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Accommodating Religion in the Public Schools

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Comment

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I. INTRODUCTION

Religion and the American experience are inextricably intertwined. Indeed, "[w]e are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses."[1] Nevertheless, a hallmark of our system is the concept of separation between church and state—a concept based upon "the belief that a union of government and religion tends to destroy government and to degrade religion."[2] The maintainance of a complete separation between church and state, however, has become increasingly difficult as the level of governmental involvement in the lives of its citizens has become more pervasive.[3]

One area of government involvement is mandatory elementary and secondary public education.[4] In the context of education, the courts have been given frequent opportunities to define the bound-

1. Zorach v. Clauson, 343 U.S. 306, 313 (1952).
2. Engel v. Vitale, 370 U.S. 421, 431 (1962). *Accord*, Everson v. Board of Educ., 330 U.S. 1, 59 (1947) (Rutledge, J., dissenting) ("we have staked the very existence of our country on the faith that complete separation between state and religion is best for the state and best for religion").
3. *See* Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L.J. 3, 4 (1978).
4. For the purposes of this comment, references to "public schools," "public education," and the like refer only to the elementary and secondary levels. The application of the Constitution is much different at the post-secondary level. *See* Michaelsen, *The Supreme Court and Religion in Public High Education*, 13 J. PUB. L. 343, 345 (1964):

> *Engel, Schempp*, and such other church-state-education cases . . . involved children in elementary or secondary schools, *i.e.*, at a different age level than students in public higher education. Students in elementary and secondary schools come under compulsory school attendance laws whereas these laws do not apply to students in public higher education. Furthermore, there is an obvious difference in maturity level between a student in the eighth or ninth grade, for example, and a college or university student. Such factors as differences in age and maturity level could be of considerable importance in determining the constitutionality of some practice at the higher education level.

aries of the wall separating church and state,[5] and have concluded that absolute separation is neither possible nor appropriate, since it would deprive individuals of their right to "religious exercise . . . without interference."[6] Thus, religion must be allowed to have some role in public education.[7]

The role of religion in public education is not entirely clear. Notably, the separation principle is given a particularly strong emphasis in the context of education because children are immature, impressionable, and easily pressured into altering their conduct.[8]

5. For religion cases in the United States Supreme Court dealing with elementary and secondary public education, see Wisconsin v. Yoder, 406 U.S. 205 (1972); Epperson v. Arkansas, 393 U.S. 97 (1968); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948).

6. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 820 (1978) ("the principle evoked by the image of a wall furnishes less guidance than metaphor").

7. *See* Zorach v. Clauson, 343 U.S. 306, 313-14 (1952):

> When the state encourages religious instruction or cooperates with religious authorities . . . , 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.

McCollum v. Board of Educ., 333 U.S. 203, 236 (1948) (Jackson, J., concurring):

> The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

8. *See* Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1046 (1963). The United States Supreme Court explained the basis for emphasizing the separation principle in McCollum v. Board of Educ., 333 U.S. 203, 216-17 (1948):

> The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agent for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coersion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

Illustrating this is the ruling that, although a chaplain may speak to and pray before the United States Congress,[9] the same remarks by the chaplain may not be read verbatim at a public school assembly.[10] Nevertheless, a number of practices may be utilized by which the rights of individuals to freely exercise their religion may be accommodated in public schools.

The purpose of this comment is to examine areas of acceptable accommodation of religion within the public schools.[11] Incorporated within are the results of a survey of Nebraska public school superintendents designed to discover the practices of the various schools regarding accommodation of religion.[12]

II. THE LEGAL BACKDROP

A. Separation of Church and State

> [T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.[13]

The concept of separation between church and state has had a

Mr. Justice Jackson, dissenting in Everson v. Board of Educ., 330 U.S. 1, 23-24 (1947), explained further that public schools are organized

> on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.

9. Zorach v. Clauson, 343 U.S. 306, 312 (1952) ("Prayers in our legislative halls" do not violate the constitution).
10. *See* State Board of Educ. v. Board of Educ., 108 N.J. Super. 564, 582-85, 262 A.2d 21, 31-32, *aff'd*, 57 N.J. 172, 270 A.2d 412 (1970).
11. This comment does not deal with topics such as released time, which involves an accommodation that occurs off the school premises or excusing a student from activities that the student finds religiously objectionable, which raises no direct establishment clause issues (*see* Vaugn v. Reed, 313 F. Supp. 431, 433-34 (W.D. Va. 1970)).
12. A questionnaire was sent to the superintendent of each Nebraska school district listed as a Class 3 (Districts of 1,000 to 50,000 population, maintaining both elementary and high school education) or Class 6 (Districts organized to maintain high school education only) school district in the NEBRASKA STATE DEP'T OF EDUCATION, EIGHTY-FIRST NEBRASKA EDUCATION DIRECTORY 130-37 (1978-1979). Each superintendent was asked to complete the questionnaire by indicating his/her opinion as to the practices and policies that exist in the school district for which he/she works. Of the 235 questionnaires distributed, 206 were completed and returned.
13. McCollum v. Board of Educ., 333 U.S. 203, 212 (1948). The separation principle is based upon the establishment clause to the first amendment which states: "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

long and complex development in this country. It arose primarily from the persecution of religious groups during the centuries immediately preceding and contemporaneous with the colonization of America.[14] During these centuries, dominant religious groups utilized the power of the government to maintain their supremacy. This union of church and state resulted in religious persecutions of minority sects by the government, bloody religious wars, conflicts between the papacy and monarchies, and all kinds of corruption in both the church and state.[15]

The religious cruelties and lack of religious freedoms that existed in the Old World provided a primary impetus for the migration to the New World.[16] When the minority sects arrived in the New World and found themselves in a position of dominance,

14. *See* Everson v. Board of Educ., 330 U.S. 1, 9 (1947); A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 3 (1964).

15. Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1404-05 (1966). The United States Supreme Court has described the situation as follows:

> With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrine, and failure to pay taxes and tithes to support them.

Everson v. Board of Educ., 330 U.S. 1, 9 (1964).

16. There were undoubtedly many factors which encouraged early American settlement. Some modern historians have emphasized the economic note, that is, the colonists' desire for improving financial conditions, and especially for securing land of their own. Others have been impressed with the struggle for national ascendance in America because of its effect on the balance of power in Europe, especially the curbing of Catholic Spain and France—a movement encouraged by the British government. Still others call attention to the desire of large groups of middle-class people to get away from conservative restraints and to improve their social status by leaving countries where class lines were still fairly rigid. The reasons for making the long journey were indeed many and varied. Some Europeans yielded to their love of change and adventure, generally because a new world meant to them a new economic opportunity (available good land in the old countries was scarce); some hoped to escape political oppression, including some of the burdens of supporting reactionary governments in the old lands, with heavy taxes, military service, and other obligations.

These and other factors, social, economic, political, all played their part. Yet the fact remains that the religious factor, at one time

many of them could not resist the temptation to set up their own systems of church-state integration.[17] Thus, many of the Old World practices and persecutions were revived in America.[18] A few groups, nevertheless, withstood the temptation to repeat history and adopted declarations of religious toleration. Among these groups were those who had been the objects of the most severe persecutions in the Old World.[19] This experience of the early colonies both with and without an established state religion was a prime factor in the eventual acceptance of the separation principle as the touchstone for church-state relations in the United States.[20]

Passage of time in the early colonies saw the rise of dissention and bitter public struggles concerning established state churches.[21] The unrest was accompanied by a diminished devotion among the populace toward the established church.[22] These effects resulted from the migration of a varied and independent people to the New World. Prior to the migration, these people generally had been political liberals and religious non-conformists.[23] Indeed, they were a people with a reputation for bucking the establishment. It is not surprising, therefore, that religious uniformity and religious conformity compelled by the state authority did not blossom in the colonies. These dissentions and struggles gave rise to "the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[24]

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so exclusively emphasized and so exaggerated as to produce a reaction, is beginning again to receive due attention.

A. STOKES & L. PFEFFER, *supra* note 14, at 21.

17. *See* Everson v. Board of Educ., 330 U.S. 1, 9 (1964); Sky, *supra* note 15, at 1404-05.
18. Everson v. Board of Educ., 330 U.S. 1, 9-10 (1964).
19. Sky, *supra* note 15, at 1405. These groups included Rhode Island under Roger Williams, William Penn's Pennsylvania with Quaker origins, and Catholic Maryland.
20. A. STOKES & L. PFEFFER, *supra* note 14, at 24: "These practices [persecutions, obnoxious practices of dominant sects, and the imposition of taxes to support dominant sects] became so commonplace as to shock the freedom-loving colonials into a feeling of abhorence . . . [and] aroused their indignation. It was these feelings which found expression in the First Amendment."
21. *Id.*
22. *Id.* at 23.
23. *Id.* at 22.
24. Everson v. Board of Educ., 330 U.S. 1, 11 (1947). This link between religious diversity and religious toleration was observed by Voltaire. He wrote: "If there were one religion in England, its despotism would be terrible; if there were only two, they would destroy each other; but there are thirty, and therefore they live in peace and happiness." A. STOKES & L. PFEFFER, *supra* note 14, at 23 (quoting VOLTAIRE, LETTRES SUR LES ANGLAIS (A. Wilson-Green ed. 1931)).

Today, many Americans assume that a well-defined line of separation has been drawn between church and state in the United States.[25] Such an assumption is not entirely correct. Granted, "[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. . . . The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute."[26] However, the aura of finality and clarity that emanates from this statement is deceiving. Indeed, the United States Supreme Court has stated that:

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. . . . Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.[27]

The various courts in the United States have had frequent opportunities to apply the separation principle to a wide variety of fact situations.

