52 Ill.2d 312

Supreme Court of Illinois.

Ruth **CECRLE**, Appellant,

v.

ILLINOIS EDUCATIONAL FACILITIES AUTHORITY, Appellee.

No. 45170.

Oct. 2, 1972.

Synopsis

Action to enjoin state Educational Facilities Authority from implementing financing agreement with college. The Circuit Court, Cook County, Donald J. O'Brien, J., sustained motion to dismiss the action and plaintiff appealed. The Supreme Court, Schaefer, J., held that Act providing for financing of institutions of higher education and excluding from facilities which may be financed by Educational Facilities Authority property used for sectarian instruction or study does not involve excessive entanglement of the state in the affairs of religious institutions and does not violate provision of State Constitution prohibiting any appropriation of public funds in aid of any sectarian purpose and does not violate the Establishment Clause of the First Amendment.

Affirmed.

Opinion

***400** SCHAEFER, Justice.

The circuit court of Cook County sustained a motion to dismiss an action in which the plaintiff, Ruth **Cecrle**, sought to enjoin the defendant, Illinois Educational Facilities Authority, from implementing an agreement with Lewis College which was entered into pursuant to the terms of the Illinois Educational Facilities Authority Act. The plaintiff appealed, and the appeal was transferred to this court. IllS.Ct.R. 302(b), Ill.Rev.Stat.1971, c. 110A, s 302(b), 50 Ill.2d R. 302(b).

The Illinois Educational Facilities Authority Act (Ill.Rev.Stat.1969, ch. 144, par. 1301 et seq.) establishes the Illinois Educational Facilities Authority, composed of seven members appointed by the Governor, who serve without compensation. The authority is empowered to issue revenue bonds and to use the proceeds from their sale to acquire, construct, enlarge, remodel, renovate, improve, furnish, or equip educational facilities for lease to private institutions of higher education. The statute follows the pattern of State authorized revenue bond financing of buildings for private colleges and universities that has been employed in several States. See ***314** Opinion of the Justices (1968), 354 Mass. 779, 236 N.E.2d 523; Vermont Educational Buildings Financing Agency v. Mann (1968), 127 Vt. 262, 247 A.2d 68,appeal dismissed, 396 U.S. 801, 90 S.Ct. 9, 24 L.Ed.2d 58; Nohrr v. Brevard County Educational Facilities Authority (Fla.1971), 247 So.2d 304; Clayton v. Kervick (1970), 56 N.J. 523, 267 A.2d 503, vacated, 403 U.S. 945, 91 S.Ct. 2274, 29 L.Ed.2d 854, aff'd on remand (1971), 59 N.J. 583, 285 A.2d 11; Hunt v. McNair (1970), 255 S.C. 71, 177 S.E.2d 362, vacated (1971), 403 U.S. 945, 91 S.Ct. 2276, 29 L.Ed.2d 854, aff'd on remand (1972), S.C., 187 S.E.2d 645.

The statute defines a ‘private institution of higher education’ as a not-for-profit educational institution which is authorized by law to provide a program of education beyond the high school level, is not owned or controlled by the State or any of its subdivisions or agencies and ‘does not discriminate in

the admission of students on the basis of race, color or creed.' The institution must admit as regular students only those with a high school degree, or its equivalent, and must provide a program for which it awards a bachelor's degree, a 2-year program acceptable for full credit toward such a degree, or a 2-year program for certain semiprofessional occupations. The institution must be accredited or meet equivalent requirements under the terms of the Act. Ill.Rev.Stat.1971, ch. 144, par. 1303.07.

The kinds of facilities which may be financed by the Authority are listed in section 3.06 of the Act; they include a wide variety, for both academic and extracurricular activities, but they 'shall not include any property used or to be used for sectarian instruction or study or as a place for devotional activities or religious worship nor any property which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination.' They may not include a facility which is to be used ***315**primarily for training of ministers, priests, rabbis or other professional persons in the field of religion. Ill.Rev.Stat.1969, ch. 144, pars. 1303.06, 1303.02.

The Authority is to determine the location and character of a project it approves, and to issue revenue bonds to finance its cost. The necessary land is to be acquired, and the cost, if any, is to be paid for 'solely from funds provided under the authority of this Act.' The bonds are payable solely from the income derived from the project, and they do not constitute a debt of the State. When the facility is constructed it is leased to the institution. The Authority fixes the rents and charges for the use of the facility, which must be sufficient to meet interest and principal payments on the bonds as well as all costs of administering and maintaining the project. Section 6 provides: 'All expenses incurred in carrying out the provisions of this Act ***401** shall be payable solely from funds provided under the authority of this Act and no liability shall be incurred by the Authority beyond the extent to which moneys shall have been provided under this Act.' The maximum maturity of the bonds is 40 years, and after they are redeemed the Authority is required to convey the facility to the educational institution. Ill.Rev.Stat.1969, ch. 144, pars. 1305.05—1309.

On August 6, 1971, the Authority entered into an agreement with Lewis College, located in Lockport, Illinois, for the financing and construction of a permanent aviation maintenance instruction facility on the Lewis College campus. Lewis College is a private Roman Catholic college under the direction of the Christian Brothers. It has received from the United States Department of Health, Education and Welfare a grant of $286,041 for the construction of the facility, and it applied to the Authority for the issuance of revenue bonds under the statute in the sum of $930,000, to cover the remainder of the total cost. It has executed a quit-claim deed conveying title to the land upon which the facility is to be built to the ***316** Authority. The agreement provides that the Authority will issue revenue bonds in the aggregate principal amount of $930,000, payable over a period of 29 years, to finance the construction and equipping of the facility. The Authority is then to contract for and supervise the construction of the facility. Thereafter, the Authority will lease the facility to Lewis College for an annual rental sufficient to comply with the requirements of the statute. When the bonds are fully redeemed the Authority is to convey the facility to Lewis College.

The Act is challenged upon the ground that it violates section 3 of article X of the Illinois constitution of 1970 (which is identical to section 3 of Article VIII of the constitution of 1870), as well as the provisions of the first amendment to the constitution of the United States which are made applicable to the States through the fourteenth amendment.

Section 3 of article X of the Illinois constitution provides:

'Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian

denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.'

The pertinent portion of the first amendment of the Federal constitution is as follows:

'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.'

From the preceding summary of the provisions of the statute it is clear the none of our own decisions have dealt with anything that very closely resembles the kind of problem that is involved here. This statute deals only with institutions of higher education; it relates only to assistance ***317*** in the construction and maintenance of buildings to be used for secular purposes; it involves no direct grant of State funds, and with one exception, to be noted hereafter, it involves no loan of public funds. The building that is to be constructed will ultimately be paid for completely by the private institution for which it is constructed. What makes the program attractive to private institutions of higher education is that this method of financing reduces the total cost of construction because interest upon the revenue bonds issued under the Act will be exempt from Federal income taxation.

The plaintiff argues that 'the State of Illinois, by making its privilege to issue ***402*** 'tax exempt' bonds available for use and benefit of private, sectarian institutions of higher learning, is making a very substantial grant or donation to such institutions.' This form of aid, not by a grant or loan of money or property, but by making available a tax-exempt status with respect to a tax imposed by another government, was unknown when section 3 of article X was originally included in our constitution, and the first question to be determined is whether it is prohibited by that section.

For more than a century our successive Illinois constitutions have expressly authorized the General Assembly to exempt from taxation property used exclusively 'for school, religious, and charitable purposes.' (Ill.Const. of 1848, art. IX, sec. 3; Ill.Const. of 1870, art. IX, sec. 3; Ill.Const. of 1970, art. IX, sec. 6.) The same constitution which contains section 3 of article X, also specifically authorizes the legislature to exempt from taxation all property used for school or religious purposes. It is unmistakably clear that section 3 of article X was not intended to prohibit the General Assembly from directly establishing a tax-exempt status for religiously affiliated schools. And in our opinion it would be inconsistent to read into section 3 of article X a prohibition against the kind of indirect tax exemption that is involved in this case.

1So far as the constitution of the United States is ***318*** concerned, outright exemption from taxation is not prohibited by the first amendment. In Walz v. Tax Commission (1970), 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697, the Supreme Court sustained the validity, under the Federal constitution, of New York's grant of an exemption from property taxes to religious organizations. And in Tilton v. Richardson (1971), 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790, the Supreme Court suatained a Federal program under which institutions of higher education, including religiously affiliated institutions, were given direct grants for the construction of buildings and facilities for secular purposes. The Court has held that in order to be consistent with the Establishment Clause a program of aid to religiously affiliated schools must meet three separate standards. It must have a secular purpose, a primary effect that neither advances nor inhibits religion, and it must not give rise to an 'excessive entanglement' between the government and religion. Lemon v. Kurtzman (1971), 403 U.S. 602, 612—613, 91 S.Ct. 2105, 29 L.Ed.2d 745, 755.

In the case before us it is clear that the purpose of the General Assembly was to maintain and improve the quality of higher education in the State, and thereby to enhance the welfare of the State. We have been given no cause to question this purpose.

In determining that the primary effect of the Federal statute neither advanced nor inhibited religion, the Supreme Court emphasized the fact that the facility was itself religiously neutral, and that it was to be used by students attending an institution of higher learning who are less impressionable than those attending church-related primary and secondary schools. (See also, Freund, Public Aid to Parochial Schools, 82 Harv.L.Rev. 1680, 1691.) These factors are also present in the case before us.

Before the Lemon and Tilton cases were decided, the highest courts of New Jersey and South Carolina had sustained the validity of legislation authorizing revenue ***319*** bond financing for private educational institutions, both secular and sectarian. (Clayton v. Kervick (1970), 56 N.J. 523, 267 A.2d 503; Hunt v. McNair (1970), 255 S.C. 71, 177 S.E.2d 362.) These cases were remanded by the Supreme Court of the United States to the respective State courts for further consideration in the light of the decisions in Lemon, Tilton and other cases (Clayton v. Kervick, 403 U.S. 945, 29 L.Ed.2d 854, 91 S.Ct. 2274, 2276). The purpose of the remand was apparently to give the State courts an opportunity to consider whether or not their statutes involved 'excessive entanglement' of the ***403*** State in the affairs of religious institutions. The validity of the statutory schemes was again affirmed by the New Jersey and South Carolina courts 59 N.J. 583, 285 A.2d 11; S.C., 187 S.E.2d 645.

2We are of the opinion that the basic provisions of the present statute do not involve 'excessive entanglement.' Such supervision as is involved in this statute apparently relates to the possible violation of the statutory provision which prohibits the use of the facility in question for religious purposes. The likelihood of a violation of that provision of the statute seems remote, for the institution would have little to gain but much to lose by failing to comply with the statute. The degree of supervision required would be minimal, and does not operate to invalidate the main scheme of the statute.

3In Tilton the Supreme Court held that the Federal program would have violated the Establishment Clause if the facility was conveyed to a religiously affiliated institution after 20 years without restrictions as to its use. The Act before us specifies that funds raised under it may not be used for the acquisition of any property 'used or to be used' for sectarian instruction or activities (Ill.Rev.Stat.1969, ch. 144, pars. 1303.2, 1303.6), and we hold that this language requires the institution to refrain from using the facility for any sectarian purpose so long as it has any substantial value. This interpretation effectuates the purpose of the General Assembly and avoids an interpretation ***320*** which would render the Act unconstitutional. See Claryton v. Kervick (1972), 59 N.J. 583, 285 A.2d 11, 20.

45We are of the opinion, however, that the provision of section 17 of the Act (Ill.Rev.Stat.1969, ch. 144, par. 1317), which authorizes '(c)ounties, cities, villages, incorporated towns, and other municipal corporations, political subdivisions and public bodies and public officers of any thereof' to 'legally invest any sinking funds, moneys or other funds belonging to them or within their control in any bonds issued pursuant to this Act,' cannot be sustained. That provision authorizes governmental bodies and public officers to loan public money to finance the construction of a building for a religious educational institution, and in our opinion it violates section 3 of article X of the constitution of Illinois. It eliminates the 'one-time' aspect relied upon to sustain the grant in the Tilton case. The potential for entanglement in a long range relationship of debtor and creditor is great, for in the event of default the bondholders are authorized to apply for the appointment of a receiver to operate the facility. This defect does not invalidate the entire statute, for the provision authorizing the investment of public funds in the revenue bonds issued by the Authority is clearly severable. Ill.Rev.Stat.1969, ch. 144, par. 1323.

Judgment of the circuit court of Cook County is affirmed.Judgment affirmed. **All Citations**52 Ill.2d 312, 288 N.E.2d 399

54 Ill.2d 448

Supreme Court of Illinois.

BOARD OF EDUCATION, SCHOOL DISTRICT NO. 142, COOK COUNTY, Illinois, Appellant,

v.

Michael J. **BAKALIS**, Superintendent of Public Instruction, et al., Appellees.

Nos. 45189, 45242.

June 25, 1973.

Synopsis

Action for declaration as to validity of school bussing statute and for other relief. The Circuit Court, Cook County, Nathan M. Cohen, J., entered judgment for defendants and plaintiff appealed. The Supreme Court, Goldenhersh, J., held that statute requiring school board to provide same transportation along its regular school bus routes for nonpublic school pupils as it provides for its public school pupils was constitutional.

Affirmed.

Ryan, J., concurred specially and filed opinion.

Opinion

GOLDENHERSH, Justice.

In each of these cases plaintiff, Board of Education of School District No. 142, Cook County, upon allowance of a motion filed under Rule 302(b), Ill.Rev.Stat.1971, ch. 110A, s 302(b) (52 Ill.2d R. 302(b)), appeals directly to this court from the judgment of the circuit court of Cook County dismissing its action for injunction and declaratory judgment. Although separately briefed and argued, the cases have been consolidated for opinion. In No. 45189, plaintiff sought a declaratory judgment that section 29—4 of the School Code of 1961 (Ill.Rev.Stat.1971, ch. 122, par. 29—4), which requires a school board to provide the same transportation along its regular school bus routes for nonpublic school pupils as it provides for its public school pupils, was unconstitutional, and the issuance of a writ of injunction enjoining the defendants, the Superintendent of Public Instruction and the County Superintendent of Schools of Cook County, from withholding State Aid funds because of plaintiff's refusal to furnish transportation to nonpublic school ***452*** pupils. In No. 45242 plaintiff ****739*** sought a declaratory judgment that sections 2—3.7, 2—3.8, 3—10 and 3—14.7 of the School Code (Ill.Rev.Stat.1971, ch. 122, pars. 2—3.7, 2—3.8, 3—10 and 3—14.7) were unconstitutional and also asked that the defendants, the Superintendent of Public Instruction and the County Superintendent of Schools of Cook County, be enjoined from withholding State Aid to the

plaintiff because of its refusal to follow and act in accordance with, the opinions and rulings of the defendants.

School District 142, of which plaintiff school board is the governing body, maintains grades 1 through 8 inclusive in three schools in the Village of Oak Forest and an adjoining unincorporated area. Plaintiff was requested to furnish bus transportation for more than 76 pupils enrolled in St. Damian School in Oak Forest, and St. Christopher School in Midlothian. It is plaintiff's position that there are no seats available on its buses and that in order to provide transportation for the pupils of these nonpublic schools it would be required to hire two additional buses at a substantial annual cost. Plaintiff contends further that unless enjoined from so doing defendants will withhold from the school district State Aid funds to which it is entitled.

The first paragraph of section 29—4 of the School Code provides:

'The school board of any school district that provides any school bus or conveyance for transporting pupils to and from the public schools shall afford transportation, without cost, for childen who attend any school other than a public school, who reside at least 1 1/2 miles from the school attended, and who reside on or along the highway constituting the regular route of such public school bus or conveyance, such transportation to extend from the homes of such children or from some point on the regular route nearest or most easily accessible to their homes to and from the school attended, or to or from a point on such regular route which is nearest or most easily accessible to the school attended by such children.'

453 Plaintiff contends that section 29—4 is invalid in that it violates section 3 of article X of the Illinois Constitution of 1970, S.H.A., which provides:

'Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlld by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.'

It argues that the trial court erred in holding that under the United States Supreme Court's interpretations of the first amendment to the Federal Constitution section 29—4 was constitutional, and contends that assuming, Arguendo, that the statute does not violate the first amendment, it is invalid under the provisions of section 3 of article X of the 1970 Illinois Constitution.

In reaching its decision, the circuit court relied principally upon Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711. In Everson, a New Jersey township school board, acting under a statute which empowered it to promulgate rules and make contracts for the transportation of its pupils to and from schools, by resolution authorized reimbursement to the parents of money expended by them for the transportation of their childen on regular buses operated by the public transportation system. Reimbursement was authorized and made to parents of children who attended Catholic parochial schools. The New Jersey Court of Error and Appeals, with one dissent, held that neither the statute ***740*** nor the board's resolution violated either the New Jersey Constitution or the first amendment. In a 5—4 decision the Supreme Court of the United States affirmed and Mr. Justice Black, ***454*** writing for the majority, summarized the purpose and intent of the Establishment Clause as follows:

'The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor a 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 brlief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' Reynolds v. United States, supra (98 U.S. 145 at 164, 25 L.Ed. 244).' 330 U.S. at 15—16, 67 S.Ct. at 511, 91 L.Ed. at 723.

The court then went on to say:

'New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, ***455** Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, Because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending taxraised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have bee paid for by the State. The same possibility exists where the state requies a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation ***456** of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the ****741** approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support

them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall ***457** between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.' 330 U.S. at 16—18, 67 S.Ct. at 512—513, 91 L.Ed. at 724—725.

In a dissenting opinion in Everson, Mr. Justice Rutledge, said, 'Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. No such finding has been or could be made in this case.' 330 U.S. at 52—53, 67 S.Ct. at 529, 91 L.Ed. at 742.

Everson demonstrates the difficulty of distinguishing legislation which provides funds for the welfare of the general public from that which aids or sustains religious institutions. In Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, in which the Supreme Court held that the directive of a board of education in New York which required that a prayer be said aloud at the beginning of each school day violated the first amendment, Mr. Justice Douglas, a member of the majority in Everson said in a concurring opinion: 'My problem today would be uncomplicated but for Everson v. Board of Education, 330 U.S. 1, 17, 67 S.Ct. 504, 91 L.Ed. 711, which allowed taxpayers' money to be used to pay 'the bus fares of parochial school pupils as a part of a general program under which' the fares of pupils attending public and other schools were also paid. The Everson case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools—lunches, books, and tuition being obvious examples.' 370 U.S. at 443, 82 S.Ct. at 1273, 8 L.Ed.2d at 615.

In Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697, holding valid a ***458** New York statute exempting from real-property tax realty owned by an association organized exclusively for religious purposes and used exclusively for carrying out such purposes, Mr. Justice Douglas said in a dissenting opinion: 'With all due respect the governing principle is not controlled by Everson v. Board of Education, Supra. Everson involved the use of public funds to bus children to parochial as well as to public ****742**schools. Parochial schools teach religion; yet they are also educational institutions offering courses competitive with public schools. They prepare students for the professions and for activities in all walks of life. Education in the secular sense was combined with religious indoctrination at the parochial schools involved in Everson. Even so, the Everson decision was five to four and, though one of the five, I have since had grave doubts about it, because I have become convinced that grants to institutions teaching a sectarian creed violate the Establishment Clause.' (397 U.S. at 703, 90 S.Ct. at 1429, 25 L.Ed.2d at 721.) Although the Supreme Court has continued to cite Everson with approval (see, E.g., Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060; Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697; Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790), the difficulty of the problem is further demonstrated by the statement of Mr. Chief Justice Burger, writing for the majority in Lemon v. Kurtzman, 403 U.S. 602, 611—612, 91 S.Ct. 2105, 2110, 29 L.Ed.2d 745, 755: 'In Everson v. Board of Education, 330, U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), this Court upheld a state statute that reimbursed the parents of parochial school children for bus transportation expenses. There Mr. Justice Black, writing for the majority, suggested that the decision carried to 'the verge' of forbidden territory under the Religion Clauses. Id. at 16, 67 S.Ct., at 511. Candor compels acknowledgement, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.'

