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THE PRAYER DECISIONS

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Contrary to popular belief the Constitution does not specifically provide for the separation of church and state. Further, nowhere in the Constitution is there mention of a "wall of separation between church and state." Instead, the first amendment opens with the words, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The provision that Congress shall make no law respecting an establishment of religion is commonly referred to as the establishment clause, and the provision that Congress shall make no law prohibiting the free exercise thereof is called the free exercise clause. These terse provisions are to be borne in mind along with the due process clause of the fourteenth amendment containing the prohibition: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law," in the discussion which follows, for they are the sole constitutional provisions on which rest the decisions of the Supreme Court on the subject of prayer and Bible reading in the public schools.[1]

The first of the recent decisions of the United States Supreme Court concerning prayer in the public schools was made in the case of *Engel v. Vitale*,[2] decided in 1962. A district board of education in the State of New York, acting in its official capacity under the state law, directed that the following prayer be said aloud by each class at the beginning of each school day:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.[3]

This prayer was composed and recommended for such use in the public schools by the State Board of Regents, a body having super-

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[1] The only other Constitutional provision relating to religion is the prohibition found in article six against any religious test for office under the United States. This provision, of course, is not applicable to the present discussion.

[2] 370 U.S. 421 (1962).

[3] *Id.* at 422.

visory powers over the state's public schools. No student was obliged to participate in the prayer or to be present when it was said if he or his parents objected.

The Supreme Court of the United States, with only one Justice dissenting, decided that such composing and use of the prayer was a violation of the above quoted establishment clause of the Constitution. The Court reasoned that the use of the prayer was a religious activity; that it was part of a governmental program to further religious belief, and that therefore it was a breach of "the constitutional wall of separation between Church and State."[4] Further, it emphatically stated that the establishment clause plus the due process clause prohibit government, state or federal, from composing[5] or prescribing[6] official prayers for use as part of any program of governmentally sponsored religious activity.

In the course of its opinion the Court expressed principles and views which would do far more besides outlawing prayer in the public schools. In comparing the meanings of the establishment clause and the free exercise clause the Court used this significant language: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[7] In this language, as will be explained later, the Court laid down a basis for invalidating, if it chooses, many other long continued religious practices and expressions in American public life.

The second of the Court's recent decisions concerning prayer in the public schools was made in *School Dist. v. Schempp*,[8] decided in 1963. This decision arose from two lower court cases.[9] In the first of these a statute in Pennsylvania required that at least ten verses from the Bible be read at the opening of each public school on each

[4] *Id.* at 425.

[5] The Court stated that the establishment clause, "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Ibid.*

[6] *Id.* at 430.

[7] *Id.* at 431.

[8] 374 U.S. 203 (1963).

[9] Schempp v. School Dist., 201 F. Supp. 815 (E.D.Pa. 1962), *aff'd*, 374 U.S. 203 (1963) and Murray v. Curlett, 228 Md. 239, 179 A.2d 698 (1962), *rev'd* 374 U.S. 203 (1963).

school day. At the school involved, the daily opening exercises included Bible reading and also recitation of the Lord's Prayer. The students and their parents were advised that any student might absent himself from the classroom where the reading and prayer took place, or if he remained, he might refrain from participating. In the second case the Board of School Commissioners of Baltimore adopted a rule providing for opening exercises in the city schools including Bible reading and/or the Lord's Prayer. Students whose parents so requested were excused. The Court in each case held that the prayers and Bible reading violated the establishment clause of the Constitution. Again only one justice dissented.

The Court, in its discussion of the establishment clause, expressed far reaching views and principles. First it pointed out that it had already been stated that neither a state nor the federal government can pass laws which aid one religion or all religions.[10] Then quoting with emphatic approval from a previous dissenting opinion of Justice Rutledge,[11] the Court stated that the purpose of the first amendment "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[12] To this end the test of invalidity under the establishment clause was stated to be: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[13]

The majority opinion quoted the statement in the *Engel* case concerning placing "the power, prestige and financial support of government" behind a particular religious belief.[14] Further, Justice Brennan, in a concurring opinion, commented on the *Engel* case, stating that New York, in authorizing the Regents' prayer, had acted contrary to the establishment clause "when it placed the 'power, prestige and financial support of government' behind the prayer."[15]

The constitutional ground for both decisions is the provision of the first amendment that "*Congress* shall make no *law* respecting an

[10] 374 U.S. at 216, citing Everson v. Board of Educ., 330 U.S. 1, 15 (1947).
[11] Everson v. Board of Educ., *supra* note 10 at 31-32.
[12] 374 U.S. at 217.
[13] *Id.* at 222.
[14] *Id.* at 221.
[15] *Id.* at 264.

establishment of religion . . . ." When local school authorities provide for voluntary prayer and Bible reading in a school's opening exercises it is obvious that *Congress* has not made a *law,* and the constitutional provision appears not even remotely applicable. But the fourteenth amendment reads, "[N]or shall any state deprive any person of life, *liberty,* or property, without due process of law." What is included in the "liberty" here mentioned? The Supreme Court in *Cantwell v. Connecticut*[16] said that the liberty embodied in the fourteenth amendment includes the liberties guaranteed by the first amendment, and therefore the fourteenth makes the state legislatures as incompetent as Congress to enact laws respecting an establishment of religion or prohibiting the free exercise thereof.[17] There is plausibility in saying that "liberty" includes the constitutional prohibition against laws impairing the free exercise of religion; and under the facts of the *Cantwell* case which directly raised this question,[18] that was all the Court needed to say. But the Court went beyond what was actually before it for decision and stated that the liberty protected by the fourteenth amendment includes the prohibition against laws respecting an establishment of religion.

Later in *Murdock v. Pennsylvania,*[19] another case involving only the free exercise of religion, not the establishment clause, the Court again said that the fourteenth amendment makes the first, including the establishment clause, applicable to the states.[20] Other cases,[21] including both prayer decisions, have repeated the same doctrine, usually citing one or both of these earlier cases.

The process has, then, become one of broad synthesization in the decisions involving the religious provisions of the first amendment. Moreover, as demonstrated, the Court in a particular decision has made statements going far beyond the case in hand. Then it has used such statements as authority for later holdings, thus extending the area of the constitutional prohibitions.

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[16] 310 U.S. 296 (1940).

[17] *Id.* at 303.

[18] The case involved a prosecution for violation of a statute requiring permission of an administrative officer to solicit funds for a religious cause.

[19] 319 U.S. 105 (1943).

[20] *Id.* at 108.

[21] School Dist. v. Schempp, 374 U.S. 203, 215 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962); Torcasso v. Watkins, 367 U.S. 488, 492 (1961); McGowan v. Maryland, 366 U.S. 420, 429-30 (1961); Zorach v. Clauson, 343 U.S. 306, 309 (1952); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210 (1948); Everson v. Board of Educ., 330 U.S. 1, 8 (1947).

Since in each case the point was irrelevant to the decision, the Court did not explain in either *Cantwell* or *Murdock* why "liberty" in the fourteenth amendment includes the establishment clause of the first.[22] The opposite would seem to be true. The language that a state shall not deprive any person of liberty "without due process of law" does not appear to have any relation to the prohibition against making any law respecting an establishment of religion. Could such a law be made *with* due process of law? Certainly if the framers of the fourteenth amendment really had intended by it to prohibit the states from making any law respecting an establishment of religion it would have been easy for them to say so, with the first amendment before them as a model,[23] rather than leaving the prohibition to be arrived at by the Court by a dubious interpretation of their language.[24]

Moreover, the establishment clause is a prohibition on Congress in making laws. If the fourteenth amendment extends the first to the states it would seem, as stated in *Cantwell*,[25] to be a limitation on legislatures in making laws. But the Court in later cases said that the limitation is on the *conduct* of governments, state and federal.[26] Thus the Court makes the establishment clause apply not just to

[22] It has been pointed out that the establishment clause was applied by the Court to the states without argument or reasoning. Comment, 57 Nw. U.L. Rev. 578, 585, 590 (1962). Thus this exceedingly important constitutional doctrine came about by statement and reiteration, not by reasoned decision.

