which may prove too easy to follow when other controversial decisions interpreting the Bill of Rights are handed down. . . . Whatever disagreement some may have with the Bible-Prayer decisions, we believe strongly that they do not justify this experiment." Quoted in D. BOLES, *supra* note 29, at 314-15.

222. S.J. Res. 148, 89th Cong., 2d Sess. (1966). Senator Dirksen's proposed amendment not only would have codified the principle announced in *Engel*, but also would have sanctioned student-initiated prayers of some type. For a discussion of student-initiated prayers see note 73 *supra* and accompanying text.

223. Sky, *supra* note 201, at 1398-1400. The "Sense of the Congress" resolution proposed by Senator Birch Bayh (D-Ind.) was also rejected, mainly because of Senator Dirksen's quip that it was "absolutely meaningless." The resolution would have declared the sense of the Congress to be that nothing in the Supreme Court decisions prohibits local school districts "from permitting individual students to engage in silent, voluntary prayer or meditation." Nashville Tennessean, Sept. 22, 1966, at 16, col. 1.



VIII. CONCLUSION: "NO ESTABLISHMENT" VERSUS  
"FREE EXERCISE"

The duty of the public schools to maintain neutrality in the area of religion is not an express constitutional command; rather it is derived from two separate and potentially conflicting clauses in the first amendment. The "no establishment" clause prohibits any attempt to aid religion or to prefer one religion over others. The "free exercise" clause, on the other hand, guarantees to every citizen the right to the free exercise of his religion without interference by the state. It is perhaps of significance that the "no establishment" clause precedes the "free exercise" clause, yet the conclusion is inescapable that the two clauses were intended to operate together in harmony. The conflicting policies of the two clauses must be balanced and reconciled.

A strict theory of neutrality would require the state to be indifferent to religion. Yet indifference to religion could well constitute governmental sanction for a philosophy of secularism, thus creating a policy of governmental hostility to religion. Such a hostile attitude would clearly infringe upon the free exercise guarantee, for the "free exercise" clause implies that the state is under a duty to maintain "a hospitable climate for religious liberty."<sup>224</sup> It is apparent, therefore, that the development of the neutrality concept cannot proceed solely on the basis of the "no establishment" prohibition. The "free exercise" clause demands that the neutrality concept recognize that "[w]e are a religious people whose institutions presuppose a Supreme Being."<sup>225</sup> The neutrality which results is clearly something other than a strict neutrality. Because it undertakes to balance "free exercise" with "no establishment," it could perhaps be described as a "benevolent neutrality"<sup>226</sup> or as an accommodation neutrality.<sup>227</sup>

The Supreme Court attempted to define this accommodation theory in *Abington School District v. Schempp*<sup>228</sup> by holding that the state is under a duty to avoid any activity which would have the purpose

224. P. KAUPER, *supra* note 81, at 87.

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

226. See Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation*, 1963 RELIGION AND THE PUBLIC ORDER 3, 16-28 (Giannella ed. 1964). In the majority opinion in the *Schempp* case, Mr. Justice Clark referred to a "wholesome" neutrality. 374 U.S. at 222. Apparently Professor Kauper is of the opinion that the word "benevolent" better describes the balancing process than does the word "wholesome."

227. The majority opinion in the *Zorach* case states: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs." 343 U.S. at 313-14 (emphasis added).

228. 374 U.S. 203 (1963).

or primary effect of either advancing or inhibiting religion. The theory was further defined in *Sherbert v. Verner*,<sup>229</sup> wherein the Supreme Court held that religious convictions respecting a day of worship must be respected by a state in determining whether a person is qualified for unemployment compensation benefits. The *Schempp* and *Sherbert* cases clearly reject the notion that the state should be strictly neutral with respect to religious matters. They stand for the proposition that notwithstanding the "no establishment" clause, a state may, and in some instances must, accommodate its activity to further the religious interests protected by the "free exercise" clause.<sup>230</sup> The "no establishment" clause remains a "wall of separation" prohibiting governmental activity which tends to indoctrinate or which has a "pervading religious character."<sup>231</sup> Yet the accommodation theory will sustain governmental activity in which the secular purpose is paramount and the religious reference only incidental. Likewise, it will sustain governmental involvement in religious matters if such involvement is only slight compared with the religious interests of the community.