***459** The same divergence of opinion expressed in Everson in found in the decisions of State appellate courts which have considered, under State constitutions containing prohibitions against the

use of public funds for sectarian purposes, the validity of legislation authorizing the use of public funds to transport nonpublic school pupils. The courts upholding such legislation have generally adopted the rationale of the Everson majority opinion, while those invalidating such legislation have adopted the rationale of the dissenting opinion. States sustaining public bussing of parochial students are: California (Bowker v. Baker (1946), 73 Cal.App.2d 653, 167 P.2d 256) Connecticut (Snyder v. Town of Newtown (1960), 147 Conn. 374, 161 A.2d 770, appeal dismissed, 365 U.S. 299, 81 S.Ct. 692, 5 L.Ed.2d 688);Kentucky (Nichols v. Henry (1945), 301 Ky. 434, 191 S.W.2d 930; Rawlings v. Butler (Ky.1956), 290 S.W.2d 801); Maine (Squires v. Inhabitants of City of Augusta (1959), 155 Me. 151, 153 A.2d 80 (dicta)); Maryland (Board of Education of Baltimore County v. Wheat (1938), 174 Md. 314, 199 A. 628 (three judges dissenting); Adams v. County Comm'rs of St. Mary's County (1942), 180 Md. 550, 26 A.2d 377 (one judge dissenting)); Massachusetts (Quinn v. School Committee of Plymouth (1955), 332 Mass. 410, 125 N.E.2d 410); Michigan (Alexander v. Bartlett (1968), 14 Mich.App. 177, 165 N.W.2d 445); Minnesota (Americans United, Inc. v. Independent School District No. 622 (1970), 288 Minn. 196, 179 N.W.2d 146); New Jersey (Everson v. Board of Education (1945), 133 N.J.L. 350, 44 A.2d 333 (one judge dissenting), aff'd, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (4 justices dissenting); West Morris Regional Board of Education v. Sills (1971), 58 N.J. 464, 279 A.2d 609, cert. denied, 404 U.S. 986, 92 S.Ct. 450, 30 L.Ed.2d 370); New York (Board of Education v. Allen (1967), 20 N.Y.2d 109, 281 N.Y.S.2d 799, 228 N.E.2d 791 (3 judges dissenting), overruling the rationale of Judd v. Board of Education (1938), 278 N.Y. 200,*460 15 L.Ed.2d 576 (3 judges dissenting), which until Everson expressed the majority view in the country that bussing parochial students was an unconstitutional aid to religion; the effect of Judd had been removed before Allen, however, by an amendment to the New York Constitution specifically permitting bussing of parochial students); Ohio (Honohan v. Holt (1968), 17 Ohio Misc. 57, 244 N.E.2d 537);Pennsylvania (*****743*** Rhoades v. Abington Township School Dist. (1967), 424 Pa. 202, 226 A.2d 53 (two judges dissenting), appeal dismissed, 389 U.S. 11, 88 S.Ct. 61, 19 L.Ed.2d 7); and West Virginia (State ex rel. Hughes v. Board of Education (W.Va.1970), 174 S.E.2d 711 (2 judges dissenting).) Those States which have invalidated such legislation are: Alaska (Matthews v. Quinton (Alaska 1961), 362 P.2d 932 (one judge dissenting)); Delaware (State ex rel. Traub v. Brown (1934), 6 W.W.Harr. 181, 36 Del. 181, 172 A. 835, Opinion of the Justices (Del.1966), 216 A.2d 668); Hawaii (Spears v. Honda, 51 Hawaii 1, 449 P.2d 130); Idaho (Epeldi v. Engelking (1971), 94 Idaho 390, 488 P.2d 860 (2 judges dissenting)); Oklahoma (Board of Education v. Antone (Okl.1963), 384 P.2d 911); Washington (Visser v. Nooksack Valley School District (1949), 33 Wash.2d 699, 207 P.2d 198 (2 judges dissenting)); and Wisconsin (State ex rel. Reynolds v. Nusbaum (1962), 17 Wis.2d 148, 115 N.W.2d 761 (2 judges dissenting)). It appears that while there is unanimity neither among the courts nor their respective judges, the majority view and the trend of judicial opinion is that transportation at public expense of parochial school students on the same basis as public school students is considered primarily a health and safety measure for the benefit of all students, and that any aid to the parochial school, or the church supporting it, is incidental.

12In their brief, defendants, citing statistics and highway safety reports, assert that travel by school bus is safer than by automobile or on foot, that children traveling by school bus are protected from inclement weather and from persons who might do them harm, and argue that ****461*** section 29—4 is a health and safety measure for the protection of all school children. Plaintiff, on the other hand, argues that the transportation of parochial school students is a benefit and constitutes assistance to church-controlled schools, that the ‘child benefit’ theory advocated by defendants is a subterfuge to circumvent the constitution, and that aid to a religion-oriented school is tantamount to assisting the church which controls that school. From our examination of the authorities we conclude that section 29—4 was enacted for the secular legislative purpose of protecting the health and safety of children traveling to and from nonpublic schools; that the primary effect of the statute neither advances nor inhibits religion, that any benefit to the parochial school or church controlling it is incidental and that the statute does not foster an excessive government entanglement with religion.

Plaintiff contends that section 3 of article X of the 1970 Illinois Constitution is more restrictive than the establishment-of-religion clause of the first amendment and prohibits even incidental aid or benefits to sectarian schools. In support of its contention plaintiff argues that the language of section 3 of article X is identical to that of section 3 of article VIII of the 1870 Illinois Constitution, and that both the 1870 and 1970 Constitutional Conventions rejected efforts to amend it or replace it with a provision similar to the religion clause of the first amendment. 2 Debates of Constitutional Convention 1869—70, at 626; 2 Record of Proceedings, Sixth Illinois Constitutional Convention 841—854 (hereinafter cited as Proceedings).

In People ex rel. Keenan v. McGuane, 13 Ill.2d 520, 527, 150 N.E.2d 168, 172, this court stated: 'While in construing the constitution the true inquiry concerns the understanding of the meaning of its provisions by the voters who adopted it, still the practice of consulting the debates of the members of the convention which framed the constitution has long been indulged in by courts in determining the meaning of***462*** provisions which are thought to be doubtful.' In our opinion the Record of Proceedings of the Sixth Illinois Constitutional Convention indicates that the language of section 3 of article X was retained from the 1870 Constitution in order to maintain the existing detente that had developed between the State and nonpublic schools.

****744*** The Committee on Education in its Proposal Number 1 (6 Proceedings 223—289) recommended that section 3 of article VIII of the 1870 Constitution be retained as a part of the new constitution. The explanation in the committee proposal and appendices to the proposal show the depth of the committee's study, its interpretation of the provision prohibiting public funds for sectarian purposes and its reasons for retaining the provision from the 1870 Constitution. The Committee stated:

'It is the intention of the Education Committee by retaining this language to reaffirm the traditional principle of the separation of church and state as expressed in the 1870 Constitution and as expressed by the Federal First Amendment which prohibits any 'law respecting an establishment of religion'.

The Committee heard almost a hundred witnesses testify regarding ARTICLE VIII, Section 3. In brief, there are five possible approaches to this question as suggested by the witnesses, by delegate proposals and as considered by the Committee:

1. The first alternative would strengthen the language of Section 3 to make such language more prohibitive of various types of payments which might be considered in aid of nonpublic schools. Some witnesses requested greater restriction, but virtually no one submitted any specific language which would be more restrictive. None of the member proposals presented this alternative. The Committee recognizes that language which is more restrictive might tend to invalidate programs now in effect. Such programs are the Illinois State Scholarship program, pupil transportation, the school lunch program, aid to handicapped children and industrial and training school programs among others. More restrictive language could be drafted which might entirely prohibit the State ***463*** from doing business with any private entity. Having no desire to retard or eliminate such established programs, nor to venture into unexamined areas of restriction where the effects could go far beyond education, the Committee rejected this alternative.

The remaining four alternatives are as follows:

2. To amend the present language to make specific types of aid to non-public schools more permissible (Member Proposals Nos. 90, 91, 253, 285).

3. To substitute the wording of the Federal First Amendment prohibiting any 'law respecting an establishment of religion'.

4. To strike the section in its entirety and remain silent on the question (Member Proposals Nos. 101, 152, 192, 544).

5. To retain the present language unchanged (Member Proposal No. 204).

It is possible to consider these four alternatives as a group because, as legal experts have testified before the Committee, the same substantive results could accrue from each of the four choices. No matter what the wording of the Illinois Constitution, no legislative program of assistance to private schools or pupils, direct or indirect, can be carried out if such program violates the Federal First Amendment. As a practical matter then, neither the present Section 3, nor silence on the subject, nor more permissive language can effectively allow any program which violates the Federal prohibition, since such a program is voidable by the Federal courts. Therefore, to change the Illinois language in accordance with alternatives 2, 3, or 4 can make a practical, substantive difference only if the standard of the present Illinois Section 3 is a more restrictive standard than the Federal 'establishment' clause.

The Committee is of the opinion that the Illinois Supreme Court in the cases *****745*** of Dunn v. Chicago Industrial School For Girls, 280 Ill. 613 (117 N.E. 735) (1917); Trost v. Ketteler Manual Training School, 282 Ill. 504 (118 N.E. 743) (1918); and, St. Hedwig's Industrial School for Girls v. Cook County, 289 Ill. 432 (124 N.E. 629) (1919), has enterpreted the words 'aid', 'support or sustain', and 'sectarian purpose' to yield the same results as the United States Supreme Court's interpretation of the word 'establish' in the Federal First Amendment. In addition, since the testimony of legal authorities ****464*** (and see Braden and Cohn, p. 409), has indicated that the present language is no more restrictive than the Federal language but rather yields the same substantive results, the Committee has concluded that any program which is constitutional under the Federal 'establishment' clause is constitutional under the present wording of ARTICLE VIII, Section 3.

In the cases of Everson v. Board of Education, and Board of Education v. Allen, 392 U.S. 236 (88 S.Ct. 1923, 20 L.Ed.2d 1060) (1968), the U.S. Supreme Court held, as did the New York Court of Appeals in the Allen case, that, as a matter of law, religious and secular ends can be separated. In recommending the retention of Section 3 as is, the Committee has recognized the possibility of this separation. Whether any particular program constitutes 'aid' or 'support' for prohibited sectarian purposes or is in furtherance of nonsectarian purposes is a factual matter to be left to court determination.

The Committee thus decided to follow the recommendation of the overwhelming majority of the witnesses which was to retain Section 3without change. The depth of emotion underlying much of the testimony has further convinced the Committee that any change, even one that is not substantive, would be unwise.

The New York experience is particularly relevant. In New York, the Constitutional Convention substituted the Federal First Amendment language for a section similar to Section 3 in Illinois. It is generally agreed, that the resulting controversy over what appeared, probably erroneously, to be the allowance of greater aid led to the defeat of the entire New York Constitution. Ironically, the New York Legislature then passed the textbook loan program which was upheld in the Allen case, under both the New York and the Federal Constitutions.' 6 Proceedings 249—254.

3We conclude that the opinion expressed by the Committee on Education with respect to section 3 of article X was also the understanding of the Convention (see 2 Proceedings 841—854) and of the voters who adopted it. Section 29—4 was enacted in 1933 (Laws of 1933, p. 1048), and when the voters approved the ****465*** Constitution of 1970, the bussing of nonpublic students at public expense was a well-recognized and long-established practice. 'This is an instance where * * * the history of past practices is determinative of the meaning of a constitutional clause not a decorous introduction to the study of its text.' (Mr. Justice Reed, dissenting in People ex rel. McCollum v. Board of

Education, 333 U.S. 203, 256, 68 S.Ct. 461, 487, 92 L.Ed.2d 649, 682.) We hold that section 29—4 of the School Code of 1961 does not violate section 3 of article X of the 1970 Illinois Constitution.

4Plaintiff contends next that it providing for free transportation to pupils attending church-controlled schools, section 29—4 gives a preference to the controlling church in violation of section 3 of article I of the 1970 Constitution, which in pertinent part provides: 'No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.' Plaintiff asserts that in Illinois approximately 88% Of the elementary and 95% Of the secondary school children attending ***746** nonpublic schools are enrolled in Catholic schools. It argues that the chief beneficiaries of section 29—4 are the Catholic schools and that this constitutes the granting of a preference to the Catholic Church, which controls these schools.

Section 3 of article I of the 1970 Constitution is identical to section 3 of article II of the 1870 Constitution. The Bill of Rights Committee, which voted 13 to 0 with 2 absent to retain this section, stated: 'The Committee was persuaded that it would be inadvisable to make any change in this important and sensitive provision. The Committee heard many witnesses on this subject. Most spoke to the advisability or inadvisability of government aid to parochial and other private schools, a question that is primarily in the hands of the Education Committee. (See ***466** Article VIII, Sec. 3 of the 1870 Constitution.)' (6 Proceedings 21.) The position taken by the Bill of Rights Committee was also the position take by the Convention. See 3 Proceedings 1372.

The same secular purpose, primary neutral effect and absence of excessive government entanglement which place section 29—4 outside the prohibition of section 3 of article X against the use of public funds for sectarian purposes also place it outside the prohibition of section 3 of article I against any preference being given by law to any religious denomination. Section 29—4 does not violate section 3 of article I of the 1970 Illinois Constitution.

5Citing Schuler v. Board of Education, 370 Ill. 107, 18 L.Ed.2d 174, plaintiff contends next that section 29—4 violates section 1(a) of article VIII of the 1970 Illinois Constitution, which provides: 'Public funds, property or credit shall be used only for public purposes.' Plaintiff asserts that the bussing of nonpublic school children by a public school district constitutes the use of public funds for a private purpose. The obvious answer to this contention in view of what we have heretofore said is that the transportation of school children, public or nonpublic, is a public purpose. Schuler is easily distinguishable. That case involved a contract between a public high school and a private junior college whereby the high school would purchase books and laboratory equipment for the joint use of the high school and junior college students. The court found that the transaction was a loan of public credit and property to a private corporation in violation of section 20 of article IV and separate section 2 of the 1870 Illinois Constitution, neither of which appears in the 1970 Illinois Constitution. The bussing of nonpublic school students is not a loan of public credit or property to the private schools, and we hold that section 29—4 does not violate section 1(a) of article VIII of the 1970 Illinois Constitution.

6Finally, plaintiff contends that section 29—4 violates section 13 of article IV of the 1970 Illinois Constitution, which provides: 'The General Assembly shall pass no ***467** special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.' The substance of plaintiff's argument is that section 29—4 will not operate uniformly as to all nonpublic school pupils, and will result in discrimination as to many of them because of the great differences and many variations in the locations of public schools, nonpublic schools, the regular public school routes and the distances between the pupils' homes and the regular bus routes and the schools, both public and nonpublic. Obviously, plaintiff is not a member of the class of nonpublic school pupils against whom it contends the statute is unreasonably discriminatory and is without standing to question the validity of the statute on this

ground. Rosewood Corp. v. Fisher, 46 Ill.2d 249, 259, 263 N.E.2d 833; Schreiber v. County Board of School Trustees of Peoria County, 31 Ill.2d 121, 125, 198 N.E.2d 848; Chicago Cosmetic Co. v. City of Chicago, 374 Ill. 384, 394, 29 N.E.2d 495.

***747** 7The circuit court correctly held section 29—4 to be constitutional, and the judgment dismissing plaintiff's action is affirmed.

Plaintiff's second action for declaratory judgment (No. 45242) arose from the same factual situation and controversy as did the first. In this case it challenged the constitutionality of those sections of the School Code (Ill.Rev.Stat.1971, ch. 122, par. 1—1 et seq.) which authorized the Superintendent of Public Instruction

'To be the legal adviser of school officers, and, when requested by any school officer, to give his opinion in writing upon any question arising under the school laws of the State' (par. 2—3.7)

and

'To hear and determine all controversies arising under the school laws of the State, coming to him by appeal from a county superintendent of schools' (par. 2—3.8)

and which provides:

***468** 'In all controversies arising under the school law, the opinion and advice of the county superintendent shall first be sought, whence appeal may be taken upon a written statement of facts certified by the county superintendent to the Superintendent of Public Instruction' (par. 3—10)

and that the County Superintendent of Schools is

'To act as the official adviser and assistant of the school officers and teachers in his county. In the performance of this duty he shall carry out the advice of the Superintendent of Public Instruction.' (par. 3—14.7)

It has been the practice of the Office of the Superintendent of Public Instruction to give written opinions on questions arising under the School Code. The opinions are written on the stationery of the Office of the Superintendent of Public Instruction and are signed by the legal adviser, who is an attorney at law, or one of eight assistant legal advisers, all of whom are attorneys. The Superintendent of Public Instruction is not an attorney. In reply to a letter written by counsel for plaintiff, an opinion was furnished plaintiff with respect to its duties under the provisions of 29—4. Plaintiff, acting upon the advice of its attorney, declined to act in accordance with the opinion of the Office of the Superintendent of Public Instruction, the Superintendent of Public Instruction ordered certain funds withheld, and this litigation was instituted.

It is plaintiff's contention that the General Assembly cannot constitutionally authorize either the Superintendent of Public Instruction or County Superintendent of Schools to act as legal adviser to school officials throughout the State or to render opinions concerning school law. It contends further that only the judicial branch of government is vested with the power to define and regulate the practice of law; that the Superintendent of Public Instruction is not an attorney licensed by this court and that he may not use the services of licensed attorneys to engage in the practice of law; that the rendition of ***469** opinions on questions of school law constitutes the practice of law; that the authorization of the Superintendent of Public Instruction of act as legal adviser and give written opinions on questions of school law to school officers violates section 1 of article II of the Illinois Constitution of 1970, which provides for the separation of powers among the legislative, executive and judicial branches of government; that the authorization to hear and determine controversies arising under the school laws was an unconstitutional delegation of judicial power.

The legislation authorizing the Superintendent of Public Instruction to interpret the school laws was enacted in 1857 and provided:

'The said state superintendent of public instruction shall make such rules and regulations as he may think necessary ***748*** and expedient to carry into full effect the provisions of this act, and of all the laws which now are or may hereafter be in force for establishing and maintaining schools in this state; and the said superintendent shall have power, and it shall be his duty, to explain and interpret and determine to all school commissioners, directors, township and other school officers, the true intent and meaning of this act, and their several duties enjoined thereby, and his decisions shall be final, unless otherwise directed by the legislature, or reversed by a court of competent jurisdiction.' Laws of 1857, pp. 259—260.

In 1871 this section was amended to provide:

'The said state superintendent of public instruction shall make such rules and regulations as may be necessary and expedient to carry into efficient and uniform effect the provisions of this act, and of all the laws which now are or may hereafter be in force for establishing and maintaining free schools in this state; and shall be the legal adviser of all school officers, and when requested by any such school officer, shall give his opinion in writing upon any question arising under the school laws of this state.' Laws of 1871, p. 702.

The validity of this statutory provision amended to substantially its present form in 1915, and virtually ***470*** unchanged in several revisions of the School Code does not appear to have been previously questioned.

In support of its contention that the Superintendent of Public Instruction cannot be authorized to give advisory opinions to school officials on questions arising under the school law, plaintiff relies principally upon Stein v. Howlett, 52 Ill.2d 570, 289 N.E.2d 409, which involved the constitutionality of the Governmental Ethics Act (Ill.Rev.Stat., 1972 Supp., ch. 127, par. 601—103 et seq.). Section 4A—106 (par. 604A—106) of that Act authorized the Secretary of State, upon request of any person subject to the Act, to render an advisory written opinion on questions concerning the interpretation of article 4A and authorized him to employ counsel to carry out this duty. Under the authority of Fergus v. Russel, 270 Ill. 304, 110 N.E. 130, we held this section unconstitutional.

89In Fergus, the court held that the constitution clothed the Attorney General with all the common-law powers of that office, and although the General Assembly may impose new duties upon him, it cannot take from him any of his common-law powers or duties. One of his common-law duties is to act as 'the sole official adviser of the executive officers, and of all boards, commissions and departments of the state government' (270 Ill. at 342, 110 N.E. at 145), and section 4A—106 of the Governmental Ethics Act was held unconstitutional for the reason that it would have permitted the Secretary of State to act as legal adviser to other executive officers who were subject to the Governmental Ethics Act. Stein is clearly distinguishable for the reason that the school officers who receive legal advice from the Office of the Superintendent of Public Instruction are not executive officers, boards, commissions or departments of the State Government whose legal adviser or representative must be the Attorney General. (People ex rel. Board of Trustees of U. of I. v. Barrett, 382 Ill. 321, 46 N.E.2d 951.) We hold, therefore, that section 2—3.7 of the School Code does not purport to take from the Attorney General any ***471*** of his common-law duties or powers and does not violate the Constitution of 1970. We hold further that in utilizing the services of licensed attorneys as legal advisers, to perform the duties imposed upon him under section 2—3.7, the Superintendent of Public Instruction is not engaged in the unauthorized practice of law.

10We consider next plaintiff's contention that in authorizing the Superintendent of Public Instruction 'to hear and determine all controversies' section 2—3.8, in violation of the provision of section 1 of article II of the Constitution of 1970, provides ***749*** for an unconstitutional delegation of judicial

power. Included in the powers and duties of the Superintendent of Public Instruction enumerated in section 2—3 of the School Code are many administrative duties. An officer charged with administrative duties may properly be granted such quasi-judicial powers as are necessary and incidental to those duties. (Department of Finance v. Cohen, 369 Ill. 510, 17 N.E.2d 327); and the authorization of such powers is not an unconstitutional grant of judicial power. (Toplis and Harding, Inc. v. Murphy, 384 Ill. 463, 51 N.E.2d 505.) The School Code provides for Administrative Review (Ill.Rev.Stat.1971, ch. 110, par. 264 et seq.) of many of the decisions of the Superintendent of Public Instruction, and where administrative review is not available, as demonstrated in this case, judicial review may be invoked by way of an action for declaratory judgment. We hold that section 2—3.8 is not an unconstitutional delegation of judicial power.

