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Prayer in Public Schools

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PRAYER IN PUBLIC SCHOOLS†

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IT IS WELL AT THE OUTSET to define with precision the constitutional issue involved in *Engel v. Vitale*.[1] The issue was not simply prayer in public schools. No legal power can prevent a student from reciting privately his prayers while sitting in the school library or standing in the schoolyard provided he does not interfere with any academic assignments or with prescribed recreational employments. All prayer is personal, all prayer is a religious exercise, wheresoever it is said, in private or public institutions, and on every occasion. No description of prayer as ceremonial deprives it of its religious nature and meaning. Only the internal dispositions and, secondarily, the outward demeanor of a private individual or of a public official, determine whether he is truly praying or not. Prayer is always and on every occasion a religious exercise or it is not prayer at all. A ceremonial prayer which is not a religious act is a contradiction in terms.

Prayer may be individual when one prays by himself or even in the midst of others for his own intentions. And prayer may also be corporate as when several pray together in unison for one another, or for a purpose common to all of them. Corporate prayer may be at home as when a family prays together, or in a house of worship when a congregation professing the same creed takes part in a common liturgy. Corporate prayer may also be civic as when fellow citizens voluntarily unite to pray to God for divine blessings upon their country. From the earliest days of our history, it has been a time-honored and cherished tradition for our people to respond in prayer at the official request of government authorities on solemn public occasions, in times of impending peril,

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[1] 370 U.S. 421 (1962).

during war and in peace. Men, women and children of different religious confessions and church affiliations united by the common bond of belief in God have joined their hearts and minds in a corporate act of prayer for the preservation, survival and prosperity of America. Civic corporate prayer has been one of the most effective unifying spiritual bonds in our national history.

In the case before the high tribunal, no one disputed that prayer was a religious act. The Court admitted the absence of regulatory compulsion and punitive coercion.[2] The prayer in its simple wording was a solemn declaration of belief in the existence of Almighty God and a public acknowledgement of our dependence upon God as a nation as well as individually. There was no intent or effect of "teaching" a new belief in God.[3] The prayer was an open affirmation of a faith already possessed by every participant. The approval of the parents incontestably upholds this fact. The prohibition against any comments on the prayer was to ensure this fact. Voluntary participation and liberty of exemption gave the widest possible scope to personal response of conscience.

An Establishment of Religion

The Supreme Court ruled that because the prayer had been composed by a governmental agency it fell under the ban of the no establishment clause. Now this cardinal argument of the Court on governmental composition may not really be as telling as it seems. If by composition it is understood that the prayer originated in wording and meaning wholly with the New York Board of Regents and entirely on their own initiative then the argument is without foundation. The New York educational authorities were motivated in part by the broad public consensus authentically embodied in our national documents on the religious foundations of our Republic and, in part, by the rights and anxieties

[2] Justice Douglas made these detailed admissions in his concurring opinion: "First a word as to what this case does not involve. Plainly, our Bill of Rights would not permit a State or the Federal Government to adopt an official prayer and penalize anyone who would not utter it. This, however, is not that case, for there is no element of compulsion or coercion in New York's regulation requiring that public schools be opened each day with the . . . prayer. . . . The prayer is said upon the commencement of the school day, immediately following the Pledge of Allegiance to the flag. The prayer is said aloud in the presence of a teacher, who either leads the recitation or selects a student to do so. No student, however, is compelled to take part. The respondents have adopted a regulation which provides that 'neither teachers nor any school authority shall comment on participation or non-participation . . . nor suggest or request that any posture or language be used or dress be worn or be not used or not worn.' Provision is also made for excusing children, upon written request of a parent or guardian, from the saying of the prayer or from the room in which the prayer is said. A letter implementing and explaining this regulation has been sent to each taxpayer and parent in the school district. As I read this regulation, a child is free to stand or not stand, to recite or not to recite, without fear of reprisal or even comment by the teacher or any other school official. In short, the only one who need utter the prayer is the teacher; and no teacher is complaining of it. Students can stand mute or even leave the classroom, if they desire."