[23] An amendment called the Blaine Amendment which did provide that no state shall make any law respecting an establishment of religion was before Congress in 1876, but was lost in the Senate. Down to 1929 it was reintroduced twenty times without result. Corwin, *The Supreme Court as National School Board*, 14 Law & Contemp. Prob. 3, 17 (1949); Comment, 64 Harv. L. Rev. 939 (1951). What could not be enacted into the Constitution by the constitutional processes, the Court read into the Constitution.

[24] Dean Griswold points out that it took "some rather broad construing" to make the first amendment applicable to the states. Griswold, *Absolute Is In the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 Utah L. Rev. 167, 171 (1963). "To get the establishment clause 'incorporated' into its [the fourteenth amendment's] words calls for quite a constructional wrench." Sutherland, *Establishment According to Engel*, 76 Harv. L. Rev. 25, 41 (1962). Corwin, *supra* note 23 at 19, and Long, *Is the First Amendment Made Applicable to the States by the Fourteenth?*, 49 A.B.A.J. 345 (1963), argue that "liberty" in the fourteenth amendment does not include the establishment clause.

[25] 310 U.S. at 303.

[26] Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947); see notes 5-6, *supra*.

Congress, or state legislatures, but also to school boards. Probably under the Court's view, even a teacher could not voluntarily say a prayer in a public school classroom, since she is an agent of the government. There are those who think this is a very good thing, but it is a long way from anything said in the Constitution.

By prohibiting laws respecting an establishment of religion the framers of the first amendment did not intend to prohibit prayer and Bible reading in the public schools. This is obvious, since at the time of the enactment of the amendment there was no public school system.[27] At that time schools were private, and they were largely owned and operated by religious groups and denominations.[28] Prayer in these schools was accepted practice,[29] and religion was regarded as a principal subject for study.[30] If the fourteenth amendment did make the establishment clause applicable to the states, its intended meaning was made applicable too, and as demonstrated it could not have been intended to mean that prayer in any of the schools was prohibited.

If no support can then be found for the conclusion that the framers of the first and fourteenth amendments *intended* to invalidate prayer and Bible reading in the public schools,[31] it remains only to examine the broad principles the Court has laid down to justify the holdings, in order to see if such principles are supported by the language of the amendments, the intent of their framers, or the history, traditions, practices and beliefs of the nation.

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[27] School Dist. v. Schempp, 374 U.S. 203, 238 & n.7 (1963) (concurring opinion); Comment, 63 COLUM. L. REV. 73, 81 (1963).

[28] School Dist. v. Schempp, *supra* note 27. The public school system in this country is there shown to date from the 1820s and 1830s. Justice Jackson dates it from about 1840. Everson v. Board of Educ., 330 U.S. 1, 23 (1947) (dissenting opinion).

[29] Engel v. Vitale, 18 Misc. 2d 659, —, 191 N.Y.S.2d 453, 470 (Sup. Ct. 1959), *aff'd*, 11 App. Div. 2d 340, 206 N.Y.S.2d 183 (1960), *aff'd*, 10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 (1961), *rev'd*, 370 U.S. 421 (1962).

[30] The Northwest Ordinance for the government of the territory of the United States northwest of Ohio, adopted in 1787 by Congress under the Articles of Confederation, provided, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 51, 52 n.(a), Art. III (1787).

[31] Justice Brenan concurring in School Dist. v. Schempp, 374 U.S. 203, 237-38 (1963), concedes that the framers of the establishment clause gave no "distinct consideration" to whether the clause forbade devotional exercises in public institutions.

The Court repeatedly refers to the "wall of separation" between church and state prescribed by the Constitution.[32] As previously noted, no wall of separation is mentioned in the Constitution. Instead the phrase comes from a letter written by Jefferson years after the adoption of the first amendment, in which he stated that the purpose of its provisions was to erect such a wall.[33] In opinions on the religion provisions of the first amendment the Justices have given great weight to views expressed by Jefferson and Madison on the ground that both were influential in bringing about adoption of the provisions. The Court has referred to Madison as the author of the amendment,[34] and also as its "architect."[35] However, Madison was not the draftsman of the amendment. He did draft a proposed amendment, but it was not adopted. The adopted amendment was instead drafted in committee[36] at a time when Jefferson was not even in the country.[37] This does not indicate that his views were not influential—doubtless they were—but his absence impairs his position to state with authority what the amendment as drafted was intended to mean. It seems unwarranted to ascribe the views of these two Virginians to the representatives of the other states who participated in drafting and ratifying the first amendment. Especially is this true in view of the fact that a number of those states had established churches at the time,[38] and the amendment's provision that Congress shall make no law *respecting* an establishment of religion not only prevented Con-

[32] Engel v. Vitale, 370 U.S. 421, 425 (1962); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 211 (1948); Everson v. Board of Educ., 330 U.S. 1, 18 (1947); Reynolds v. United States, 98 U.S. 145, 164 (1878).

[33] The letter was written by Jefferson in 1802. Comment, 63 COLUM. L. REV. 73, 82 n.66 (1963).

[34] Engel v. Vitale, 370 U.S. 421, 436 (1962).

[35] McGowan v. Maryland, 366 U.S. 420, 430 (1961). In Everson v. Board of Educ., 330 U.S. 1, 31 (1947) (dissenting opinion joined by Justices Burton, Frankfurter and Jackson), Justice Rutledge refers to the first amendment as "the compact and exact summation of its author's [Madison's] views formed during his long struggle for religious freedom." By the double jointed process of first naming Madison as the author and then importing his views into the amendment the Justices read into the amendment much more than it says. The dubious validity of so doing is emphasized by the fact that Justice Rutledge conceded in a footnote that Madison's draft of the amendment was not adopted. *Id.* at 39 n.27.

[36] Corwin, *supra* note 23, at 11-12.

[37] He was in Paris. *Id.* at 13.

[38] *Id.* at 11-12.

gress from making an establishment of religion but also from interfering with those established.[39]

If Jefferson and those who felt as he did wanted to provide a wall of separation they could have framed a provision saying so, but whether they could have had it adopted is another matter. The long and short of it is that no such provision was adopted. "[W]hat was submitted for ratification was the text of the First Amendment, not Jefferson's figure of speech."[40]

The Court has not stopped with construing the first amendment to require this wall of separation. No church was involved in the prayer decisions. Religion was. The Court has made separation of church and state mean separation of government from religion. Certainly no such thing as this was intended by those who framed and enacted the first amendment. The first Congress which proposed the amendment also provided for chaplains in both Houses and the armed forces.[41] It is unlikely that the same Congress which made such provisions also intended to make them unconstitutional under the amendment it proposed. The Declaration of Independence had already announced the common conviction of our revolutionary forefathers as to the source of the rights later contained in the Constitution when it was stated that "[A]ll men are created equal; that they are endowed by their Creator with certain unalienable rights."

Beginning with George Washington and continuing to John Kennedy it has been the practice of Presidents of the United States upon taking office to ask the help of God.[42] Oaths of office by federal statute conclude with the words, "So help me God."[43] The sessions of the Supreme Court itself are opened with the cry, "God save the United States and this Honorable Court."[44] Our Presidents annually proclaim a national day of Thanksgiving, and Thanksgiving Day is a legal holiday by resolution of Congress.[45] It is prescribed by resolu-

[39] *Id.* at 12.

[40] Fahy, *Religion, Education, and the Supreme Court,* 14 LAW & CONTEMP. PROB. 73, 83-84 (1949). That Jefferson's views were not fully shared by his contemporaries is made plain even by a writer arguing for his views. Konvitz, *Separation of Church and State: The First Freedom,* 14 LAW & CONTEMP. PROB. 44, 57, notes that Jefferson, as President, refused to proclaim fasting and thanksgiving "as my predecessors did."

[41] Engel v. Vitale, 370 U.S. 421, 437 n.1 (1962) (concurring opinion).

[42] *Id.* at 446 (dissenting opinion).

[43] REV. STAT. § 1757 (1875), 5 U.S.C. § 16 (1958).