We consider next plaintiff's contentions with respect to section 3—10. Despite the language of that section, an examination of the School Code shows that there are many controversies, such as those involving boundary changes, in which the County Board of School Trustees has primary jurisdiction (art. 7, ch. 122, par. 7—1 et seq.), and dismissal of teachers in contractual continued service (ch. 122, par. 24—12) in which primary jurisdiction lies in the school boards, both with provisions for administrative ***472*** review (see sections 7—7 and 24—16), which obviously are not governed by the provisions of section 3—10. Presumably there are situations to which section 3—10 is applicable, but none is presented in this case and we need not, therefore, determine its validity. Nor does this record present a factual situation which requires us to determine the validity of section 3—14.7.

Finally we consider plaintiff's contention that in taking the position that it must be governed by his interpretation of the school law, rather than by the opinion of its own attorneys, the Superintendent of Public Instruction has improperly interfered with its powers and duties in the administration of the school district which it governs and has unlawfully, under threat of withdrawal of recognition and withholding of funds, sought to force it to accede to his views.

11Clearly the Superintendent of Public Instruction in the performance of his duties must determine factual situations and apply the controlling law to those facts, and that is precisely what was done here. The Superintendent of Public Instruction concluded that plaintiff was not in compliance with section 29—4, and the sanction of having funds whthheld was imposed, not, as suggested by plaintiff because of its refusal to comply with the legal opinion of the Superintendent of Public Instruction, but because of its violation of section 29—4. The fact that plaintiff could bring these actions for declaratory judgment and injunction demonstrates that a remedy is available to school officers who disagree with the opinions of the Office of the Superintendent of Public Instruction. We conclude that the trial court correctly dismissed plaintiff's actions, and the judgments are affirmed.

Judgments affirmed.

RYAN, Justice (specially concurring):

I agree with the result reached by my colleagues. However, I would not reach the result by equating the ***473*** provisions of section 3 of article X of the 1970 constitution with the first amendment of the Federal constitution. The opinion states that the majority view in other jurisdictions holds that the transportation of pupils is considered primarily a health and safety measure for the benefit of the students and that any aid to parochial schools as a result of sulch transportation is only incidental. On this basis I would uphold the statute in question. This has been the basis upon which other States which have constitutional language ***750*** as restrictive as that contained in our section 3 of article X have sustained statute providing transportation to students in parochial schools. (See Annot., 41 A.L.R.3d 344.) These other jurisdictions have not upheld such statutes by holding that the restrictive language of their constitutions conveys the same meaning as do the provisions of the first amendment of the Federal constitution.

Clearly it was not the intention of the delegates to the constitutional convention of 1870 that the language of section 3 of article VIII of the constitutional of 1870 (which language is identical with that of section 3 of article X of the 1970 constitution) should have the same meaning as the first amendment. The Illinois constitutions of 1818 and 1848 did not contain provisions similar to those found in section 3 of article VIII of the constitution of 1870. However, each of those previous documents did contain a general clause relating to religion similar to that contained in the first amendment. Likewise, in the constitution of 1870 a similar general provision was incorporated in section of the article II, which provided: 'The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; * * *. No person shall be required to attend to support any ministry or place of worship against his consent, nor shall any preference be given by law of any religious denomination or mode of worship.'

However, the delegates to the 1870 convention were ***474*** not satisfied with this general prohibition against supporting or giving preference to any religious denomination. The debates reflect a great concern over aid to sectarian schools, apparently because of some experience in the State of New York. Resolutions were presented to the convention requesting that there be incorporated in the constitution specific prohibitions against the use of public funds for the support of sectarian schools. (1 Debates and Proceedings of the Constitutional Convention of 1870, at 85, 118, 127.) There was submitted to the convention a proposed section which ultimately became section 3 of article VIII. During the debate on this section Delegate Church, in replying to a proposed amendment to the section, stated: 'Now the intention of the committee was to make that section so broad and distinct that no appropriations could be made in aid of any of those objects that are mentioned. * * * there are various pretexts that might be got up to give aid to them by indirection, if the amendment should be adopted.' The amendment was rejected. 1 Debates and Proceedings of the Constitutional Convention of 1870, at 617.

During the course of debate the following substitute for the proposed section was offered and rejected by the convention: 'The General Assembly shall pass no law for the establishment of religion or prohibiting the free exercise thereof.' (1 Debates and Proceedings of the Constitutional Convention of 1870, at 626.) The almost identical language of this proposed substitute with that contained in the first amendment of the Federal constitution suggests its source. Its rejection as a substitute for section 3 of article VIII indicates to me that the framers of the constitution of 1870 did not intend that this section have the same meaning as the first amendment but that it be more restrictive insofar as public aid to sectarian schools is concerned.

Thus, the constitution of 1870 as finally adopted had two sections concerning church-state relationship: the ***475*** general religion clause found in section 3 of article II, which has been quoted above and is similar to the prohibitions and protections afforded by the first amendment, and the specific prohibitions against public aid to sectarian schools as contained in section 3 of article VIII of the constitution of 1870. The provisions of this section are:

'Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay ***751*** from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State or any such public corporation, to any church, or for any sectarian purpose.'

These two provisions in the constitution of 1870, considered with the fact that the convention specifically rejected the language of the first amendment when offered as a substitute for the language of section 3 of article VIII, indicate to me that it was the intention of the framers of the constitution of 1870 that the specific prohibitions of section 3 of article VIII should be more restrictive

with regard to public aid to sectarian schools than are the general prohibitions of the first amendment.

In the 1970 constitution section 3 of article I is identical to section 3 of article II of the constitution of 1870, and section 3 of article X is identical to section 3 of article VIII of the constitution of 1870. Thus in the constitution of 1970, as in the constitution of 1870, we have the general prohibitions similar to those found in the first amendment and the specific prohibition against aid to sectarian schools.

The majority opinion indicates that somehow between 1870 and 1970 all of the specific proscriptions of section 3 of article X of the 1970 constitution have become verbiage ***476*** and have come to mean nothing more than 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof'—the provisions of the first amendment of the Federal constitution. The opinion quotes extensively from the constitutional debates of 1970 citing these debates as an indication of the intention of the delegates that the meaning of section 3 of article X should be the same as the provisions of the first amendment. To me the quoted portions of the debates do not indicate this. Rather, I view the language of the debates as acknowledging that this subject was a controversial issue which the delegates were reluctant to face. They rejected the substitution of the language of the first amendment for the language of section 3 of article VIII of the constitution of 1870, fearing that this substitution would antagonize a large section of the electorate. The only intention that I can glean from the debates is that the convention attempted to sidestep the issue and to lead the electorate to believe that the specific prohibitions contained in section 3 of article X mean what the language of that section clearly states, while at the same time hoping that this court at some future date will extend the dicta found in Dunn v. Chicago Industrial School for Girls (1917), 280 Ill. 613, 117 N.E. 735, and say that this language means no more than the first amendment.

This questionable scheme was furthered by the official explanation which the convention adopted for the information of the voters (see Proposed 1970 Constitution—Official Text with Explanation, 7 Record of Proceedings, Sixth Illinois Constitutional Convention 2742). If it was the intention of the delegates that this section have the same meaning as the first amendment, why did they not say this in the explantion of this section? Instead, the official explanation states: 'This is exactly the same as Article VIII, section 3 of the 1870 Constitution.'

Would a voter, after having read this explanation and before casting his vote for or against the proposed ***477*** constitution, think that the specific and detailed prohibitions of section 3 of article X were no more restrictive than the general prohibitions of the first amendment? Ibelieve he would not. It was the vote of the People which was required to bring this constitution into existence. I am therefore concerned only with what the voters intended when they voted for the adoption of the constitution, ****752*** and that intent must be gathered from the clear and specific language of the instrument. I am not concerned with the intent of the delegates to the convention, because I fear that their intention was to evade this controversial issue and to be less than candid with the electorate.

I do not believe that the meaning of section 3 of article X of the constitution of 1970 can be forever tied to the construction which has been or which may be placed upon the general language of the first amendment of the Federal constitution. The divergent language used in these two provisions inevitably will lead to a result which will conflict with a specific prohibition of section 3 of article X. Only recently (June 25, 1973) the Supreme Court of the United States in Norwood v. Harrison, 413 U.S. 455, at —-, 93 S.Ct. 2804, at 2810, 37 L.Ed.2d 723stated:

'Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; * * *.'

From this language I conclude that furnishing textbooks to students attending parochial schools would constitute a violation of the prohibition of section 3 of article X of our constitution, which proscribes appropriating or paying anything to help support or sustain any ***478**school controlled by any church. Yet, under the first amendment the Supreme Court has held that the furnishing of textbooks to students is permissible. Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.E.2d 1060.

This different result is possible because not only does section 3 of article X of our constitution prohibit the payment of anything the primary effect of which is to advance religion, as does the first amendment, but it also specifically prohibits any appropriation or payment to help support or sustain a school controlled by a church, whether or not the effect of that payment is to advance religion. Thus, any payment that helps support or sustain such a school would be in violation of the Illinois constitution whereas it may be proper under the first amendment because it does not constitute a payment advancing religion. There are many forms of aid to parochial schools which may ultimately be construed as not advancing religion and thus not in violation of the first amendment. However, unless the last two thirds of article X is ignored such aid to a school controlled by a church would be contrary to the specific prohibitions of the Illinois constitution.

For these reasons, I cannot agree that section 3 of article X of the constitution of 1970 is no more restrictive than the first amendment of the Federal constitution.

All Citations

54 Ill.2d 448, 299 N.E.2d 737

127 Ill.App.3d 451

Appellate Court of Illinois,

First District, First Division.

Martin **HECKMANN** and Edward T. Cawley, individually and on behalf of Local 106, AFL–CIO Service Employees International Union, a labor organization of all cemetery workers members thereof, Plaintiffs-Appellants,

v.

CEMETERIES ASSOCIATION OF GREATER CHICAGO, et al., Defendants-Appellees,

and

People of the State of Illinois, ex rel. Neil F. Hartigan, Attorney General, etc., Defendant-Intervenor,

Merkaz Harabonim-Chicago Orthodox Rabbinate, et al., Defendants- Intervenors.

No. 84–1480.

Sept. 17, 1984.Dissenting Opinion Oct. 15, 1984.

Synopsis

Union representatives brought suit on behalf of union members challenging constitutionality of statute permitting certain burials on Sundays and legal holidays. The Circuit Court, Cook County, Arthur L. Dunne, J., entered summary judgment in favor of defendants, and appeal was taken. The Appellate Court, McGloon, J., held that: (1) statute did not violate the establishment clause of the First Amendment; (2) statute did not arbitrarily confer a special benefit on certain religious groups in violation of the special legislation clause; and (3) statute did not violate equal protection.

Affirmed.

Buckley, P.J., dissented and filed opinion.

Opinion

McGLOON, Justice:

Plaintiffs filed a declaratory judgment action challenging the constitutionality and validity of “An Act to permit certain burials on Sundays and legal holidays * * *.” On appeal from an order granting defendants-intervenors' motion for summary judgment, plaintiffs contend: (1) the Act violates the Establishment Clause of the United States Constitution and Article I, section 3 of the Illinois Constitution; (2) state action in the area of labor relations is preempted by federal law; (3) the Act violates the equal protection clauses of the United States and Illinois constitutions and the Illinois constitutional prohibition on special legislation; (4) their right of free exercise of religion guaranteed

under the constitution and the Federal Civil Rights Act of 1964 is abridged by the Act; (5) the Act mandates involuntary servitude; (6) the Act violates due process; and (7) the obligations of contract are impaired by the Act.

We affirm.

The subject of this appeal is “An Act to permit certain burials on Sundays and legal holidays * * *.” (the Act) (Ill.Rev.Stat.1983, ch. 21, par. 101 *et seq.*). The pertinent provisions of the Act provide:

“1. (a) Every contract, agreement or understanding between a cemetery authority and a cemetery workers' association which totally prohibits burials of human remains on Sundays or legal holidays shall be deemed to be void as against public policy and wholly unenforceable.

(b) Nothing in this Section shall prohibit a cemetery authority and a cemetery workers' association from entering into a contract, ***454**agreement or understanding which limits Sunday or holiday burials of human remains to decedents who were members of religious sects whose tenets or beliefs require burials within a specified period of time and whose deaths occurred at such times as to necessitate Sunday or holiday burials. Such contract, agreement or understanding may provide that a funeral director notify the cemetery authority within a reasonable time when a Sunday or holiday burial is necessitated by reason of the decedent's religious tenets or beliefs.

(c) It shall be unlawful for any person to restrain, prohibit or interfere with the ***1357 ***577** burial of a decedent whose time of death and religious tenets or beliefs necessitate burial on a Sunday or legal holiday.

“2. Any person aggrieved by any conduct of a cemetery authority or cemetery workers' association which is prohibited by Section 1 may maintain an action in the circuit court of the county in which the violation occurred to enjoin any conduct in violation of that Section. The circuit court may enter an expedited order or temporary restraining order without notice and hearing to protect the rights of persons aggrieved by such conduct in violation of Section 1 of this Act.” (Ill.Rev.Stat.1983, ch. 21, pars. 101(a), 101(b), 101(c) and 102.)

Plaintiffs Martin **Heckmann** and Edward T. Cawley, elected representatives of Local 106, AFL–CIO Employees International Union, filed a class action on behalf of union members seeking to have the Act declared invalid and unconstitutional. The named defendants were Cemeteries Association of Greater Chicago, Inc., an association of approximately 30 cemetery owners and operators, and Robert Rothschild, director of the Association's labor committee. The State of Illinois, the Jewish Burial Society, the Jewish Sacred Society, Agudath Israel of Illinois, Merkaz Harabonim-Chicago Orthodox Rabbinate, Congregation Poalei Zedek, Maine Township Jewish Congregation, Congregation Ezras Israel and Congregation Shaarei Tfiloh Bnai Reuven Nusach Hoari were granted leave to intervene.

Plaintiffs' complaint alleged that Rothschild, in his capacity as director of the labor committee and as operator of Evergreen Cemetery, told Cawley that after the effective date of the Act, any cemetery worker refusing to perform duties on Sundays or holidays would be fired. Under the collective bargaining agreement entered into by plaintiffs and the Association, the following holidays were designated workless holidays: New Year's Day, Independence Day, Labor Day, ***455** Veteran's Day, Thanksgiving Day, Christmas Day and the employee's birthday. The agreement further provided that no funeral services, interments, cremations or storages would be held on such holidays or Memorial Day except for cases where immediate burial was required by Board of Health regulations. Also, by

custom and mutual understanding between cemetery workers and owners, no work is performed on Sunday, the day workers observe as their day of rest and religious holiday.

Plaintiffs' motion for judgment on the pleadings was denied and the trial court entered an order granting defendants-intervenors' motion for summary judgment. For the reasons advanced in the issues which follow, plaintiffs argue that the trial court erred in granting the motion for summary judgment. All of the issues raised on appeal were raised in plaintiffs' complaint.

First, plaintiffs contend the Act violates the Establishment Clause of the United States Constitution and Article I, section 3 of the Illinois Constitution which prohibits preference to any religious denominations or mode of worship.

12Generally, the Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment (*Everson v. Board of Education* (1947), 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711), prohibits governmental sanctioning of the tenets of any and all religions. (*School District of Abington v. Schempp* (1963), 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844.) Neither the states nor the federal government may pass laws which aid religion or prefer one religion over another. (*Everson.*) Nevertheless, statutes which confer benefits or give special recognition to religion in general or to one faith are not invalidated merely on that basis; rather, legislation must be examined to determine whether it establishes a religion or religious faith or tends to do so. *Lynch v. Donnelly* (1984), 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604.

3To defeat a challenge based on the Establishment Clause, a statute generally must satisfy three criteria: (1) the law ***1358 ***578**must have a secular legislative purpose; (2) its principal effect must neither advance nor inhibit religion; and (3) the law must avoid excessive government entanglement with religion. (*Lynch; Larkin v. Grendel's Den, Inc.* (1982), 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297; *Lemon* ***456** *v. Kurtzman* (1971), 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745.) All the facts and circumstances of each case must be considered (*Lynch; Lemon*) and, at times, the three-part test set forth above has not been applied. In fact, in *Lynch,* the court noted that courts are not confined to any single test in this area. (465 U.S. 668, 104 S.Ct. 1362, 79 L.Ed.2d 613–614.) Regardless of the approach used in this case, we find that the Act does not violate the Establishment Clause.

45The Act in question has a valid secular purpose. The record indicates that certain religious groups were required to conduct burials on Sundays or holidays because of their religious beliefs and could not always act in accordance with their beliefs because under certain labor agreements, cemetery workers did not have to perform interments on those days. The Act eliminated the discriminating effect of the agreements. Statutes designed to eliminate even unintentional discrimination, and to accommodate religious beliefs are secular in purpose. (*Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL–CIO* (7th Cir.1981), 643 F.2d 445, 454, *U.S. cert. den.,* 454 U.S. 1046, 102 S.Ct. 587, 70 L.Ed.2d 488.) Furthermore, the Act does confer a benefit to one group to the exclusion of others, but relieves a burden on those who were unable to freely exercise their beliefs. It neither requires a particular religious affiliation or theological position nor inhibits the exercise of religious beliefs. Therefore, the Act meets the second criteria. (*Nottelson.*) Finally, we find that the statute does not foster excessive government entanglement with religion because government does not have to involve itself in any administration or planning and religion is not politicized. For these reasons, we reject plaintiffs' contention that the Act violates the Illinois constitutional provision prohibiting religious preferences.

Second, plaintiffs contend that by enacting the National Labor Relations Act (NLRA) (29 U.S.C.A. 151 *et seq.*), the federal government has preempted states' rights to regulate and restrict union collective bargaining processes. They maintain that the Act at issue in this case is unauthorized and prohibited legislation because it requires union members to relinquish their negotiated right to non-working Sundays and holidays, thereby interfering with the union's collective bargaining powers.

6States cannot restrict labor rights guaranteed by federal law. (*Lodge 76, International Association of Machinists and Aerospace Workers, AFL–CIO v. Wisconsin Employment Relations Commission* (1976), 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396.) However, federal labor policies are subordinate to First Amendment rights (***457** *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL–CIO* (7th Cir.1981), 643 F.2d 445) and a state may act to correct discriminatory practices within a union to accommodate religious beliefs of some union members. *Nottelson,* 643 F.2d, 450–51.

7As noted previously in this opinion, the Act accommodates those who were unable to practice their beliefs because of the agreement and understanding that no burials would be made on Sundays and holidays. We have no doubt that Congress or the federal courts would not countenance a denial of First Amendment rights in order to enforce an agreement denying those rights. Just as the NLRA cannot shield an employer or union from making reasonable accommodations to the religious needs of employees, we believe the NLRA cannot be invoked to allow cemetery workers to deprive those whom they serve of their right to practice their religious beliefs.

Plaintiffs further contend that the Act violates the equal protection clauses of the United States Constitution and the Constitution of Illinois and the state prohibition of special legislation.

***1359 ***579** 8910Special legislation is that which "confers a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated." (*Illinois Polygraph Society v. Pellicano* (1980), 83 Ill.2d 130, 137, 46 Ill.Dec. 574, 578, 414 N.E.2d 458, 462.) However, a statute classifying persons does not violate the special legislation proscription if there is a reasonable basis for the classification and if the legislation bears a reasonable and proper relation to the purpose of the act and the evil sought to be remedied. (*Bridgewater v. Hotz* (1972), 51 Ill.2d 103, 281 N.E.2d 317.) A law need not affect every person or place in the state alike, but it must operate uniformly on all persons in like circumstances. *Youhas v. Ice* (1974), 56 Ill.2d 497, 309 N.E.2d 6; *People ex rel. Vermilion County Conservation District v. Lenover* (1969), 43 Ill.2d 209, 251 N.E.2d 175.

11In view of the foregoing principles, we reject plaintiffs' argument that the Act arbitrarily conferred a special benefit on certain religious groups in violation of the special legislation clause. As pointed out previously in this opinion, the legislature sought to relieve a burden on those who had not been able to freely exercise their religious beliefs. The classification made in the Act was reasonably related to its purpose and the evil to be remedied.

12Many of the principles applicable to the special legislation issue are also applicable to the equal protection question. These are that legislative classifications cannot be arbitrary and must be based on a rational difference of condition or situation. Where the legislature concludes that reform is necessary, it may address itself to one stage ***458** of the problem and remedy it one step at a time. (*Illinois Coal Operators Association v. Pollution Control Board* (1974), 59 Ill.2d 305, 319 N.E.2d 782; *Youhas.*) However, as noted in *Illinois Polygraph Society:*

"Special legislation differs from a violation of equal protection in that the latter consists of arbitrary and invidious discrimination *against* a person or a class of persons. It results from the governmental withholding of a right, privilege or benefit from a person or a class of persons without a reasonable basis (or, where a fundamental right or suspect classification is involved, a compelling State interest) for doing so. Whether a law is attacked as special legislation or as violative of equal protection, it is still the duty of the courts to decide whether the classification is unreasonable in that it preferentially and arbitrarily includes a class (special legislation) to the exclusion of all others, or improperly denies a benefit to a class (equal protection)." (*Citations omitted.*) (83 Ill.2d, 138, 46 Ill.Dec. 578–79, 414 N.E.2d 462–63.)