As the courts have struggled to properly apply the separation principle, a tripartite test has emerged as the guide for distinguishing appropriate from inappropriate interminglings of church and state. The three criteria necessary for a religious act in school to be in accordance with the separation principle are: (1) the statute or practice must have a secular purpose; (2) the primary effect of the statute or practice must be one that neither advances nor inhibits religion; and (3) the statute or practice must not foster excessive governmental entanglement with religion.[28]

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25. O. ZABEL, GOD AND CAESAR IN NEBRASKA 1 (1955).
26. Zorach v. Clauson, 343 U.S. 306, 312 (1952).
27. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The separation principle, however, does mean at least this:
> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1964).
28. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

B. Free Exercise of Religion

The United States Constitution provides that: "Congress shall make no law . . . prohibiting the free exercise [of religion]."[29] The free exercise of religion and separation principles developed concurrently and arose from the same historical backdrop. They developed as companion principles for the purpose of gaining the fullest realization of religious liberty.[30] While the separation principle was designed to prevent state involvement with religion,[31] the free exercise principle was designed to prevent religious coercion by the state.[32]

The right of free exercise is said to be founded upon the principle that the seat of religious belief is the individual heart and mind—a citadel which cannot be invaded by the power of government.[33] Thus, religious *beliefs* are entirely exempt from governmental regulation.[34] Only religious *acts* can be regulated by the government. Acts, however, cannot be regulated indiscriminately. Only when "[state] interests of the highest order and those not otherwise served" are at stake can the right of free exercise be overbalanced.[35] These state interests comprise a very limited class of interests. Consequently, free exercise claims have been overbalanced in decisions by the United States Supreme Court only when the challenged exercise posed a substantial threat to public health, safety, peace or order.[36] In spite of this belief-act dichotomy, some areas of conduct are completely exempt from governmental control under the free exercise clause.[37]

Although the free exercise principle was designed to complement the separation principle, the two often clash with each other.[38] The clash has resulted in the development of a "benevo-

29. U.S. CONST. amend. I.
30. Abington School Dist. v. Schempp, 374 U.S. 203, 232, 305 (1963) (Brennan, J., concurring and Goldberg, J., concurring).
31. "Sponsorship, financial support, and active involvement of the sovereign in religious activity" are the evils intended to be prevented by the free exercise clause. Tilton v. Richardson, 403 U.S. 672, 677 (1971).
32. Abington School Dist. v. Schempp, 374 U.S. 203, 222-23 (1963).
33. *Id.* at 226.
34. Sherbert v. Verner, 374 U.S. 398, 402 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
35. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
36. Sherbert v. Verner, 374 U.S. 398, 403 (1963); Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobsen v. Massachusetts, 197 U.S. 11 (1905).
37. Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding right to refrain from sending children to public schools). This rule is due in part to the fact that in certain contexts "belief and action cannot be neatly confined in logic-tight compartments." *Id.* at 220.
38. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970); L. TRIBE, *supra* note 6, at 815.

lent neutrality"[39] or "wholesome 'neutrality' "[40] concept. This concept permits the accommodation of religion by the state and prohibits state manifestations of hostility toward religion.[41]

III. SECULAR RELIGIOUS INSTRUCTION

A. Instruction in General

The most direct means of accommodating religion in public education is secular instruction. In *Abington School District v. Schempp*[42] the United States Supreme Court struck down a statutorily mandated[43] practice of reading from the Bible during the school day. In so holding, however, the court stated that "one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization"[44] and "the Bible is worthy of study for its literary and historic qualities."[45] The Court then declared that education involving religious subject matters and texts can occur in the public schools without violating the constitution.[46] Thus, from *Abington* we have two principles—one prohibiting religious exercises and the other permitting the instructional use of religious materials. The distinction between the two principles involves the degree of objectivity involved in the presentation of religion. In *Abington* the Court stated that:

> Nothing we have said here indicates that . . . [the] study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are *religious exercises*, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.[47]

Thus, objective religious instruction is constitutionally appropriate, whereas anything amounting to a religious exercise in the public schools is constitutionally prohibited.

The practical problem presented to educators who wish to

39. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); L. TRIBE, *supra* note 6, at 815.
40. Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963); L. TRIBE, *supra* note 6, at 815.
41. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 306-07 (1963) (Goldberg, J., concurring); McCollum v. Board of Educ., 333 U.S. 203, 211-12 (1948).
42. 374 U.S. 203 (1963).
43. 24 PA. CONS. STAT. ANN. § 15-1516: "At least ten verses from the Holy Bible shall be read without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."
44. 374 U.S. at 225.
45. *Id.*
46. *Id.*
47. *Id.* (emphasis added).

teach religion is to insure that the subject matter is presented objectively and that the presentation does not constitute a religious exercise. Some judicial assistance has been offered in this regard by *Vaughn v. Reed*[48] in which the court offered four guidelines by which to judge the objectivity of religious training.

First, the objectives of the religious instruction must be secular.[49] *Vaughn* involved the constitutionality of a religious education program in an elementary public school. The court found the following statement of objectives and purposes, given by one of the religion teachers, to be secular and quite appropriate:

> [T]he purpose of . . . [the religious instruction] is the same purpose as my teaching. To help the boys and girls understand the Bible. We have the feeling that in order to understand the country in which we live, the democracy, and to understand our western civilization, to understand our own culture, [to] understand the art you see by the great artists, [to] understand the music of today, one has to know something about the background of the Bible or these things have very little meaning, and we feel like it's important that we give them. We're not trying to convert them to religion, if that's what you mean. We're just trying to help them understand today's civilization.[50]

Second, proper objectives must be accompanied by appropriate practices.[51] In *Vaughn* the court stated that any practice amounting to "the indoctrination or practice of religion" must be scrupulously avoided.[52] If teaching practices are subject to legitimate criticism in this regard, the practices lack the objectivity required to pass constitutional muster.[53] The third guideline involves the use of a policy whereby a student is allowed to leave the classroom during instruction about religion. The *Vaughn* court suggested

48. 313 F. Supp. 431 (W.D. Va. 1970).
49. *Id.* at 434 & n.2.
50. *Id.* at 434 n.2.
51. Although the *Vaughn* court found the stated objectives of the religious instruction to be appropriate, it found that certain actions amounted to the practice of religion and were therefore unconstitutional. *Id.* at 433 & n.1.
52. *Id.* at 434.
53. *Id.* Examples of situations that constitute indoctrination or practice of religion in public schools can be found in Abington School Dist. v. Schempp, 372 U.S. 203 (1963) (Bible reading, without comment, at the beginning of each school day); Engel v. Vitale, 370 U.S. 421 (1962) (a non-denominational prayer written by state authorities to be recited every day by public school students); McCollum v. Board of Educ., 333 U.S. 203 (1948) (religious instruction in public schools by teachers employed by a private, interdenominational religious group, subject to the approval and supervision of the superintendent of the public schools); Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965) (student-initiated oral prayers in public school); Goodwin v. Cross County School Dist. No. 7, 394 F. Supp. 417 (E.D. Ark. 1973) (Bible verses and Lord's Prayer recited by school student council members as part of school's opening exercises); American Civil Liberties Union v. Albert Gallatin Area School Dist., 307 F. Supp. 637 (W.D. Pa. 1969) (Bible reading and recitation of Lord's Prayer during school time encouraged by school board).

that such a policy, although it does not ordinarily raise constitutional questions, indicates that a constitutionally questionable course of teaching exists:[54] "If the course is being properly taught within the constitutional limits, there is no reason for non-attendance by any student."[55]

The final guideline offered in *Vaughn* is derived from a unique factual situation at issue in the case. The teachers in the *Vaughn* situation, who were sent to the public schools for the purpose of teaching about religion, were hired, not by the local school board, but by the Week-Day Religious Education Council—a private organization.[56] Thus, control over the religious education program rested, not with the public school, but with the private organization.[57] The court held that "[t]he better procedure would be for the school board to hire and control the teacher."[58] The court hastened to add, however, that "special teachers" may be hired for religious instruction and that the courts are not empowered to dictate the qualifications that a teacher must possess.[59]

Additional guidance regarding the objectivity of religious instruction was offered in *Reed v. Van Hoven*.[60] The *Reed* court indicated that certain materials of a religious nature could be read ceremonially in the public schools without violating the Constitution. These permissible materials are those that offer "lessons in the impact of religion upon the men who were leaders of our nation, and in turn, through them, upon the nation's affairs and history."[61] They may include statements regarding such things as the essentially religious character of our nation, the belief in a supreme being, and the belief that the rights of man originated

54. 313 F. Supp. at 433-34.

55. *Id.* at 434. The *Vaughn* court also stated:

> If the course is taught within constitutional limits, every student should be required to attend. If the course is necessary to the education of one child, it is equally necessary to the education of all students. The controversial nature of a course should not be grounds for dismissing a student from its study. Once the school board determines that a particular course should be taught in the schools, the court sees no justification for allowing a student or his parents to decide that the student will not attend.

Id. at 433-34. *Compare id. with* Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (a school cannot require a student to participate in a Reserve Officer Training Corps program that is contrary to the student's religious beliefs as a conscientious objector).

56. 313 F. Supp. at 432.

57. *See id.* at 434.

58. *Id.*

59. *Id.*

60. 237 F. Supp. 48 (W.D. Mich. 1965).

61. *Id.* at 55.

with the supreme being.[62] Examples given by the *Reed* court[63] are: (1) the Declaration of Independence;[64] (2) speeches by Presidents,[65] *e.g.*, Lincoln's Gettysburg Address,[66] Lincoln's inaugural address,[67] and addresses by John F. Kennedy;[68] (3) statements

62. *Id.*

63. *See id.* at 55-56.

64. When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. . . . We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights.

Quoted in id. at 55-56 n.9.

65. *See* Engel v. Vitale, 370 U.S. 421, 446-48 n.3 (1962) (Stewart, J., dissenting).

66. It is rather for us to be here dedicated to the great task remaining for us that from these honored dead we take increased devotion to the cause for which they gave the last full measure of devotion; that we here highly resolve that these dead shall not have died in vain; that this nation, under God, shall have a new birth of freedom, and that the government of the people, by the people, and for the people shall not perish from the earth.

W. STODDARD, ABRAHAM LINCOLN: THE TRUE STORY OF A GREAT LIFE 413 (1885).

67. Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said 'the judgments of the Lord are true and righteous altogether.'

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.

Inaugural address of President Abraham Lincoln (Mar. 4, 1865) (*quoted in* 237 F. Supp. at 55 n.7).

68. "[T]he same revolutionary beliefs for which our forebears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state but from the hand of God." Inaugural address of President John F. Kennedy (Jan. 20, 1961) (*quoted in* 237 F. Supp. at 56 n.9).

We in this country, in this generation, are, by destiny rather than choice, the watchmen on the walls of world freedom. We ask, therefore, that we may be worthy of our power and responsibility, that we may exercise our strength with wisdom and restraint, and that we may achieve in our time and for all time the ancient vision of 'peace on earth, good will toward men.' That must always be our goal—and the righteousness of our cause must always underlie our strength. For as was written long ago: 'Except the Lord keep the city, the watchman waketh but in vain.'

about religion by the United States Supreme Court;[69] and (4) the Northwest Territory Ordinance.[70]

An example of judicially approved guidelines for secular religious instruction can be found in *Florey v. Sioux Falls School District*.[71] The *Florey* guidelines were an application of the policy stated by the local school district that no religious belief or nonbelief should be promoted or disparaged by the school district, that toleration and acceptance of differing religious views should be encouraged, and that the school district should give the students an awareness of the role that religion has played in the development of our nation.[72] In applying this policy the guidelines directed that:

Address of President John F. Kennedy (Dallas, Texas, Nov. 22, 1963) (*quoted in* 237 F. Supp. at 56 n.9).