[44] Engel v. Vitale, 370 U.S. 421, 446 (1962) (dissenting opinion).

[45] 55 STAT. 862 (1941), 5 U.S.C. § 87b (1958). One of the last messages

tion of Congress that the President shall proclaim one day each year as a National Day of Prayer.[46] Both houses of Congress have chaplains and open their sessions with prayer.[47] There is compulsory chapel at the army, navy, and air force academies.[48] Our official national motto is "In God we trust."[49] The same words appear on our coins and currency by statutory requirement,[50] and they are sung in our National Anthem. The pledge of allegiance to the flag includes the words "under God."[51] Sunday observance laws existed in all the states at about the time of the adoption of the first amendment,[52] and still do in almost all the states.[53] Christmas is a legal holiday,[54] and in North Carolina, for example, Easter Monday is a bank holiday.[55] Public schools, colleges and universities have baccalaureate services. There are departments of religion in some state universities.[56] Deductions from income for contributions to religious organizations are allowed by law for income tax purposes.[57] Church property and income is exempt from taxation.[58] These are no mere collection of isolated examples. They are part of a continuing stream of religious thought and expression in the life of the nation. They are part of the American tradition. They demonstrate that neither was there in the beginning nor is there now a wall of separation between our government and religion.[59] This position is substantiated by an opinion in 1892 by the Supreme Court in which it

of President Kennedy to his countrymen was his Thanksgiving Day Proclamation issued November 4, 1963. In it he recalled that "our first President in the first year of his first administration proclaimed November 26, 1789, as 'a day of public thanksgiving and prayer.'" Pres. Proc. No. 3560, 28 Fed. Reg. 11871 (1963).

[46] 66 Stat. 64 (1952), 36 U.S.C. § 185 (1958).

[47] Engel v. Vitale, 370 U.S. 421, 446 (1962) (dissenting opinion).

[48] *Id.* at 437 n.1 (concurring opinion).

[49] 70 Stat. 732 (1956), 36 U.S.C. § 186 (1958).

[50] 69 Stat. 290 (1955), 31 U.S.C. § 324a (1958).

[51] 68 Stat. 249 (1954), 36 U.S.C. § 172 (1958).

[52] McGowan v. Maryland, 366 U.S. 420, 433 (1961).

[53] *Id.* at 435.

[54] 52 Stat. 1246 (1938), 5 U.S.C. § 86a (1958).

[55] N.C. GEN. STAT. § 103-4 (1958).

[56] Including the University of North Carolina.

[57] INT. REV. CODE OF 1954, § 170(c).

[58] Such laws, state and federal, are cited and discussed by Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation,* 14 LAW & CONTEMP. PROB. 144 (1949).

[59] Much less has any such wall been kept "high and impregnable" as the Court said it must be. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

summarized important historical documents and practices[60] verifying its conclusion that "this is a religous nation."[61]

Our presidents, courts and legislatures have acknowledged our dependence on God and invoked his aid. The tradition was continued by President Lyndon Johnson when, on the tragic day of the assassination of President Kennedy, Johnson concluded his brief airport statement to the American people with the words, "I ask your help, and God's."[62] Like our revolutionary forefathers who framed the Constitution, President Johnson sought the support of God at a time of great crisis, and did not seem worried about thus lending the prestige of government to belief in Him. Acknowledging their dependence on God and seeking His blessing is what the school children did in reciting the Regents' prayer. In so doing they were completely in accord with the concensus of religious beliefs found in those utterances and manifestations which are part of our religious tradition and its official expression.

Briefly, by way of review, the Court has repeatedly stated that the first amendment erects a wall of separation between church and state, and has interpreted this to mean separation between religion and government. It has said, however erroneously, that the purpose of the amendment was to create a complete separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. It has indicated that the power, prestige and financial support of government may not be put behind a particular religious belief. Further, not only may there be no aid to one religion, there may be no aid to all religions. If the Court adheres consistently to such principles, what will the effect be on the many expressions of religion in our public life?

Chaplains for legislatures and the armed forces, and compulsory chapel in the army, navy, and air force academies, are plainly inconsistent with a "wall of separation" between religion and government, and it is also clear that in these instances "the power, prestige and financial support of government is placed behind a particular

[60] Church of the Holy Trinity v. United States, 143 U.S. 457, 465-71 (1892).

[61] *Id.* at 470. Governmental expressions, practices and laws favorable to religion are listed in Engel v. Vitale, 370 U.S. 421, 437-43 (1962) (concurring opinion), and also in the dissenting opinion, 370 U.S. at 446-50.

[62] N.Y. Times, Nov. 23, 1963, p. 1, cols. 2 & 3.

religious belief," namely belief in God.[63] In a footnote in *School Dist. v. Schempp*,[64] the Court stated that it was not passing upon a situation such as military service where unless the government permits voluntary religious services to be conducted with use of government facilities, military personnel would be unable to practice their faiths. This bodes ill for chaplains in legislative bodies and compulsory chapel in the academies of the armed forces, for no such rationalization would be applicable to them, nor would it be available when military units are not stationed in isolated places.

Thanksgiving Day proclamations and laws making Thanksgiving a legal holiday certainly lend support to a religious belief,[65] namely that God exists, otherwise there is no one to thank on such a day. Of course, to avoid reaching an unpopular and perhaps, to the Court, disastrous conclusion that official Thanksgiving is unconstitutional, the Court might find a secular purpose for such a day, as it found a secular purpose as the basis for sustaining Sunday observance laws against attack on first amendment grounds.[66] Doubtless thankfulness is a human trait to be encouraged, and has psychological and social value, but thankfulness with no one to thank would be a futile thing not likely to further any social or psychological values. And what about Christmas and Easter Monday as legal holidays? These holidays are Christian in origin and present meaning, although the Court might conceivably sustain Christmas as an aid to commerce. Doubtless it is, but such a judicial recognition of the corruption of the meaning of Christmas would be no forward step.[67]

May there be Christmas and Easter observances in the public schools? If these days so important to children go unobserved, while

[63] The writer of a note in 24 OHIO ST. L.J. 173, 177 (1963), thought that prayer in convening the sessions of Congress may well be a violation of the Constitution under the decision in *Engel*, but doubted whether any party would have standing to challenge the practice.

[64] 374 U.S. 203, 226 n.10 (1963).

[65] In the 1963 Thanksgiving Day proclamation of President John F. Kennedy are the words, "On that day let us gather in sanctuaries dedicated to worship. . . ." Pres. Proc. No. 3560, 28 Fed. Reg. 11871 (1963). Surely this was governmental support for religion.

[66] Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinly, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

[67] "Christmas, I suppose, is still a religious celebration, not merely a day put on the calendar for the benefit of merchants." Engel v. Vitale, 370 U.S. 421, 442 n.8 (1962) (concurring opinion).

much to-do is made over Columbus Day, Veterans' Day and Arbor Day, the children are likely to absorb the impression that their schools disfavor religion, not that the schools are neutral. But to observe them as anything but days of religious significance would be to distort their meaning and again leave the impression of hostility to religion.[68]

Baccalaureate services are occasions where public schools and colleges give expression to a religious point of view; that is what such services are for. Our national motto and its presence on coins and in our national anthem are inconsistent with any "wall of separation" between religion and government, and they put the power, prestige and financial support of government behind a particular religious belief, namely that we do trust in God. Equally inconsistent with the Court's announced principles is our pledge of allegiance to the flag. Our presidents apparently have been violating the constitution in their inaugural addresses for generations, for their expressions of faith in God beyond doubt have put the power, prestige, and to some degree, the financial support of government behind belief in God. And what of such great utterances as the Declaration of Independence, with its avowal that men are endowed by their Creator with unalienable rights, and Lincoln's Gettysburg Address, which exhorted the people to resolve "that this nation, under God, shall have a new birth of freedom?" True, the Court in a footnote in *Engel*[69] indicated that school children might be officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Diety, and the Court conceded in the same footnote that there are many manifestations in our public life of belief in God. The Court referred to these as patriotic or ceremonial occasions. But suppose someone were to take the glowing religious spirit in these documents seriously and recite them meaning every word, and not as a mere patriotic or ceremonial expression? Would the Constitution then be violated?[70] And even though these great utterances of the past may

[68] See Comment, 57 Nw. U.L. Rev. 578, 593 (1962).