13Plaintiffs maintain that the Act violates equal protection because it applies only to agreements between union workers and cemetery associations and not to agreements between non-union

workers and other cemeteries. However, the Act's targeting of labor association agreements and its provision declaring agreements which totally prohibit Sunday and holiday burials void may be justified on the legislature's belief that unions traditionally have been in a better position to negotiate such workless days. Thus, associations are generally responsible for the total ban on Sunday and holiday burials. Additionally, section 1(c) of the Act (Ill.Rev.Stat.1983, ch. 21, par. 101(c)) makes it unlawful for any person, not just labor association members, to restrain, prohibit or interfere with burials permitted under the Act. This section is general and treats all persons alike. We cannot say that the classification is arbitrary or that the legislature acted unreasonably in singling out workers' association agreements.

Fourth, plaintiffs contend the Act violates section 703(a)(1) of the Civil Rights Act of 1964 (42 U.S.C.A. 2000e–2(a)(1)) and abridges their right of free exercise of religion. Each contention is based on plaintiffs' belief that the statute requires and compels all cemetery employees to work on Sundays and holidays under penalty of criminal sanctions. They further maintain ***1360 ***580** that statutory mandate violates the rights of those workers whose religious beliefs do not allow work on Sundays or religious holidays.

14Initially, we note that no provision of the Act compels any cemetery worker to work on Sundays or holidays. Its provisions only extend ***459** to voiding contracts totally prohibiting burials on all Sundays and holidays and to interferences with burials conducted on those days. Furthermore, depositions in the record indicate that Sunday burials had been conducted in the past and that cemeteries had no difficulty recruiting workers willing to perform the services. There has not been any conflict with the religious beliefs of employees in the past and the Act as written does not present such conflicts. The scenario depicted by plaintiffs that employees will be forced to work on these days is unfounded.

15Plaintiffs' fifth contention is that the Act violates the federal constitutional prohibition of involuntary servitude because it compels employees to work. Because of our finding that the Act does not require any employee to work against his will, we reject plaintiffs' argument.

16Sixth, plaintiffs contend that section 2 of the Act (Ill.Rev.Stat.1983, ch. 21, par. 102), which permits the issuance of a temporary restraining order without notice, violates due process. However, this section of the Act does not allow an order to issue in all circumstances. It states that the circuit court *may* enter the order to protect rights of those aggrieved. The general rules pertaining to issuing temporary restraining orders found in the Code of Civil Procedure (Ill.Rev.Stat.1983, ch. 110, par. 11–101) remain applicable and plaintiffs have not argued that this section of the Code is unconstitutional. Plaintiffs have misconstrued the provision of the Act and we find their contention to be without merit.

17Finally, plaintiffs contend the Act abridges their freedom to contract and violates the federal and state constitutional prohibition against the impairment of contractual obligations.

18The Contract Clause limits a state's power to regulate contracts between private parties, but the prohibition is not absolute. (*United States Trust Co. of New York v. New Jersey* (1977), 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92; *Meegan v. Village of Tinley Park* (1972), 52 Ill.2d 354, 288 N.E.2d 423.) Rights granted by contract are subject to reasonable regulatory actions by the state designed to secure the welfare of the community. (*Meegan.*) We believe the legislation in issue does not offend the constitutions' contract clauses. Its provisions are narrowly drawn to permit the free exercise of religious rights while allowing labor to restrict their working schedules accordingly. It is, as noted above, a reasonable exercise of legislative authority in an area of legitimate legislative concern.

For the foregoing reasons, the order of the circuit court of Cook ***460** County is affirmed.

ORDER AFFIRMED.

O'CONNOR, J., concurs.

BUCKLEY, P.J., dissents.

BUCKLEY, Presiding Justice, dissenting:

I respectfully dissent from the decision of my colleagues because I believe the statute in question violates the establishment clause of the first amendment. The present case raises the issue of whether government may dictate the terms of a collective bargaining agreement through legislative enactment for the avowed purpose of ensuring that members of a particular religious sect or sects will be permitted to bury their dead in accordance with their prescribed rituals. Such governmental action designed to accommodate the needs of a particular religious minority must, of necessity, run afoul of the central purpose of the establishment clause—the purpose of ensuring governmental neutrality in matters of religion. *Gillette v. United* *****1361 ***581*** *States* (1971), 401 U.S. 437, 450–51, 91 S.Ct. 828, 836, 28 L.Ed.2d 168, 180–81.

The majority improperly relies on *Lynch v. Donnelly* (1984), 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604, for the proposition that "statutes which confer benefits or give special recognition to religion in general or to one faith are not invalidated merely on that basis." (Maj. op. at 1357.) *Lynch* concerned an establishment clause challenge to the erection of a Christmas display by the city of Pawtucket, Rhode Island which featured a nativity scene or créche. In upholding the right of the city to include a créche in its Christmas display, the Supreme Court noted:

"The Court has made it abundantly clear, however, that 'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.' [Citations omitted.] Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the créche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." (465 U.S. at ——, 104 S.Ct. at 1364, 79 L.Ed.2d at 616.)

Thus, the Supreme Court recognized that government action which confers only "indirect," "remote," or "incidental" benefits on a given religion may still be constitutionally permissible under the establishment ****461*** clause.

The instant statute inserts the power and authority of the State of Illinois into the collective bargaining process for the direct and explicit benefit of a given religious minority. Surely, such action cannot be properly characterized as "incidentally," "remotely," or "indirectly" benefitting religion. Accordingly, *Lynch* is not controlling. Prior Supreme Court decisions forbidding governmental favoritism toward the adherents of any sect or religious organization require invalidation of this statute. *Abington School District v. Schempp* (1963), 374 U.S. 203, 216, 83 S.Ct. 1560, 1567–68, 10 L.Ed.2d 844, 854; *Engel v. Vitale* (1962), 370 U.S. 421, 430–31, 82 S.Ct. 1261, 1266–67, 8 L.Ed.2d 601, 607–08; *Everson v. Board of Education* (1947), 330 U.S. 1, 15–16, 67 S.Ct. 504, 511, 91 L.Ed. 711, 723.

I also disagree with the majority's assertion that the "Act in question has a valid secular purpose" because it was designed to eliminate discrimination and to accommodate religious belief. (Maj. op. at 1358.) The case relied upon by the majority in support of this conclusion, *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL–CIO* (7th Cir.1981), 643 F.2d 445, involved an establishment clause challenge to section 701(j) of the Civil Rights Act of 1964, as amended (42 U.S.C.A. § 2000e(j)). Section 701(j) forbids both employers and unions from discriminating against any individual because of his religious affiliation and required both to make reasonable accommodation for an employee's religiously motivated conduct or to show that to do so would work an undue hardship. In upholding section 701(j) the federal court found a valid secular purpose, explicitly noting that:

“Application of Section 701(j) does not, as defendants contend, have a primary effect of advancing the interests of religionists over non-religionists or the beliefs of one sect over those of another.” (643 F.2d 445, 454.)

and further that:

“The fact that some religions may have more or different kinds of religiously dictated observances than other religions does not invalidate a law that applies to all faiths equally.” (643 F.2d 445, 455.)

The court concluded that since section 701(j) required accommodation for all religiously motivated conduct, it promoted only the “principle of supremacy of conscience” and was therefore compatible with the establishment clause. (643 F.2d 445, 454–55.) In the present case, the Act in question does not require accommodation for all, but only for a few; it does not ***1362 ***582** promote the “principle of supremacy of conscience” but only promotes the beliefs of certain religious groups. Accordingly, ***462** the majority's reliance on *Nottelson* in attempting to articulate a secular purpose is misplaced.

Undoubtedly, our General Assembly acted with the best of motives in attempting to accommodate the religious beliefs of a group long subjected to so much discrimination. However, the flaw in the instant statute does not lie in the good intentions of its authors but in its effects. In a pluralistic society, religious minorities of all persuasions are invariably hindered in the observance of their religions because they do not share the same customs and beliefs as those in the majority. Restaurants and grocery stores may not observe food preparation and storage restrictions required by many minority religions, religious holidays may not coincide with those of the majority and, as the present case demonstrates, customs common to the majority may frustrate a minority religion's burial requirements. Remedial state action which is neutral and undertaken to permit greater accommodation for all religious belief addresses itself to these inherent problems and does not violate the establishment clause, for no particular religion is being advanced or inhibited by government. *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL–CIO* (7th Cir.1981), 643 F.2d 445, 454–55.

However, where government departs from this evenhanded approach and attempts to tailor its laws in order to permit an accommodation for a particular religious group, the question necessarily arises why one group has been accommodated and not another. As the competing demands of other religious minorities for special accommodation arise, the state will inevitably be cast in the role of picking and choosing which minority religions are to receive favored treatment and which are not. The notion that such a spectacle represents a proper function of government is rejected by the establishment clause and the cases construing it. (*Abington School District v. Schempp* (1963), 374 U.S. 203, 216, 83 S.Ct. 1560, 1567–68, 10 L.Ed.2d 844, 854; *Engel v. Vitale* (1962), 370 U.S. 421, 430–31, 82 S.Ct. 1261, 1266–67, 8 L.Ed.2d 601, 607–08; *Everson v. Board of Education* (1947), 330 U.S. 1, 15–16, 67 S.Ct. 504, 511, 91 L.Ed. 711, 723.) Accordingly, I would hold that the instant statute is violative of the establishment clause and would reverse the judgment of the trial court.

All Citations

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318 Ill.App.3d 1194

Appellate Court of Illinois,

Fourth District.

Barbara B. **TONEY**, on behalf of herself and her minor child; Colman Buchbinder; Rev. D. Floyd W. Davis; Brenda Diehl; and Deborah S. McCleary on behalf of herself and her minor children, Plaintiffs–Appellants,

v.

Glen L. **BOWER**, in His Official Capacity as Director, Illinois Department of Revenue of the State of Illinois, and The Illinois Department of Revenue, Defendants–Appellees,

and

Patty Redpath, in her own behalf and as Natural Guardian of her Children, Joey Redpath, Jesse Redpath, and Alex Redpath; Dr. Matthew Kuhn, in his own behalf and as Natural Guardian of his Children, Alexis Kuhn and Andrew Kuhn; Mary Ellen Lovell, in her own behalf and as Natural Guardian of her Children, Ryan Lovell and Hayley Lovell; Maria Razo, in her own behalf and as Natural Guardian of her Children, Cecilia Razo and Gloria Razo; Rabbi David Schnell, in his own behalf and as Natural Guardian of his children, Tzvi Schnell, Avivia Schnell, Devora Schnell, Shmuel Schnell, Nechama Schnell, Ephraim Schnell, and Esther Schnell; Silvia Espinoza, in her own behalf and as Natural Guardian of her Children, Daniel Espinoza, Onyx Espinoza, and Christopher Espinoza; Dr. Shakir Moiduddin, in his own behalf and as Natural Guardian of his Children, Abed Moiduddin and Akif Moiduddin; Anne Sapienza, in her own behalf and as Natural Guardian of her Children, Christina Sapienza, Andrea Sapienza, Gerard Sapienza, Maria Sapienza, Phillip Sapienza, and Gina Sapienza; Steven Pancer, in his own behalf and as Natural Guardian of his Children Joshua Pancer, Ari Pancer, and Meir Pancer; Michael Riordan, in his own behalf and as Natural Guardian of his Children, Brian Riordan and Kevin Riordan; Dalyn Dye, in his own behalf and as Natural Guardian of his Child, Nathan Dye; and Helen Mixon, in her own behalf and as Natural Guardian of her Child, Termaine Mixon, Intervenors–Appellees.

No. 4–00–0401.

Feb. 8, 2001.

Synopsis

Parents of students brought declaratory judgment action against Department of Revenue, alleging the unconstitutionality of statute providing income tax credit for a taxpayer's expenses for the elementary school and secondary school education of children. The Circuit Court, Sangamon County, Thomas R. Appleton, J., granted Department's motion to dismiss. Parents appealed. The Appellate Court, Garman, J., held that: (1) the tax credit was not an "appropriation" of "public funds," under the state Constitution; (2) the tax credit did not violate the state Constitution's establishment clause; (3) the tax credit served a public purpose; and (4) the tax credit did not violate state constitutional requirement of reasonableness and uniformity in non-property-tax classifications.

Opinion

Justice GARMAN delivered the opinion of the court:

Plaintiffs filed a complaint in the Sangamon County circuit court, alleging that section 201(m) of the Illinois Income Tax Act (Tax Code) (35 ILCS 5/201(m) (West Supp.1999)) is unconstitutional, in that it violates section 3 of article I (Ill. Const. 1970, art. I, § 3), section 3 of article X(Ill. Const. 1970, art. X, § 3), section 1(a) of article VIII (Ill. Const. 1970, art. VIII, § 1(a)), and section 2 of article IX (Ill. Const. 1970, art. IX, § 2) of the Illinois Constitution of 1970 (Illinois Constitution). The trial court granted defendants' motion to dismiss (735 ILCS 5/2–615 (West 1998)), and plaintiffs appeal. We affirm.

I. BACKGROUND

Section 201(m) of the Tax Code allows, beginning with tax years ending after December 31, 1999, a credit (hereinafter Credit) of up to $500 against income tax liability equal to 25% of qualified education expenses incurred on behalf of qualifying pupils. The term "qualifying pupils" means individuals who (1) are Illinois residents, (2) are under the age of 21 years at the close of the school year for which a credit is sought, and (3) were full-time pupils enrolled in a kindergarten through twelfth-grade education program at any public or nonpublic ***1197*** school that is in compliance with Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.* (1994)) and attendance at which satisfies the requirements of section 26–1 of the School Code (105 ILCS 5/26–1 (West 1998)). "Qualified education expense" is defined as an amount incurred on behalf of a qualifying pupil in excess of $250 for tuition, book fees, and lab fees at the school in which the pupil is enrolled. 35 ILCS 5/201(m) (West Supp. 1999).

Plaintiffs filed their complaint for declaratory relief in November 1999. In attacking the statute's constitutionality, plaintiffs alleged that (1) few, if any, taxpayers whose children attend Illinois public schools will receive any benefit from the Credit, because (a) public schools do not charge tuition to pupils who reside in the school district in which the school is located; (b) public schools do not charge book ***356 ***74*** or lab fees in excess of $250 per year per pupil; (c) although tuition is charged for pupils who attend a school not in the district where they live, that number is small; and (d) according to the Illinois State Board of Education (Board), during the 1998–99 school year, less than 1% of the 2 million students enrolled in public schools attended schools outside their home district; (2) the Credit discriminates against low-income parents because they earn insufficient income to claim the Credit; (3) since the Credit allows money that would otherwise be paid to the State in income taxes to be used to pay private school expenses, it will reduce the State's annual revenue and is the practical equivalent of a legislative appropriation; (4) virtually all the money that will be diverted from the State treasury as a result of the Credit will be expended at private schools, the vast majority of which are sectarian; (5) the Credit requires plaintiffs to support a ministry or place of worship against their consent and a preference is given by law to a religious denomination or mode of worship, in violation of section 3 of article I of the Illinois Constitution; (6) the diversion of State revenue resulting from the Credit constitutes an appropriation or payment from a public fund and a grant or donation of money made by the State to help support sectarian private schools and for other sectarian purposes, in violation of section 3 of article X of the Illinois Constitution; (7) because religious education and activities are not "public purposes," the Credit violates the requirement in section 1(a) of article VIII of the Illinois Constitution that public funds shall be used only for public purposes; and (8) a distinction exists between low-income and high-income taxpayers as to who will be able to take full advantage of the Credit, and since this distinction bears no reasonable relationship to the Credit's stated objective, it violates section 2 of article IX of the Illinois Constitution.

The trial court allowed a group of parents to intervene as ***1198*** defendants. Intervenors and defendants filed separate motions to dismiss the complaint. Plaintiffs filed a motion for summary judgment.

In April 2000, the trial court entered a written order dismissing plaintiffs' complaint and denying plaintiffs' motion for summary judgment. The court found that (1) money accruing from the Credit did not constitute public money or an expenditure of public money, (2) the Credit did not constitute an unreasonable tax classification, and (3) the Credit did not provide support for sectarian schools. The court noted that money is not public until it belongs to the State and the fact that a State allows individual taxpayers to keep more of their own money does not make it the State's money. Thus, no one was required to support religion. The trial court also found the United States Supreme Court's decision in *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), controlling. Plaintiffs appeal.

II. ANALYSIS

A. Standard of Review

1A motion to dismiss under section 2–615 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2–615 (West 1998)) attacks the legal sufficiency of the complaint. The question presented is whether the allegations of the complaint, when viewed in a light most favorable to plaintiffs, are sufficient to state a cause of action upon which relief can be granted. *Vernon v. Schuster,* 179 Ill.2d 338, 344, 228 Ill.Dec. 195, 688 N.E.2d 1172, 1175 (1997). A reviewing court will uphold a trial court's decision to dismiss a complaint with prejudice for failure to state a cause of action if it clearly appears that no facts could be set forth that would entitle plaintiffs to relief. *Mattis v. State Universities Retirement System,* 296 Ill.App.3d 675, 683, 231 Ill.Dec. 49, 695 N.E.2d 566, 571 (1998).

234Legislative enactments enjoy a heavy presumption of constitutionality. The party challenging the constitutionality ***357***75*** of a statute has the burden of clearly establishing its invalidity. *In re Marriage of Lappe,* 176 Ill.2d 414, 422, 223 Ill.Dec. 647, 680 N.E.2d 380, 384 (1997). Courts must resolve all doubts in favor of the statute's constitutionality. *Lappe,* 176 Ill.2d at 422, 223 Ill.Dec. 647, 680 N.E.2d at 384–85.

B. Whether the Credit Constitutes an Appropriation or a Public Fund

5The trial court found that the Credit did not violate the constitutional provisions cited by plaintiffs because it does not constitute public funds but merely allows people to keep more of their own money. Plaintiffs argue that following the trial court's reasoning would permit ***1199*** the State to do indirectly through the Tax Code what it cannot do directly. Plaintiffs insist that the effect of reimbursing parents for private school tuition expenses through the Credit is exactly the same as reimbursing them through payments from the State treasury. The cost of a tax benefit given to certain taxpayers is necessarily borne by other taxpayers in the form of higher taxes or reduced services; thus, these taxpayers are compelled to support the religious preferences of those who will be able to claim the Credit.

Section 3 of article I of the Illinois Constitution guarantees the free exercise of religion and also states:

"No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship." Ill. Const. 1970, art. I, § 3.

Section 3 of article X of the Illinois Constitution prohibits the State and its political subdivisions from making any appropriation or paying from any public fund anything in aid of any church or sectarian

purpose, or to help support or sustain any school or other literacy or scientific institution controlled by any church or sectarian denomination.

67Plaintiffs rely on cases from other states. However, our supreme court has stated that the meaning of a statute or constitutional provision depends upon the intent of the drafters at the time of its adoption. A court has the duty to ascertain and effectuate that intent. The ordinary meaning of the language employed by the drafters in the questioned statutory or constitutional clause provides the best evidence of the drafters' intent. *Sayles v. Thompson,* 99 Ill.2d 122, 125, 75 Ill.Dec. 446, 457 N.E.2d 440, 442 (1983); *Cincinnati Insurance Co. v. Chapman,* 181 Ill.2d 65, 77, 229 Ill.Dec. 264, 691 N.E.2d 374, 380 (1998). Defendants and intervenors urge us to give the terms “public fund” and “appropriation” their plain and ordinary meaning, as did the trial court.

“Public fund” is defined in Black's Law Dictionary as, “1. The revenue or money of a governmental body. 2. The securities of the national government or a state government.” Black's Law Dictionary 682 (7th ed. 1999). In contrast, “tax credit” is defined as “[a]n amount subtracted directly from one's total tax liability, dollar for dollar, as opposed to a deduction from gross income.” Black's Law Dictionary 1473 (7th ed. 1999).

Plaintiffs direct us to no evidence demonstrating that the framers of the Illinois Constitution intended the term “public fund” to have the broad, expansive meaning that plaintiffs would give it. Giving the term such a meaning may have broad implications for other tax credits, deductions, and exemptions from taxation, such as the ***1200*** property tax exemption for property used exclusively for religious purposes (35 ILCS 200/15–40 (West 1998)) and the partial state income tax exemption for religious organizations (35 ILCS 5/205(a) (West 1998)). We are unwilling to interpret the term “public fund” so broadly as to endanger the legislative scheme of taxation.

89Similarly, the Credit does not constitute an “appropriation,” as that term is commonly understood. An appropriation ***358 ***76**involves “ ‘the setting apart from public revenue a certain sum of money for a specific object.’ ” *American Federation of State, County & Municipal Employees v. Netsch,* 216 Ill.App.3d 566, 567, 159 Ill.Dec. 138, 575 N.E.2d 945, 946 (1991), quoting *Illinois Municipal Retirement Fund v. City of Barry,* 52 Ill.App.3d 644, 646, 10 Ill.Dec. 439, 367 N.E.2d 1048, 1049 (1977). Accordingly, we reject plaintiffs' argument that a tax credit constitutes a public fund or an appropriation of public money to which section 3 of article I, section 3 of article X, and section 1(a) of article VIII of the Illinois Constitution apply. However, were we to agree with plaintiffs' argument on this issue, we would find that the Credit does not contravene the constitutional provisions plaintiffs cite.