"With a good conscience our only sure reward, with history the final judge of our deeds, let us go forth to lead the land we love, asking His blessing and His help, but knowing that here on earth God's work must truly be our own." Inaugural address of President John F. Kennedy (Jan. 20, 1961) (*quoted in id.* at 55 n.7).

69. Abington School Dist. v. Schempp, 374 U.S. 203, 213 (1963):

> It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people. . . . 'The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home the church and the inviolable citadel of the individual heart and mind.'

Id. at 226.

70. Art. I. No person, demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.

. . . .

Art. III. 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 (July 13, 1787) (quoted at *id.*).

71. 464 F. Supp. 911 (D.S.D. 1979), *appeal docketed*, No. 79-1277 (8th Cir. 1979).

72. *Id.* at 918. This statement of policy reads in full:

Recognition of Religious Beliefs and Customs

It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged. Instead, the school district should encourage all students and staff members to appreciate and be tolerant of each other's religious views. The school district should utilize its opportunity to foster understanding and mutual respect among students and parents, whether it involves race, culture, economic background or religious beliefs. In that spirit of tolerance, students and staff members should be excused from participating in practices which are contrary to their religious beliefs unless there are clear issues of overriding concern that would prevent it.

The Sioux Falls School District recognizes that one of its educational goals is to advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization.

. . . .

Religious institutions and orientations are central to human expe-

[T]he practice of the Sioux Falls School District shall be as follows:

1. The District supports the inclusion of religious literature, music, drama and the arts in the curriculum and in school activities provided it is intrinsic to the learning experience in the various fields of study and is presented objectively.
2. The emphasis on religious themes in the arts, literature and history should be only as extensive as necessary for a balanced and comprehensive study of these areas. Such studies should never foster any particular religious tenets or demean any religious beliefs.
3. Student-initiated expressions to questions or assignments which reflect their beliefs or non-beliefs about a religious theme shall be accommodated. For example, students are free to express religious belief or non-belief in compositions, art forms, music, speech and debate.[73]

These guidelines were developed by a citizens' committee which had been established by the District 49-5 School Board for the purpose of studying church-state relations in the public schools and were then adopted by the School Board. The plaintiffs in *Florey* filed suit seeking injunctive relief and a declaration that the guidelines were unconstitutional.[74] The court denied the plaintiffs' request.[75] The guidelines, therefore, provide valuable and practical assistance in assuring that particular practices of instruction about religion in public schools pass constitutional muster.

Objective instruction about religion provides a direct means of accommodating religion in public schools. The questionnaire sent to superintendents of various Nebraska school districts[76] inquired about the extent of objective instruction about religion in Nebraska schools.[77] Of the 206 superintendents responding to this inquiry, 111 indicated that little, if any, such instruction occurs in their school districts, ninety-four indicated that moderate quantities of such instruction occurs, and only one superintendent indicated that a substantial portion of time is devoted toward objective teaching about religion.

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rience, past and present. An education excluding such a significant aspect would be incomplete. It is essential that the teaching *about*—and not *of*—religion be conducted in a factual objective and respectful manner.

Id.

73. *Id.* at 918-19.
74. *Id.* at 913.
75. *Id.* at 918.
76. *See* note 12 & accompanying text *supra*.
77. The United States Supreme Court has stated that the objective teaching of religion (*e.g.*, from a standpoint of literature, history, or comparative study) is constitutionally proper. Does your school system participate in such objective teaching about religion?
    a. Little if any such teaching occurs
    b. Moderate quantities of such teaching occurs
    c. A substantial portion of time is devoted toward such teaching.

B. Holiday Celebrations

An application of the objective religious instruction rationale has been used to uphold the prudent use of religious music, art, literature, drama, and symbols in public schools. In *Florey*[78] the plaintiffs unsuccessfully attacked a set of public school guidelines which encouraged the study of religious beliefs and customs in the public schools.[79] Although directed against the entire set of guidelines[80] the attack centered on the rules regarding observance of religious holidays.[81] The plaintiffs demanded a ruling "that all Christmas assemblies must be absolutely and irrevocably secular."[82] The court, however, upheld the guidelines[83] and gave a thoughtful and thorough analysis of the situation.

The *Florey* court observed that the indiscriminate observance of any and every religious holiday had not been prescribed by the guidelines. Instead the guidelines had mandated that only those holidays be observed which have both a religious and secular significance (*e.g.*, Christmas and Easter).[84] Excluded from an observable status in public schools, therefore, were such holidays as Pentacost, Ash Wednesday, and Good Friday.[85] The court found

78. 464 F. Supp. 911 (D.S.D. 1979), *appeal docketed* No. 79-1277 (8th Cir. 1979).
79. *See* notes 60-75 & accompanying text *supra*.
80. 464 F. Supp. 911, 918-19.
81. The guidelines regarding religious holidays read in full:

> *Observance of Religious Holidays*
>
> The practice of the Sioux Falls School District shall be as follows:
>
> 1. The several holidays throughout the year which have a religious and a secular basis may be observed in the public schools.
> 2. The historical and contemporary values and the origin of religious holidays may be explained in an unbiased and objective manner without sectarian indoctrination.
> 3. Music, art, literature and drama having religious themes or basis are permitted as part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday.
> 4. The use of religious symbols such as a cross, menorah, crescent, Star of David, creche, symbols of Native American religions or other symbols that are a part of a religious holiday is permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature. Among these holidays are included Christmas, Easter, Passover, Hannukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving and Halloween.
> 5. The school district's calendar should be prepared so as to minimize conflicts with religious holidays of all faiths.

Id.
82. *Id.* at 913.
83. *Id.* at 918.
84. *Id.* at 915.
85. *Id.*

this limitation to be very important in removing constitutional objections from the religious holiday observance guidelines.[86]

The *Florey* court utilized the well-established tripartite test in analyzing the constitutionality of the guidlines: namely, that to pass muster, the situation (1) must reflect a clearly secular legislative purpose; (2) must have a primary effect that neither advances or inhibits religion; and (3) must avoid excessive governmental entanglement with religion.[87] Regarding the first part of the test, the court observed that the guidelines require that any presentation of religious art, literature, or music at religious holiday observances in the public school be cloaked with objectivity and prudence.[88] This requirement led the court to determine that "[t]he purpose of the . . . [instruction] is to expose and involve the student in the full spectrum of our Western musical tradition," rather than to promote the Christian religion.[89] Moreover, the court found that the reason behind adopting the guidelines was to "guide school personnel in chartering a constitutionally valid course in this sensitive area."[90] Consequently, the purpose of the study was found to be secular.

Regarding the second part of the test, the statement of Mr. Justice Jackson in *McCollum v. Board of Education* is apropos: "Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, *even from a secular point of view.*"[91] Therefore, to allow the objective, educational use of materials having a religious significance in public school holiday observances is not only proper, but a contrary rule "would leave the schools in the position of only being permitted to present programs that are eccentric and incomplete"[92] and would have the effect of demonstrating a hostility toward religion.[93] Thus, the *Florey* court found the primary effect of the guidelines to be secular and not promotive or inhibitive of religion;[94] therefore, the guidelines were valid under the second part of the tripartite test.

In its analysis of the guidelines under the second part of the tripartite test, the *Florey* court focused primarily on rule four[95] of

86. *Id.*
87. *See* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973).
88. 464 F. Supp. at 915.
89. *Id.* at 916.
90. *Id.*
91. 333 U.S. 203, 236 (1948) (Jackson, J., concurring) (emphasis added).
92. 464 F. Supp. at 916.
93. *Id.* at 917.
94. *Id.* at 916.
95. *See* note 81 *supra.*

the religious holiday observance guidelines. Rule four provided that religious symbols, such as a cross, menorah, crescent, Star of David, or creche, could be used in the observance of religious holidays. According to rule four, any display of such symbols had to have a teaching function—providing examples of the cultural and religious heritage of the holiday—and had to be temporary in nature. The holding that rule four had a secular purpose and an effect that did not promote religion[96] finds support in *Lawrence v. Buchmueller*[97] which permitted the erection of a nativity scene on public school premises during the Christmas school recess. The *Lawrence* court reasoned that a contrary ruling would

> be tantamount to sanctioning judicially a policy of nonrecognition of God in the public schools resulting in a denial that religion has played any part in the formulation of the moral standards of the community. In such circumstances the State's declared purpose of fostering in the children of the State 'moral and intellectual qualities,' would be thwarted.[98]

Under the third portion of the tripartite test, the *Florey* court concluded that the policy, rules, and implementation of the guidelines did not "result in *any* particular relationship between the school and any religious authority."[99] In arriving at this conclusion, the court granted that (1) "an individual's religious sensibilities might possibly be kindled by participating in a school Christmas assembly in which songs with religious texts are sung";[100] (2) "[t]he school cannot guarantee that exposure to various religions and religious ideas will not aid religion in some cases";[101] and (3) the school cannot guarantee that the application of the guidelines will not provide a religious sect with a convert.[102] Nevertheless, the court declared that any prediction that a benefit would accrue to any religion through the implementation of the

96. 464 F. Supp. at 916-17.
97. 40 Misc. 2d 300, 243 N.Y.S.2d 87 (1963). For other cases allowing the erection of religious symbols on public property, see Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) (monument inscribed with Ten Commandments on courthouse grounds); Allen v. Morton, 161 U.S. App. D.C. 239, 495 F.2d 65 (1973) (nativity scene in federal park adjacent to White House during Christmas season); Paul v. Dade County, 202 So.2d 833 (Fla. Dist. Ct. App.), *cert. denied*, 390 U.S. 1041 (1968) (lights in shape of Latin cross on courthouse during Christmas season); Opinions of the Justices, 108 N.H. 97, 228 A.2d 161 (1967) (plaques with the words "In God We Trust" in public schoolrooms); Meyer v. Oklahoma City, 496 P.2d 789 (Okla.), *cert. denied*, 409 U.S. 980 (1972) (50 foot permanent Latin cross, sponsored by Council of Churches). *Contra*, Fox v. City of Los Angeles, 150 Cal. Rptr. 867, 587 P.2d 663 (1978) (display of huge cross on city hall during Christmas and Easter seasons struck down under California Constitution).
98. 40 Misc. 2d at 300, 243 N.Y.S.2d at 88.
99. 464 F. Supp. at 918.
100. *Id.* at 917.
101. *Id.*
102. *Id.* at 918.

guidelines would be highly speculative.[103] Therefore, the guidelines were found to involve no excessive entanglement between government and religion[104] and to withstand all the demands of the tripartate test. It should be emphasized, however, that although the guidelines permitted the use in holiday observances of music, art, literature and drama having religious content, they allowed only the objective use of such materials.[105] The *Florey* court emphasized at the beginning of its analysis that a certain kindergarten Christmas program presented in 1977 violated the constitution for the very reason that it lacked objectivity. The unconstitutional kindergarten program included the following responsive discourse entitled "The Beginners Christmas Quiz:"

> Teacher: Of whom did heav'nly angels sing,
> And news about His birthday bring?
> Class: Jesus.
> Teacher: Now, can you name the little town
> Where they the Baby Jesus found?
> Class: Bethlehem.
> Teacher: Where had they made a little bed
> For Christ, the blessed Saviour's head?
> Class: In a manger in a cattle stall.
> Teacher: What is the day we celebrate
> As birthday of this One so great?
> Class: Christmas.[106]

Thus, *Florey* did not give a blanket provision for religious exercises at Christmas time but provided only for objective, educational uses of religious materials.