The application of the neutrality and accommodation concepts in the public school situation is a most delicate task.<sup>232</sup> The schools must not advance religion, yet they must not be so blind to religious values that they begin to further atheism or agnosticism. Resolution of the conflicting duties should proceed, it is submitted, according to the following standard: the "no establishment" prohibition must take precedence wherever the school district involves itself in religious matters to the extent of sanctioning sectarian indoctrination, creating a distinctively religious atmosphere, or preferring one system of beliefs over others. Thus, where state-composed prayers, teacher-sponsored prayers, the Lord's Prayer, or Bible readings are made a part of a devotional exercise, the school district definitely has violated the "no establishment" clause.<sup>233</sup> It has likewise embarked upon un-

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229. 374 U.S. 398 (1963).

230. See Kauper, *supra* note 226, at 36-39.

231. *Abington School Dist. v. Schempp*, *supra* note 228, at 224.

232. The majority opinion in the *Schempp* case states: "In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a *delicate* sort, the rule itself is clearly and concisely stated in the words of the First Amendment." 374 U.S. at 226 (emphasis added).

233. In his recent book, Mr. Justice Douglas makes the following observations: "As to prayers in public schools, we should remember that public schools are supported by all sects—nonbelievers as well as believers, by minorities as well as by the majority. In America public schools have a unique public function to perform. They are designed to train American students in an atmosphere that is free from parochial, sectarian, and separatist influences. The heritage they seek to instill is one that all sects, all races, all groups have in common. It is not atheistic nor is it theistic. It is a civic and patriotic heritage that transcends all differences among people, that bridges the gaps in sectarian creeds, that cements all in a common unity of nationality, and that

constitutional activity when it "celebrates" religious holidays, displays religious symbols, holds baccalaureate services, distributes religious literature, or permits its property to be used for the erection of a nativity scene.<sup>234</sup>

On the other hand, the balancing effect of the "free exercise" clause gives the school district considerable freedom to arrange its program of instruction in order to accommodate the religious needs of the students. While the public school may not sponsor activities designed to advance religion, it may (and indeed should) develop a teaching program that will help to create an awareness of and an appreciation for the religious factors prevailing in society. Thus, objective religion courses and "explanations" of religious holidays are manifestly acceptable accommodations. The accommodation theory also permits activity which has a valid secular purpose and only incidental reference to religion. Hence, it is entirely appropriate for the school district to open the school day with a period of silence or with a patriotic ceremony, to make use of religious art and religious music in the fine arts classes, or to encourage classroom discussions concerning morality and virtue. While such accommodations as off-the-premises released time programs, shared time plans and allowances for student-initiated prayers are not necessarily justifiable under the secular purpose theory, they would appear to be justified on the ground that the governmental involvement is only slight in relation to the religious needs of the students.

It is apparent, therefore, that the duty of neutrality which the first amendment imposes upon the public school is not of an absolute nature. Rather it is a duty which requires that the "free exercise" clause be balanced with the "no establishment" clause. The total program of the public school must be guided by this balancing concept of neutrality—a concept that prohibits the schools from either propagating or ignoring religious values.

P. RAYMOND BARTHOLOMEW

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reduces differences that emphasis on race, creed, and sect only accentuate." W. DOUGLAS, *supra* note 199, at 58-59.

234. That a majority of the residents within a particular school district have no objection to such religious influences in the public school is no answer to the constitutional command. The first amendment is an exception to the doctrine of majority rule. Its purpose is two-fold: to prevent the majority from imposing its religion on the minority, and to prevent religious strife from erupting. Today's majority may well be tomorrow's minority. If today's majority is permitted to place devotional exercises in the public school there would surely be trouble should the complexion of the community change. It is just such a clash that the "no establishment" clause was intended to avert. For a discussion of the majority-rule-versus-minority-rights controversy see *Reed v. Van Hoven*, 237 F. Supp. 48, 51-53 (W.D. Mich. 1965); D. BOLES, *supra* note 29, at 334-43; W. DOUGLAS, *supra* note 199, at 47-58.