C. Section 3 of Article I and Section 3 of Article X of the Illinois Constitution

10Our supreme court has held that the restrictions in our constitution concerning the establishment of religion are identical to those contained in the federal establishment clause (U.S. Const., amend. I). In *Board of Education, School District No. 142 v. Bakalis,* 54 Ill.2d 448, 451, 299 N.E.2d 737, 738 (1973), the plaintiff attacked the constitutionality of a statute that required school boards to provide the same bus transportation for nonpublic school students as provided for public school students. Plaintiff argued that the trial court erred in holding that, under the United States Supreme Court's interpretations of the first amendment to the federal constitution (U.S. Const., amend. I), the state statute was constitutional. *Bakalis,* 54 Ill.2d at 453, 299 N.E.2d at 739. Plaintiff contended that, assuming this to be true, section 3 of article X of the Illinois Constitution is more restrictive than the federal establishment clause and prohibits even incidental aid to sectarian schools. In support of this argument, plaintiffs noted that the language of section 3 of article X is identical to that of section 3 of article VIII of the Illinois Constitution of 1870 (Ill. Const. 1870, art. VIII, § 3), and that both the 1870 and 1970 constitutional conventions rejected efforts to amend or replace it with a provision similar to the establishment clause. *Bakalis,* 54 Ill.2d at 461, 299 N.E.2d at 743. The supreme court stated its opinion that the language of section 3 of article X of the Illinois Constitution was ***1201*** retained from

the 1870 Constitution to maintain the existing détente that had developed between the state and nonpublic schools. *Bakalis,* 54 Ill.2d at 462, 299 N.E.2d at 743.

The court reviewed the proceedings of the 1970 Convention and noted that the Committee on Education concluded that the words "aid," "support or sustain," and "sectarian purpose" yield the same results as the United States Supreme Court's interpretation of the word "establish" in the federal first amendment. *Bakalis,* 54 Ill.2d at 463, 299 N.E.2d at 744–45. Thus, any program that is constitutional under the establishment clause is constitutional under section 3 of article X of the Illinois Constitution. *Bakalis,* 54 Ill.2d at 464, 299 N.E.2d at 745.

The *Bakalis* court found that the opinion of the committee was also the understanding of the constitutional convention and of the voters who approved the 1970 Constitution. *Bakalis,* 54 Ill.2d at 464, 299 N.E.2d at 745. The busing of nonpublic school students at public expense was a long-established practice. The court thus held that the statute did not violate section 3 of article X of the Illinois Constitution. *Bakalis,*54 Ill.2d at 465, 299 N.E.2d at 745.

The supreme court followed its decision in *Bakalis* in *People ex rel. Klinger v. Howlett,* 56 Ill.2d 1, 305 N.E.2d 129 (1973). That case involved three legislative programs of financial assistance to nonpublic elementary and secondary education. *Howlett,* 56 Ill.2d at 3, 305 N.E.2d at 130. The court held that *Bakalis* was controlling in any analysis of the validity of the statutes under the Illinois Constitution and***359 ***77** that, under United States Supreme Court decisions, statutes that are valid under the federal establishment clause must (1) have a clearly secular legislative purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid an excessive government entanglement with religion. *Howlett,* 56 Ill.2d at 3–4, 305 N.E.2d at 130. Applying United States Supreme Court cases, the court struck down a program that provided grants to low-income parents of private school students (*Howlett,* 56 Ill.2d at 7, 305 N.E.2d at 132) and a program that provided textbooks and auxiliary services at State expense to nonpublic school students, while not providing the same benefit to public school students. *Howlett,* 56 Ill.2d at 11–12, 305 N.E.2d at 134.

Recently, the supreme court reaffirmed the holding of its *Bakalis* and *Howlett* decisions. In *People v. Falbe,* 189 Ill.2d 635, 637, 244 Ill.Dec. 901, 727 N.E.2d 200, 203 (2000), defendants were charged with unlawful possession of cocaine with intent to deliver (720 ILCS 570/401(c)(2) (West 1998)), said conduct occurring while defendants were on a public way within 1,000 feet of a church, thus enhancing the sentence from a ***1202** Class 1 felony to a Class X felony (720 ILCS 570/407(b)(1) (West 1998)). Defendants challenged the constitutionality of the statute (*Falbe,* 189 Ill.2d at 637, 244 Ill.Dec. 901, 727 N.E.2d at 203) and argued that the statute violated the federal establishment clause and section 3 of article I of the 1970 Constitution (*Falbe,* 189 Ill.2d at 645, 244 Ill.Dec. 901, 727 N.E.2d at 206). The court noted that in *Howlett,* it held that the restrictions of the Illinois Constitution concerning the establishment of religion are identical to those imposed by the federal establishment clause and that any statute that is valid under that clause is also valid under the Illinois Constitution. *Falbe,* 189 Ill.2d at 645, 244 Ill.Dec. 901, 727 N.E.2d at 207. The court went on to find the statute constitutional. *Falbe,* 189 Ill.2d at 649, 244 Ill.Dec. 901, 727 N.E.2d at 209.

The parties devote considerable argument to the question of whether *Bakalis* and *Howlett* require application of United States Supreme Court establishment clause precedent only as it existed at the time of those decisions. Plaintiffs believe that in 1973, section 3 of article Xhad the same meaning as did the establishment clause, as reflected in the then-existing decisions of the United States Supreme Court. This "existing détente" means that Illinois could provide assistance to sectarian schools in the form of purely secular services that could not be used for religious purposes, such as bus transportation or secular textbooks. We note that plaintiffs' argument would also apply to section 3 of article I of the Illinois Constitution, since in *Falbe,* our supreme court applied the *Bakalis* analysis to that constitutional provision.

1112Defendants and intervenors, on the other hand, argue that *Falbe* indicates that the "lockstep doctrine" should be applied in cases construing the religion clauses of our constitution. Under this doctrine, our supreme court applies decisions of the United States Supreme Court construing federal constitutional provisions to the construction of comparable provisions of our State constitution. *People v. DiGuida,* 152 Ill.2d 104, 118, 178 Ill.Dec. 80, 604 N.E.2d 336, 342 (1992). However, that court is not bound in every case to follow this doctrine. Rather, the court has looked to the intent behind our constitution to determine if its provisions should receive a similar interpretation to those given comparable federal constitutional provisions. Where the language of our constitution or the debates and committee reports of the constitutional convention show that the framers intended a different construction, our supreme court will construe similar provisions in a different manner than has the United States Supreme Court. *DiGuida,* 152 Ill.2d at 118, 178 Ill.Dec. 80, 604 N.E.2d at 342.

Given our supreme court's opinions in *Bakalis, Howlett,* and *Falbe,* we think it *****360 ***78*** likely that the court would apply the lockstep doctrine to ****1203*** this case. Regardless, however, we find that United States Supreme Court precedent, including those cases decided subsequent to 1973, constitutes persuasive authority for our decision here. We will thus apply that precedent.

1. *Establishment Clause Precedent*

13In *Lemon v. Kurtzman,* 403 U.S. 602, 606–07, 91 S.Ct. 2105, 2108, 29 L.Ed.2d 745, 752 (1971), the Supreme Court held two state statutes unconstitutional under the first amendment. In doing so, the Court utilized a three-part test in reviewing the statutes, holding that they must (1) have a secular legislative purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion. *Lemon,* 403 U.S. at 612–13, 91 S.Ct. at 2111, 29 L.Ed.2d at 755.

The Supreme Court has consistently applied this test, with some variation, in its establishment clause cases. In *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 762–65, 93 S.Ct. 2955, 2960–61, 37 L.Ed.2d 948, 957–58 (1973), the Supreme Court used the test in striking down New York laws that gave (1) grants to nonpublic schools for maintenance and repair of their facilities, (2) tuition reimbursement grants to low-income parents who sent their children to nonpublic schools; and (3) income tax deductions to parents who did not qualify for the reimbursement grants. The Court found that the programs did not limit the aid to secular purposes. *Nyquist,* 413 U.S. at 774, 783, 93 S.Ct. at 2966, 2970–71, 37 L.Ed.2d at 963–64, 968–69.

In *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481, 482, 106 S.Ct. 748, 749, 88 L.Ed.2d 846, 851 (1986), the Court held that rehabilitation aid payments from the State to a blind student for education at a Christian college did not violate the establishment clause. In applying the three-part test enunciated in *Lemon,* the Court noted the secular purpose behind the statute, *i.e.,* to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services. *Witters,* 474 U.S. at 485–86, 106 S.Ct. at 751, 88 L.Ed.2d at 853. It also noted that only a minuscule amount of the aid awarded was likely to flow to religious education. *Witters,* 474 U.S. at 486, 106 S.Ct. at 751, 88 L.Ed.2d at 853. The Court noted that any aid under this program flowed to religious institutions only as a result of the "genuinely independent and private choices of aid recipients." *Witters,* 474 U.S. at 487, 106 S.Ct. at 752, 88 L.Ed.2d at 854. Thus, the aid was made available without regard to the nature of the institution benefitted thereby. *Witters,* 474 U.S. at 487, 106 S.Ct. at 752, 88 L.Ed.2d at 854–55. It created ****1204*** no financial incentive for students to attend sectarian schools. *Witters,* 474 U.S. at 488, 106 S.Ct. at 752, 88 L.Ed.2d at 855.

In *Zobrest v. Catalina Foothills School District,* 509 U.S. 1, 3, 113 S.Ct. 2462, 2464, 125 L.Ed.2d 1, 7 (1993), the Court held that the establishment clause did not bar a public school district from providing a deaf student with a sign-language interpreter to accompany him to classes at a Catholic

high school. The Court noted that the service provided by the school district was available to all students regardless of whether they attended public or private schools. Thus, a government-paid interpreter would be present in a sectarian school only as the result of private choices made by individual parents. *Zobrest,* 509 U.S. at 10, 113 S.Ct. at 2467, 125 L.Ed.2d at 11. The direct beneficiaries of the aid were disabled children; to the extent that sectarian schools benefitted at all from the aid, they were only incidental beneficiaries. *Zobrest,* 509 U.S. at 12, 113 S.Ct. at 2469, 125 L.Ed.2d at 13.

Defendants and intervenors cite *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), where the Supreme Court addressed the constitutionality of a Minnesota statute under the establishment clause. The statute allowed residents a ***361 ***79**deduction against their state income taxes for expenses paid for tuition, textbooks, and transportation of students attending elementary and secondary schools in Minnesota and certain other states. *Mueller,* 463 U.S. at 390 n. 1, 103 S.Ct. at 3064 n. 1, 77 L.Ed.2d at 725 n. 1. The Supreme Court noted that about 95% of Minnesota private school students attended sectarian schools. *Mueller,* 463 U.S. at 391, 103 S.Ct. at 3065, 77 L.Ed.2d at 725. Petitioners claimed that the statute violated the establishment clause by providing financial assistance to such schools. *Mueller,* 463 U.S. at 392, 103 S.Ct. at 3065, 77 L.Ed.2d at 726. Applying the first prong of the *Lemon* test, *Mueller* held that the Minnesota statute had a secular purpose, noting that (1) a state's effort to assist parents in meeting the rising costs of educating their children serves the secular purpose of ensuring that the state's citizens are well educated; (2) Minnesota could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and nonsectarian, because such schools relieve taxpayers of the burden of educating additional students; and (3) private schools may serve as a benchmark for public schools. *Mueller,* 463 U.S. at 395, 103 S.Ct. at 3067, 77 L.Ed.2d at 728. On the second prong of the *Lemon* test, the Supreme Court held that the Minnesota statute did not have the primary effect of advancing the sectarian aims of nonpublic schools. The court noted that the tax deduction was only one of many tax deductions allowed by Minnesota. Legislatures ***1205** have broad latitude in creating classifications in tax statutes. Thus, the legislature's judgment regarding a tax deduction for educational expenses was entitled to substantial deference. *Mueller,* 463 U.S. at 396, 103 S.Ct. at 3067–68, 77 L.Ed.2d at 728–29. The deduction was available for educational expenses incurred by all parents, including those who attended public and nonsectarian private schools. *Mueller,* 463 U.S. at 397, 103 S.Ct. at 3068, 77 L.Ed.2d at 729.

The Court recognized that financial assistance provided to parents has an economic effect comparable to that of aid directly given to the schools attended by their children. However, the court noted, under Minnesota's arrangement, public funds become available only as a result of numerous private choices of individual parents. Thus, the means by which state assistance flows to private schools is a material consideration. *Mueller,* 463 U.S. at 399, 103 S.Ct. at 3069, 77 L.Ed.2d at 730–31. The Court rejected petitioners' argument that, in practical application, the benefit of the Minnesota statute would inure almost exclusively to sectarian schools. Petitioners provided the Court with a statistical analysis supporting their argument. The Court rejected this, stating that it would be "loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller,* 463 U.S. at 401, 103 S.Ct. at 3070, 77 L.Ed.2d at 732.

On the third part of the *Lemon* test, the Supreme Court found that the statute did not foster an excessive entanglement between the State and religion. The only possible entanglement would consist of the necessity to determine which books and materials qualified for the deduction. This type of decision had previously been held not to constitute an excessive entanglement. *Mueller,* 463 U.S. at 403, 103 S.Ct. at 3071, 77 L.Ed.2d at 733.

2. *Applying Establishment Clause Precedent to the Credit*

14We conclude that the above cases support the constitutionality of the Credit. We note that plaintiffs challenged the constitutionality of the statute on its face. The effect of the statute as applied is unknown at this time. Therefore, we reject, as did the Supreme Court in *Mueller,* 463 U.S. at 401, 103 S.Ct. at 3070, 77 L.Ed.2d at 732, plaintiffs' attempt to use statistical evidence to show that the primary benefit of the Credit will inure to *****362 ***80*** parents who send their children to sectarian schools.

15We find *Mueller* to be particularly applicable here. Applying the first *Lemon* factor to this case, we conclude that the statute creating the Credit has a secular legislative purpose. Like the Minnesota statute, ****1206*** the Illinois statute seeks to assist parents in meeting the rising costs of educating their children. As was the case in *Mueller,* 463 U.S. at 395, 103 S.Ct. at 3067, 77 L.Ed.2d at 728, such assistance has a secular purpose of ensuring that Illinois children are well educated. In addition, the State has an interest in maintaining the financial health of private schools, because those schools relieve the taxpayers of the burden of educating these private school students.

16As to the second prong of the *Lemon* test, we note, as did the Supreme Court in *Mueller,* 463 U.S. at 396, 103 S.Ct. at 3067, 77 L.Ed.2d at 729, that the Credit is but one of many tax credits allowed by our tax laws. See, *e.g.,* 35 ILCS 5/206 (West 1998) (tax credit for coal research and coal utilization equipment); 35 ILCS 5/208 (West 1998) (tax credit for residential real property taxes). Also, the Credit is equally available to all parents of public school children, as well as to those who send their children to private nonsectarian or sectarian schools.

Plaintiffs complain that the $250 threshold expenditure limit virtually guarantees that the vast majority of public school parents will not be able to claim the credit. As we have stated, we reject plaintiffs' attempt to transform their facial challenge to the Credit into a challenge to the statute as applied. The statute is facially neutral with respect to the availability of the credit to all parents of public and private school students. Here, as in *Mueller,* 463 U.S. at 399, 103 S.Ct. at 3069, 77 L.Ed.2d at 730–31, the public funds become available to schools only as the result of private choices made by individual parents. The historic purposes of the establishment clause "simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Mueller,* 463 U.S. at 400, 103 S.Ct. at 3070, 77 L.Ed.2d at 731.

We thus conclude that the Credit satisfies the second prong of the *Lemon* test. This conclusion is also supported by the Supreme Court's opinion in *Zobrest.* There, it held that the establishment clause did not bar a public school district from providing a sign-language interpreter to a student attending a Catholic high school. *Zobrest,* 509 U.S. at 3, 113 S.Ct. at 2464, 125 L.Ed.2d at 7. The Court noted that the service provided was part of a general government program that distributed benefits neutrally to any child qualifying as disabled, without regard to the nature of the school the child attended. Any government aid to religion occurred only as the result of the private decisions of individual parents. *Zobrest,* 509 U.S. at 10, 113 S.Ct. at 2467, 125 L.Ed.2d at 11.

17*1207 The third part of the *Lemon* test may be viewed as a separate inquiry or as part of the second *Lemon* prong, *i.e.,* whether the statute has a primary effect of advancing or inhibiting religion. Regardless of how this last prong is cast, the factors used to assess whether an entanglement is "excessive" are similar to those used to examine " effect." *Agostini v. Felton,* 521 U.S. 203, 232, 117 S.Ct. 1997, 2015, 138 L.Ed.2d 391, 420 (1997).

In *Mueller,* 463 U.S. at 403, 103 S.Ct. at 3071, 77 L.Ed.2d at 733, the Court found that the only plausible source of entanglement would lie in the fact that state officials must disallow deductions for materials used in teaching religious tenets. The Court found such decisions not to foster an excessive government entanglement with religion. Here, state officials, as in *Mueller,* would be required to determine whether a taxpayer's claimed expenses met the definition of "qualified education expense" *****363 ***81*** set forth in the statute. Such a requirement differs little, if at all, from

similar decisions required to be made with regard to any number of other tax deductions and credits allowed by Illinois law. For these reasons, we find that the Credit does not foster an excessive government entanglement with religion.

Accordingly, we reject plaintiffs' constitutional challenge to the Credit on the basis of section 3 of article I and section 3 of article X of the Illinois Constitution.

D. Section 1(a) of Article VII of the Illinois Constitution

18This constitutional provision states: "Public funds, property or credit shall be used only for public purposes." Ill. Const. 1970, art. VIII, § 1(a). Our analysis in section C above disposes of plaintiffs' challenge to the Credit based on this constitutional provision. The statute's secular purposes may also be characterized as public purposes. State assistance to ensure that Illinois children are well educated is a public purpose, and the State's interest in maintaining the financial health of private schools is a valid public purpose. We therefore conclude that the Credit does not violate section 1(a) of article VIII of the Illinois Constitution.

19Section 2 of article IX of the Illinois Constitution requires reasonableness and uniformity in non-property-tax classifications. It also states that "[e]xemptions, deductions, credits, refunds[,] and other allowances shall be reasonable." Ill. Const. 1970, art. IX, § 2.

Plaintiffs have apparently abandoned their argument that the Credit discriminates against low-income parents. Instead, they argue that the Credit violates section 2 of article IX because the $250 expense threshold will disqualify nearly all parents of public school students. While plaintiffs concede that the requirement that a taxpayer exceed a ***1208** threshold expenditure level to claim a tax credit may not be unreasonable *per se,* they argue that the $250 *per child* threshold set here is unreasonable because it is unrelated to taxpayers' total financial burden of educating their children.

20The sole requirement placed on tax credits by section 2 of article IX is that the "[e]xemptions, deductions, credits, refunds[,] and other allowances shall be reasonable." Ill. Const. 1970, art. IX, § 2. Thus, our constitution recognizes that differences will exist in the deductions granted to various classes of taxpayers and merely imposes a requirement of reasonableness. *Brown v. Department of Revenue,* 89 Ill.App.3d 238, 243, 44 Ill.Dec. 516, 411 N.E.2d 882, 885 (1980).

All parents of public or private school students who incur at least $250 of qualified education expenses are eligible to claim the Credit against their income tax liability. To the extent that certain parents do not benefit from the Credit, it is because they incur lower costs in educating their children than do parents who meet the statute's requirements. By creating the Credit, the legislature has recognized that parents who send their children to private schools often do so at considerable expense to themselves and that they provide a benefit to the State treasury by relieving the State and local taxpayers of the expense of educating their children. It is an appropriate legislative goal to assist those schools in remaining financially viable. Thus, we conclude that the Credit does not contravene section 2 of article IX of the Illinois Constitution.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment dismissing plaintiffs' complaint and denying plaintiffs' motion for summary judgment.

Affirmed.

McCULLOUGH and COOK, JJ., concur.

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374 U.S. 203 (1963)

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, ET AL.
v.
SCHEMPP ET AL.

No. 142.

Supreme Court of United States.

Argued February 27-28, 1963.

Decided June 17, 1963.[*]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

John D. Killian III, Deputy Attorney General of Pennsylvania, and *Philip H. Ward III* argued the cause for appellants in No. 142. With them on the brief were *David Stahl,* Attorney General of Pennsylvania, *Percival R. Rieder* and *C. Brewster Rhoads.*

Henry W. Sawyer III argued the cause for appellees in No. 142. With him on the brief was *Wayland H. Elsbree.*

Leonard J. Kerpelman argued the cause and filed a brief for petitioners in No. 119.