According to the survey of Nebraska public school superintendents,[107] holiday celebrations are a widely used means of accommodating religion in Nebraska schools. One hundred fifty-nine of the 206 schools which responded provide some type of ceremonial observance of the Christmas holiday,[108] and these observances generally involve the singing of such religious songs as "Silent Night, Holy Night," and the display of such religious symbols as a nativity scene or cross.[109] Only forty-five superintendents responded without qualification that no type of ceremonial holiday observance was provided by the school system.

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103. *Id.* at 917.
104. *See id.* at 917-18.
105. *Id.* at 914. *See also* text accompanying note 47 *supra.*
106. 464 F. Supp. at 912.
107. *See* note 12 & accompanying text *supra.*
108. The question eliciting this response reads as follows:
> Does your school system provide for any type of ceremonial observance of the Christmas Holiday?
> a. Yes
> b. No

109. The question eliciting this response reads as follows:

C. Theories of Origins

Public school instruction regarding the origins of mankind and the environment has been the source of much controversy in America. At the heart of the controversy has been the struggle for supremacy between two basic theories. One theory, commonly referred to as evolution, holds that man developed from lower forms of life in an environment that evolved through natural processes.[110] The theory of divine creation, on the other hand, holds that the universe, the earth, and all life, including mankind, came into being by acts of God.[111] The controversy found its focal point in the historic *Scopes* trial.[112] Prior to *Scopes*, the divine creation theory had been broadly accepted. To insure its continued acceptance, the Tennessee Legislature had adopted the Anti-Evolution Act,[113] which made the teaching of evolution in public schools a crime.[114] John Thomas Scopes was convicted under the Anti-Evolution Act and fined $100. On appeal, the lower court's

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If you answered question number seven [*see* note 108 *supra*] "Yes," does this observance include any of the following practices:

a. The singing of religious songs (*e.g.*, "Silent Night, Holy Night")?
   1) Yes
   2) No
b. The display of religious symbols (*e.g.*, a nativity scene or a cross)?
   1) Yes
   2) No.

In response to part a. of this question, 155 (of the 159 schools that provided ceremonial observances) answered "Yes." In response to part b. of this question, 101 (of the 159 schools that provide ceremonial observances) answered "Yes."

110. *See* THE HARPER ENCYCLOPEDIA OF SCIENCE 425-27 (rev. ed. 1967); VAN NOSTRAND'S SCIENTIFIC ENCYCLOPEDIA 989 (5th Ed. 1976). According to Julian Huxley, "[e]volution in the extended sense can be defined as a directional and essentially irreversible process, occurring in time, which in its course gives rise to an increase of variety and an increasingly high level of organization in its products."; H. MORRIS, THE TROUBLED WATERS OF EVOLUTION 81 (1974). "Evolution comprises all the stages of the development of the universe: the cosmic, biological and human or cultural developments." Dobzhansky, *Changing Map*, 155 SCIENCE 409, 409 (1967).

111. J. MOORE & H. SLUSHER, BIOLOGY: A SEARCH FOR ORDER IN COMPLEXITY 555 (1974). Neither the divine creation view nor the evolutionary view are monolithic. The specific details regarding each of the theories vary widely among their respective adherents. *See* Daniel v. Waters, 515 F.2d 485, 491 (6th Cir. 1975); J. HUXLEY, EVOLUTION: THE MODERN SYNTHESIS 29-31 (1974); J. SAVAGE, EVOLUTION *iii-iv* (3d ed. 1977).

112. Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

113. 1925 Tenn. Pub. Acts ch. 27 at 50.

114. The Act reads in full:

> An act prohibiting the teaching of the evolution theory in all the Universities, normals and other public schools of Tennessee, which

judgment was reversed, though not on first amendment grounds.[115]

Since *Scopes*, the controversy has become primarily a first amendment question due to the religious character of divine creation explanations.[116] One might argue that any religious element inherent in the divine creation theory does not prevent a public school teacher from teaching that God created all things. The rule permitting objective teaching about religion[117] permits a public school teacher to objectively present a theory of divine creation and its scientific basis[118] to students in a public classroom. Great care must be exercised by the teacher, however, to insure that the instruction is objective.

In striving for objectivity, it may be necessary for a teacher to fully present an evolutionary explanation of origins. The advisabil-

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are supported in whole or in part by the public school funds of the state, and to provide penalties for the violations thereof.

Section 1. Be it enacted by the General Assembly of the state of Tennessee, that it shall be unlawful for any teacher in any of the Universities, normals and all other public schools of the state which are supported in whole or in part by the public school funds of the state, to teach any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals.

Section 2. Be it further enacted, that any teacher found guilty of the violation of this act, shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars for each offense.

Section 3. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

Id.

115. The court held that this Act did not violate the United States Constitution. 154 Tenn. at 111-12, 289 S.W. at 366, and that it did not violate Tennessee's constitutional provision against preferring any religion. 154 Tenn. at 118-19, 289 S.W. at 366-67. The court's reversal was based upon the fact that, although the jury had found Scopes guilty, it had been the trial judge who assessed the fine: "Since a jury alone can impose the penalty this act requires, and as a matter of course no different penalty can be inflicted, the trial judge exceeded his jurisdiction in levying this fine, and we are without power to correct his error. The judgment must accordingly be reversed." 154 Tenn. at 121, 289 S.W. at 367.

116. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968); Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975); Wright v. Houston Indep. School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 480 F.2d 137 (5th Cir. 1973).

117. *See* § III-A of text *supra*. Instruction about divine creation is covered by this rule. *See* McCollum v. Board of Educ., 333 U.S. 203, 206 (1948) (Jackson, J., concurring).

118. Religious dogma is not the only foundation upon which a theory of divine creation can be constructed. A number of textbooks, written by highly trained scientists rather than theologians, employ scientific discussion rather than religious dogma to present a theory of divine creation. Examples of these textbooks are J. MOORE & H. SLUSHER, *supra* note 111; ORIGINS (R. Bliss ed., Creation-Life Pub. 1976); THE SCIENCE AND CREATION SERIES (H. Morris & J. Phelps eds., Creation-Science Research Center 1971).

ity of this approach is manifested in *Palmer v. Board of Education of Chicago*.[119] *Palmer* involved an untenured kindergarten teacher who, because of her religious beliefs, refused to follow the curriculum prescribed by school authorities.[120] The teacher claimed that her refusal was appropriate under the free exercise clause.[121] The court ruled that the teacher had no constitutional right to make such a refusal because the refusal would "deprive her students of an elementary knowledge and appreciation of our national heritage"[122] and would provide only "a distorted view of our country's history."[123] The court explained that "[p]laintiff's right to her own religious views and practices remains unfettered, but she has no constitutional right to require others to submit to her views and to forgo a portion of their education they would otherwise be entitled to enjoy."[124]

Presenting an evolutionary theory fully, however, does not mean that a teacher is required to present it as truth or as a law of science. Ideas about man's evolution from lower forms of life are generally held to be theories only—not laws of science.[125] Certainly, a teacher has a free speech right to emphasize this fact to students.[126] A teacher should not be prohibited from presenting to students alleged incompatibilities between certain scientific principles and evolutionary theories.[127] Moreover, a teacher need not

119. 603 F.2d 1271 (7th Cir. 1979).

120. The teacher was a Johovah's Witness and had refused "to teach any subjects having to do with love of country, the flag or other patriotic matters in the prescribed curriculum." *Id.* at 1272. She considered that instruction and participation in such matters promoted idolatry. *Id.* at 1274. The curriculum had been prescribed by policies of the Board of Education and by directives from the teacher's principal and other superiors. *Id.* at 1273-74. There was nothing innovative or unique about this part of the prescribed curriculum—it was traditional. *Id.* at 1274. Moreover, "[e]xtraordinary efforts were made to accommodate plaintiff's religious beliefs at her particular school and elsewhere in the system, but it could not reasonably be accomplished." *Id.* at 1272.

121. *Id.* at 1272.

122. *Id.* at 1274.

123. *Id.*

124. *Id.*

125. *See* EVOLUTION: PROCESS AND PRODUCT 431 (2d ed. E. Dodson & P. Dodson 1976); F. RACLE, INTRODUCTION TO EVOLUTION 2-3 (1979). However, many writers contend that there is no possibility that the evolution concept could be erroneous. *See, e.g.*, F. AYALA & J. VALENTINE, EVOLVING—THE THEORY & PROCESSES OF ORGANIC EVOLUTION 1 (1979); J. SAVAGE, *supra* note 111, at *iii*.

126. *See* note 128 *infra*.

127. For example, evolutionary theories may be seen as inconsistent with the first and second laws of thermodynamics. *See* J. WHITCOMB, JR. & H. MORRIS, THE GENESIS FLOOD 222-27 (1961). Essentially, these two laws mean that "[i]n any naturally occurring process, the tendency is for all systems to proceed from order to disorder." Lindsay, *Entropy Consumption and Values in Physical Science*, 47 AMERICAN SCIENTIST 376, 382 (1959).

feign a belief that an evolutionary explanation of origins accurately explains reality: "[o]bviously, a teacher is not required to be completely neutral on all matters of intellectual or topical import."[128] Disparagements concerning an evolutionary view are, of course, subject to the requirement that a divine creation view be presented objectively.[129] Disparagements are also subject to the principle that a teacher's instruction may not arbitrarily inculcate doctrinaire views in the minds of students or be coercive.[130]

The preceding discussion assumes that instruction concerning a divine creation view of origins is essentially religious in character and therefore subject to the establishment clause of the Constitution. Such an assumption, however, is not necessarily valid. A strong argument can be made that the presentation of scientific evidence for a divine creation theory does not violate the requirements of the establishment clause because it is not instruction in religious material.[131] Indeed, "[t]eachers of science in public

128. Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U. L. REV. 1176, 1193 (1973).