[3] Mr. Justice Douglas, in his concurring opinion, stated: "In the present case, school facilities are used to say the prayer and the teaching staff is employed to lead the pupils in it. There is, however, no effort at indoctrination and no attempt at exposition. Prayers of course may be so long and of such a character as to amount to an attempt at the religious instruction that was denied by the *McCollum* case. But New York's prayer is of a character that does not involve any element of proselytizing as in the *McCollum* case."

of religious-minded parents of students in the public schools. They were guided in the writing of the prayer in context and in words by state constitutions, by congressional resolutions and laws, by presidential acts, and by practices in the judiciary. Fifty state constitutions, in one way or another, acknowledge their dependence upon Divine Providence, express their gratitude to God as the Author of our civil and religious liberties, and pray for His continuing guidance and counsel in their government deliberations. In addition to legislative and military chapels and chaplaincies, acts of the national Congress and other deliberative assemblies have called for days of prayer through executive proclamations. The day after the national Congress passed the proposal which became the first amendment, it passed a resolution calling for the designation of "a day of public thanksgiving and prayer." This tradition of civic corporate prayer at the invitation of government officials has been, with but two exceptions, unbroken from the days of George Washington to the present administration. More precisely to the issue at hand, the Congress has officially prescribed and adopted the divine invocation on our coinage and currency, in the national anthem and motto, and in the Pledge of Allegiance to the flag. What the New York Board of Regents did was neither novel nor original. Only in a minimal sense—almost only in the capacity of an amanuensis—may it be said to be *their* composition. They simply gave expression to what the American people and their duly elected representatives have ratified and adopted in every decade of our national history.[4]

Some few reassuring voices insist that the Court decision might not proscribe the optional recitation of a prayer composed by nonofficials. But the fact and the law are that whatever takes place permissively in a state school under official supervision or conduct necessarily involves governmental responsibility to some degree or another. It is respectfully submitted that the high tribunal over-exaggerated the significance of the role of the New York Board of Regents in the construction of the prayer and foresaw potential dangers to Church and State wholly out of proportion to its real intent. It may be said that not every and any government involvement in a religious act is *eo ipso* suspect and tainted with unconstitutionality. One must look to the context, purpose, and concrete circum-

[4] While the majority opinion written by Mr. Justice Black pivots the decision technically on governmental composition of the prayer, construed as one of the exercises of a proscribed state-established church under the ban of the first amendment, Mr. Justice Douglas, on the other hand, settles upon governmental financing of religious exercises. Both the majority and concurring opinions isolate elements of state-church establishment, elements which by themselves are not necessarily derivative of nor conducive to state-church establishment. Indeed a governmental composition of a prayer—*not any prayer*—and certain governmental financing of religious exercises may be justifiably sustained by the religious liberty clause. (In the instant case, there was greater use of what was already financed. An additional specific expenditure of public funds was not entailed by the optional recitation of the New York prayer.) In severing these elements from one another, the way is paved for absolutizing an isolated element into a constitutional barrier whether or not anyone suffers an infringement of religious liberty and without regard to the equal protection which the law should extend to all, believer and nonbeliever, consentient and dissident. Such an absolutizing process gradually expands from a narrow legalism to a broad premise of proscription. Only recently, the New York Commissioner of Education ruled that a part of The Star-Spangled Banner may not be used as a school prayer. The radical source of the an-

stances of the religious act to ascertain its constitutional propriety. One would suppose that an officially prepared civic corporate prayer, publicly known, approved and consented to in advance, might have been favorably viewed as a calculated precaution to ensure the necessary constitutional safeguards against any surprise encroachments upon a sectarian conscience by the impromptu prayer of a well-meaning student or teacher. Of two likely opposing interpretations, the Court chose the negative one. The pivotal question may well have turned on the rights of religious-minded parents and school children to choose freely to participate in an official prayer modeled on our national documents, in an educational program, to impress upon the school children the moral and spiritual values which have been recognized as the basis of our free society.

Ancient History and Modern Law

As if to give substance to its fears about an official prayer, the Court reached back to sixteenth-century England and the Common Prayer Book which the Established Church imposed upon a nation. The employment of history in the determination of cases should be subject to more rigorous canons of constitutional relevance than was exercised in the ruling on prayer. The Common Prayer Book and its succeeding amended versions was composed by the Established Church of England with the deliberate intent of effectuating revolutionary doctrinal changes—at first upon those unsuspecting faithful who still clung to

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tinomies which have been inserted by court interpretation into the religious clauses of the first amendment is the as yet unsettled legal question (historically, there appears to be less doubt about it) whether the two clauses, dealing with no establishment and free exercise, are so correspondent to one another that an adjudication under one clause may not be at the expense of the legal guarantees of the other, or whether the two clauses may be interpreted in exclusive isolation to one another. Until and unless this question of the interrelationship of the two clauses is resolved, the absolutist construction of the no establishment clause which Mr. Justice Rutledge put forth in his dissenting opinion in *Everson* and which the Court adopted in *McCollum* is likely to prevail over the original authentic meaning of no establishment as explained by James Madison in his rejoinders to questions put to him in the debates of Congress. The danger involved in the absolutist interpretation is that the judiciary may over-reach itself by preempting the democratic political process and embodying on its own initiative public policy into constitutional law. In *Zorach,* the possibilities of relating the two religious clauses to one another harmoniously in specific programs of mutual accommodation seemed an implementation of Mr. Justice Black's assertion in *Everson* about "the interrelationship of these complementary clauses" and his warning against interjecting a religious discriminatory norm into the first amendment.

Another source of ambiguity is the fear of the extent to which government aid to religion may go. To date, the Court has not yet formulated practical norms beyond which the political process may not extend. The wide variety of legislative precedents from the beginning of the Republic to this day of governmental financing of religious life directly, indirectly, and incidently offers the greatest obstacles to the judicial construction of such norms. Perhaps in the last resort, public opinion may provide the practical wisdom to which intercredal dialogues hope to make sensible contributions. Some constitutional lawyers have opposed a "neutral principle" to the principle of neutrality in the area of federal aid to education. This neutral principle looks to the standard of public function and will not allow religion to be *the* cause for action or inaction because the religious clauses of the first amendment prohibit classification that would entail conferment of a benefit or the imposition of a burden. Under this neutral principle, the prayer case might have turned on the question whether civic corporate prayer was indeed a constitutionally justifiable exercise for the promotion of an educational program to foster in school children moral and

articles of faith according to papal teaching after the breach with Rome, and in the following century, upon alert and vigorously resisting Puritans. It was deliberately designed not only to change ancient ceremonial administration of the sacraments, but its wording was calculated to instill in the people the new theological doctrines of the Episcopal Church touching upon the meaning, substance, and validity of the sacramental rites. The Common Prayer Book was an instrument of radical credal changes prescribed for the willing and the unwilling, for the knowledgeable and the unknowing, and the English government was a party to this.[5]

The New York prayer was not a surprise encroachment upon sectarian confessions; it conformed with beliefs already held, it was imposed on no one, it was recommended to all, it was freely adopted by the local school board, and in the instant case, voluntarily participated in by all school children with the approval of their parents, with but one exemption—the highest degree of near unanimity possible.

The constitutional relevance of sixteenth- and seventeenth-century English history was without any substantive analogy to the New York case. The resort to the historical past does not enlighten if it serves to evoke ancient fears and premonitions out of tune with our times and our sensibilities. Americans have a right to fashion their own constitutional history in church-state relations without being burdened by the memories of religious wars and animosities of their distant forebears.

Perhaps in an effort to bolster the weakness of the historical analogy, the Court sought to bridge the span of centuries and the disparity of national experiences by the use of a "bad tendency" rule together with an agreement based on indirect coercive pressure. The majority opinion said that "a union of government and religion tends to destroy government and to degrade religion." To which we would add that when government encourages religious life as part of its spiritual heritage, it strengthens itself and enhances religious liberty. And both the dark and bright lessons of history will illustrate that the governments which show impartial accommodations for the exercise of religious liberty to all are the wonder of mankind and the hope of all churches. As for the indirect coercive pressure, it is no more—perhaps even less—than what might be inferred from voluntary salute to the flag with or without the divine reference, in the singing of the national anthem and in the program of released time for religious instruction.

It is no small cause for wonder that in all of the first amendment cases touching upon education and religion, at no time does the Court, in resorting to Jefferson, ever consider Jefferson's own plans for lower and higher education which he drew up for his own state of Virginia upon his retirement from the presidency. His educational plans of 1814[6], 1817[7], 1818[8], 1822[9],

spiritual values which have been traditionally part of our national heritage. The determination of this precise issue would in turn rest on the ulterior question whether it is part of the public function of tax-supported schools to transmit the spiritual heritage of the nation *as it is authentically embodied* in the official acts and the authoritative documents of American history.

[5] 2 HUGHES, THE REFORMATION IN ENGLAND 111-13, 121-26 (1954).

[6] JEFFERSON, *Plan for An Educational System,* in THE COMPLETE JEFFERSON 1064-69 (Padover ed. 1943) [hereinafter cited as PADOVER].

[7] JEFFERSON, *An Act for Establishing Elementary Schools,* in PADOVER 1072, 1076.

and 1824[10] disclose three principles to be permanent in Jefferson's mind. First, that a totally non-religious education is defective. Secondly, government is to offer impartial encouragement and, if need be, accommodations to expressions of religious life in state schools. Thirdly, in the manner of mutual accommodation and cooperative relationship, neither government nor religion is to lose any measure of its proper competence and independent jurisdiction. Jefferson never construed such cordial arrangements and mutual adjustments as tantamount to a union of Church and State which tends to destroy the one and degrade the other. If the high tribunal was in search of Jefferson's mind on a practice that bore some substantial constitutional analogy to the New York prayer it might have examined his draft for the establishment of state elementary schools which the Virginia Assembly enacted into law in 1817. In the eleventh provision of the act we read:

> The said teachers shall, in all things relating to education and government of their pupils, be under the direction and control of the visitors; but no religious reading, instruction or exercise shall be prescribed or practiced *inconsistent with the tenets of any religious sect or denomination.*

For Jefferson there was only one absolute and all controlling restriction on any religious exercise or instruction in the elementary grades; that it be not inconsistent with the confessional tenets of the school children. He was most anxious to guard the religious conscience of all minors against the more learned persuasion of adult instructors. All of his educational plans insist upon a positive doctrine of impartial and mutually beneficent accommodation between the religious conscience and the state schools. The New York prayer gave offense to no denominational confession. On the contrary, it was willingly recited precisely because it was in full accord with professed beliefs. We do not say that Thomas Jefferson should be considered the constitutional oracle of government relations with religion in education. But if the Supreme Court chooses to quote him, it ought to have recourse to the very documents that give his own explicit direct and pertinent testimony. Whether the Court might then be still willing to follow him remains at this time an open question.

One of the most engaging enterprises of the high tribunal is the frequency with which it employs James Madison's justly famed *Memorial and Remonstrance Against Religious Assessments* of 1785 and the ease with which its meaning is bent beyond its authentic purpose. In 1784, Patrick Henry proposed to the Virginia Assembly a "Bill Establishing a Provision for Teachers of the Christian Religion" with the expectation that such a comprehensive tax support would find acceptance with all Christians to take place of the abrogated provision for the support of the Anglican ministers alone. It was against this preference through tax support of *a* religion, a broadly defined christianity under the benign mantle of the Anglican Establishment, that Madison directed his famed *Memorial.*

> Who does not see that the same authority which can *establish Christianity,* in *exclusion* of all other Religions, may establish with the same ease any *particular* sect of Christians, in *exclusion* of all other Sects? That the same authority which can *force* a citizen to contribute three pence only of

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[8] JEFFERSON, *The University of Virginia, Aim and Curriculum,* in PADOVER 1097, 1104.

[9] JEFFERSON, *Freedom of Religion at the University of Virginia,* in PADOVER 957-58.

[10] JEFFERSON, *Regulations for the University,* in PADOVER 1106-11.

> his property for the support of any one establishment, may *force him to conform* to any other establishment in all cases whatsoever.[11]

The New York prayer was singularly free of any of these Madisonian premonitions. It allowed Christians of every denomination and non-Christians of any confession to join in a unifying corporate prayer wholly of their own choice and in accord with their own religious conscience. Fifty signers of the Declaration of Independence —34 Episcopalians, 13 Congregationalists, 6 Presbyterians, 1 Baptist, 1 Quaker, and 1 Catholic—confessed publicly to self-evident truths in the common patrimony of human nature which the Creator had endowed with certain inalienable rights. And Paul of Tarsus, Jewish Apostle of Christianity among the Gentiles, taught that knowledge of God is open to human reason apart from the teachings of divine revelation.

As for the Court's reference to James Madison, one may note that, apart from its misleading use of his *Memorial,* it scarcely takes any cognizance of Madison's own unequivocal explanation of the scope and meaning of the no establishment clause recorded in the congressional debates.[12] And further, it takes no note of the significant fact that ex-President Madison was one of the Commissioners for the University of Virginia for whom Jefferson drafted the educational plan of 1818 for submission to the legislature of the state, which declares that:

> [T]he proofs of. . . . God, the creator, preserver, and supreme ruler of the universe, the author of all the relations of morality, and of the laws and obligations these infer, will be *within* the province of the *professor of ethics;* to which adding the developments of these moral obligations, of those *in which all sects agree,* with a knowledge of the languages, Hebrew, Greek, and Latin, a basis will be formed *common to all sects.*

Psychology and Law

The establishment clause, the Supreme Court said, does "not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether the laws operate directly to coerce the non-observing or not." It may be that the Court was simply saying that, as in England today, direct governmental compulsion need not be a necessary incidence of proscribed establishment even though it almost always entails at least indirect coercive pressure. In a word, the Court ruled the element of compulsion to be constitutionally non-relevant and not as controlling as it had held in the *McCollum* and *Zorach* cases.

Indirect coercive pressure upon the religious nonconformist is everywhere in the air we breathe, apart from those circumstances where there is governmental provision for religious expression in public institutions. It takes its strongest emotional experience in a constraining feeling of embarrassment. This is generally the concomitant of most acts of dissent and nonconformity. Public law is committed to the defense of individual rights, to the remedy and redress of hurt rights, not hurt feelings unless the hurt is such that it effectively impedes the free exercise of personal choice. Public law is not required to convert the psychology of dissent into a constitutional principle. It is not the function of law to remove the situations wherein contrary choices may engender contrary feelings. The dissenter must be the first to acknowl-

[11] 2 THE WRITINGS OF JAMES MADISON 184-88 (Hunt ed. 1901). (Emphasis added.)

[12] 1 ANNALS OF CONG. 727 (1789).

edge that the condition for his own dissent is to live and let live. Good will in a community rests in great measure on people leaving others to their own choices. No man is an island to himself in society. Robinson Crusoe was seemingly free from any social inhibitions until one day he noticed the footprints of another and from that moment on, the law of mutual adjustment and tolerance set in. The right of the conscientious objector is to shield his own conscience, not to strike down the religious rights of his neighbors. We are all conscientious objectors and none of us should enjoy an exclusive privilege to the prejudice of others.[13]

If words have substantive meaning, a "captive audience" is an audience whose involuntary presence is forcibly detained or whose involuntary participation is compelled. To have denied the school children the choice of joining in the recitation of the prayer was to deny them the opportunity of sharing in the spiritual heritage of our nation. The governmental denial of freedom of choice is as much coercion as the imposing of an action. The argument that public law is required to ensure the conscientious dissenter impervious to indirect coercive pressure, divisiveness, and the likelihood of social stigma and isolation that may possibly follow upon a governmental program of religious accommodation, bears within itself a premise of assault upon the salute to the flag in our public schools to which the Jehovah Witnesses oppose their religious conscience.

We have travelled a full and truly *vicious* circle. From religious persecution, intolerance and church establishment to benign tolerance—to disestablishment—to equality of all faiths before the law—to equality of belief and nonbelief before the law—and now to the secularist and the religious dissenter's intolerance of religious belief in public law. The wry irony is that this is being done, we are told, in the name of and for the sake of religious liberty.

We are losing by default. We have taken our spiritual heritage for granted. We have allowed a creeping gradualism of secularism under one specious pretext after another to take over our public schools. A vociferous and highly organized pressure group is exerting its own form of indirect coercive pressure upon the American community. Determined to deflect our national traditions and heritage from their authentic historic course, it is cutting a devisive swath across the nation, advertising for clients to challenge in court what is obnoxious to them. Whoever works for the destruction of the positive doctrine of accommodation and mutual adjustment must shoulder the blame for uprooting the bonds of concord and friendship and forcibly injecting bitter antagonisms in our pluralistic society. Political and legal action *alone* cannot create the moral and social impulses which are the

[13] Jewish Orthodox want an exception for their ritual slaughter of animals in humane slaughter laws. Jehovah's Witnesses are exempt from the salute to the flag. Pacifists object to combatant and noncombatant military service. Christian Scientists are excused from hygiene courses. One atheist child wiped out a voluntary cooperative arrangement of five years standing by eight hundred Protestants, about twenty Catholics, and thirty Jews for religious instruction in public schools. Sabbatarians oppose Sunday Laws. Catholics oppose the use of public funds for the promotion of birth control instructions at home and in any foreign aid program. The Amish raise religious objections to the Social Security tax. These are but a handful of the instances of legally and politically effective protests. Is there any room for conscientious protest against godless education in public schools? Would Thomas Jefferson's protest be heeded today?

conditions of harmony in a community. With full regard for the radical and primary rights of *all* parents to guide the education of their children in public schools, as well as in independent private schools, members of a local community can strive with persevering good will to find a reasonable accommodation and mutual adjustment of one another's choices. In this way law becomes—as it ought—the formal expression of the practical wisdom of a self-regulating community. Dissidents and consentients should be motivated to the exercise of *cultivated* rights of men living in fellowship and not as strangers in a contest of absolute and conflicting claims.

The more we examine the context of the New York prayer and the circumstances attending its optional recitation, the more we discern the vast possibilities it offered for the increase of friendly community life.

First, the children and their approving parents of different faiths and church affiliations came together in a prayer based on the common bonds of their religious beliefs. Their religious sectarianism was in no way experienced as a barrier to the brotherhood of all men under the Fatherhood of God. One would suppose that with all the adult incantations about the intercredal relations and the counsels—on all sides—of charity and good-will against divisiveness, here indeed was a truly unitive bond of intercredal relations in the most sensitive time of the school children's formative years.

Second, it provided an opportune and excellent educational training and habituation to the exercise of individual choice in the midst of others according to the vaunted American boast of individualism and free self-expression. Religious differences are a very broad fact even for the most enlightened adults, and social adjustment in this matter is essential to good community relations. Should not the youngsters mature gradually in this delicate experience with civility toward one another without resentment and without inhibition? The circumstances for the corporate prayer provided an early schooling both for the dissidents and the consentients to advance in mutual reverence for one another's religious choices.

Third, the dissenter and the minority must surely be shielded from majoritarian imposition. So too must the majority be protected from the unilateral dictation of the absolute dissenter. It is indeed a strange pathology of our time that when people in increasing numbers freely choose to act agreeably in unison there is less cause for public gratification than in the uncompromising protestations of the dissenter. The numerical superiority of a consensual agreement should not be constitutionally suspect, and if conformity is the flower of human freedom, the wider the area of religious consensus among the variety of religious confessions, the greater will be the harmony among men of good will. Only when the dissenter treasures the liberties of others as his own and insists on equal freedom and the same legal immunity for opposing choices that he demands for himself, then will we be sure that he acts in the name of law and justice.

No one can deny that public law is burdened with an almost insurmountable task when it is confronted with the problems of religious pluralism. We are of the opinion that the voluntary nondenominational prayer was possibly one of the best, and at that, a minimal resolution of this thorny moral-legal problem.

Separation and Relation

Separation of Church and State in American law is uniquely an American experience. Its meaning derives from our own constitutional history from the days of the Northwest Ordinance to the recent construction of the chapel at the Air Force Academy in Colorado. Our separation of Church and State is a positive affirmation, not a negative protestation. Its paramount purpose is to preserve unimpaired and inviolable the freedom and independence of both Church and State. It is but the counterpart of an orderly and harmonious relationship of friendly powers, a relationship of cordial cooperation and of benevolent accommodation, not a relationship of mutually exclusive isolation. In *Everson*[14] the Court held for benevolent impartiality for believers and unbelievers equally alike. In *Zorach*[15] a positive doctrine of accommodation was opposed to a neutrality of total abstention, of indifference, suspicion and hostility. The New York prayer was indeed a reasonable and proper accommodation to the spiritual needs of our people in accordance with the spiritual heritage of

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[14] "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith or lack of it,* from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious beliefs." Everson v. Board of Educ., 330 U.S. 1, 16 (1947). (Emphasis added.)

[15] *"We are a religious people whose institutions presuppose a Supreme Being.* We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of the government that shows *no partiality* to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state *encourages* religious instruction or *cooperates* with religious authorities by adjusting the schedule of public events to sectarian needs, *it follows the best of our traditions.* For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a *callous indifference* to religious groups. *That would be preferring those who believe in no religion over those who do believe."* Zorach v. Clauson, 343 U.S. 306, 312 (1952). (Emphasis added.)

In the *Zorach* opinion which Mr. Justice Douglas wrote, he listed, with apparent approval and as giving substance to his argument, several tax-supported religious exercises by public officials and in public institutions: "Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and other references to the Almighty that run through our laws, our public rituals, our ceremonies, would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'" In *Engel v. Vitale,* Justice Douglas has forgotten the fastidious objector and attached himself to an absolutizing principle of government financing of religious activity (and every governmental action is tax-supported) that would abrogate the multitude of governmental involvements in religious exercises which he had cited with approval in *Zorach.* Now, apparently, a taxpayer may have stronger claims before Justice Douglas as a fastidious financier than as a fastidious conscientious objector.

our country. What absolute right has a dissenter to protest against such an orderly harmony when the government acts to foster the relevance of religion to our national existence according to the cherished traditions of our country? To what purpose then may a court reason, "If this is allowed to take place, dire consequences will *therefore* inevitably follow." Politics, social relations, and public law cannot be regulated solely by narrow legal ergotisms. Each human experience is invested with sensibilities of its own times and the present may presage a future wholly alien to the heavy hand of the past. The law of progress is applicable to public law as to other human enterprises. Far from being a dark beginning, a first experiment on our liberties, a portent of dangers to come, the New York prayer was, on the contrary, a refined product of American constitutional history on Church-State relations, sensitive to the rights of conscience of all—of parents and their children, of participants and nonparticipants, of equal neutrality between believer and nonbeliever, of impartiality among all the religious confessions, with due regard to the government's role to foster in public schools the relevance of belief in God to our national existence—and all above with immunity for personal choice.

Every generation of Americans has admitted to the role of the government in attesting to the religious foundations of our republic and official composition or adoption of divine invocations has been one of the traditional government practices in a great variety of government-supported religious exercises: the Presidential proclamations of days of prayer and thanksgiving, the prayerful invocation in fifty state constitutions, the prayer which opens each day's session of the Supreme Court, the religious inscription on our coinage and currency,[16]

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[16] Occasionally one hears and reads of statements (recently, by Rev. Dean Kelley of the Department of Religious Liberty, Council of the Churches of Christ) that religious inscriptions on coins and currency are a profane use of divine invocations. Really, no one may argue conclusively that there *must* be religious inscriptions on our coinage. But given the fact by congressional enactment, one may question the charge of impropriety of the employment of divine references on our currency. Radically it is a question of asceticism. Optimistic asceticism affirms that the original goodness of divine creation forever retains the image of godliness against any evil doing. All things remain sacred and for this reason St. Paul wrote that all creation calls out "Abba Pater" and our Divine Lord said that the stones would cry out in His praise if the jubilant shouts of the children had been stifled. Through the centuries men have quarried stones and marble to raise magnificent houses of worship. Most of the tangible articles used in divine services are of gold, silver and the finest raiment. There is too a somber asceticism once prevalent among the English and American Puritans which saw the danger of distraction or interference in these instrumentalities to the direct communication of the human heart with God. This view, however, is not relevant to the issue. The charge of profane use rests logically upon a presupposition of Manichaeism which considers corporeal and material things as somehow vitiated, tainted, and imbued with a radical principle for evil in eternal contest with the spiritual principle of Goodness for the allegiance of men. In this view, material things in no way can give glory to God. Optimistic asceticism affirms, on the contrary, that the source of evil does not spring from things—*falsitas non ex rebus sed ex peccatis* (St. Augustine) but from a love that is not God-centered—*nonfaciunt bonos vel malos mores nisi boni vel mali amores* (St. Augustine). Now, optimistic asceticism does not demand nor require that there be divine invocations on currencies. But it does deny that such inscriptions on coinage are a profane use. They are in accord with the dominical prayer for daily bread and may serve as a telling reminder that commercial instruments of exchange are not to be debauched by dishonest trafficking. Also, religious-minded citizens may wish divine

in our national anthem and motto, and in the salute to the flag—not to mention the public financing of legislative and military chapels and chaplaincies by the state and national governments. Now if federal and state government officials and public institutions may engage in religious activity why should the first amendment operate to greater duress upon a local school board and the school children who wish to say a prayer together? The New York prayer was no more a violation of the no establishment clause in public school activities than the optional participation in the singing of the national anthem, the Pledge of Allegiance, the released time religious instruction program, and in court proceedings, the statutory alternate of testifying under oath or by affirmation. In *Zorach,* we were told that the "problem, like many problems on constitutional law, is one of degree." But in the prayer case, the Court perceived an absolutizing principle which posed a threat to government and religion.

One Nation Under God

It is not in any way intimated that a civic corporate prayer so much in evidence in our public institutions and in our national documents would, if excluded from our public schools, bear within itself a "bad tendency" rule that might inexorably work to the development of a godless state in America. But in our times we have seen a highly civilized society whose government gradually restricted in their civil institutions the official profession of belief and dependence upon God and withdrew religious exercises exclusively to churches and homes. But when the tragic hour of conflicting allegiances bore upon its citizens, they obeyed with passioned submission and gratified acquiescence a supreme and absolute statal authority to the complete destruction of the state and to the enduring shame of their religious confessions. Perhaps the United States Supreme Court might have allowed a "good tendency" rule to be immanent in the civic corporate prayer to impress on all alike—on the participants and the nonparticipants—that there is a higher allegiance to God under which men must rule, that no patriotism may obey against the moral law, that personal immunity against arbitrary power is a divine mandate. It is not without profound symbolism that public authority should be a party to an acknowledgement of dependence upon God.

Thomas Jefferson once wrote:

> Can the liberties of a nation be thought secure, when we have removed their own firm basis, a conviction in the minds of the people that these liberties are the gifts of God?[17]

Public schools should share in the task of transmitting to our school children the relevance of a free order among men to the Divine Author of all liberties and accordingly allow this conviction to abide and deepen among the rising generation of Americans.

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blessing and providence for our national economy.

[17] Quoted by MORRIS, CHRISTIAN LIFE AND CHARACTER OF THE CIVIL INSTITUTIONS OF THE UNITED STATES DEVELOPED IN THE OFFICIAL AND HISTORICAL ANNALS OF THE UNITED STATES 35 (1864).