Francis B. Burch and *George W. Baker, Jr.* argued the cause for respondents in No. 119. With them on the brief were *Nelson B. Seidman* and *Philip Z. Altfeld.*

204*204 *Thomas B. Finan,* Attorney General of Maryland, argued the cause for the State of Maryland, as *amicus curiae,* urging affirmance in No. 119. With him on the brief were *James P. Garland* and *Robert F. Sweeney,* Assistant Attorneys General of Maryland. *Richmond M. Flowers,* Attorney General of Alabama, *Robert Pickrell,* Attorney General of Arizona, *Bruce Bennett,* Attorney General of Arkansas, *Richard W. Ervin,* Attorney General of Florida, *Eugene Cook,* Attorney General of Georgia, *Allan G. Shepard,* Attorney General of Idaho, *William M. Ferguson,* Attorney General of Kansas, *Jack P. F. Gremillion,* Attorney General of Louisiana, *Frank E. Hancock,* Attorney General of Maine, *Joe T. Patterson,* Attorney General of Mississippi, *William Maynard,* Attorney General of New Hampshire, *Arthur J. Sills,* Attorney General of New Jersey, *Earl E. Hartley,* Attorney General of New Mexico, *Thomas Wade Bruton,* Attorney General of North Carolina, *J. Joseph Nugent,* Attorney General of Rhode Island, *Daniel R. McLeod,* Attorney General of South Carolina, *Frank R. Farrar,* Attorney General of South Dakota, and *George F. McCanless,* Attorney General of Tennessee, joined in the brief on behalf of their respective States, as *amici curiae.*

205*205 MR. JUSTICE CLARK delivered the opinion of the Court.

Once again we are called upon to consider the scope of the provision of the First Amendment to the United States Constitution which declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. While raising the basic questions under slightly different factual

situations, the cases permit of joint treatment. In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment.

I.

The Facts in Each Case: No. 142. The Commonwealth of Pennsylvania by law, 24 Pa. Stat. § 15-1516, as amended, Pub. Law 1928 (Supp. 1960) Dec. 17, 1959, requires that "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." The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of the statute, contending that their rights under the Fourteenth Amendment to the Constitution of the United States are, have been, and will continue to be violated unless this statute be declared unconstitutional as violative of these provisions of the First Amendment. They sought to enjoin the appellant school district, wherein the Schempp children attend school, and its officers and the 206*206 Superintendent of Public Instruction of the Commonwealth from continuing to conduct such readings and recitation of the Lord's Prayer in the public schools of the district pursuant to the statute. A three-judge statutory District Court for the Eastern District of Pennsylvania held that the statute is violative of the Establishment Clause of the First Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment and directed that appropriate injunctive relief issue. 201 F. Supp. 815.[1] On appeal by the District, its officials and the Superintendent, under 28 U. S. C. § 1253, we noted probable jurisdiction. 371 U. S. 807.

The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian church in Germantown, Philadelphia, Pennsylvania, where they, as well as another son, Ellory, regularly attend religious services. The latter was originally a party but having graduated from the school system *pendente lite* was voluntarily dismissed from the action. The other children attend the Abington Senior High School, which is a public school operated by appellant district.

On each school day at the Abington Senior High School between 8:15 and 8:30 a. m., while the pupils are attending their home rooms or advisory sections, opening exercises 207*207 are conducted pursuant to the statute. The exercises are broadcast into each room in the school building through an intercommunications system and are conducted under the supervision of a teacher by students attending the school's radio and television workshop. Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students. Participation in the opening exercises, as directed by the statute, is voluntary. The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures. There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.

It appears from the record that in schools not having an intercommunications system the Bible reading and the recitation of the Lord's Prayer were conducted by the 208*208 home-room

teacher,[2] who chose the text of the verses and read them herself or had students read them in rotation or by volunteers. This was followed by a standing recitation of the Lord's Prayer, together with the Pledge of Allegiance to the Flag by the class in unison and a closing announcement of routine school items of interest.

At the first trial Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible "which were contrary to the religious beliefs which they held and to their familial teaching." 177 F. Supp. 398, 400. The children testified that all of the doctrines to which they referred were read to them at various times as part of the exercises. Edward Schempp testified at the second trial that he had considered having Roger and Donna excused from attendance at the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected.[3]

209*209 Expert testimony was introduced by both appellants and appellees at the first trial, which testimony was summarized by the trial court as follows:

"Dr. Solomon Grayzel testified that there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible, the most obvious of which was the absence of the New Testament in the Jewish Holy Scriptures. Dr. Grayzel testified that portions of the New Testament were offensive to Jewish tradition and that, from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was `practically blasphemous.' He cited instances in the New Testament which, assertedly, were not only sectarian in nature but tended to bring the Jews into ridicule or scorn. Dr. Grayzel gave as his expert opinion that such material from the New Testament could be explained to Jewish children in such a way as to do no harm to them. But if portions of the New Testament were read without explanation, they could be, and in his specific experience with children Dr. Grayzel observed, had been, psychologically harmful to the child and had caused a divisive force within the social media of the school.

"Dr. Grayzel also testified that there was significant difference in attitude with regard to the respective Books of the Jewish and Christian Religions in that Judaism attaches no special significance to the reading of the Bible *per se* and that the Jewish Holy Scriptures are source materials to be studied. But Dr. Grayzel did state that many portions of the New, 210*210 as well as of the Old, Testament contained passages of great literary and moral value.

"Dr. Luther A. Weigle, an expert witness for the defense, testified in some detail as to the reasons for and the methods employed in developing the King James and the Revised Standard Versions of the Bible. On direct examination, Dr. Weigle stated that the Bible was non-sectarian. He later stated that the phrase `non-sectarian' meant to him non-sectarian within the Christian faiths. Dr. Weigle stated that his definition of the Holy Bible would include the Jewish Holy Scriptures, but also stated that the `Holy Bible' would not be complete without the New Testament. He stated that the New Testament `conveyed the message of Christians.' In his opinion, reading of the Holy Scriptures to the exclusion of the New Testament would be a sectarian practice. Dr. Weigle stated that the Bible was of great moral, historical and literary value. This is conceded by all the parties and is also the view of the court." 177 F. Supp. 398, 401-402.

The trial court, in striking down the practices and the statute requiring them, made specific findings of fact that the children's attendance at Abington Senior High School is compulsory and that the practice of reading 10 verses from the Bible is also compelled by law. It also found that:

"The reading of the verses, even without comment, possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is

followed immediately by a recital in unison by the pupils of the Lord's Prayer. The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises 211*211 does not mitigate the obligatory nature of the ceremony for . . . Section 1516 . . . unequivocally requires the exercises to be held every school day in every school in the Commonwealth. The exercises are held in the school buildings and perforce are conducted by and under the authority of the local school authorities and during school sessions. Since the statute requires the reading of the `Holy Bible,' a Christian document, the practice . . . prefers the Christian religion. The record demonstrates that it was the intention of . . . the Commonwealth . . . to introduce a religious ceremony into the public schools of the Commonwealth." 201 F. Supp., at 819.

No. 119. In 1905 the Board of School Commissioners of Baltimore City adopted a rule pursuant to Art. 77, § 202 of the Annotated Code of Maryland. The rule provided for the holding of opening exercises in the schools of the city, consisting primarily of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." The petitioners, Mrs. Madalyn Murray and her son, William J. Murray III, are both professed atheists. Following unsuccessful attempts to have the respondent school board rescind the rule, this suit was filed for mandamus to compel its rescission and cancellation. It was alleged that William was a student in a public school of the city and Mrs. Murray, his mother, was a taxpayer therein; that it was the practice under the rule to have a reading on each school morning from the King James version of the Bible; that at petitioners' insistence the rule was amended[4] to permit children to 212*212 be excused from the exercise on request of the parent and that William had been excused pursuant thereto; that nevertheless the rule as amended was in violation of the petitioners' rights "to freedom of religion under the First and Fourteenth Amendments" and in violation of "the principle of separation between church and state, contained therein. . . ." The petition particularized the petitioners' atheistic beliefs and stated that the rule, as practiced, violated their rights

"in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith."

The respondents demurred and the trial court, recognizing that the demurrer admitted all facts well pleaded, sustained it without leave to amend. The Maryland Court of Appeals affirmed, the majority of four justices holding the exercise not in violation of the First and Fourteenth Amendments, with three justices dissenting. 228 Md. 239, 179 A. 2d 698. We granted certiorari. 371 U. S. 809.

II.

It is true that religion has been closely identified with our history and government. As we said in *Engel* v. *Vitale,* 370 U. S. 421, 434 (1962), "The history of man is inseparable from the history of religion. And . . . since 213*213 the beginning of that history many people have devoutly believed that `More things are wrought by prayer than this world dreams of.' " In *Zorach* v. *Clauson,* 343 U. S. 306, 313 (1952), we gave specific recognition to the proposition that "[w]e are a religious people whose institutions presuppose a Supreme Being." The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, "So help me God." Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of

this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship. Indeed, only last year an official survey of the country indicated that 64% of our people have church membership, Bureau of the Census, U. S. Department of Commerce, Statistical Abstract of the United States (83d ed. 1962), 48, while less than 3% profess no religion whatever. *Id.,* at p. 46. It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are "earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing . . . .]" Memorial and Remonstrance Against Religious Assessments, quoted in *Everson* v. *Board of Education,* 330 U. S. 1, 71-72 (1947) (Appendix to dissenting opinion of Rutledge, J.).

214*214 This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life. Nothing but the most telling of personal experiences in religious persecution suffered by our forebears, see *Everson* v. *Board of Education, supra,* at 8-11, could have planted our belief in liberty of religious opinion any more deeply in our heritage. It is true that this liberty frequently was not realized by the colonists, but this is readily accountable by their close ties to the Mother Country.[5] However, the views of Madison and Jefferson, preceded by Roger Williams,[6] came to be incorporated not only in the Federal Constitution but likewise in those of most of our States. This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion. Today authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups. Bureau of the Census. *op. cit., supra,* at 46-47.

III.

Almost a hundred years ago in *Minor* v. *Board of Education of Cincinnati,*[7] Judge Alphonso Taft, father 215*215 of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of

"absolute equality before the law, of all religious opinions and sects . . . .

.....

"The government is neutral, and, while protecting all, it prefers none, and it *disparages* none."

Before examining this "neutral" position in which the Establishment and Free Exercise Clauses of the First Amendment place our Government it is well that we discuss the reach of the Amendment under the cases of this Court.

First, this Court has decisively settled that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has been made wholly applicable to the States by the Fourteenth Amendment. Twenty-three years ago in *Cantwell* v. *Connecticut,* 310 U. S. 296, 303 (1940), this Court, through Mr. Justice Roberts, said:

"The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment 216*216 has rendered the legislatures of the states as incompetent as Congress to enact such laws. . . ."[8]

In a series of cases since *Cantwell* the Court has repeatedly reaffirmed that doctrine, and we do so now. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108 (1943); *Everson* v. *Board of Education, supra; Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, 210-211 (1948); *Zorach* v. *Clauson, supra; McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Torcaso* v. *Watkins,* 367 U. S. 488 (1961); and *Engel* v. *Vitale, supra.*

Second, this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost 20 years ago in *Everson, supra,* at 15, the Court said that "[n]either 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." And Mr. Justice Jackson, dissenting, agreed:

"There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. . . . This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity." *Id.,* at 26.

217*217 Further, Mr. Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, declared:

"The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.,* at 31-32.

The same conclusion has been firmly maintained ever since that time, see *Illinois ex rel. McCollum, supra,* at pp. 210-211; *McGowan* v. *Maryland, supra,* at 442-443; *Torcaso* v. *Watkins, supra,* at 492-493, 495, and we reaffirm it now.

While none of the parties to either of these cases has questioned these basic conclusions of the Court, both of which have been long established, recognized and consistently reaffirmed, others continue to question their history, logic and efficacy. Such contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.

IV.

The interrelationship of the Establishment and the Free Exercise Clauses was first touched upon by Mr. Justice Roberts for the Court in *Cantwell* v. *Connecticut, supra,* at 303-304, where it was said that their "inhibition of legislation" had

"a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of 218*218 conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

A half dozen years later in *Everson* v. *Board of Education, supra,* at 14-15, this Court, through MR. JUSTICE BLACK, stated that the "scope of the First Amendment. . . was designed forever

to suppress" the establishment of religion or the prohibition of the free exercise thereof. In short, the Court held that the Amendment

"requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Id.,* at 18.

And Mr. Justice Jackson, in dissent, declared 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." *Id.,* at 23-24.

Moreover, all of the four dissenters, speaking through Mr. Justice Rutledge, agreed that

"Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this 219*219 reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private." *Id.,* at 52.

Only one year later the Court was asked to reconsider and repudiate the doctrine of these cases in *McCollum* v. *Board of Education.* It was argued that "historically the First Amendment was intended to forbid only government preference of one religion over another . . . . In addition they ask that we distinguish or overrule our holding in the *Everson* case that the Fourteenth Amendment made the `establishment of religion' clause of the First Amendment applicable as a prohibition against the States." 333 U. S., at 211. The Court, with Mr. Justice Reed alone dissenting, was unable to "accept either of these contentions." *Ibid.* Mr. Justice Frankfurter, joined by Justices Jackson, Rutledge and Burton, wrote a very comprehensive and scholarly concurrence in which he said that "[s]eparation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." *Id.,* at 227. Continuing, he stated that:

"the Constitution . . . prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." *Id.,* at 228.

In 1952 in *Zorach* v. *Clauson, supra,* MR. JUSTICE DOUGLAS for the Court reiterated:

"There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the `free exercise' of religion and an 220*220`establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter." 343 U. S., at 312.

And then in 1961 in *McGowan* v. *Maryland* and in *Torcaso* v. *Watkins* each of these cases was discussed and approved. CHIEF JUSTICE WARREN in *McGowan,* for a unanimous Court on this point, said:

"But, the First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church;* it forbade all laws *respecting an establishment of religion.* Thus, this

Court has given the Amendment a `broad interpretation . . . in the light of its history and the evils it was designed forever to suppress. . . .' " 366 U. S., at 441-442.

And MR. JUSTICE BLACK for the Court in *Torcaso,* without dissent but with Justices Frankfurter and HARLAN concurring in the result, used this language:

"We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person `to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." 367 U. S., at 495.

Finally, in *Engel* v. *Vitale,* only last year, these principles were so universally recognized that the Court, without 221*221 the citation of a single case and over the sole dissent of MR. JUSTICE STEWART, reaffirmed them. The Court found the 22-word prayer used in "New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer . . . [to be] a religious activity." 370 U. S., at 424. It held that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.,* at 425. In discussing the reach of the Establishment and Free Exercise Clauses of the First Amendment the Court said:

"Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.,* at 430-431.

And in further elaboration the Court found that the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Id.,*at 431. When government, the Court said, allies itself with one particular form of religion, the 222*222 inevitable result is that it incurs "the hatred, disrespect and even contempt of those who held contrary beliefs." *Ibid.*

V.

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression

thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson* v. *Board of Education, supra; McGowan* v. *Maryland, supra,* at 442. The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise 223*223 of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach* v. *Clauson.* The trial court in No. 142 has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.

There is no such specific finding as to the religious character of the exercises in No. 119, and the State contends (as does the State in No. 142) that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. The case came up 224*224 on demurrer, of course, to a petition which alleged that the uniform practice under the rule had been to read from the King James version of the Bible and that the exercise was sectarian. The short answer, therefore, is that the religious character of the exercise was admitted by the State. But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners.[9] Nor are these required exercises mitigated by the fact that individual students may absent 225*225 themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel* v. *Vitale, supra,* at 430. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties." Memorial and Remonstrance Against Religious Assessments, quoted in *Everson, supra,* at 65.

It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of

secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." *Zorach* v. *Clauson, supra,* at 314. We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said 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. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. 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.

Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those 226*226 affected, collides with the majority's right to free exercise of religion.[10] While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone,* it has never meant that a majority could use the machinery of the State to practice its beliefs. Such a contention was effectively answered by Mr. Justice Jackson for the Court in *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 638 (1943):

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

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. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment. Applying that rule to the facts of these cases, we affirm the judgment in No. 142. 227*227 In No. 119, the judgment is reversed and the cause remanded to the Maryland Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE DOUGLAS, JUSTICE GOLDBERG, JUSTICE HARLAN concurring MR. JUSTICE STEWART, dissenting.

465 U.S. 668 (1984)

LYNCH, MAYOR OF PAWTUCKET, ET AL.
v.
DONNELLY, ET AL.

No. 82-1256.

Supreme Court of United States.

Argued October 4, 1983

Decided March 5, 1984

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

670*670 *William F. McMahon* argued the cause for petitioners. With him on the briefs were *Richard P. McMahon* and *Spencer W. Viner.*

Solicitor General Lee argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General McGrath, Deputy Solicitor General Bator, Deputy Assistant Attorney General Kuhl,* and *Kathryn A. Oberly.*

Amato A. DeLuca argued the cause for respondents. With him on the brief were *Sandra A. Blanding, Burt Neuborne, E. Richard Larson,* and *Norman Dorsen.*[*]

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Committee et al. by *Samuel Rabinove;* and for the Anti-Defamation League of B'Nai B'rith et al. by *Justin J. Finger, Alan Dershowitz, Meyer Eisenberg, Jeffrey P. Sinensky, Nathan Z. Dershowitz,* and *Marc Stern.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality 671*671 from including a creche, or Nativity scene, in its annual Christmas display.

I

Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R. I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation — often on public grounds — during the Christmas season.

The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the city.

The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and

animals, all ranging in height from 5" to 5'. In 1973, when the present creche was acquired, it cost the city $1,365; it now is valued at $200. The erection and dismantling of the creche costs the city about $20 per year; nominal expenses are incurred in lighting the creche. No money has been expended on its maintenance for the past 10 years.

Respondents, Pawtucket residents and individual members of the Rhode Island affiliate of the American Civil Liberties Union, and the affiliate itself, brought this action in the United States District Court for Rhode Island, challenging the city's inclusion of the creche in the annual display. The District Court held that the city's inclusion of the creche in the display violates the Establishment Clause, 525 F. Supp. 1150, 1178 (1981), which is binding on the states through the 672*672Fourteenth Amendment. The District Court found that, by including the creche in the Christmas display, the city has "tried to endorse and promulgate religious beliefs," *id.,* at 1173, and that "erection of the creche has the real and substantial effect of affiliating the City with the Christian beliefs that the creche represents." *Id.,* at 1177. This "appearance of official sponsorship," it believed, "confers more than a remote and incidental benefit on Christianity." *Id.,* at 1178. Last, although the court acknowledged the absence of administrative entanglement, it found that excessive entanglement has been fostered as a result of the political divisiveness of including the creche in the celebration. *Id.,* at 1179-1180. The city was permanently enjoined from including the creche in the display.

A divided panel of the Court of Appeals for the First Circuit affirmed. 691 F. 2d 1029 (1982). We granted certiorari, 460 U. S. 1080 (1983), and we reverse.

II

A

This Court has explained that the purpose of the Establishment and Free Exercise Clauses of the First Amendment is

"to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lemon* v. *Kurtzman,* 403 U. S. 602, 614 (1971).

At the same time, however, the Court has recognized that

"total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Ibid.*

In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.

673*673 The Court has sometimes described the Religion Clauses as erecting a "wall" between church and state, see, *e. g., Everson* v. *Board of Education,* 330 U. S. 1, 18 (1947). The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson.[1] The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation . . . ." *Committee for*

Public Education & Religious Liberty v. *Nyquist,* 413 U. S. 756, 760 (1973). Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, *e. g., Zorach* v. *Clauson,* 343 U. S. 306, 314, 315 (1952); *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, 211 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. *Zorach, supra,* at 314. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum, supra,* at 211-212.

B

The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees. A significant example 674*674 of the contemporaneous understanding of that Clause is found in the events of the first week of the First Session of the First Congress in 1789. In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and Senate. In *Marsh* v. *Chambers,* 463 U. S. 783 (1983), we noted that 17 Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press, and religion and antagonism toward an established church were subjects of frequent discussion. We saw no conflict with the Establishment Clause when Nebraska employed members of the clergy as official legislative Chaplains to give opening prayers at sessions of the state legislature. *Id.,* at 791.

The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress

"was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instument," *Myers* v. *United States,*272 U. S. 52, 174-175 (1926).

It is clear that neither the 17 draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries. It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.

C

There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. Seldom in our opinions was this more affirmatively expressed than in Justice Douglas' opinion for the Court validating a program allowing release of 675*675 public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly:

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson, supra,* at 313.

See also *Abington School District* v. *Schempp,* 374 U. S. 203, 213 (1963).

Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.

Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration[2] and Congress made it a National Holiday more than a century ago. Ch. 167, 16 Stat. 168. That holiday has not lost its theme of expressing thanks for Divine aid[3] any more than has Christmas lost its religious significance.

676*676 Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. See J. Res. 5, 23 Stat. 516. Thus, it is clear that Government has long recognized — indeed it has subsidized — holidays with religious significance.

Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," 36 U. S. C. § 186, which Congress and the President mandated for our currency, see 31 U. S. C. § 5112(d)(1) (1982 ed.), and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children — and adults — every year.

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in 677*677 Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages.[4] The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent — not seasonal — symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.