[69] 370 U.S. at 435 n.21.

[70] The question may seem fanciful, but Sutherland, *supra* note 24, at 37 n.34, brings out that after the *Engel* decision the New York Commissioner of Education forbade the Hicksville public schools to use part of the third verse of the Star Spangled Banner as an official prayer, but allowed it to be sung or recited. Perhaps the Commissioner, in permitting the words to be

be recited, from now on no more such great utterances may be made by our leaders in their official capacities in times of national crisis if the Court is to be taken at its word.

It may be argued in connection with some of these practices that their effect in impairing the requirement of separation of religion from government and in putting the power, prestige and financial support of government behind a religious belief is minimal, and the Court may perhaps not invalidate them for that reason. However, in *Engel* the Court considered the view that the Regents' prayer was so brief and general that it created no danger to freedom of religion, and the Court answered by quoting Madison: "[I]t is proper to take alarm at the first experiment on our liberties."[71] This leaves the Court in a position to take alarm at even our national motto and our flag salute if it wants to. Nor would the fact that some of the religious practices in our public life, such as Thanksgiving Day proclamations, have been of long standing prevent the Court from taking belated alarm at them. As already pointed out, prayer and Bible reading have existed in our schools from the beginning of the nation, and in many of our public schools since their infancy.

It may also be argued that in the case of some of the expressions of religion in our public life no one would have standing to sue to prevent the practices, and therefore no case could be presented to the Court wherein it could hold them unconstitutional. Such an obstacle furnishes no secure barrier against such holdings by the Court unless it wants to find such a barrier.[72] The Court in the *Schempp* case[73] made the point that the laws and practices there involved could be challenged only by persons having standing to complain, but found such standing in school children and their parents although they were not obliged to participate in the prayer and Bible reading. If

used in song but not in prayer, overlooked the fact that prayers are frequently sung or chanted.

[71] 370 U.S. at 436. Again in School Dist. v. Schempp, 374 U.S. 203, 225 (1963), the Court said that it was no defense that the religious practices were minor encroachments on the first amendment, and used the same quotation from Madison.

[72] Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 17-22 (1961), discusses the problem of standing to sue, and notes that sometimes the Court ignores the problem. He finds in the Court's decisions on the matter a confusing diversity rather than clear precedent.

[73] 374 U.S. at 224 n.9.

the Court were to conclude that any of the various expressions of religion in our public life amount to an establishment of religion it could find that such establishment put official and public pressure against the views of a dissenter, such as an atheist, and interfered with his right to be free from any such governmental establishment and its pressures toward conformity, and that this impairment of his rights gave him standing to sue.[74]

In support of the Courts' position it can be argued that although the framers of the first amendment did not have in mind such results as outlawing prayer and Bible reading in the schools, still changes in the character and religious beliefs of our population justify different results in the application of the old principles contained in the amendment.[75] With the immigration of people from all over the world there have come to this country groups whose religions are diverse, and there is a strong moral case, so it can be argued, against conducting in the public schools religious exercises which are contrary to the beliefs of children and their parents belonging to various minority groups. Thus the Court's position, though it be a departure from previous concepts of what the first amendment requires can be ascribed to a growing public and judicial sensitivity to the beliefs and feelings of all manner of people, and a mounting belief that respect for the inherent worth and dignity of every person requires that his religious views be not affronted in our public institutions and practices. As we grow more truly moral old principles gain greater content.

Such a moral case for the Court's expansion of the meaning of the first amendment is appealing. But decent regard for the religious beliefs of other people is not a moral requirement only on majorities in their conduct toward minorities. Such a moral principle also makes its demands on minorities in their relations with majorities. The minority groups which have come to this country from many lands to enjoy the religious freedom which prevails here do not themselves display any great sensitivity to the feelings and beliefs of others when they set about impeaching the expression in our

[74] Sutherland, *supra* note 24, at 35 raises the question, "Where a state does something amounting to 'establishment', will the Supreme Court enjoin it on the suit of any member of society who dislikes the policy?"

[75] Such a view was expressed by Justice Brennan. School Dist. v. Schempp, 374 U.S. 203, 240 (1963) (concurring opinion).

public life of the the religious views which have from the beginning been part of the American tradition. The Jew or Moslem or Buddhist may choose to witness with tolerance practices in which he does not participate, and when he does so he gives better witness for his own religion than when he seeks to suppress the religious practices which are traditional in the public life of the people among whom he dwells. Such religious expressions can be respected without being embraced. When a Christian people[76] opens its doors to men of all views and creeds, affording them the religious freedom denied them in other lands, that people ought not by so doing to lose its right to carry out its own previous practices because the newcomers hold different religious views.

Moreover, the minorities which seek by lawsuits to remove expression of our religious tradition from our public life may in the end help destroy the foundations of the religious freedom in the name of which they make their attacks.[77] The American people from the beginning have grounded their belief in freedom on their religious faith. The Declaration of Independence asserted that men are endowed by their Creator with unalienable rights, including liberty. The Preamble to the Constitution of North Carolina recites, "We, the people of the State of North Carolina, grateful to Almighty God . . . for . . . the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings . . ."[78] Comparable provisions are to be found in the constitutions of other states.[79] In the Gettysburg address Lincoln called upon the people to resolve: "[T]hat this nation, under God, shall have a new birth of freedom . . . ."[80] President Kennedy in his inaugural address declared: "The world is very different now . . . . And yet the same revolutionary beliefs for which our forbears fought are still at issue around the Globe—the belief that

[76] Griswold, *supra* note 24, at 173-74, points out that virtually all of the immigrants who came to this country by the time of the adoption of the Constitution were Christian.

[77] "This . . . has been, and is, a Christian country, in origin, history, tradition and culture. It was out of Christian doctrine and ethics, I think it can be said, that it developed its notion of toleration." *Id.* at 176.

[78] N.C. CONST. preamble.

[79] Justice Froessell in Engel v. Vitale, 10 N.Y.2d 174, 183, 176 N.E.2d 579, 582, 218 N.Y.S.2d 659, 663 (1961) (concurring opinion), points to a similar provision in the Preamble to the Constitution of New York and adds that virtually every state constitution contains similar references.

[80] AM. JUR. 2D, DESK BOOK 76 (1962).

the rights of man come not from the generosity of the state but from the hand of God."[81] Religious convictions are the declared foundation of our American liberties. If our public life may no longer embody and declare such religious convictions then they can no longer effectively play their historic role in furnishing the foundation for our belief in freedom.

The prayer and Bible reading held invalid in the Court's prayer decisions were wholly voluntary. No pupil was obliged to participate or even to be present. Each enjoyed religious freedom in the matter. In his concurring opinion in the *Schempp* case,[82] however, Justice Brennan pointed out that the participation of the group as a whole puts a pressure on each child to participate since there is in children a desire to conform. Justice Brennan amassed behind this familiar fact an impressive array of support from behavioral scientists showing that children are disinclined to flout "peer-group norms."[83]

It is true that withdrawal from the opening exercises in the school marks the withdrawing child as someone different from the group. However, the Jew, the atheist, and members of other minority groups are persons who are different and intend to be. If their children are to become members of such groups they will have to choose to be different also, and to resist their inclinations to conformity with the mass. The student who asks to be excused from attendance on a Jewish holiday voluntarily marks himself as different, but no one contends that all the other students should be excused too so that no one will notice that the Jew is a Jew. No constitutional provision can protect persons who are different from being seen to be different. We cannot by constitutional provision protect a child from being black or white, male or female. If the public schools were to try to convince the children that they are all the same color, sex, or religion the schools would be trying to implant patently absurd notions. If the schools lead the children to understand that they are diverse in many ways, but that no one should be subjected to any disesteem, indignity or rejection on account of such diversity they will be preparing the pupils for life in a democracy such as ours with its great variety of people.

[81] LOTT, THE INAUGURAL ADDRESSES OF THE AMERICAN PRESIDENTS 269 (1961).
[82] 374 U.S. at 289-92.
[83] *Id.* at 290.

If the influx of minority groups does not afford a convincing basis for the Court's version of the meaning of the first amendment, can its version be justified by pointing to a change in attitude on the part of the people as a whole? It is said that it is a *constitution* which the Court is expounding.[84] By this is meant that the document contains broad principles which have to be adapted to the changed conditions and views of later generations.[85] It is true that the United States Constitution, although it is a written one, is in operation partly an unwritten one. What it means depends not just upon its literal words and the intent of those who enacted them; the interpretation arises partly out of the life of the people. Their deeply held convictions on fundamental principles may change and develop, and the changes may represent permanent growth, not mere transient fluctuations in public opinion. Their way of life may also change, requiring new adaptations of old constitutional provisions.

No such considerations support the principles laid down by the Court as to the scope and meaning of the religion provisions of the first amendment. There is no movement in our national life with which the decisions keep the Constitution up to date. The decisions keep the Constitution up to date only with the changing views of the Court. There is nothing to show that the people have changed their deeply held views on the relation of government and religion. As already brought out, with numerous examples, there has been up to the present moment a continuous interrelationship between the religious convictions of the people and their public institutions, life, and official pronouncements. Chaplains in the armed forces and legislative bodies, Thanksgiving Day proclamations, Christmas and Easter Holidays, baccalaureate services in the public schools and colleges, and the like are still part of the American scene and will be unless the Court says, "No." It was in 1954 that the words "under God" were added to the pledge of allegiance to the flag,[86] and in 1956 Congress made "In God we trust" our national motto.[87] The report of a nationwide Gallup Poll dated August 11, 1962 showed that

[84] *Id.* at 241 (concurring opinion).

[85] "We can live in the atomic age under a horse-and-buggy constitution only because the Supreme Court has kept the Constitution up to date, so to speak, through constant revision by means of interpretation." Konvitz, *supra* note 40, at 50.

[86] 68 Stat. 249 (1954), 36 U.S.C. § 172 (1958).

[87] 70 Stat. 732 (1956), 36 U.S.C. § 186 (1958).

80 per cent of parents of public school children approved religious observances in the public schools and only 14 per cent disapproval. The figures for the views of all people were 79 per cent approval, 14 percent disapproval.

The reverent, spontaneous, nationwide turning of our people to God in the dark days following the assassination of President Kennedy showed that religious faith is still an inextricable part of our national life. This turning to God for guidance, this spontaneous upsurge of prayer, was participated in by multitudes of people, and also by their government officials speaking in their official capacities. There was no separation of government from religion in this time of crisis, and it is fortunate for our country that there was not. One of history's recurrent and most insistent lessons is that when a people's spiritual life wanes their nation perishes.

The American people do indeed believe in separation of church and state, and this writer shares the belief. We want no church established by the state. But the people do not want separation of belief in God from our public life, as they have abundantly demonstrated. Every prayer and expression of faith in God is not necessarily a church.

The writer does not believe that the Court is authorized to make its own views as to policy into constitutional requirements, nevertheless the underlying policy concerning exclusion of prayer and Bible reading in the public schools will be further examined. First, is there a need for a national policy in the matter which ought to be enforced on all localities? There is diversity of general opinion concerning allowing or forbidding such prayer and Bible reading,[88] just as there has been diversity in the holdings of the state courts on the subject. Most of the state courts have sustained such practices.[89] Since there are different views and local practices, there is no visible reason why one view and one policy ought to be imposed.[90]

Far the most serious criticism of the Court's decisions and opinions concerning the application of the religion provisions of the first amendment to public school education is that the Court is

[88] The divergent opinions of important persons, religious groups and publications are noted by Butler, *The Regent's Prayer Case: In the Establishment Clause "No Means No,"* 49 A.B.A.J. 444 (1963).

[89] 16 VAND. L. REV. 205, 206-07 (1962).

[90] Baker, *The Supreme Court and the Freedom of Religion Mélange,* 49 A.B.A.J. 439 (1963); see Griswold, *supra* note 24, at 173.

making a major contribution to the secularization of our way of thinking. The Court is sensitive to the religious conflicts of earlier centuries and to the persecutions of dissenters when particular religions were officially established.[91] This historical background weighs heavily in the Court's decisions on the meaning of the religion provisions of the first amendment. The Court, though, does not appear to be equally sensitive to a far more deadly conflict of global dimensions going on in our own time. It will be tragic if by over-extension of constitutional provisions arising out of the religious conflicts of earlier centuries the Court prevents the people from coping successfully with the perils of a desperate idealogical conflict in our own day.

Part of the present all pervading world-wide clash called the cold war is a conflict of basic ideas about the nature of man and the final nature of reality. From ancient times materialists have held the view that the ultimate reality in the universe is matter and force. Man himself is but matter and force in highly intricate arrangement. Opposed to materialism has been the religious view that the final reality is God, Who is infinite Mind and Spirit. The essential nature of man is not in the matter of which he is composed, but is in his mind and spirit, made in the image of God. The twentieth century has seen a mounting tide of secularistic thought, *i.e.*, thought excluding religion. Communism is a militantly materialistic and avowedly atheistic ideology, which has already impressed its beliefs on a considerable portion of mankind, and proposes to capture the minds of all men. To do so it is pressing its world revolution. But materialism and secularism are not confined to communists. They are pervading also the thought of the non-communist world. In this country one reason is the change in the nature of education in the schools.

In the early years of this nation's life the schools were largely established and maintained by religious groups, and religion and religious versions of truth were part of the thought presented in the schools. Then came the rise of the system of public schools founded and supported by government. Being secular in origin, what they taught became increasingly secular.[92] Now the Supreme Court in the

[91] Engel v. Vitale, 370 U.S. 421, 432-33 (1962). See Everson v. Board of Educ., 330 U.S. 1, 8-11 (1947).

[92] See Comment, 36 So. CAL. L. REV. 240, 246 (1963). In Illinois *ex rel.*

name of the first amendment is insisting that education in the public schools be wholly secular.[93] The inevitable result will be further secularization of our ways of thinking.[94] Plainly if from the first grade through college a student is presented all knowledge and all thought from a purely secular viewpoint, in the end his thought about all realities, including himself, will be secular in nature. This follows logically, and the logic is verified by what is going on in American ways of thinking. Newspapers, magazines, books, radio and television, the media through which the people express their thought, increasingly reflect the secular nature of our thinking. To develop in detail this point would require more than the space here available, but the point will be illustrated by one extremely important example.

Basic in the life of any people are its convictions concerning what is morally right and what is wrong. There are many secular versions of the nature of right and wrong. One of these is that what is right and wrong for a particular people at any given time is a matter of their accepted beliefs. These vary. For example, the ancient Germanic tribes, the Japanese in the Middle Ages, and the American people of today have had widely different beliefs as to the nature of right. The set of beliefs of each group constitute what is right for that group. As the beliefs of the group change, right for them changes also. Right is the mores of a time and place.

Such a version of right makes moral nomads of the human race. Since there is no right existing as a reality in and of itself, there is no moral destination for humanity and no moral progress since there is

McCollum v. Board of Educ., 333 U.S. 203, 216 (1948), Justice Frankfurter, concurring, refers to "The sharp confinement of the public schools to secular education...."

[93] "Our constitutional policy... does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree." School Dist. v. Schempp, 374 U.S. 203, 218 (1963), quoting with approval from a dissenting opinion in Everson v. Board of Educ., 330 U.S. 1, 52 (1947).

"Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a *secular* program of education, may not be effected consistent with the First Amendment." *Id.* at 225. (Emphasis added.)

[94] In Engel v. Vitale, 10 N.Y.2d 174, 184, 176 N.E.2d 579, 583, 218 N.Y.S.2d 659, 664 (1961), Justice Burke, concurring, referring to the contention that the first amendment requires rejection of any religious element in the public schools, wrote, "This, of course, would force on the children a culture that is founded upon secularist dogma."

no right to progress toward. If all the people come to accept evil practices, then the practices cease to be evil. Being accepted they become a new mores. When a Kinsey report shows that most American men have sex relations outside marriage,[95] we ought not to condemn such practices as wrong. Thus any imaginable moral evil can justify itself by becoming widespread enough. Nevertheless this variety of thinking is permeating popular thought and expression, and we hear much about shifting moral values, as if such shifts were self justifying.