> First amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969). *See also* James v. Board of Educ. of Central Dist. No. 1, 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

129. *See* § III-A of text *supra*.

130. James v. Board of Educ. of Central Dist. No. 1, 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972): "Certainly there must be some restraints [upon the teacher's freedom of instruction] because the students are a 'captive' group." This rule may also have some application in preventing a teacher's instruction about evolution from being coercive.

131. *See* Bird, *Freedom From Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POL. 125, 165-74 (1979).

> The supranatural element of a creator in scientific creationism does not cause that theory to be religious doctrine, as long as little emphasis is given to the identity of the creator just as the supranatural element of the eternal existence of matter or of the teleology of natural selection does not make the general theory of evolution religious. And the impossibility of irrefutable scientific verification of the occurrence of creation or of experimental observation of the act of creation does not render scientific creationism a religious theory, just as the impossibility of verification that evolution actually occurred or observation of evolutionary events that predated man does not make evolution a religious theory. While these factors do not render either theory of origins religious in nature, they do show that both the general theory of evolution and the theory of scientific creationism have an element of unprovable faith or assumption and that both have implications for religious belief.

Id. at 170 (footnotes omitted).

schools should not be expected to avoid the discussion of every scientific issue on which some religion claims expertise."[132]

The survey[133] of Nebraska public school superintendents indicates that many teachers in Nebraska schools are taking advantage of the right to instruct students about divine creation views. Of the 206 responses to the survey, 139 indicated that divine creation views were presented to students;[134] while only sixty-four responses indicated that little if any such teaching occurs.[135]

Decisions as to whether a divine creation view will be presented to students are generally made by the individual teachers. One hundred-eighty of the 206 survey responses indicated that the discretion of each teacher is the controlling factor in this matter.[136] Only nineteen of the survey responses said that an articulated policy of the school system controlled whether a divine

132. Wright v. Houston Indep. School Dist., 366 F. Supp. 1208, 1211 (S.D. Tex. 1972), *aff'd per curiam*, 480 F.2d 137 (5th Cir. 1973). This principle was articulated by the court as a basis for rejecting the argument that restricting the study of human origins to an uncritical examination of the theory of evolution violates the establishment clause by lending official support to a religion of secularism. The court explained that instruction concerning evolution is peripheral to the matter of religion, *id.*, and that any connection between evolution and religion "is too tenuous a thread on which to base a First Amendment complaint." *Id.* at 1210. By the same token, a creation theory based upon scientific evidence is only peripherally related to religion and ought not be classified as religious simply because the scientific reasoning led to conclusions consistent with the conclusions of religious thought. *Cf.* Women's Serv. v. Thone, 48 U.S.L.W. 2392 (D. Neb. 1979):

> As long as the legislature bases its determination as to what factors amount to human life on considerations that are as capable of being labled philosophical as religious, the Constitution does not require that the chosen set of factors be called religious or that a different set of factors be chosen.

Id. at 2392 (quoting U.S.L.W. summary).

133. *See* note 12 & accompanying text *supra*.

134. The question eliciting information regarding theories of origins reads as follows:

> Regarding the origins of man and his environment, does your school system teach a divine creation theory?
> a. Such a theory is not taught
> b. Students are merely made aware of the existence and basic tenets of such a theory
> c. Such a theory is taught a legitimate and viable alternative to a Darwinian theory of evolution.

Of the 139 responses indicating that a divine creation view is presented to students, 119 indicated that students in their schools were merely made aware of the existence and basic tenents of divine creation explanations, while twenty indicated that divine creation was taught as a legitimate and viable alternative to evolutionary explanations.

135. Three of the respondents did not answer this question.

136. The question eliciting this information reads as follows:

creation view is presented to students.[137]

A number of cases have dealt with the right of public authorities to set policy concerning the substantive content of instruction about the origins of mankind and the environment.[138] The effect of these cases has been to severely limit the policy-making authority of public officials in the origins instruction context. According to these cases, a public authority may not: (1) prohibit the teaching of a scientific theory;[139] (2) penalize a teacher for instructing students about an evolutionary theory;[140] (3) prohibit the teaching of an evolutionary theory as true—as scientific fact rather than mere theory;[141] (4) establish a policy of preference for a divine creation view over an evolutionary view;[142] or (5) establish a policy of preference for one religion's view of divine creation over another religion's view.[143] Such limitations, although restrictive, do not absolutely prohibit appropriate public authorities from setting policy regarding instruction about theories of origins. Indeed, it would be anomalous to permit a teacher to teach about divine creation and evolution yet strip public authorities, who are responsible for curriculum content, of any control over what is taught.[144]

A public school policy-making authority, therefore, desiring that students be made aware of a divine creation theory might let its will be known by issuing a very general, religiously neutral and sanctionless policy statement that does not run afoul of the establishment clause. Such a policy might be stated as follows: "Instruction on Origins of Man and the Environment—Since the presentation of only an evolutionary theory in the classroom might force some students to choose between their system of belief and an evolutionary theory, classroom instruction should not be limited to evolutionary explanations."[145] An appropriate policy-mak-

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The practice indicated in your response to question number two [concerning origins instruction, *see* note 134 *supra*] is the result of:
a. The discretion of individual teachers
b. An articulated policy of the school system.

137. On seven of the questionnaires, this question was not answered directly.
138. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968); Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975); Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).
139. Epperson v. Arkansas, 393 U.S. 97, 107 (1968). The Court suggested, however, that this restriction applies only when the prohibition is based upon reasons that violate the first amendment.
140. *Id.*
141. *Id.* at 102-03; Daniel v. Waters, 515 F.2d 485, 489 (6th Cir. 1975).
142. *Id.* at 489.
143. *See* Wright v. Houston Indep. School Dist., 366 F. Supp. 1208, 1211 (S.D. Tex. 1972), *aff'd per curiam*, 480 F.2d 137 (5th Cir. 1973).
144. "[S]tates possess an undoubted right so long as not restrictive of constitutional guarantees to prescribe the curriculum for their public schools." Epperson v. Arkansas, 393 U.S. 97, 107 (1968).
145. This type of policy has been adopted by the California Board of Education

ing authority might also make its will known by approving textbooks containing a divine creation model.[146] In light of the teacher's right to present a creation viewpoint,[147] these religiously neutral actions by the appropriate school authorities should be constitutionally valid.[148]

IV. PRACTICING RELIGION

A. Prayer

1. General Principles

In 1962, the United States Supreme Court made a controversial ruling regarding prayer in public schools.[149] The case involved the voluntary recitation of a prayer by students at the beginning of each school day. The prayer was recited pursuant to a program recommended by the State Board of Regents[150] and adopted by the Board of Education of a local school district. The prayer, composed by the Board of Regents, was nondenominational and read as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our Country."[151] The Court found that this religious exercise in the public school violated the first amendment prohibition against establishment of religion.[152]

One year later, the Court ruled upon another school prayer case. That case, *Abington School District v. Schempp*,[153] involved recitations of the Lord's Prayer at the beginning of each public school day. The Court struck down the *Abington* practice and

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and by large school districts in Dallas, Texas; Columbus, Ohio; and Kanawha County, West Virginia; as well as by the states of Arizona and Oregon. *See* Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 516-17 nn.4-8.

146. The states of Georgia, Idaho, Indiana, Oklahoma, and Tennessee have added to their approved list general textbooks or supplementary texts that present a divine creation model. *Id.* at 517 n.9.

147. *See* notes 117-18 & accompanying text *supra*.

148. It must be noted, however, that a controversy does exist and that these actions have yet to be judicially approved. Nevertheless, these actions have developed during the period of the controversy as appropriate accommodations in resolving the situation. *Id.* at 515-18.

149. Engel v. Vitale, 370 U.S. 421 (1962). For a discussion of various views represented in this controversy, see Kauper, *Prayer, Public Schools, and the Supreme Court*, 61 MICH. L. REV. 1031, 1031-32 (1963).

150. The Board of Regents is "a governmental agency created by the State Constitution to which the New York Legislature has granted broad supervisory, executive, and legislative powers over the State's public school system." *Id.* at 423.

151. *Id.* at 422.

152. *Id.* at 424.

153. 374 U.S. 203 (1963).

thereby reaffirmed its earlier ruling in *Engel*.[154]

The negative response to the *Engel* and *Abington* decisions was very strong. Proposals for changing the rule included such things as disobedience,[155] curtailing the power and jurisdiction of the Supreme Court,[156] impeaching the justices,[157] and adopting a constitutional amendment.[158] Nevertheless, the lower courts subsequently applied the *Engel-Abington* principle rather strictly. In *DeSpain v. DeKalb County Community School District*,[159] for example, a kindergarten teacher had required the children in her class to recite, prior to their morning snack, a verse that read, "We thank you for the flowers so sweet; We thank you for the food we eat; We thank you for the birds that sing; We thank you for everything."[160] Although the verse contained no reference to God, the court determined that it was a prayer[161] and, therefore, in violation of the establishment clause.[162] Another example is *Stein v. Oshinsky*[163] in which a federal court held that even student-initiated prayers could be prohibited by local school authorities. In *Stein*, the prayer had the same content as the verse challenged in *DeSpain*, except that the last line contained a direct address to "God."[164] The recitation of the verse in *Stein*, however, occurred not at the direction of the classroom teacher or any other school authority, but from the initiative of the students themselves. In response to the recitation, the school principal "ordered his teachers who were instructing the kindergarten classes to stop the infant children from reciting the simple and ancient prayer."[165] The court ruled that "[t]he authorities acted well within their powers