There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage. Congress has directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U. S. C. § 169h. Our Presidents have repeatedly issued such Proclamations.[5] Presidential Proclamations and messages have also issued to commemorate Jewish Heritage Week, Presidential Proclamation No. 4844, 3 CFR 30 (1982), and the Jewish High Holy Days, 17 Weekly Comp. of Pres. Doc. 1058 (1981). One cannot look at even this brief resume without finding that our history is pervaded by expressions of religious beliefs such as are found in *Zorach.* Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, 678*678 as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." 343 U. S., at 314.

III

This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history.*" *Walz* v. *Tax Comm'n,* 397 U. S. 664, 671 (1970) (emphasis added). In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith — as an absolutist approach

would dictate — the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so. See *Walz, supra,* at 669. Joseph Story wrote a century and a half ago:

"The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." 3 J. Story, Commentaries on the Constitution of the United States 728 (1833).

In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." *Walz, supra,* at 668. The line between permissible relationships and those barred by the Clause can no 679*679 more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon,* 403 U. S., at 614.

In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. *Lemon, supra.* But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. See, *e. g., Tilton* v. *Richardson,* 403 U. S. 672, 677-678 (1971); *Nyquist,* 413 U. S., at 773. In two cases, the Court did not even apply the *Lemon*"test." We did not, for example, consider that analysis relevant in *Marsh* v. *Chambers,* 463 U. S. 783 (1983). Nor did we find *Lemon* useful in *Larson* v. *Valente,* 456 U. S. 228 (1982), where there was substantial evidence of overt discrimination against a particular church.

In this case, the focus of our inquiry must be on the creche in the context of the Christmas season. See, *e. g., Stone* v. *Graham,* 449 U. S. 39 (1980) *(per curiam); Abington School District* v. *Schempp,* 374 U. S. 203 (1963). In *Stone,* for example, we invalidated a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls. But the Court carefully pointed out that the Commandments were posted purely as a religious admonition, not "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U. S., at 42. Similarly, in *Abington,* although the Court struck down the practices in two States requiring daily Bible readings in public schools, it specifically noted that nothing in the Court's holding was intended to "indicat[e] that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently 680*680 with the First Amendment." 374 U. S., at 225. Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations. See, *e. g., Stone* v. *Graham, supra,* at 41; *Epperson* v. *Arkansas,*393 U. S. 97, 107-109 (1968); *Abington School District* v. *Schempp, supra,* at 223-224; *Engel* v. *Vitale,* 370 U. S. 421, 424-425 (1962). Even where the benefits to religion were substantial, as in *Everson* v. *Board of Education,* 330 U. S. 1 (1947); *Board of Education* v. *Allen,* 392 U. S. 236 (1968); *Walz, supra;* and *Tilton, supra,*we saw a secular purpose and no conflict with the Establishment Clause. Cf. *Larkin* v. *Grendel's Den, Inc.,* 459 U. S. 116 (1982).

The District Court inferred from the religious nature of the creche that the city has no secular purpose for the display. In so doing, it rejected the city's claim that its reasons for including the creche are essentially the same as its reasons for sponsoring the display as a whole. The

District Court plainly erred by focusing almost exclusively on the creche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated. The city, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday. See *Allen* v. *Hickel,* 138 U. S. App. D. C. 31, 424 F. 2d 944 681*681 (1970); *Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 526 F. Supp. 1310 (Colo. 1981).

The narrow question is whether there is a secular purpose for Pawtucket's display of the creche. The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.[6] The District Court's inference, drawn from the religious nature of the creche, that the city has no secular purpose was, on this record, clearly erroneous.[7]

The District Court found that the primary effect of including the creche is to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular. Comparisons of the relative benefits to religion of different forms of governmental support are elusive and difficult to make. But to conclude that the primary effect of including the creche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, *Board of Education* v. *Allen, supra;*[8] expenditure of public funds for transportation of 682*682 students to church-sponsored schools, *Everson* v. *Board of Education, supra;*[9] federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, *Tilton* v. *Richardson,* 403 U. S. 672 (1971);[10] noncategorical grants to church-sponsored colleges and universities, *Roemer* v. *Board of Public Works,* 426 U. S. 736 (1976); and the tax exemptions for church properties sanctioned in *Walz*v. *Tax Comm'n,* 397 U. S. 664 (1970). It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws upheld in *McGowan*v. *Maryland,* 366 U. S. 420 (1961);[11] the release time program for religious training in *Zorach* v. *Clauson,* 343 U. S. 306 (1952); and the legislative prayers upheld in *Marsh* v. *Chambers,* 463 U. S. 783 (1983).

We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause. What was said about the legislative prayers in *Marsh, supra,* at 792, and implied about the Sunday Closing Laws in *McGowan* is true of the city's inclusion of the creche: its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." See *McGowan, supra,* at 442.

This case differs significantly from *Larkin* v. *Grendel's Den, Inc., supra,* and *McCollum,* where religion was substantially 683*683 aided. In *Grendel's Den,* important governmental power — a licensing veto authority — had been vested in churches. In *McCollum,* government had made religious instruction available in public school classrooms; the State had not only used the public school buildings for the teaching of religion, it had "afford[ed] sectarian groups an invaluable aid. . . [by] provid[ing] pupils for their religious classes through use of the State's compulsory public school machinery." 333 U. S., at 212. No comparable benefit to religion is discernible here.

The dissent asserts some observers may perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion. We can assume, *arguendo,* that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from

governmental action. The Court has made it abundantly clear, however, that "not every law that confers an `indirect,' `remote,' or `incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Nyquist,* 413 U. S., at 771; see also *Widmar* v. *Vincent,* 454 U. S. 263, 273 (1981). Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

The District Court found that there had been no administrative entanglement between religion and state resulting from the city's ownership and use of the creche. 525 F. Supp., at 1179. But it went on to hold that some political divisiveness was engendered by this litigation. Coupled with its finding of an impermissible sectarian purpose and effect, this persuaded the court that there was "excessive entanglement." The Court of Appeals expressly declined to 684*684accept the District Court's finding that inclusion of the creche has caused political divisiveness along religious lines, and noted that this Court has never held that political divisiveness alone was sufficient to invalidate government conduct.

Entanglement is a question of kind and degree. In this case, however, there is no reason to disturb the District Court's finding on the absence of administrative entanglement. There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the creche. No expenditures for maintenance of the creche have been necessary; and since the city owns the creche, now valued at $200, the tangible material it contributes is *de minimis.* In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries. There is nothing here, of course, like the "comprehensive, discriminating, and continuing state surveillance" or the "enduring entanglement" present in *Lemon,* 403 U. S., at 619-622.

The Court of Appeals correctly observed that this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct. And we decline to so hold today. This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for, *Mueller* v. *Allen,* 463 U. S. 388, 403-404, n. 11 (1983). In any event, apart from this litigation there is no evidence of political friction or divisiveness over the creche in the 40-year history of Pawtucket's Christmas celebration. The District Court stated that the inclusion of the creche for the 40-years has been "marked by no apparent dissension" and that the display has had a "calm history." 525 F. Supp., at 1179. Curiously, it went on to hold that the political divisiveness engendered by this lawsuit was evidence of excessive entanglement. A litigant cannot, by the very act of commencing a lawsuit, however, create the appearance 685*685 of divisiveness and then exploit it as evidence of entanglement.

We are satisfied that the city has a secular purpose for including the creche, that the city has not impermissibly advanced religion, and that including the creche does not create excessive entanglement between religion and government.

IV

JUSTICE BRENNAN describes the creche as a "re-creation of an event that lies at the heart of Christian faith," *post,* at 711. The creche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas. Even the traditional, purely secular displays extant at Christmas, with or without a creche, would inevitably recall the religious nature of the Holiday. The display

engenders a friendly community spirit of goodwill in keeping with the season. The creche may well have special meaning to those whose faith includes the celebration of religious Masses, but none who sense the origins of the Christmas celebration would fail to be aware of its religious implications. That the display brings people into the central city, and serves commercial interests and benefits merchants and their employees, does not, as the dissent points out, determine the character of the display. That a prayer invoking Divine guidance in Congress is preceded and followed by debate and partisan conflict over taxes, budgets, national defense, and myriad mundane subjects, for example, has never been thought to demean or taint the sacredness of the invocation.[12]

Of course the creche is identified with one religious faith but no more so than the examples we have set out from prior cases in which we found no conflict with the Establishment 686*686 Clause. See, *e. g., McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Marsh* v. *Chambers,* 463 U. S. 783 (1983). It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol — the creche — at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

The Court has acknowledged that the "fears and political problems" that gave rise to the Religion Clauses in the 18th century are of far less concern today. *Everson,*330 U. S., at 8. We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.

V

That this Court has been alert to the constitutionally expressed opposition to the establishment of religion is shown in numerous holdings striking down statutes or programs as violative of the Establishment Clause. See, *e. g., Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203 (1948); *Epperson* v. *Arkansas,* 393 U. S. 97 (1968); *Lemon* v. *Kurtzman, supra; Levitt* v. *Committee for Public Education & Religious Liberty,* 413 U. S. 472 (1973); *Committee* 687A*687A *for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S. 756 (1973); *Meek* v. *Pittenger,*421 U. S. 349 (1975); and *Stone* v. *Graham,* 449 U. S. 39 (1980). The most recent example of this careful scrutiny is found in the case invalidating a municipal ordinance granting to a church a virtual veto power over the licensing of liquor establishments near the church. *Larkin* v. *Grendel's Den, Inc.,* 459 U. S. 116 (1982). Taken together these cases abundantly demonstrate the Court's concern to protect the genuine objectives of the Establishment Clause. It is far too late in the day to impose a crabbed reading of the Clause on the country.

VI

We hold that, notwithstanding the religious significance of the creche, the city of Pawtucket has not violated the Establishment Clause of the First Amendment.[13] Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS dissenting

ELK GROVE UNIFIED SCHOOL DISTRICT ET AL.
v.
NEWDOW ET AL.

No. 02-1624.

Supreme Court of United States.

Argued March 24, 2004.

Decided June 14, 2004.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

2*2 3*3 STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, and in which THOMAS, J., joined as to Part I. *post,* p. 18. O'CONNOR, J., *post,* p. 33, and THOMAS, J., *post,* p. 45, filed opinions concurring in the judgment. SCALIA, J., took no part in the consideration or decision of the case.

Terence J. Cassidy argued the cause for petitioners. With him on the briefs was *Michael W. Pott.*

Solicitor General Olson argued the cause for the United States as respondent under this Court's Rule 12.6 in support of petitioners. With him on the briefs were *Assistant Attorney General Keisler, Deputy Solicitor General Clement, Deputy Assistant Attorney General Katsas, Patricia A. Millett, Robert M. Loeb, Lowell V. Sturgill,* and *Sushma Soni.*

Michael A. Newdow, pro se, argued the cause and filed a brief as respondent.[*]

4*4 JUSTICE STEVENS delivered the opinion of the Court.

Each day elementary school teachers in the Elk Grove Unified School District (School District) lead their classes in 5*5 a group recitation of the Pledge of Allegiance. Respondent, Michael A. Newdow, is an atheist whose daughter participates in that daily exercise. Because the Pledge contains the words "under God," he views the School District's policy as a religious indoctrination of his child that violates the First Amendment. A divided panel of the Court of Appeals for the Ninth Circuit agreed with Newdow. In light of the obvious importance of that decision, we granted certiorari to review the First Amendment issue and, preliminarily, the question whether Newdow has standing to invoke the jurisdiction of the federal courts. We conclude that Newdow lacks standing and therefore reverse the Court of Appeals' decision.

*6*6 I*

"The very purpose of a national flag is to serve as a symbol of our country," *Texas*v. *Johnson,* 491 U. S. 397, 405 (1989), and of its proud traditions "of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations," *id.,* at 437 (STEVENS, J., dissenting). As its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.

The Pledge of Allegiance was initially conceived more than a century ago. As part of the nationwide interest in commemorating the 400th anniversary of Christopher Columbus' discovery of America, a widely circulated national magazine for youth proposed in 1892 that pupils recite the following affirmation: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all."[1] In the 1920's, the National Flag Conferences replaced the phrase "my Flag" with "the flag of the United States of America."

In 1942, in the midst of World War II, Congress adopted, and the President signed, a Joint Resolution codifying a detailed set of "rules and customs pertaining to the display and use of the flag of the United States of America." Ch. 435, 56 Stat. 377. Section 7 of this codification provided in full:

"That the pledge of allegiance to the flag, `I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all', be rendered by 7*7 standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words `to the flag' and holding this position until the end, when the hand drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute." *Id.,* at 380.

This resolution, which marked the first appearance of the Pledge of Allegiance in positive law, confirmed the importance of the flag as a symbol of our Nation's indivisibility and commitment to the concept of liberty.

Congress revisited the Pledge of Allegiance 12 years later when it amended the text to add the words "under God." Act of June 14, 1954, ch. 297, 68 Stat. 249. The House Report that accompanied the legislation observed that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H. R. Rep. No. 1693, 83d Cong., 2d Sess., p. 2 (1954). The resulting text is the Pledge as we know it today: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U. S. C. § 4.

II

Under California law, "every public elementary school" must begin each day with "appropriate patriotic exercises." Cal. Educ. Code Ann. § 52720 (West 1989). The statute provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. *Ibid.* The Elk Grove Unified School District has implemented the state law by requiring that "[e]ach elementary school class recite the pledge of allegiance to the 8*8 flag once each day."[2] Consistent with our case law, the School District permits students who object on religious grounds to abstain from the recitation. See *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624 (1943).

In March 2000, Newdow filed suit in the United States District Court for the Eastern District of California against the United States Congress, the President of the United States, the State of California, and the School District and its superintendent.[3] App. 24. At the time of filing, Newdow's daughter was enrolled in kindergarten in the School District and participated in the daily recitation of the Pledge. Styled as a mandamus action, the complaint explains that Newdow is an atheist who was ordained more than 20 years ago in a ministry that "espouses the religious philosophy that the true and eternal bonds of righteousness and virtue stem from reason rather than mythology." *Id.,* at 42, ¶ 53. The complaint seeks a declaration that the 1954 Act's addition of the words "under God" violated the Establishment and Free Exercise Clauses of the United States Constitution,[4] as well as an injunction against the School District's policy

requiring daily recitation of the Pledge. *Id.,* at 42. It alleges that Newdow has standing to sue on his own behalf and on behalf of his daughter as "next friend." *Id.,* at 26, 56.

9*9 The case was referred to a Magistrate Judge, whose brief findings and recommendation concluded, "the Pledge does not violate the Establishment Clause." *Id.,* at 79. The District Court adopted that recommendation and dismissed the complaint on July 21, 2000. App. to Pet. for Cert. 97. The Court of Appeals reversed and issued three separate decisions discussing the merits and Newdow's standing.

In its first opinion the appeals court unanimously held that Newdow has standing "as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter." *Newdow* v. *U. S. Congress,* 292 F. 3d 597, 602 (CA9 2002) *(Newdow I).* That holding sustained Newdow's standing to challenge not only the policy of the School District, where his daughter still is enrolled, but also the 1954 Act of Congress that had amended the Pledge, because his "`injury in fact'" was "`fairly traceable'" to its enactment. *Id.,* at 603-605. On the merits, over the dissent of one judge, the court held that both the 1954 Act and the School District's policy violate the Establishment Clause of the First Amendment. *Id.,* at 612.

After the Court of Appeals' initial opinion was announced, Sandra Banning, the mother of Newdow's daughter, filed a motion for leave to intervene, or alternatively to dismiss the complaint. App. 82. She declared that although she and Newdow shared "physical custody" of their daughter, a state-court order granted her "exclusive legal custody" of the child, "including the sole right to represent [the daughter's] legal interests and make all decision[s] about her education" and welfare. *Id.,* at 82, ¶¶ 2-3. Banning further stated that her daughter is a Christian who believes in God and has no objection either to reciting or hearing others recite the Pledge of Allegiance, or to its reference to God. *Id.,* at 83, ¶ 4. Banning expressed the belief that her daughter would be harmed if the litigation were permitted to proceed, because others might incorrectly perceive the child as sharing her father's atheist views. *Id.,* at 85, ¶ 10. Banning 10*10 accordingly concluded, as her daughter's sole legal custodian, that it was not in the child's interest to be a party to Newdow's lawsuit. *Id.,* at 85. On September 25, 2002, the California Superior Court entered an order enjoining Newdow from including his daughter as an unnamed party or suing as her "next friend." That order did not purport to answer the question of Newdow's Article III standing. See *Newdow* v. *U. S. Congress,* 313 F. 3d 500, 502 (CA9 2002) *(Newdow II).*

In a second published opinion, the Court of Appeals reconsidered Newdow's standing in light of Banning's motion. The court noted that Newdow no longer claimed to represent his daughter, but unanimously concluded that "the grant of sole legal custody to Banning" did not deprive Newdow, "as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child." *Id.,* at 502-503. The court held that under California law Newdow retains the right to expose his child to his particular religious views even if those views contradict the mother's, and that Banning's objections as sole legal custodian do not defeat Newdow's right to seek redress for an alleged injury to his own parental interests. *Id.,* at 504-505.

On February 28, 2003, the Court of Appeals issued an order amending its first opinion and denying rehearing en banc. *Newdow* v. *U. S. Congress,* 328 F. 3d 466, 468 (CA9 2003) *(Newdow III).* The amended opinion omitted the initial opinion's discussion of Newdow's standing to challenge the 1954 Act and declined to determine whether Newdow was entitled to declaratory relief regarding the constitutionality of that Act. *Id.,* at 490. Nine judges dissented from the denial of en banc review. *Id.,* at 471, 482. We granted the School District's petition for a writ of certiorari to consider two questions: (1) whether Newdow has standing as a noncustodial

parent to challenge the School District's policy, and (2) if so, whether the policy offends the First Amendment. 540 U. S. 945 (2003).

*11*11* *III*

In every federal case, the party bringing the suit must establish standing to prosecute the action. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth* v. *Seldin,* 422 U.S. 490, 498 (1975). The standing requirement is born partly of "`an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen* v. *Wright,* 468 U. S. 737, 750 (1984) (quoting *Vander Jagt* v. *O'Neill,* 699 F. 2d 1166, 1178-1179 (CADC 1983) (Bork, J., concurring)).

The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake. Even in cases concededly within our jurisdiction under Article III, we abide by "a series of rules under which [we have] avoided passing upon a large part of all the constitutional questions pressed upon [us] for decision." *Ashwander* v. *TVA,* 297 U. S. 288, 346 (1936) (Brandeis, J., concurring). Always we must balance "the heavy obligation to exercise jurisdiction," *Colorado River Water Conservation Dist.* v. *United States,* 424 U. S. 800, 820 (1976),against the "deeply rooted" commitment "not to pass on questions of constitutionality" unless adjudication of the constitutional issue is necessary, *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101, 105 (1944). See also *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549, 568-575 (1947).

Consistent with these principles, our standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, see *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555, 559-562 (1992); and prudential standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction," 12*12 *Allen,* 468 U. S., at 751. The Article III limitations are familiar: The plaintiff must show that the conduct of which he complains has caused him to suffer an "injury in fact" that a favorable judgment will redress. See *Lujan,* 504 U. S., at 560-561. Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen,* 468 U. S., at 751. See also *Secretary of State of Md.* v. *Joseph H. Munson Co.,* 467 U. S. 947, 955-956 (1984). "Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth,* 422 U. S., at 500.

One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus,* 136 U. S. 586, 593-594 (1890). See also *Mansell* v. *Mansell,* 490 U. S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law"); *Moore* v. *Sims,* 442 U. S. 415, 435 (1979) ("Family relations are a traditional area of state concern"). So strong is our deference to state law in this area that we have recognized a "domestic

relations exception" that "divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt* v. *Richards,* 504 U. S. 689, 703 13*13 (1992). We have also acknowledged that it might be appropriate for the federal courts to decline to hear a case involving "elements of the domestic relationship," *id.,* at 705, even when divorce, alimony, or child custody is not strictly at issue:

"This would be so when a case presents `difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.' Such might well be the case if a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties." *Id.,* at 705-706 (quoting *Colorado River,* 424 U. S., at 814).

Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, see, *e. g., Palmore* v. *Sidoti,* 466 U. S. 429, 432-434 (1984), in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts.[5]

As explained briefly above, the extent of the standing problem raised by the domestic relations issues in this case was not apparent until August 5, 2002, when Banning filed 14*14 her motion for leave to intervene or dismiss the complaint following the Court of Appeals' initial decision. At that time, the child's custody was governed by a February 6, 2002, order of the California Superior Court. That order provided that Banning had "`*sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of'" her daughter. *Newdow II,* 313 F. 3d, at 502. The order stated that the two parents should "`consult with one another on substantial decisions relating to'" the child's "`psychological and educational needs,'" but it authorized Banning to "`exercise legal control'" if the parents could not reach "`mutual agreement.'" *Ibid.*

That family court order was the controlling document at the time of the Court of Appeals' standing decision. After the Court of Appeals ruled, however, the Superior Court held another conference regarding the child's custody. At a hearing on September 11, 2003, the Superior Court announced that the parents have "joint legal custody," but that Banning "makes the final decisions if the two ... disagree." App. 127-128.[6]

15*15 Newdow contends that despite Banning's final authority, he retains "an unrestricted right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive." *Id.,* at 48, ¶ 78. The difficulty with that argument is that Newdow's rights, as in many cases touching upon family relations, cannot be viewed in isolation. This case concerns not merely Newdow's interest in inculcating his child with his views on religion, but also the rights of the child's mother as a parent generally and under the Superior Court orders specifically. And most important, it implicates the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution.