Such views have consequences. If people are persuaded that there are no right and wrong existing as such, but only current beliefs, the obligation to do right is relaxed, since we may as well change our moral beliefs to more pleasureable ones. The general moral decline in our time, with its rapidly growing crime rate,[96] has accompanied the loosening of moral convictions. But of course if right is only the mores of time and place there is no moral decline, just a new kind of mores.

Vastly different from this and other secular versions of right and wrong and far more exacting is the religious version. Great religions of the world teach that right and wrong, good and evil, are realities in and of themselves and that righteousness is part of the nature of the supreme mind and spirit, God, Who is the ultimate reality in the universe. God requires of man that he do right and abstain from wrong. From this viewpoint the deliberate wrongdoer puts himself in defiance of reality, as does one who jumps from the top of a tall building in defiance of the law of gravity.

The writer believes that a far better case can be made for this version of right than for any secular one; further that morality wanes when the religious version is discarded. Washington in his Farewell Address warned: "[R]eason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle."[97] Nevertheless, under the Supreme Court's version of the

[95] KINSEY, POMEROY AND MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 392 (1948).

[96] Serious crimes reported increased ninety-eight per cent between 1950 and 1960. UNIFORM CRIME REPORTS 1 (1960). Part of the increase is obviously due to population growth, but crime outstripped population growth by over four to one.

[97] Quoted in School Dist. v. Schempp, 374 U.S. 203, 280 n.56 (1963) (concurring opinion). Jefferson regarded religion as the alpha and omega of the moral law. Corwin, *supra* note 23, at 14.

first amendment, religion cannot be taught as truth in public schools. Courses can be taught *about* religion, but religion cannot be taught.[98] Secular versions of all reality may be taught as truth; religious verisons as such may not be, if our public school education is to be secular.

The Court has intimated that the place for religion is the church and home, not the public school.[99] Many agree. It cannot be gainsaid that home influence is critical in the training of a child. Why, then, do we not leave secular instruction to the home? Because if that were done the great majority of children would be poorly educated. Parents have neither the time nor the knowledge required to educate their children in all the manifold subjects which make up their secular education from the first grade through college. It must be remembered that education of a religious nature does not include only the instillation of religious belief. It includes presenting bodies of knowledge from a religious standpoint, not a purely secular one. How many parents are qualified to do this? For example, in the matter of the nature of right and wrong, already noted, how many parents are qualified to teach the various secular versions, such as utilitarianism, pragmatism, moral relativity, and ideological concepts of right and wrong such as those found in Nazism and communism, and to show that all of these are inadequate and incomplete without the truths contributed by religion? Or suppose a parent does not accept psychological determinism, with its teaching that conduct depends on such factors as heredity and environment, and that individual power of choice in making moral decisions is a myth.[100] Suppose the parent thinks that acceptance of such a doctrine leads to individual irresponsibility and is a corrupting influence on persons and societies. Assuming that the average parent knows that there is such a thing as psychological determinism, how many would be

[98] School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

[99] See *id.* at 226, and the concurring opinion of Justice Brennan, 374 U.S. at 230, 273-74. See also Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 218, 220 (1948) (concurring opinion).

[100] "[I]n certain psychiatric groups, it has become a sign of modernity and scientific maturity to go all out for determinism, to believe that man is a helpless victim of his genes and his environment." Guttmacher, *The Psychiatric Approach to Crime and Correction,* 23 LAW & CONTEMP. PROB. 633, 635 (1958). In Hartung, *A Critique of the Sociological Approach to Crime and Correction,* 23 LAW & CONTEMP. PROB. 703, 725 (1958), free will is referred to as mysticism.

qualified to show that it is only a disputed theory, not established truth, and that the individual's responsibility for his moral choices taught by religion is part of the total truth? From the practical standpoint the education of children in the various subjects of study will be received in the schools, which for most children means the public schools. If all the subjects are presented in school from a purely secular standpoint, the child becomes an adult with a secular outlook on reality as a whole, with his religion narrowed to an area of diminishing importance. The communists, being unqualified materialists and secularists, have gone all the way and ascribe to religion no importance at all.

It is true that the churches afford religious education in the Sunday schools. These are of great value. But when a young person is taught secular courses by paid teachers educated for the purpose, is compelled by law to attend, and in high school and college is taught by persons expert in particular fields of secular knowledge, some of them outstanding authorities in these fields, all of them paid professional people, and such study is the students' full time occupation until he reaches adult life, all supported by the vast resources of government, the volunteer Sunday school teacher, given half an hour of the students' time a week if he chooses to attend, is under a considerable handicap.

The parent who wants his child to be instructed in various fields of knowledge in the light of religious understanding can, legally, send his child to a school or college maintained by a church or religious organization.[101] The Supreme Court has held that a state may not require that school attendance be at a public school.[102] But jurisprudential experience shows that an abstract legal freedom of choice does not result in actual freedom to choose if economic necessity dictates the choice.[103] To most of our citizens the choice to set up denominational schools and send their children to them is not a free choice. Parents in their capacity as taxpayers must contribute to public schools and colleges. If a group of religious persons wants to maintain a denominational school for their children, and besides that

[101] See School Dist. v. Schempp, 374 U.S. 203, 242 (1963) (concurring opinion).

[102] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[103] See Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 195-98 (1914).

are obliged as taxpayers to contribute to the public schools their children do not attend, they carry a heavy double burden. The result is that most students receive public school education, which means secular education. Religious persons are being compelled to pay for teaching a secular version of truth whether they like it or not.

The Court's insistence on secularization of public school education is part of its more general insistence on secularization in law and governmental activity. The Court has held that laws banning commercial activities on Sunday do not violate the first amendment.[104] Its opinion in the first of the companion cases on the subject brought out that at about the time of the adoption of the first amendment each of the states had laws restricting work on Sunday,[105] and almost every state now has some type of such Sunday regulation.[106] This should have sufficed for the decision of the case, because such an almost universal practice showed that the first amendment was not intended to invalidate such laws, nor was the fourteenth, nor is there any shift in public beliefs and practices justifying a changed interpretation of the first amendment to make it condemn such laws. But the Court chose to go on to find that there was a secular purpose to be served by a weekly day of rest, and to hold the Sunday laws valid by reason of such secular purpose. Thus the Court, without any necessity for so doing in order to decide the case, read into the first amendment a prohibition of state laws which serve religious purposes without being justified by secular objectives.

The Court has held that the first amendment does not prohibit a state from spending tax funds to pay bus fares of parochial school pupils as part of a general program for paying bus fares for children to go to school.[107] The Court said that the state could not contribute tax funds to support an institution which teaches the tenets of any church,[108] but viewed paying the bus fares as an aid to parents in getting their children, regardless of their religion, safely to school. The Court had earlier held that tax funds could be used to supply free school books to school children, although some of the children went to sectarian schools. The books were not religious in nature and

[104] Cases cited note 66 *supra.*
[105] See McGowan v. Maryland, 366 U.S. 420, 433 (1960).
[106] See *id.* at 435.
[107] Everson v. Board of Educ., 330 U.S. 1 (1947).
[108] *Id.* at 16.

were for the use of the children, not the schools.[109] The Court in the *Schempp* case, citing its decisions on Sunday laws and bus transportation, said flatly, "[T]o withstand the strictures of the Establishment Clause there must be a *secular* legislative purpose and a primary effect that neither advances nor inhibits religion."[110]

The people are sensitive to the danger arising from the secularization of our system of education, and have resorted to various devices to prevent religion from being kept out. One scheme has been a program whereby for one class period each week children whose parents so desired were released from their regular classes to attend, in the school building, classes for religious instruction by persons supplied for the purpose by religious groups. A plan of this kind was held invalid by the Court as contrary to the establishment clause.[111] The Court, however, held valid a similar scheme which provided for religious classes off the school premises.[112] Prayer and Bible reading as part of opening exercises are another device to bring religion into the educational system.[113] Such devices as these are woefully inadequate to offset the secular nature of the instruction in the regular classes, but at least they prevent the children from absorbing the impression that religion has no truth at all to offer if it is given no place in their education. Some state universities have departments of religion,[114] but these are under a serious handicap if they must only teach about religion, and may not teach religion. Other departments may offer their intellectual wares as truth, but departments of

[109] Cochran v. Board of Educ., 281 U.S. 370 (1930).

[110] 374 U.S. at 222. (Emphasis added.)

[111] Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). The released time plan is discussed by Justice Frankfurter. *Id.* at 222-25.

[112] Zorach v. Clauson, 343 U.S. 306 (1952). Comment, 57 Nw. U.L. REV. 578, 594 (1962), refers to a "shared time" arrangement receiving limited trial in Pennsylvania, under which students are allowed to take "objective" courses such as mathematics and the physical sciences in public school while taking "value content" courses such as social studies and religion in parochial schools.

[113] By 1962 at least twenty-two states had by statute or court decision required or permitted either Bible reading or prayer or both in the public schools. Only a few states had expressly prohibited either one. See Comment, 63 COLUM. L. REV. 73, 87 (1963).

[114] The teaching of religion in state colleges and universities is discussed by Louisell and Jackson, *Religion, Theology, and Public Higher Education,* 50 CALIF. L. REV. 751 (1962). The authors argue that "The dialogue of an intellectual community is not complete without the participation of theology." *Id.* at 792.

religion may not, if they are confined to showing what various religions are and may not show that there is any truth in them.

Religious educational institutions are indirectly subsidized by government in many ways, such as tax exemption[115] and deductions of contributions to them from income for income tax purposes.[116] The recent federal legislation setting up an approximately 1,200,000,000 dollar program to help colleges build classrooms, laboratories and libraries makes the program available to privately endowed and church connected schools as well as those publicly owned and financed.[117] Perhaps the only way of putting religious schools and wholly secular schools on exactly the same basis would be for school tax laws to provide that the taxpayer may designate whether his payment is to go to secular schools or some designated denominational school. If, as the Court has decided, he may send his children to a parochial school, why not his money? At least this would embody in practice the declared principle against forcing a person to pay for teaching what he does not believe.[118] However, the purpose of this article is not to present or advocate particular plans for keeping religion from being pushed out of the education of our children. Such plans are emerging out of the give and take of popular movements and views. The purpose of the people to find ways and means, consistent with their religious liberty, of preserving their religious beliefs now imperilled in the worldwide ideological struggle, should not be thwarted by the Supreme Court in the name of principles read into, rather than derived from, the first amendment. The people are trying to reconcile the great values of religious freedom with the great values of religion. It is a task the Court cannot perform. The Court should

[115] See Paulsen, *supra* note 58.

[116] INT. REV. CODE OF 1954, § 170.

[117] 77 Stat. 363 (1963). This legislation appears to fall within the condemnation of the Court's declaration: "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." Everson v. Board of Educ., 330 U.S. 1, 16 (1947), quoted in Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210 (1948). If the Court were to hold this legislation unconstitutional such a decision would make an additional road block in the way of working out solutions for the problem of avoiding the danger of secularization while preserving religious freedom.

[118] See Everson v. Board of Educ., 330 U.S. 1, 60 (1947) (dissenting opinion of four Justices).

not needlessly raise constitutional obstacles to its performance.[119] That the people can work out the problem of the place of religion in our national life was illustrated when for the first time a Catholic was elected President of the United States. The Court could hardly have required the election of an occasional Catholic as President as a means of eliminating in practice religious qualifications for office.

It is uncertain what the Court will decide as to the validity of the many interrelationships between religion and government it has not yet passed upon, some of them enumerated in this discussion, if cases calling them into question come before the Court. If it applies the principles it has stated requiring the complete separation of government from religion it will invalidate many of the manifestations of religion in our public life. But the Court has not consistently adhered to the position that there must be an impregnable wall of separation between religion and government. As previously indicated, the Court long ago pointed to the religious influence which has been part of the country's history and tradition, and concluded that "this is a religious nation."[120] The Court and individual justices have repeatedly noted the many fashions in which religious belief is incorporated into our official pronouncements and public life.[121] In *Zorach v. Clauson*[122] the Court declared that the first amendment does not say that in all respects there shall be separation of church and state,[123] and in the same case the Court said: "We are a religious people whose institutions presuppose a Supreme Being."[123a] It may be that the Court will not press on with decisions eliminating religion from our public life.

One problem remains. What can be done about the prayer

[119] There is a wide difference between a broad interpretation of constitutional principles to enable the people to realize their purposes through the action of their representative bodies, and a broad interpretation to deny them such realization of their purposes, especially so vital and proper a purpose as that of preserving a spiritual outlook on life against the rising worldwide tide of materialism.

[120] See note 61 *supra.*

[121] See, *e.g.,* School Dist. v. Schempp, 374 U.S. 203, 213 (1963); Engel v. Vitale, 370 U.S. 421, 446-50 (1962) (dissenting opinion); Zorach v. Clauson, 343 U.S. 306, 312-13 (1952); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 253-55 (1948) (dissenting opinion).

[122] 343 U.S. 306 (1952).

[123] *Id.* at 312. In School Dist. v. Schempp, 374 U.S. 203, 303-04 (1963), Justice Brennan, concurring, tentatively suggests certain religious manifestations in our public life which *may* not be unconstitutional.

[123a] 343 U.S. at 313.

decisions? And if the Court does make further decisions holding unconstitutional traditional manifestations of religion in our public life, what can be done about that, if it turns out that the people want no such destruction of the American tradition?

One course is disobedience. Constitutional requirements have in the past been abolished by the people through the process of disregarding them. Thus at the turn of the century legislation for the improvement of the condition of workers was frequently held unconstitutional by the courts on the ground that the legislation impaired the freedom of contract guaranteed by the Constitution. Nevertheless the tide of popular support for such legislation continued to rise, and in the end it was the courts which gave way and changed their decisions.[124] At one time the courts held invalid the use of subpoenas by administrative agencies in making investigations not related to adjudicating cases or law enforcement. But popular attitudes and statutes reflecting them persisted in supporting such power in administrative agencies without the limitations imposed by the courts, and again it was the court decisions which changed.[125]

The people drank the eighteenth amendment out of the Constitution. But it is uncertain whether there will be any such revolt against the Court's spiritual prohibitions as there was against the prohibition of alcoholic beverages. The type of person who believes most strongly in religious values is likely also to be foremost in respect for law, and to realize that general disregard for law is itself an evil. Disobedience to law as laid down by the Court is not a remedy to be advocated with any enthusiasm.

There is the remedy of amending the Constitution, and after the first prayer decision literally dozens of amendments on the subject were proposed in Congress.[126] But it is hard to capture the full American tradition on the matter of the relationship between government and religion in any short set of words to be inserted in the Constitution. Of course, though, specific decisions can be overturned by specific constitutional amendments. The Constitution could be so

[124] See Pound, *supra* note 103.

[125] DAVIS, ADMINISTRATIVE LAW § 31 (1951).

[126] Sutherland, *supra* note 24, at 50-51. He states that there were "fifty or so" amendments to overrule the prayer decision in the *Engel* case. Butler, *supra* note 88, at 444, states that one of the proposed amendments had the endorsement of forty-nine state governors. Only Rockefeller of New York abstained.

amended as to provide that nothing in the Constitution shall be interpreted to prohibit prayer and Bible reading in the public schools. But the Constitution is not the place to provide and change specific rules of law, it is instead the place for basic principles. What is needed more than a new amendment is a construction of our present first amendment which does not do violence to tradition.

Reexamination of the powers and functions of the Court by the people and by the Court could be fruitful. The Court ought not to sit as a continuing constitutional convention. The constitutional function of the Court is not to make the Constitution. The Judicial power extends only to cases and controversies.[127] In cases concerning the religion provisions of the first amendment the Court at times has seemed more concerned with announcing constitutional doctrines than with simply deciding the case at hand on the basis of principles necessary to the decision. Thus in the bus transporation case[128] the Court, besides pointing out that the bus fares were paid for the purpose of getting the children safely to school, which was the basis for the decision, said by way of dictum,

> 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 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, 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."[129]

Most of what the Court said in this often quoted dictum had very little to do with whether school authorities could pay bus fares to transport children to parochial schools, which was what the Court

[127] U.S. CONST. art. III, § 2 (1); Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894).

[128] Everson v. Board of Educ., 330 U.S. 1 (1947).

[129] *Id.* at 15-16.

had before it to decide. But in *Illinois ex rel. McCollum v. Board of Educ.*[130] the Court held that the classes in religion on the school premises fell under the ban of the first amendment, "as we interpreted it in *Everson* [the bus case] . . . ." Then the Court repeated the above quoted statement from *Everson.*[131] Thus the Court in the bus case made statements vastly beyond the case before it, and then used its statements as authority for a later holding.

Of course interpretation of the provisions of the Constitution applicable in a particular case requires some creativity. If no such case as a particular one before the Court has been decided by it before, the decision will add something to the content and meaning of the constitutional provision involved. However, the creativity should be within the guide lines of the constitutional provisions and their intended meaning. Interpretation should not become invention.

One who reads the religion decisions of the Court is likely to be impressed with the sincerity of the Court's views and with the fact that it has conscientiously sought to promote what it conceives to be policy best serving the national well being. But convictions of a Court are not necessarily constitutional requirements.[132] Constitutional fundamentals ought not to shift with transient currents of public opinion, much less should they shift with the changing personnel of a court.[133] Further, the constitutional function of the Court is not a matter properly to be decided by turning the issue into a debate on the relative merits of a "broad" construction of the Constitution versus a "narrow" construction.[134] The question is one of the Court's constitutional power. Going beyond that power cannot be justified by labeling the result "broad construction."

If it be true that rapid, even revolutionary changes in our way of life and our beliefs make imperative constitutional changes which

[130] 333 U.S. 203 (1948).

[131] *Id.* at 210-11.

[132] Justice Holmes wrote concerning the fourteenth amendment: "I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (dissenting opinion).

[133] "All these cases reveal the justices at sixes and sevens in interpreting religious liberty. Their interpretations involve shadings and nuances baffling even the sharpest intellects. They frequently depend on the oscillation of a justice or two, or the fortuitous advent of a new member to the bench." Baker, *supra* note 90, at 442.

[134] Comment, 36 So. CALIF. L. REV. 240 (1963), contrasts the views of the "broad constructionists" and the "narrow constructionists."

cannot await the slow and cumbersome process of amending the Constitution, then serious consideration should be given the question whether the Supreme Court is the appropriate body for making the changes. The Preamble to the Constitution indicates that the power to make the Constitution is in the people. The Court has a narrow base of representation. Its members are appointed by the President, by and with the advice and consent of the Senate.[135] Approval by the Senate is given in the great majority of cases.[136] Further, constitutional changes by the Court cannot be made as need arises, but must await the bringing of lawsuits. If indeed prayer in the public schools is unconstitutional, we had this unconstitutional practice for generations before a few persons decided to bring a lawsuit. We would have had the practice for the indefinite future if these few private parties had not gone to court. In their lawsuit conducted by their lawyers not only were their constitutional rights settled but so were the rights of millions of persons not before the Court and whose lawyers were not there either. In his first inaugural address Lincoln said:

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[137]

This statement of Lincoln's may not be favored by many modern liberals, but at least they are unlikely to prove that he was a member of the John Birch society.

There have been proposals for curtailing the power of the Supreme Court.[138] It has been proposed that Congress have authority by two-thirds vote to overrule decisions of the Court.[139] The General Assembly of the States proposed an amendment to the Constitution of the United States setting up a Court of the Union composed of the chief justices of the highest courts of the several

[135] U.S. CONST. art. II, § 2[2].
[136] HYNEMAN, THE SUPREME COURT ON TRIAL 45-46 (1963).
[137] LOTT, THE INAUGURAL ADDRESSES OF THE AMERICAN PRESIDENTS 121 (1961).
[138] HYNEMAN, *op. cit. supra* note 136, at 48-53.
[139] See Sutherland, *supra* note 24, at 50 n.76. Such proposals are discussed by HYNEMAN, *op. cit. supra* note 136, at 52.

states to review judgments of the Supreme Court relating to the rights reserved to the states or to the people by the Constitution.[140]

Objections to these suggestions are apparent. Against making Congress the court of last resort is historical experience abundantly showing that decision of cases by legislative bodies has not worked well.[141] The proposal for a Court of the Union has been objected to on the ground that it would result in adjudication of national constitutional questions, not by a national court, but by judicial representatives of the states.[142] However, there is a converse objection[143] that the present Supreme Court, resting on a purely national base, is rapidly destroying the constitutional plan of a federation of states with a central government confined to the powers granted in the Constitution, and with the other powers, unless prohibited to the states, reserved to the states or to the people.[144] To meet such objections, a body could be devised with a broad base of representation, for example, a body composed of representatives one or more to be appointed by each of the following: the President, Congress, the Supreme Court, the state governors as a group, and the state chief justices as a group. The purpose here, however, is not to advocate any particular plan, but to suggest that if this is an age making rapid constitutional change necessary and if such changes are to be made other than by constitutional amendment, there should be careful and intensive public consideration as to the kind of body which should exercise such power. If the power is to remain vested in the Supreme Court this should be the result of a thoroughly considered national decision, not of inertia in leaving the power with the Court because it seems to have come to rest there now.

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[140] The General Assembly of the States is a biennial convention of state legislators and officials sponsored by the Council of State Governments. The amendment to establish a Court of the Union is one of three amendments proposed by the Assembly. As of June 17, 1963, this amendment had been approved by the legislatures of five states. Shanahan, *Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations,* 49 A.B.A.J. 631 (1963). Mr. Shanahan presents the case for the amendments. The case against them is presented by Black, *Proposed Constitutional Amendments: They Would Return Us to Confederacy,* 49 A.B.A.J. 637 (1963).

[141] Pound, *Justice According to Law,* 14 COLUM. L. REV. 1, 1-12 (1914).

[142] See Black, *supra* note 140, at 639. Professor Black does a better job of showing the defects in the suggested amendment than of showing that all is well at present.

[143] See Shanahan, *supra* note 140.

[144] U.S. CONST. amend. X.

Concerning future decisions on the constitutionality of particular aspects of religion in our public life, the best solution may well be a return by the Court to a policy of judicial self restraint,[145] motivated by a principle of constitutional interpretation to the effect that long established practices of the people deeply imbedded in their way of life should not be declared invalid in the name of constitutional provisions not intended to have any such effect.

[145] See Sutherland, *supra* note 24, at 40-41. The Conference of Chief Justices (of the state supreme courts) in 1958, by a vote of 36 to 8, adopted a resolution urging the United States Supreme Court to exercise judicial self-restraint by recognizing the difference between what the Constitution may prescribe and that which a majority of the Court may deem desirable when the Court determines questions as to the extent of national as against state powers and as to the validity of the exercise of powers reserved to the states. The resolution of the Conference also approved a committee report urging self-restraint on the part of the Court and declaring, "[T]he Supreme Court too often has tended to adopt the role of policy maker without proper judicial restraint." *What 36 State Chief Justices Said About the Supreme Court,* 45 U. S. News and World Report, Oct. 3, 1958, 92.

Judicial self-restraint would be furthered by a change of policy in selecting the judges for the Supreme Court. The majority of the members of the Court should be selected from among the ablest judges to be found on the state and federal appellate courts. For the country's highest court are needed those who have demonstrated ability as the country's ablest appellate judges. Judicial self-restraint is likely to be a developed capacity, and to be found in such judges. Political leaders, eminent practitioners, and law professors should not make up a majority of the Court. This view is not to be equated with merely requiring judicial experience for appointees to the Supreme Court, a much discussed subject. Experience as judges and achieved eminence as judges are not one and the same.