154. *Id.* at 224.
155. This proposal is not without precedent. For example, "[t]he people drank the eighteenth amendment out of the Constitution." Hanft, *The Prayer Decisions*, 42 N.C. L. REV. 567, 594 (1964).
156. *Id.* at 597.
157. Pfeffer, *Court, Constitution and Prayer*, 16 RUTGERS L. REV. 735, 735 (1962).
158. *See, e.g.*, Rice, *Let Us Pray—An Amendment to the Constitution*, 10 CATH. LAW. 178 (1964); Rice, *The Prayer Amendment: A Justification*, 24 S.C. L. REV. 705 (1972).
159. 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968).
160. *Id.* at 837.
161. *Id.* This determination was based on a variety of factors: *e.g.*, (1) for several years prior to the school year in question, this kindergarten teacher required her students to recite a verse identical to the one being challenged except that the last line read, "We thank you, God, for everything;" and (2) expert testimony that the intent of the verse was to offer thanks to God and that the pronoun "you" was "obviously addressed to someone who is thought to provide everything, . . . [which] is a common definition of God." *Id.* at 837-38.
162. *Id.* at 840.
163. 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965).
164. *Id.* at 1000.
165. *Id.*

in concluding that plaintiffs must content themselves with having their children say these prayers before nine or after three."[166] The court then added that "[a]fter all that the states have been told about keeping the 'wall between church and state . . . high and impregnable,' . . . it would be rather bitter irony to chastise New York for having built the wall too tall and too strong."[167]

2. *Moment of Silence*

At first blush, prayer appears to have absolutely no place in the public schools. Upon closer examination, however, the possibility exists for having a reasonable accommodation of prayer in the classroom, while maintaining at the same time a high degree of separation between religion and government. This possibility is founded upon the case of *Gaines v. Anderson*[168] which involved a statutorily prescribed moment of silence at the beginning of each public school day to be used for the purpose of meditation or prayer.[169] Pursuant to this statute, a local school authority adopted a resolution and guidelines for conducting the moment of silence.[170] The guidelines contemplated that a teacher would su-

166. *Id.* at 1002.
167. *Id.*
168. 421 F. Supp. 337 (D. Mass. 1976).
169. At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period silence shall be maintained and no activities engaged in.
MASS. GEN. LAWS ANN. ch. 71, § 1A (West Supp. 1969).
170. The guidelines adopted by the local school authority read in full:
1) The following announcement shall be made each school day morning in each school at the commencement of the first class (it being understood that in the high schools the home room period would be considered the first regular period of the day) by the teacher in charge of the room. The announcement shall be made during the period of time when school attendance is taken.
'A one minute period of silence for the purpose of meditation or prayer shall now be observed. During this period silence shall be maintained and no activities engaged in.' At the end of the one minute period, the following shall be announced by the teacher.
'Thank you.'
2) If teachers are asked questions concerning this period for meditation or prayer the following should be the response.
'We are doing this in compliance with State Law. Any other questions you have should be discussed with your parents or with someone in your home.'
3) Students not adhering to this regulation shall be reminded by the teacher of their responsibility to obey school rules and regulations. This should be done without detailed explanations or corrective action by the teacher.

pervise and enforce the moment of silence.[171] To assure cooperation, the guidelines directed that persistent violators of the silence be referred to the school principal. If cooperation did not ensue, established procedures for dealing with breaches of school regulations were to be followed.[172] The court held that the moment of silence was constitutionally appropriate based on the finding that the practice as instituted and enforced by state authorities did not advance or inhibit religion, did not coerce any student to participate in any activity which infringed upon his liberty of conscience, did not interfere with the free exercise of any student's religion, and did not constitute a religious exercise.[173] This holding was foreshadowed by Mr. Justice Brennan when he wrote:

> It has not been shown that . . . the observance of a moment of reverent silence at the opening of class, may not adequately serve . . . [a] solely secular purpose . . . without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.[174]

In analyzing the moment of silence under the establishment clause, the *Gaines* court examined the purpose and effect of the moment of silence. Particularly important in the analysis was the statutory language requiring that moments of silence be "observed for meditation *or* prayer."[175] The court found that the word "meditation" did not infuse the statute with an unconstitutional purpose because the act of meditating is not necessarily a religious exer-

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4) If a student persists in violating this regulation, the teacher shall refer the student to the principal for corrective action.

5) The principal shall attempt to gain the cooperation of the student in obeying this regulation. If reasonable action on the part of the principal fails to achieve compliance with the regulation, the principal will continue to follow normal established procedures for dealing with breaches of school regulations. These will include a conference or conferences with parents or guardian of the student and, in those situations judged necessary by the principal, suspension of the student from school. The student and his parents or guardian shall be advised of their right to appeal the decision of the principal to the Superintendent of Schools or the School Committee.

421 F. Supp. at 340 n.4.

171. *Id.*

172. *Id.*

173. *Id.* at 340. *Accord*, Reed v. Van Hoven, 237 F. Supp. 48, 56 (W.D. Mich. 1965) (The court stated that a period of silence before lunch would afford each student "an opportunity to say their own denominational prayer, and all would be privileged to say any prayer which their own denomination may have taught them. Those who do not share the prayer would be free to contemplate anything they desired."); Opinion of the Justices, 228 A.2d 161, 162 (N.H. 1967).

174. Abington School Dist. v. Schempp, 374 U.S. 203, 281 (1963) (Brennan, J., concurring) (emphasis added).

175. MASS. GEN. LAWS ANN. ch. 71, § 1A (West Supp. 1969) (emphasis added).

cise:[176] meditation involves only the "serious reflection or contemplation on a subject which may be religious, irreligious or nonreligious."[177] Therefore, the court reasoned that the moment of silence would be unconstitutional only if the moment of silence had the primary purpose or effect of encouraging the activity of prayer.[178]

The court found that the practice did not have the purpose or effect of encouraging prayer for two reasons. First, the court found that the statute was designed to be religiously neutral: to accommodate, rather than promote, religion in public schools.[179] The statute did not mandate that the students pray, nor did it even mandate that the students meditate;[180] instead, it maintained neu-

176. 421 F. Supp. at 342. *But see* Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (the court indicated that while the voluntary practice of the transcendental meditation technique in schools "might be defended . . . as primarily a relaxation or concentration technique with no ultimate significance," *id.* at 213, it found transcendental meditation to be "a constitutionally protected religion," *id.* at 214, and hence the practice was violative of the establishment clause). *Malnak* and other cases subsequent to *Gaines* suggest that courts are now inclined to take a very broad view of what constitutes establishment of religion. *Id.* at 207-13.

177. 421 F. Supp. at 342. The court cited the following definition of "meditation" given in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1403 (unabr. ed. 1966):

> 1: a spoken or written discourse treated in a contemplative manner and intended to express its author's reflection or esp. when religious to guide others in contemplation
> 2: a private devotion or spiritual exercise consisting in deep continued reflection on a religious theme . . .
> 3: the act of meditating: steady or close consecutive reflection: continued application of the mind.

421 F. Supp. at 342 n.6.

178. *Id.* at 343. The court cited the following definition of "prayer" given in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1782 (unabr. ed. 1966):

> 1a: a solemn and humble approach to Divinity in word or thought usu. involving beseeching, petition, confession, praise, or thanksgiving . . . b: an earnest request to someone or for something . . . .
> 2: the act or practice of praying: the addressing of words or thought to Divinity in petition, confession, praise, or thanksgiving . . . 3: a religious service consisting chiefly of prayers . . . 4: a set form of words used in praying: a formula of supplication, confession, praise, or thanksgiving addressed to God or an object of worship . . . 5: something prayed for: a subject of prayer . . . 6: a slight or minimal chance (as to succeed or survive).

421 F. Supp. at 343 n.8. The plaintiffs introduced affidavits of experts that the terms "prayer" and "meditation" are synonymous in certain faiths, but the court ruled that "[t]his understanding . . . is not binding on either the state legislature or this court." *Id.* at 342 n.6.

179. *Id.*

180. *Id.*

trality in that it compelled only silence.[181] Moreover, when questions regarding the moment of silence arose from the students, the guidelines maintained neutrality in directing the teachers to respond with the specific statement that: "We are doing this in compliance with State Law. Any other questions you have should be discussed with your parents or with someone in your home."[182] Furthermore, the court determined from legislative history that the legislature had been sensitive to the requirements of religious neutrality in enacting the moment of silence statute.[183] Second, the court found that the moment of silence can serve legitimate secular purposes in the education of students. For example, the moment of silence at the beginning of the school day "would tend to still the tumult of the playground and start a day of study."[184] The court, therefore found that the mere provision of an opportunity for prayer to students desiring to pray did not render the moment of silence unconstitutional.[185] Thus, the requirements of the establishment clause were met.

The court also found that the mandates of the free exercise clause were met. In reaching this conclusion, the court pointed to the following factors: (1) no student was compelled to participate in practices violating religious beliefs regarding prayer; (2) no student was compelled to participate in religious exercises violating liberty of conscience; (3) no student was confronted with the choice of participating in a religious exercise or requesting to be excused from it; (4) a student may reflect silently on a secular topic or simply remain silent during the moment of silence; and (5) a student desiring to do so may pray silently during the moment of silence.[186] The challenged practice was therefore acceptable under the religion clauses of the Constitution.[187]

In light of the negative reaction to the prayer decisions of the

181. *Id.* at 344.

182. *See id.* at 340 n.4 (subsection 2) & 344.

183. *See id.* at 343. The term "prayer" was not in the statute as originally enacted. The words "or prayer" were added by amendment in 1973. 1973 Mass. Acts, Ch. 621, at 606 (MASS. GEN. LAWS ANN. ch. 71, § 14). The original bill proposing the addition of "or prayer" to the statute used the conjunctive "and" so that the statute would have read, "observed for meditation *and* prayer." Mass. House Bill 4890 (1973) (emphasis added). The sponsor of the bill later amended it on the floor by taking out the conjunctive "and" and replacing it with the disjunctive "or." 421 F. Supp. at 343.

184. *Id.* at 342 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 281 (1963)). Moreover, the court added that "[t]he legislature could reasonably believe that students tend to learn greater self-discipline and respect for the authority of the teacher from a required moment of silence." *Id.*

185. *Id.* at 344.

186. *Id.* at 345.

187. *Accord*, State Bd. of Educ. v. Board of Educ., 108 N.J. Super. 564, 574-75, 262 A.2d 21, 26-27, *aff'd*, 57 N.J. 172, 270 A.2d 412 (1970). However, it is impermissi-

United States Supreme Court, the moment of silence seems to be a reasonable and acceptable means of accommodating religion in the public schools. Certainly, the moment of silence could be utilized as a direct substitute for the "opening exercise" practices struck down in *Engel*[188] and *Abington*.[189] Heretofore, the moment of silence has not been widely utilized. Of the 206 responses to the survey of Nebraska public school superintendents,[190] only two superintendents indicated that their school systems provided for a moment of silence on a regular basis.[191]

3. Graduation Prayers

Despite of the rather strict prohibition against prayers in public schools, a number of courts have upheld the use of invocations and benedictions in public school graduation ceremonies.[192] These have been sanctioned in spite of the fact that the invocations and benedictions were found to clearly constitute prayers,[193] and that these prayers were uttered as a part of an official public school function. In analyzing the situation under the free exercise clause, the voluntary nature of attendance at the graduation ceremony has been emphasized.[194] The cases involved situations in which no pressures to attend the graduation ceremony were placed upon the students.[195] In *Wood v. Mt. Lebanon Township School District*,[196] for example, the court found that all compulsory instruction, ex-

ble for the school to provide students with religious materials upon which to meditate. *Id.*

188. 374 U.S. at 206-07.

189. 370 U.S. at 422.

190. *See* note 12 & accompanying text *supra*.

191. The question inquiring about the moment of silence reads as follows:

> Does your school system provide on a regular basis for a moment of silence which may be used by the students for meditation or prayer?
>
> a. Yes
>
> b. No.

192. *See* Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974); Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293 (W.D. Pa. 1972); Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974).

193. *See* Grossberg v. Deusbebio, 380 F. Supp. 285, 288 (E.D. Va. 1974). *See also* Wiest v. Mt. Lebanon Township School Dist., 457 Pa. 166, 176, 320 A.2d 362, 368 (1974) (Pomeroy, J., concurring).

194. *See* Grossberg v. Deusebio, 380 F. Supp. 285, 290 (E.D. Va. 1974); Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293, 1294 (W.D. Pa. 1972); Wiest v. Mt. Lebanon Township School Dist., 457 Pa. 166, 171, 320 A.2d 362, 364-65 (1974). It should be noted that, although voluntariness has frequently been declared to be irrelevant in evaluating facts under the establishment clause, *see, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203, 224-25 (1963), voluntariness speaks directly to the issue of coercion under the free exercise clause, *see* Abington School Dist. v. Schempp, 374 U.S. 203, 222-23 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962).

195. In Wiest v. Mt. Lebanon Township School Dist., 457 Pa. 166, 169, 320 A.2d 362,

aminations, and training were completed before the graduation ceremony and that it stood completely apart from all formal requirements for graduation.[197] Indeed, a student not attending the ceremony would nevertheless receive a diploma as well as all other rights and privileges bestowed upon those who did attend.[198]

In spite of this lack of objective coercion, the *Grossberg v. Deusebio*[199] court recognized that certain subjective, indirect pressures to attend existed.[200] But these pressures did not invalidate the invocation and benediction under the free exercise clause because "[w]hile there are indirect pressures to attend, there are no substantial demands to partake."[201] In support of this finding, the court pointed to the facts that no audience recitation of a prayer was involved and that each student's mind could be turned to matters of the student's own choosing during the invocation and benediction.[202] The court conceded that the invocation and benediction might cause offense to some, but found that such an offense would not inhibit the practice and pursuit of individual religious beliefs. Therefore, it concluded that: "While an acute fastidiousness might and indeed does give one pause, the Court is not convinced that the primary effect of the invocation will be either doctrinal dissemination or a manifestation of governmental affinity for religion. Such substance is rarely the result of high school graduation exercises."[203]

The court found the invocation and benediction matter to be a close question under the establishment clause.[204] In arriving at the conclusion that the establishment clause was not violated, the court pointed to the fact that prayers and other references to God are not absolutely prohibited in public life.[205] Among the constitutionally acceptable references to God in public life, according to Mr. Justice Douglas, are prayers in legislative halls, appeals to God in presidential speeches, and other references to God in our na-

364 (1974), however, the court found that graduation ceremonies were usually attended by more than 90% of the graduating class.

196. 342 F. Supp. 1293 (W.D. Pa. 1972).
197. *Id.* at 1294.
198. *Id.*
199. 380 F. Supp. 285 (E.D. Va. 1974).
200. *Id.* at 290.
201. *Id.*
202. *Id.*
203. *Id.*
204. *See* Grossberg v. Deusebio, 380 F. Supp. 285, 290 (E.D. Va. 1974); Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293, 1295 (W.D. Pa. 1972).
205. Zorach v. Clauson, 343 U.S. 306, 312-13 (1952); Grossberg v. Deusebio, 380 F. Supp. 285, 289 (E.D. Va. 1974); Wiest v. Mt. Lebanon Township School Dist., 457 Pa. 166, 172-73, 320 A.2d 362, 365 (1974).

tional life.[206] Upon examining the graduation exercises, the court found their purpose to be ceremonial—indeed, "just such a public ritual or ceremony which Mr. Justice Douglas may have had in mind."[207] The *Wood v. Mt. Lebanon Township School District*[208] court, for example, explained that "graduation ceremonies at Mt. Lebanon Township School District are just that—*i.e.*, they are ceremonial and are in fact not a part of the formal, day-to-day routine of the school curriculum to which is attached compulsory attendance."[209] The purpose of the graduation exercise was to ceremoniously award honors and diplomas, and all other factors of the program were peripheral to the ceremonial function.[210]

Beyond the ritual or ceremonial justification for the invocation and benediction under the establishment clause was the fact that any expenditure of public monies connected with the challenged invocations and benedictions was *de minimus* so that no monetary harm occurred to anyone because of the prayers.[211] Moreover, the time taken up by prayer was minimal,[212] no element of calculated indoctrination existed,[213] no governmental stamp of approval was placed on the prayers,[214] the practice had no repetitive character,[215] and no danger existed of government becoming embroiled in a divisive religious battle for control of invocations and benedictions.[216] "The event, in short, [was] so fleeting that no significant transfer of government prestige can be anticipated."[217]

The decisions upholding the use of invocations and benedictions at graduation exercises may appear to stand at variance with *Engel*,[218] *Abington*,[219] and their progeny which strictly prohibit oral prayers in the public school context.[220] The primary basis for

206. Zorach v. Clauson, 343 U.S. 306, 312-13 (1952).
207. Wiest v. Mt. Lebanon Township School Dist., 457 Pa. 166, 173, 320 A.2d 362, 366 (1974). *See also* Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293, 1294 (W.D. Pa. 1974); Grossberg v. Deusebio, 380 F. Supp. 285, 288-89 (E.D. Va. 1974).
208. 342 F. Supp. 1293 (W.D. Pa. 1972).
209. *Id.* at 1294.
210. Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. at 1295. *See also* Grossberg v. Deusebio, 380 F. Supp. 285,289 (E.D. Va. 1974).
211. 342 F. Supp. at 1295.
212. *Id.*; Grossberg v. Deusebio, 380 F. Supp. 285, 288-89 (E.D. Va. 1974).
213. *Id.* at 288.
214. 342 F. Supp. at 1294.
215. 380 F. Supp. at 288-89.
216. *Id.* at 289.
217. *Id.*
218. 370 U.S. 421 (1962).
219. 374 U.S. 203 (1963).
220. *Compare* Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974); Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293 (W.D. Pa. 1972); Wiest v. Mt. Lebanon Township School Dist., 457 Pa. 166, 320 A.2d 362 (1974); *with*

this deviation from the strict prohibition is found in the fact that the graduation ceremony is too remote from the classroom or any educational program to be constitutionally impermissible.[221] The graduation ceremony, therefore, loses the special emphasis on the separation values that clothe the public education context.[222] The graduation ceremony is more like a situation in the mature, adult world than a situation in the immature and impressionable world of the child.[223]

The invocation and benediction at graduation ceremonies, therefore, provide an acceptable means by which a public school system may accommodate religion.

Responses to the survey of Nebraska public school superintendents[224] indicate that the graduation invocation and/or benediction is frequently utilized as a means of accommodating religion in Nebraska schools. Of the 206 responses to the survey, all but three superintendents indicated that an invocation and/or benediction was part of the graduation ceremony.

B. Student Meetings

Suppose a group of students at a public high school were to request use of a school room for religious purposes (*e.g.*, for Bible study). Assume also that the request would involve weekly uses lasting approximately fifteen minutes each. May the request be granted by the local high school authorities? The answer is far from settled because state and lower federal courts have reached conflicting decisions, and the United States Supreme Court has not yet addressed the issue. The different policies in various school systems reflect the unsettled law. Of the 206 responses to the survey of Nebraska public school superintendents,[225] ninety-seven indicated that a request similar to that posed in the hypothetical would not be granted, ninety-seven indicated that it could be granted, and the remainder either indicated that they did not

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Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (voluntary practice of mental technique prohibited); Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965) (student-initiated prayers prohibited); State Bd. of Educ. v. Board of Educ., 108 N.J .Super. 564, 262 A.2d 21, *aff'd*, 57 N.J. 172, 270 A.2d 412 (1970) (remarks of chaplain in United States Congress banned in public school).

221. Grossberg v. Deusebio, 380 F. Supp. 285, 288-89 (E.D. Va. 1974); Wood v. Mt. Lebanon Township School Dist., 342 F. Supp. 1293, 1294-95 (W.D. Pa. 1972).

222. For a discussion of this special separation emphasis, see notes 8-10 & accompanying text *supra*.

223. Note the similarities between the graduation cases and Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968) (invocation by clergyman at opening of town meeting upheld). *See* note 220 *supra*.

224. *See* note 12 & accompanying text *supra*.

225. *Id.*

know or they did not respond to the question.[226]

Reed v. Van Hoven[227] held that a request similar to the hypothetical request could be granted as an appropriate accommodation of religion. In *Van Hoven*, the court established specific guidelines that must govern the granting of the request.[228] The guidelines are: (1) the use of the room must occur at least five minutes before the start of or at least five minutes after the completion of the regularly scheduled class day;[229] (2) no bell should ring to signify the start of the meetings;[230] (3) the transition from the religious use of the facilities to the regular school day (or vice versa) must involve "a general commingling of the entire student body on the way to [or from] class, just as there would be were there no . . . [religious use] whatever. . . . [so that] home rooms . . . will be filled in the usual way, and no student will enter a room containing a group which has previously congregated there for the purpose prayer;"[231] (4) the role of the teacher during the meetings must be strictly that of one charged with the responsibility of maintaining order;[232] and (5) the room used must not be the regu-

226. The question eliciting this information reads as follows:

> If a group of your students would ask to meet periodically in a school room for religious purposes and would agree to use the school room prior to or immediately following the school day, would your school system grant this request?
>
> Yes
>
> No.

227. 237 F. Supp. 48 (W.D. Mich. 1965).

228. The plan [established by the court] is an attempted accommodation [of religion], and since it is an accommodation, it must in no way affect those who do not wish an accommodation. For this reason, the practices which are observed must be free of any possible elements of coercion. Those who do take the opportunity to participate in the program must be separated from the official activity of the school, as of course must be the program itself.

Id. at 54.

229. *Id.*

> Requiring that the use occur either before or after the regularly scheduled school day separates the use from official school activity. The five minute intervals were added to insure this separation. The intervals also prevent the use from affecting in any way those who do not wish such an accommodation of religion and thereby frees the use from any possible elements of coercion.

Id.

230. *Id.* The basis for this guideline is that the use "is voluntary, and those wishing to avail themselves of the opportunity provided should learn the time when it is offered to them and appear at the designated location without the aid of a school bell." *Id.*

231. *Id.* at 54-55.

232. *Id.* at 56. For example:

> No teacher shall be called upon to select the prayer which should be said, or to select the readings which may be given. The students would determine, by means of their own choosing, what should be

lar home room of the students attending the religious use.[233] *Van Hoven* is strongly supported by the argument that the constitutional freedoms of religion, expression, association, equal protection, and a public forum require the granting of the request and that the grant does not violate the establishment clause.[234]

A few state court cases, however, have held that granting student requests to use school rooms for religious purposes is a violation of the establishment clause. For example, in *Trietley v. Board of Education of Buffalo*,[235] six high school students, with their parents and members of the clergy, requested permission from the Buffalo Board of Education to use public school rooms for Bible club meetings. The request included proposed guidelines that were consistent with those established in *Van Hoven*.[236] In dealing with the constitutional issues, the court ruled that "the proposed activities would go beyond merely accommodating the religious interests of petitioners and would transgress the principles of governmental neutrality expressed in the establishment clause of the first amendment."[237] This establishment clause ruling was based upon findings that (1) the purpose of the proposed use was religious in nature, (2) the primary effect of the proposed

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done in this respect. The burden would not be cast upon the teacher to make the decision, nor to stand up and be counted.

Id.

233. *Id.* at 54.

234. For a thorough presentation of this argument, see Toms & Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 EMORY L.J. 3 (1978).

235. 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

236. These guidelines provided:

> each club must choose as officers, a bible reading chairman, a recording secretary and a memory verse chairman; that club membership must be voluntary and each club and meeting must be led by students, with no meeting dominated by any one person; that the clubs must have at least one teacher volunteer as an advisor who would attend and supervise meetings; that each club must be interdenominational; that meetings must be conducted before or after the official school class day for no longer than 15 minutes, in a place which would not interfere with the conduct of normal school activities; that the meetings would not be for socializing or the discussion of churches or church doctrines; and that each club 'must be an asset to the school, providing moral and spiritual assistance to the students.' . . . that the proposed clubs would follow criteria established for other clubs or student organizations presently existing in the Buffalo public high schools and would adhere to other reasonable requirements imposed by the Buffalo Board of Education or Superintendent of Schools.

Id. at 4, 409 N.Y.S.2d at 914.

237. *Id.* at 8, 409 N.Y.S.2d at 917. *Accord*, Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977); Commissioner of Educ. v. School Comm., 358 Mass. 776, 267 N.E.2d 226, *cert. denied*, 404 U.S. 849 (1971).

use was to advance a religious philosophy contained in the Bible, (3) state financial support would flow directly to the club members in the form of rent free use of public facilities, heat, lighting and other connected expenses, and (4) public school employees would have to supervise the use.[238] Regarding the free exercise clause, the court held there was no violation because no state coercion was involved: "Here petitioners are free to pursue their religious beliefs; they are only prevented from enlisting the aid of the public school system to do so."[239]

Public school authorities who want to grant the request are placed in a difficult position by the unsettled state of the law. Nevertheless, three alternative courses of action appear to be available for accommodating religion in this situation. The first is to simply grant the request subject to the limitations established in *Van Hoven* and with the understanding that a number of courts have refused to grant similar requests.[240] The advisability of pursuing the first alternative is, therefore, dependent upon the existence of any significant opposition in the community.

The second alternative is to grant the request subject to the *Van Hoven* limitations but only if students pay a rental fee for the use of school facilities. According to the survey of Nebraska public school superintendents,[241] a number of Nebraska schools have a policy of following this rental alternative.[242] The benefit of a rental fee is that it would satisfy much of the objection expressed in the cases prohibiting religious use of school facilities by students.[243] Moreover, a rental fee would bring the situation within the rule articulated in *Resnick v. East Brunswick Township Board of Education*.[244] *Resnick* involved the rental of public school facilities by local churches for religious services and religious education classes on Sundays. The Court stated:

> We hold that religious groups who fully reimburse school boards for relat-

238. 65 A.D.2d at 7-8, 409 N.Y.S.2d at 916-17.
239. *Id.*
240. *Van Hoven* has not been followed in New York, Massachusetts, or California. Trietly v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978); Commissioner of Educ. v. School Comm., 358 Mass. 776, 267 N.E.2d 226, *cert. denied*, 404 U.S. 849 (1971); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977).
241. *See* note 12 & accompanying text *supra*.
242. Although the questionnaire did not specifically request this information, six superintendents specified on the questionnaire form that their schools would follow the rental alternative.
243. *See* Trietly v. Board of Educ., 65 A.D.2d 1, 8, 409 N.Y.S.2d 912, 916 (1978); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 12 137 Cal. Rptr. 43, 49, *cert. denied*, 434 U.S. 877 (1977).
244. 77 N.J. 88, 389 A.2d 944 (1978). *Accord*, State *ex rel.* Gilbert v. Dilleys, 95 Neb. 527, 145 N.W.2d 999 (1914).

> ed *out-of-pocket expenses* may use school facilities on a temporary basis for religious services as well as educational classes. We further hold that the courts below erred in requiring these sectarian groups to pay a *commercial rental rate* and in placing the one-year limitation on their continued use of the school premises.[245]

The only significant difference in the *Resnick* situation and a student use would be the school supervision involved in the latter. This difference, however, could be eliminated by having an adult not connected with the school system voluntarily supervise the use,[246] or by allowing the students to simply use the room without supervision subject to revocation.

A third alternative is for the school authorities to deny the request but then assist the students in contacting clergy, parents, and appropriate community groups for the purpose of finding an alternative facility for the students to use. Authority for such assistance is found in *Zorach v. Clausen*,[247] which upheld a "released time" program for the religious education of public school students. The *Zorach* Court stated that it is constitutionally appropriate when a teacher:

> cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the [constitutionally appropriate] character of the act.[248]

In light of these three alternatives, there is no need to deprive the requesting students of the opportunity for worship. Indeed, a flat denial of their request, without at least pursuing the third alternative, might be seen as an unacceptable demonstration of hostility toward religion.

Concerning the *substance* of religious discussion or prayers occurring during the religious use, the school authorities should avoid regulatory involvement. Requirements that the religious character of the use be nondenominational or nonsectarian, for example, would be inappropriate. The United States Supreme Court ruled in *Engel v. Vitale* that it is no part of the business of government to compose official prayers or to control, support, or influence

245. 77 N.J. at 120, 389 A.2d at 960 (emphasis added). In analyzing earlier cases the court noted: "While there is a split among jurisdictions as to whether it is constitutionally permissible for public school premises to be used for religious purposes . . . the only case within the last 35 years which addressed the federal constitutional issue upheld the use." 77 N.J. at 106, 389 A.2d at 952-53 (citing Annot., 79 A.L.R.2d 1148, § 4 at 1163 (1961) (*Schools-Use for Religious Purposes*)). The single case referred to was Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 697 (Fla. Sup. Ct. 1959).

246. The adult involved should take a strictly supervisory role and not enter into the religious activity. *See* note 232 & accompanying text *supra*.

247. 343 U.S. 306 (1952).

248. *Id.* at 313.

the kinds of prayers the American people can say.[249] Presumably, such a principle applies to all types of religious discussion as well as to prayers. Indeed, if a church were to conduct its services at a public school facility (as in *Resnick*), it would be preposterous for state authorities to require that any part of the services be nondenominational or nonsectarian. By the same token, the religious character of a student use is beyond regulation. Moreover, in *Reed v. Van Hoven* the court ruled that a teacher supervising the use should avoid any control over religious aspects of the use and that the students alone would be responsible for religious content.[250] It follows that restraint by other school authorities is impermissible as well. This is not to say that school authorities cannot enforce order and reasonable decorum,[251] but they must be very careful in any regulation to avoid matters of religious substance. Furthermore, once a forum is established for religious discussion, the rights of free speech and free exercise place the content and character of the discussion beyond state regulatory authority. Religious views and discussions by their nature tend to be dogmatic, sectarian, and mystical. To require that the use be nondenominational—*e.g.*, that all prayers be addressed to some neutral being rather than to "God," "Jehovah," or "Allah," or that all discussion center on elements common to religions in general—would force a blandness upon the use that would render it religiously impotent and worthless.

V. CONCLUSION

The principle of separation between church and state is sufficiently flexible to permit reasonable governmental accommodations of religion. The means for accommodating religion examined in this comment are significant in that they enable public school students to receive a liberal education—"[O]ne can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared"[252]—and to freely exercise their religion.[253] More importantly, accommodating religion in public schools has the effect of showing respect for the religious nature of our people.[254] Great care must be exercised by school authorities to assure that an appropriate level of accommodation

249. 370 U.S. at 428, 429.
250. 237 F. Supp. at 56.
251. *See* note 36 & accompanying text *supra*.
252. McCollum v. Board of Educ., 333 U.S. 203, 236 (1948) (Jackson, J., concurring).
253. *Id.* at 211-12; Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).
254. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

exists.[255]

To be sure, the entanglement of religion and government is unacceptable, but a callous indifference on the part of government toward religion is equally unacceptable:[256]

> It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistably.[257]

It is only appropriate, therefore, that public schools recognize and reflect the fact that religion and the American experience are inextricably intertwined.

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255. In some cases, this may mean lessening the degree of the school's involvement with religion. The survey of Nebraska Public School Superintendents, *see* note 12 & accompanying text *supra*, contained a question about the local community's opinion. This question read in full "[w]ith your answers to the above questions in mind, would the majority of citizens in your community like to have (a greater, a lesser, or about the same) degree of accommodation of religious practices in your school system?" Forty of the 206 responding superintendents indicated that the citizens of their respective communities would like to have a greater degree of religious accommodation in their public school systems. No response indicated that the community would like to have a lesser degree of accommodation.

256. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

257. SIR W. MOBERLY, THE CRISIS IN THE UNIVERSITY 56 (London 1949) (*quoted in* O. ZABEL, *supra* note 25).