The interests of the affected persons in this case are in many respects antagonistic. Of course, legal disharmony in family relations is not uncommon, and in many instances that disharmony poses no bar to federal-court adjudication of proper federal questions. What makes this case different is that Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend. In marked contrast to our case law on *justertii,*see, *e. g., Singleton* v. *Wulff,* 428 U. S. 106, 113-118 (1976) (plurality opinion), the interests of this parent and this child are not parallel and, indeed, are potentially in conflict.[7]

16*16 Newdow's parental status is defined by California's domestic relations law. Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located. See *Bishop* v. *Wood,*426 U.S. 341, 346-347 (1976). In this case, the Court of Appeals,

which possesses greater familiarity with California law, concluded that state law vests in Newdow a cognizable right to influence his daughter's religious upbringing. *Newdow II,* 313 F. 3d, at 504-505. The court based its ruling on two intermediate state appellate cases holding that "while the custodial parent undoubtedly has the right to make ultimate decisions concerning the child's religious upbringing, a court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed." *In re Marriage of Murga,* 103 Cal. App. 3d 498, 505, 163 Cal. Rptr. 79, 82 (1980). See also *In re Marriage of Mentry,* 142 Cal. App. 3d 260, 268-270, 190 Cal. Rptr. 843, 849-850 (1983) (relying on *Murga* to invalidate portion of restraining order barring noncustodial father from engaging children in religious activity or discussion without custodial parent's consent). Animated by a conception of "family privacy" that includes "not simply a policy of minimum state intervention but also a presumption of parental autonomy," 142 Cal. App. 3d, at 267-268, 190 Cal. Rptr., at 848, the state cases create a zone of private authority within which each parent, whether custodial or noncustodial, remains free to impart to the child his or her religious perspective.

Nothing that either Banning or the School Board has done, however, impairs Newdow's right to instruct his daughter in 17*17 his religious views. Instead, Newdow requests relief that is more ambitious than that sought in *Mentry* and *Murga.* He wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree. The California cases simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion. *Mentry* and *Murga* are concerned with protecting "`the fragile, complex interpersonal bonds between child and parent,'" 142 Cal. App. 3d, at 267, 190 Cal. Rptr., at 848, and with permitting divorced parents to expose their children to the "`diversity of religious experiences [that] is itself a sound stimulant for a child,'" *id.,* at 265, 190 Cal. Rptr., at 847. The cases speak not at all to the problem of a parent seeking to reach outside the private parent-child sphere to restrain the acts of a third party. A next friend surely could exercise such a right, but the Superior Court's order has deprived Newdow of that status.

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. There is a vast difference between Newdow's right to communicate with his child—which both California law and the First Amendment recognize—and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order. We conclude that, having been deprived under California law of the right to sue as next friend, Newdow 18*18 lacks prudential standing to bring this suit in federal court.[8]

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA took no part in the consideration or decision of this case.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, and with whom JUSTICE THOMAS joins as to Part I, concurring in the judgment.

The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim. I dissent from that ruling. On the merits, I conclude that the Elk

Grove Unified School District (School District) policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," does not violate the Establishment Clause of the First Amendment.

I

The Court correctly notes that "our standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case or controversy requirement, see *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555, 559–562 (1992); and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction, [*Allen* v. *Wright,* 468 U. S. 737, 751 (1984)].' " *Ante,* at 7–8. To be clear, the Court does not dispute that respondent Newdow (hereinafter respondent) satisfies the requisites of Article III standing. But curiously the Court incorporates criticism of the Court of Appeals' Article III standing decision into its justification for its novel prudential standing principle. The Court concludes that respondent lacks prudential standing, under its new standing principle, to bring his suit in federal court.

We have, in the past, judicially self-imposed clear limits on the exercise of federal jurisdiction. See, *e.g., Warth* v. *Seldin,* 422 U. S. 490, 499 (1975); *Allen* v. *Wright*, 468 U. S. 737, 751 (1984) ("Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights …"). In contrast, here is the Court's new prudential standing principle: "[I]t is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." *Ante,* at 13. The Court loosely bases this novel prudential standing limitation on the domestic relations exception to diversity-of-citizenship jurisdiction pursuant to 28 U. S. C. §1332, the abstention doctrine, and criticisms of the Court of Appeals' construction of California state law, coupled with the prudential standing prohibition on a litigant's raising another person's legal rights.

First, the Court relies heavily on *Ankenbrandt* v. *Richards,* 504 U. S. 689 (1992), in which we discussed both the domestic relations exception and the abstention doctrine. In *Ankenbrandt*, the mother of two children sued her former spouse and his female companion on behalf of the children, alleging physical and sexual abuse of the children. The lower courts declined jurisdiction based on the domestic relations exception to diversity jurisdiction and abstention under *Younger* v. *Harris,* 401 U. S. 37 (1971). We reversed, concluding that the domestic relations exception only applies when a party seeks to have a district court issue a "divorce, alimony, and child custody decree," *Ankenbrandt*, 504 U. S., at 704. We further held that abstention was inappropriate because "the status of the domestic relationship ha[d] been determined as a matter of state law, and in any event ha[d] no bearing on the underlying torts alleged," *id.,* at 706.

The Court first cites the domestic relations exception to support its new principle. Then the Court relies on a quote from *Ankenbrandt*'s discussion of the abstention doctrine: "We have also acknowledged that it might be appropriate for the federal courts to decline to hear a case involving 'elements of the domestic relationship,' *id.,* at 705, even when divorce, alimony, or child custody is not strictly at issue." *Ante,* at 9–10. The Court perfunctorily states: "[T]hus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, see, *e.g., Palmore* v. *Sidoti,* 466 U. S. 429, 432–434 (1984), in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts." *Ante,* at 9. That conclusion does not follow from *Ankenbrandt*'s discussion of the domestic relations exception and abstention; even if it did, it

would not be applicable in this case because, on the merits, this case presents a substantial federal question that transcends the family law issue to a greater extent than *Palmore*.

The domestic relations exception is not a prudential limitation on our federal jurisdiction. It is a limiting construction of the statute defining federal diversity jurisdiction, 28 U. S. C. §1332, which "divests the federal courts of power to issue divorce, alimony, and child custody decrees," *Ankenbrandt,* 504 U. S., at 703. This case does not involve diversity jurisdiction, and respondent does not ask this Court to issue a divorce, alimony, or child custody decree. Instead it involves a substantial federal question about the constitutionality of the School District's conducting the pledge ceremony, which is the source of our jurisdiction. Therefore, the domestic relations exception to diversity jurisdiction forms no basis for denying standing to respondent.

When we discussed abstention in *Ankenbrandt*, we first noted that "[a]bstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation … to exercise the jurisdiction given them.' "*Id.*, at 705 (quoting *Colorado River Water Conservation Dist.* v. *United States,* 424 U. S. 800, 817 (1976)).*Ankenbrandt's* discussion of abstention by no means supports the proposition that only in the rare instances where "a substantial federal question … transcends or exists apart from the family law issue," *ante,* at 9, should federal courts decide the federal issue. As in *Ankenbrandt*, "the status of the domestic relationship has been determined as a matter of state law, and in any event has no bearing on the underlying [constitutional violation] alleged." 504 U. S., at 706. Sandra Banning and respondent now share joint custody of their daughter, respondent retains the right to expose his daughter to his religious views, and the state of their domestic affairs has nothing to do with the underlying constitutional claim. Abstention forms no basis for denying respondent standing.

The Court cites *Palmore* v. *Sidoti,* 466 U. S. 429 (1984), as an example of the exceptional case where a "substantial federal question that transcends or exists apart from the family law issue" makes the exercise of our jurisdiction appropriate. *Ante,* at 9. In *Palmore*, we granted certiorari to review a child custody decision, and reversed the state court's decision because we found that the effects of racial prejudice resulting from the mother's interracial marriage could not justify granting custody to the father. Contrary to the Court's assertion, the alleged constitutional violation, while clearly involving a "substantial federal question," did not "transcen[d] or exis[t] apart from the family law issue," *ante,* at 9; it had everything to do with the domestic relationship—"[w]e granted certiorari to review a *judgment of a state court divesting a natural mother of the custody of her infant child*," 466 U. S., at 430 (emphasis added). Under the Court's discussion today, it appears that we should have stayed out of the "domestic dispute" in *Palmore* no matter how constitutionally offensive the result would have been.

Finally, it seems the Court bases its new prudential standing principle, in part, on criticisms of the Court of Appeals' construction of state law, coupled with the prudential principle prohibiting third-party standing. In the Court of Appeals' original opinion, it held unanimously that respondent satisfied the Article III standing requirements, stating respondent "has standing as a parent to challenge a practice that interferes with his right to direct the education of his daughter." *Newdow* v. *United States Congress*, 292 F. 3d 597, 602 (CA9 2002). After Banning moved for leave to intervene, the Court of Appeals reexamined respondent's standing to determine whether the parents' court-ordered custodial arrangement altered respondent's standing.*Newdow* v. *United States Congress*, 313 F. 3d 500 (CA9 2002). The court examined whether respondent could assert an injury in fact by asking whether, under California law, "noncustodial parents maintain the right to expose and educate their children to their individual religious views, even if those religious views contradict those of the custodial parent."[Footnote 1] *Id.*, at 504. The Court of Appeals again unanimously concluded that the respondent satisfied

Article III standing, despite the custody order, because he retained sufficient parental rights under California law. *Id.,* at 504–505 (citing *In re Marriage of Murga* v. *Peterson*, 103 Cal. App. 3d 498, 163 Cal. Rptr. 79 (1980); *In re Marriage of Mentry*, 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983)).

The Court, contrary to the Court of Appeals' interpretation of California case law, concludes that respondent "requests relief that is more ambitious than that sought in *Mentry* and *Murga*" because he seeks to restrain the act of a third party outside the parent-child sphere. *Ante,* at 13. The Court then mischaracterizes respondent's alleged interest based on the Court's *de novo* construction of California law.

The correct characterization of respondent's interest rests on the interpretation of state law. As the Court recognizes, *ante,* at 11, we have a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." *Bowen* v. *Massachusetts,* 487 U. S. 879, 908 (1988). We do so "not only to render unnecessary review of their decisions in this respect, but also to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett* v. *Spokane Arcades, Inc.,* 472 U. S. 491, 500 (1985) (internal quotation marks and citation omitted). In contrast to the Court, I would defer to the Court of Appeals' interpretation of California law because it is our settled policy to do so, and because I think that the Court of Appeals has the better reading of *Murga, supra,* and *Mentry*, *supra.*

The Court does not take issue with the fact that, under California law, respondent retains a right to influence his daughter's religious upbringing and to expose her to his views. But it relies on Banning's view of the merits of this case to diminish respondent's interest, stating that the respondent "wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree." *Ante,* at 13. As alleged by respondent and as recognized by the Court of Appeals, respondent wishes to enjoin the School District from endorsing a form of religion inconsistent with his own views because he has a right to expose his daughter to those views without the State's placing its *imprimatur*on a particular religion. Under the Court of Appeals' construction of California law, Banning's "veto power" does not override respondent's right to challenge the pledge ceremony.

The Court concludes that the California cases "do not stand for the proposition that [respondent] has a right to dictate to others what they may or may not say to his child respecting religion." *Ibid*. Surely, under California case law and the current custody order, respondent may not tell Banning what she may say to their child respecting religion, and respondent does not seek to. Just as surely, respondent cannot name his daughter as a party to a lawsuit against Banning's wishes. But his claim is different: Respondent does not seek to tell just anyone what he or she may say to his daughter, and he does not seek to vindicate solely her rights.

Respondent asserts that the School District's pledge ceremony infringes his right under California law to expose his daughter to his religious views. While she is intimately associated with the source of respondent's standing (the father-daughter relationship and respondent's rights thereunder), the daughter *is not the source* of respondent's standing; instead it is their relationship that provides respondent his standing, which is clear once respondent's interest is properly described.[Footnote 2] The Court's criticisms of the Court of Appeals' Article III standing decision and the prudential prohibition on third-party standing provide no basis for denying respondent standing.

Although the Court may have succeeded in confining this novel principle almost narrowly enough to be, like the proverbial excursion ticket—good for this day only—our doctrine of prudential standing should be governed by general principles, rather than ad hoc improvisations.

II

The Pledge of Allegiance reads:

"I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U. S. C. §4.

As part of an overall effort to "codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America," see H. R. Rep. No. 2047, 77th Cong., 2d Sess., 1 (1942); S. Rep. No. 1477, 77th Cong., 2d Sess., 1 (1942), Congress enacted the Pledge on June 22, 1942. Pub. L. 623, ch. 435, §7, 56 Stat. 380, former 36 U. S. C. §1972. Congress amended the Pledge to include the phrase "under God" in 1954. Act of June 14, 1954, ch. 297, §7, 68 Stat. 249. The amendment's sponsor, Representative Rabaut, said its purpose was to contrast this country's belief in God with the Soviet Union's embrace of atheism. 100 Cong. Rec. 1700 (1954). We do not know what other Members of Congress thought about the purpose of the amendment. Following the decision of the Court of Appeals in this case, Congress passed legislation that made extensive findings about the historic role of religion in the political development of the Nation and reaffirmed the text of the Pledge. Act of Nov. 13, 2002, Pub. L. 107–293, §§1–2, 116 Stat. 2057–2060. To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, "under God" might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under God's authority. How much consideration anyone gives to the phrase probably varies, since the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation.

The phrase "under God" in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances. Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound.

At George Washington's first inauguration on April 30, 1789, he

"stepped toward the iron rail, where he was to receive the oath of office. The diminutive secretary of the Senate, Samuel Otis, squeezed between the President and Chancellor Livingston and raised up the crimson cushion with a Bible on it. Washington put his right hand on the Bible, opened to Psalm 121:1: 'I raise my eyes toward the hills. Whence shall my help come.' The Chancellor proceeded with the oath: 'Do you solemnly swear that you will faithfully execute the office of President of the United States and will to the best of your ability preserve, protect and defend the Constitution of the United States?' The President responded, 'I solemnly swear,' and repeated the oath, adding, 'So help me God.' He then bent forward and kissed the Bible before him." M. Riccards, A Republic, If You Can Keep It: The Foundation of the American Presidency, 1700–1800, pp. 73–74 (1987).

Later the same year, after encouragement from Congress,[Footnote 3] Washington issued his first Thanksgiving proclamation, which began:

"Whereas it is the duty of all Nations to acknowledge the problems of Almighty God, to obey His will, to be grateful for his benefits, and humbly to implore his protection and favor—and whereas

both Houses of Congress have by their joint Committee requested me 'to recommend to the People of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.' " 4 Papers of George Washington 131: Presidential Series (W. Abbot & D. Twohig eds. 1993).

Almost all succeeding Presidents have issued similar Thanksgiving proclamations.

Later Presidents, at critical times in the Nation's history, have likewise invoked the name of God. Abraham Lincoln, concluding his masterful Gettysburg Address in 1863, used the very phrase "under God":

"It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotions to that 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 government of the people, by the people, for the people, shall not perish from the earth." 1 Documents of American History 429 (H. Commager ed. 8th ed. 1968).

Lincoln's equally well known second inaugural address, delivered on March 4, 1865, makes repeated references to God, concluding with these famous words:

"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." *Id.,* at 443.

Woodrow Wilson appeared before Congress in April 1917, to request a declaration of war against Germany. He finished with these words:

"But the right is more precious than peace, and we shall fight for the things which we have always carried nearest our hearts,—for democracy, for the right of those who submit to authority to have a voice in their own Governments, for the rights and liberties of small nations, for a universal dominion of right for such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free. To such a task we can dedicate our lives and our fortunes, everything that we are and everything that we have, with the pride of those who know that the day has come when America is privileged to spend her blood and her might for the principles that gave her birth and happiness and the peace which she has treasured. God helping her, she can do no other." 2 *id.,* at 132.

President Franklin Delano Roosevelt, taking the office of the Presidency in the depths of the Great Depression, concluded his first inaugural address with these words: "In this dedication of a nation, we humbly ask the blessing of God. May He protect each and every one of us! May He guide me in the days to come!" 2 *id.,* at 242.

General Dwight D. Eisenhower, who would himself serve two terms as President, concluded his "Order of the Day" to the soldiers, sailors, and airmen of the Allied Expeditionary Force on D-Day—the day on which the Allied Forces successfully landed on the Normandy beaches in France—with these words: "Good Luck! And let us all beseech the blessings of Almighty God upon this great and noble undertaking,"

The motto "In God We Trust" first appeared on the country's coins during the Civil War. Secretary of the Treasury Salmon P. Chase, acting under the authority of an Act of Congress passed in 1864, prescribed that the motto should appear on the two cent coin. The motto was

placed on more and more denominations, and since 1938 all United States coins bear the motto. Paper currency followed suit at a slower pace; Federal Reserve notes were so inscribed during the decade of the 1960's. Meanwhile, in 1956, Congress declared that the motto of the United States would be "In God We Trust." Act of July 30, 1956, ch. 795, 70 Stat. 732.

Our Court Marshal's opening proclamation concludes with the words " 'God save the United States and this honorable Court.' " The language goes back at least as far as 1827. O. Smith, Early Indiana Trials and Sketches: Reminiscences (1858) (quoted in 1 C. Warren, The Supreme Court in United States History 469 (rev. ed. 1926)).

All of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character. In the words of the House Report that accompanied the insertion of the phrase "under God" in the Pledge: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H. R. Rep. No. 1693, 83d Cong., 2d Sess., 2 (1954). Giving additional support to this idea is our national anthem "The Star-Spangled Banner," adopted as such by Congress in 1931. 36 U. S. C. §301 and Historical and Revision Notes. The last verse ends with these words:

"Then conquer we must, when our cause it is just,

"And this be our motto: 'In God is our trust.'

"And the star-spangled banner in triumph shall wave

"O'er the land of the free and the home of the brave!"

As pointed out by the Court, California law requires public elementary schools to "conduc[t] … appropriate patriotic exercises" at the beginning of the schoolday, and notes that the "giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." Cal. Educ. Code Ann. §52720 (West 1989). The School District complies with this requirement by instructing that "[e]ach elementary school class recite the [P]ledge of [A]llegiance to the [F]lag once each day." App. 149–150. Students who object on religious (or other) grounds may abstain from the recitation. *West Virginia Bd. of Ed.*v. *Barnette,* 319 U. S. 624, 642 (1943) (holding that the government may not compel school students to recite the Pledge).

Notwithstanding the voluntary nature of the School District policy, the Court of Appeals, by a divided vote, held that the policy violates the Establishment Clause of the First Amendment because it "impermissibly coerces a religious act." *Newdow* v. *United States Congress,* 328 F. 3d 466, 487 (CA9 2003). To reach this result, the court relied primarily on our decision in *Lee* v. *Weisman*, 505 U. S. 577 (1992). That case arose out of a graduation ceremony for a public high school in Providence, Rhode Island. The ceremony was begun with an invocation, and ended with a benediction, given by a local rabbi. The Court held that even though attendance at the ceremony was voluntary, students who objected to the prayers would nonetheless feel coerced to attend and to stand during each prayer. But the Court throughout its opinion referred to the prayer as "an explicit religious exercise," *id.,* at 598, and "a formal religious exercise," *id.*, at 589.

As the Court notes in its opinion, "the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles." *Ante,* at 2.

I do not believe that the phrase "under God" in the Pledge converts its recital into a "religious exercise" of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase "under God" is

in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H. R. Rep. No. 1693, at 2: “From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.” Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.[Footnote 4]

There is no doubt that respondent is sincere in his atheism and rejection of a belief in God. But the mere fact that he disagrees with this part of the Pledge does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress. There may be others who disagree, not with the phrase “under God,” but with the phrase “with liberty and justice for all.” But surely that would not give such objectors the right to veto the holding of such a ceremony by those willing to participate. Only if it can be said that the phrase “under God” somehow tends to the establishment of a religion in violation of the First Amendment can respondent’s claim succeed, where one based on objections to “with liberty and justice for all” fails. Our cases have broadly interpreted this phrase, but none have gone anywhere near as far as the decision of the Court of Appeals in this case. The recital, in a patriotic ceremony pledging allegiance to the flag and to the Nation, of the descriptive phrase “under God” cannot possibly lead to the establishment of a religion, or anything like it.

When courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies. Here, Congress prescribed a Pledge of Allegiance, the State of California required patriotic observances in its schools, and the School District chose to comply by requiring teacher-led recital of the Pledge of Allegiance by willing students. Thus, we have three levels of popular government—the national, the state, and the local—collaborating to produce the Elk Grove ceremony. The Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they chose to do so. To give the parent of such a child a sort of “heckler’s veto” over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase “under God,” is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance.