WILLIAM J. MURRAY, III, Infant, etc., et al.,

Petitioners,

—vs.— No. 119

JOHN N. CURLETT, et al.,

Respondents.

Washington, D. C.
February 27, 1963.

The above-entitled cause came on for oral argument, pursuant to notice,

BEFORE:

EARL WARREN, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
THOMAS C. CLARK, *Associate Justice*
JOHN M. HARLAN, *Associate Justice*
WILLIAM J. BRENNAN, JR., *Associate Justice*
POTTER STEWART, *Associate Justice*
BYRON R. WHITE, *Associate Justice*
ARTHUR J. GOLDBERG, *Associate Justice*

APPEARANCES:

LEONARD J. KERPELMAN, ESQ., *on behalf of Petitioners, No. 119.*

FRANCIS B. BURCH, ESQ., *on behalf of Respondents, No. 119.*

GEORGE W. BAKER, JR., ESQ., *on behalf of Respondents, No. 119.*

THOMAS B. FINAN, *Attorney General of the State of Maryland, as Amicus Curiae urging affirmation in No. 119.*

PROCEEDINGS

THE COURT: Number, 119, *William J. Murray III, et al.* versus *John Curlett, et al.*

Mr. Kerpelman?

ORAL ARGUMENT BY LEONARD J. KERPELMAN, ESQ., ON BEHALF OF PETITIONERS, No. 119

MR. KERPELMAN: Mr. Chief Justice, Your Honors, this Lord's Prayer and Bible reading case which is before the Court today has perhaps a unique importance for all of us. The reason is that all of us have certainly at some time been concerned with the philosophical meanings attached to our existence here; to the significance of that existence. And all of us have no doubt directed ourselves to resolution of questions of the goals and means and functions of mankind and all of us have thought and contemplated and, no doubt prayed. Such contemplation and thought it is in the very nature of man to perform—sapient man; wondering, inquiring man.

And the nature of man being what it is, man has developed over the long centuries complex and subtle systems of philosophy, and out of these systems and out of historical knowledge and out of faith, man has constructed complex and subtle systems of religious belief; and out of these systems of religious belief, man has constructed doctrine. At the same time, extending back through painful ages, man has concurrently developed differing and no less subtle and no less complex systems of government based—at different times and in differing places—on differing principles. Perhaps the noblest of all of these systems of government is that system embodied in the enlightened and libertarian Constitution—including the Bill of Rights—of the United States of America. In fact, the principles embodied in this document are probably so noble and so ennobling that without doubt many of us experience some difficulty in daily drawing ourselves up to the perpetual measure of their standards.

One of these standards, of course, set forth in the Constitution and the Bill of Rights, as interpreted by this Court, is the principle that the church and the state in this country shall remain separate and apart. And that in fact there shall be a wall of separation between them which shall be maintained, high and impregnable.

THE COURT: I have read the First Amendment. I have never read that language in it. What's it say? What's the First Amendment say on this subject?

MR. KERPELMAN: "That Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

At any rate, it seems that my conclusion, I respectfully say, Mr. Justice, is that the First Amendment has been interpreted to mean that government shall not sponsor or favor any one religion, or religion in general; and that religion shall not interpose itself in natters of government.

THE COURT: You have here a Fourteenth Amendment case, don't you?

MR. KERPELMAN: Yes, Your Honor, the First Amendment as applied to the states by the Fourteenth Amendment—*Cantwell* v. *Connecticut*, and that line of cases.

This particular case concerns a rule of the Board of School Commissioners of Baltimore City, which is found on page 4 of the petitioners' brief, and it's very short. I'll perhaps read it to the Court: "Opening exercises." This is a rule drawn under the administrative powers of the local school board, and this rule has been in existence, I believe, since about 1905.

> Opening exercises. Each school, either collectively or in classes, shall be opened by the reading without comment of a chapter in The Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it.

This rule, before the advent of this case, was amended as follows:

> Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian.

If Your Honors please, I feel that the reason for the First Amendment interpretation having been at some time stated to have

erected a wall between church and state is clear. It stretches back, as far back as the history of governments, and particularly as far back as the history of religions themselves. The cruel and arrant features of this history were alluded to in *Engel*; they were discussed in *Torcaso*; they were treated at great scholarly length in the Sunday Blue Law Cases.

THE COURT: Mr. Kerpelman?

MR. KERPELMAN: Yes, Your Honor?

THE COURT: Was the version of the Lord's Prayer actually used in the record?

MR. KERPELMAN: Your Honor, it is not. There was no testimony taken in the case, and therefore the version which was used could not have been educed. This case was before the court on demurrer and the allegations in the petition did not allege the version which was used.

THE COURT: I noticed that in the section, the Douay version may be used by those pupils who prefer it.

MR. KERPELMAN: Yes, sir?

THE COURT: Is there anything in the record that shows how they—

MR. KERPELMAN: —how they determined that?

THE COURT: Yes.

MR. KERPELMAN: No, Your Honor, there is not. The record would not have that because the case was on demurrer. No evidence was taken. The rule itself seems to be an invitation to a short religious war every day. I don't know exactly how it's arranged. I suppose it's according to the feeling of the majority of the pupils or perhaps the feeling of the teacher in the particular instance.

THE COURT: [Inaudible][1]

MR. KERPELMAN: Your Honor, I can see no constitutional objection to the study of religion, to the study of history, to the study of Biblical history—for example—to the study of the Bible as a book of literature. What we have here, of course, is a religious ceremony set up by the school, conducted by the school and, by very strong implication, having the support and the favor of the school; and the ceremony is sectarian, as any ceremony must be. It has apparently become impossible, in the modern age with the numerous sects and the numerous religions, to have a ceremony which is not

[1]Because of an imperfect taping system and aging tapes, some passages are inaudible.

sectarian. They were not able to accomplish it—I would say in my own mind—even in the regent's prayer in New York. And where we have a ceremony set up, that is a different thing from "study."

We expressly disclaim any objection to any study of any sort, including comparative religions or whatever they might be called, in junior high school or high school phraseology; any subject.

THE COURT: There's one factor in this case that was present in *Engel* that is not present here. There is no suggestion that the state itself composed this prayer, is there?

MR. KERPELMAN: No, Your Honor.

As I read *Engel*, the phrase "composed or sanctioned" would seem to include—"sanctioning" would seem to me to indicate choosing, or favoring, or allowing, or permitting any particular prayer. And it seems to me that to interpret *Engel* as having eliminated only composed prayers overlooks the language in *Engel* concerning sanctioned prayers.

THE COURT: [Inaudible]

MR. KERPELMAN: This is implied from the rule itself, Your Honor, and from the selection of the exercise, as I recall. I don't believe our petition called it that. However, the respondents' brief did call it a devotional exercise at one point, I am fairly certain.

The conclusion that it seems to me that the courts have come to in this country is that, to quote Mr. Justice Rutledge in *Everson*, as he was reiterated in *Engel*:

> The price of religious freedom is double. It is that the church and religion shall live both within that freedom and upon that freedom.

Yet, in spite of the fact that the doctrine has become established, it would seem to me that the church and the state shall be separated. There has grown up this practice in the Maryland schools, and it's been tolerated and winked at for so long that the respondents have now denominated it a "tradition." Well I don't think, if Your Honors please, that we can repeal the Constitution by this particular means. A matter which is once unconstitutional does not become constitutional by being allowed to persist, even though it has continued almost as long as *Plessy* v. *Ferguson* had continued. And this particular practice has continued without even a *Plessy* v. *Ferguson* to support it.

Our society develops; it matures; its institutions develop; they change. The practice which one generation had not the courage to question much less overturn, it seems to me, must—if we are to advance—be questioned by the next generation. And that generation must even summon up the courage to overturn certain practices

within the constitutional framework when the issue is put to them.

Of course we are asked: How can religious men have such an attitude? And we are told that the answer to this is that those who urge the petition of the petitioners—the position of the petitioners here—not only are not religious, but they have set themselves in opposition to religion. And I respectfully say, if Your Honors please, that this is completely untrue. It is as unreasonable to say this as it is unreasonable to say that a person who is opposed to unreasonable searches and seizures is opposed to law enforcement; or that a person who is opposed to censorship is opposed to purity. Arguments such as this I feel leap a continent to vault a stone; they are non sequiturs.

The respondents, it seems to me, perhaps have the mark of being something like "nonreligious," for they have said in their brief at page 28 that "this ceremony has come to have a meaning which transcends mere religiousness." And I don't want to—I don't wish to cast reflections on the particular language that they chose, but it seems to me that infinity-plus-one is still infinity, and I don't know if there is anything which can transcend "religiousness." The petitioners certainly do not urge that there is any such thing. The petitioners are merely here asking that an injury, which they have suffered and which they say is guaranteed under the Constitution, be redressed. The injury is very real.

Now, upon the pleadings in this case which are before the Court on demurrer, there can be no argument but that the petitioners have suffered a substantial personal detriment. They claim—and the respondents by their demurrer have admitted—that William Murray, the infant plaintiff, has suffered substantially from the conduct of these exercises. Specifically, the allegations state that he lost caste; that he has been regarded with aversion by his fellows; that he has been subjected to reproach and insult; and that doubt has been raised as to his morality and good citizenship. And though all these injuries may be in the psychological or the intangible sphere, yet they are certainly as substantial an injury as one could perhaps allege.

THE COURT: This case is here on a demurrer?

MR. KERPELMAN: Yes, Your Honor.

THE COURT: So there is no evidence at all in support of those allegations? And, on the contrary, there is no evidence at all that any child, or that the parents of any child, wanted their children—in the free exercise of their religion—wanted their children to say this morning prayer at school, is there?

MR. KERPELMAN: Well, Your Honor, I think it may be easily

assumed that a majority of parents would have, would like to have their children say this prayer in the schools.

THE COURT: Well then, if we strike down this provision, we are interfering with the free exercise of their religion, aren't we?

MR. KERPELMAN: Well, Your Honor, I think that the—well, for example, the police power can yield to the necessity that the public be protected from violence. That is, freedom of speech would yield to the police power. Freedom of assembly would yield to the right of the public to have its property protected against riots. But this is a new concept to me: that a person's free exercise of religion, or his right to be unburdened or free of an establishment of religion, must yield to the free exercise of religion of other parties, when these "other parties" are in the public school.

They are saying to the petitioner: Give us your support. Give us your taxes. Give us your faith and confidence and trust in the schools—which, incidentally, the petitioners do give wholeheartedly. And they say that the "taxing" part of what they give is but a mere incidental to the other things that they give, which is a belief in the importance in our society of secular public schools. They give all of this. The majority says that, in return for this: We wish to run a religious exercise which causes you these substantial detriments. I don't think that the free exercise of the majority—the right to the free exercise—can work that way. Because, in exercising its right it is establishing a religion in the public school; by establishing the religion in the public school, they take away, of course, the right of the petitioners to be free of an establishment.

THE COURT: You're entirely free, under these regulations—your client—to just walk away from this ceremony.

MR. KERPELMAN: Well, Your Honor, now that, I believe, is more an illusory out than a real one.

THE COURT: Well, it says: "Any child shall be excused from participating in the opening exercises, or from attending the opening exercises—"

MR. KERPELMAN: Yes, Your Honor.

THE COURT: "—on the request of his parent or guardian."

MR. KERPELMAN: Right.

THE COURT: You're free to walk away—

MR. KERPELMAN: Yes, Your Honor.

THE COURT: —and not participate in any way.

MR. KERPELMAN: Yes, Your Honor.

And then, because of a matter which is not in the secular sphere—which you can't discuss in class in a rational manner because religion cannot, in the last analysis, be rational—but because of a matter which is in the spiritual sphere, this child who chooses to walk away—and I think it can be admitted—he would have no answer to the people who would think that this was a peculiar, or an ungentlemanly, or perhaps a bad thing to do. He would have no answer because these answers are all within the heart of the people that make these allegations. He has no answer. This is not a secular matter. When he walks away, he then becomes subject to whatever sanctions schoolboys may impose—and, I might say, to whatever sanctions schoolteachers may impose.

And I might say this, Mr. Justice—

THE COURT: There's no, of course no evidence, because all we have is the complaint, or the petition.

MR. KERPELMAN: No evidence, Your Honor. But were we put to the proof, we would prove that these acts of coercion were very substantial; that this boy was spat upon, insulted, assaulted. The criminal docket of the northeastern police station in Baltimore City will show that certain persons were found guilty of assaulting him when this case gained notoriety—and he's an infant. This boy is now in his junior year—

THE COURT: I was assaulted when I was an infant at school a good many times. Weren't you? I mean there may be no connection between them.

MR. KERPELMAN: Yes, Your Honor. Yes, Your Honor, but if it's on a rational matter—Did you steal Johnny's marbles? Or did you win the game? Or did he win the game?—it's something which the Constitution, I don't think, has set up any standards for.

THE COURT: The reason I asked the first question I asked you, sir, was this: It seemed to me that there are two provisions affecting and relating to religion, in the First Amendment: The establishment clause and the free exercise clause. And some of us tend to lump this all as one doctrine.

The fact is that these two separate and distinct clauses sometimes run into conflict with each other. They're not one. They're two different things; and in some areas, they conflict. And if, as you say, the evidence on the remand of this case, or if this case should ever be tried, if the evidence should show that the vast ma-

jority of the children in the Baltimore schools and their parents want to—in the free exercise of their religious beliefs—want to open their school day with a prayer, then to prevent them from doing that would be to interfere with the free exercise of their religion. Isn't that true?

MR. KERPELMAN: But under the establishment—

THE COURT: Very literally.

MR. KERPELMAN: Well, Your Honor, I can't quite follow that—and I say that respectfully—because, under the establishment clause, they have no right to establish a religion.

THE COURT: Precisely. But under the free exercise clause, they do have a constitutional right to pray when and where they want to, or not to pray if they don't want to.

MR. KERPELMAN: Yes, Your Honor, they have.

THE COURT: That's precisely my point.

THE COURT: But is that correct?

MR. KERPELMAN: Well, it seems to me—

THE COURT: Would somebody have a right to come in here, at this minute in this public institution, and interrupt our proceedings by saying they wanted to pray? And would that deprive them of their free exercise of religion, to say that they could pray on the outside, or somewhere else?

MR. KERPELMAN: Thank you, Mr. Justice. I was thinking in terms of a silent prayer. But certainly, Mr. Justice Black, if someone came in and interrupted the proceedings of this Court, that would certainly not be within their constitutional—

THE COURT: I don't think the amendment says that a person's got a right to go anywhere in the world he wants to, at any time—

MR. KERPELMAN: No, Your Honor.

THE COURT: —and intrude on other places where they're set apart for something and dedicated to something, or to express views of any kind—

MR. KERPELMAN: Yes, Your Honor.

THE COURT: —openly, so that they interrupt the people.

MR. KERPELMAN: Yes, Your Honor.

THE COURT: Like public expense, or the public's money that's against it.

THE COURT: There's no question here of any disturbance of the peace or disorderly conduct. We're not in that kind of area in this case at all, are we?

MR. KERPELMAN: No, except analogously. I feel that a person who comes in and makes a speech which constitutes disorderly conduct, although he has a right to free speech, he has a responsibility to conduct himself in an orderly manner.

THE COURT: And if the sign says "keep off the grass," he can be prohibited from walking on the grass, even if he wants to walk on it to make a speech. But we're not in that. This is not that kind of a case at all, is it?

MR. KERPELMAN: Your Honor, I feel that, under Your Honor's hypothesis, it in a way is.

Here the majority in the class wishes to establish a religion. Question: Can they establish a religion; or does that breach one of the constitutional rights of the minority? After all, if the—

THE COURT: Now these are constitutional rights that apply to all of us, whether we're in the minority or the majority; whether we're one, or whether we're a thousand. And I'm only suggesting that the establishment clause and the free exercise clause often run—collide with each other. They run head-on into each other. And it's fallacious to consider them as one and the same thing. They are two separate, distinct provisions of the Constitution. And they often, as in this very case—if you're right that a vast majority of the students and of their parents affirmatively want, in the exercise of their religious beliefs, want to open their school day with a prayer, then to prevent them from doing it in the name of the establishment clause is to interfere with the free exercise of their religion.

Now I'm not suggesting the answer; I'm simply—

MR. KERPELMAN: Yes—

THE COURT: —suggesting that it's a fallacy to lump all this together and say it all just stands for separation of church and state.

MR. KERPELMAN: Well—

THE COURT: Because the Constitution doesn't say so. It has two particular, specific provisions.

MR. KERPELMAN: Well, Your Honor is clearly more the legal scholar than I am. Yet it seems to me that the prohibition—prohibitions contained in the First Amendment, are two prohibitions. They're prohibitions against interfering with someone's free exercise; they are prohibitions against establishment. And these prohi-

bitions operate to the benefit of the minority. They cannot be used as a sword by the majority.

And I see Your Honor disagrees with me, but that is our conception of the case.

THE COURT: They're constitutional provisions. They're a "sword," if you want to call them a sword. They're a "cloak," if you want to call them that. But they are no more available, no more freely available to the majority than to the minority, to one, and to a million. It's generally minorities who invoke these rights, because usually majorities don't have to.

MR. KERPELMAN: Correct. But the majority has its legislature, and the majority has—

THE COURT: The provisions are equally applicable to all of us.

MR. KERPELMAN: Yes, Your Honor. However, it is—yes, Your Honor?

THE COURT: [Inaudible]

MR. KERPELMAN: Clearly, clearly.

THE COURT: [Inaudible]

MR. KERPELMAN: Yes, Your Honor; yes.

It seems to me also that the compact of the Constitution says that if the minority has a right, we don't count noses. And then if there are more persons opposed to their having that right than not having it, we take the right away from them. It seems to me that that must be a guiding constitutional condition; otherwise, we have no Ten Amendments to the Constitution left.

As I have said, the petitioners are in the position where they wish to give their support to the schools. They want, in return, that the school should teach secular matters only, as they feel that the school is called upon to do. They don't wish to have any dogmas in spiritual matters thrust upon the children who attend the schools. And no matter how retiring or mild or neutrally worded any of these things may be, under the condition of religions in our pleuralistic American society, these prayers are always secular—sectarian, I'm sorry—as was the prayer in *Engel*. This, of course, is the Lord's Prayer. It seems to me it's a stronger situation than *Engel*. The Lord's Prayer is taken directly from the New Testament, and it's not a matter which the religiousness of can be very much disputed. There's no question but that it's a sectarian, religious ceremony, it seems to me.

The authorities that I have been able to find in the theological field seem to be agreed that the Lord's Prayer is a Christian

prayer. And even with the Christian denominations, there is difference as to which version shall be used. The Douay omits the "Thine is the Kingdom and the power and the glory, forever and ever, Amen," as I understand it. The matter is something which we run into head-on every time that we try to have a religious ceremony conducted by government, or by a government agency. We give sanction, or favor, as was prohibited in *Barnette*, as was prohibited in many other cases—in *Torcaso*, in *McGowan*. We give sanction or favor to one religion as opposed to other religions, or we give sanction or favor to religion, as opposed to non-religion.

This case, or course makes everyone uncomfortable, because a large majority of the country loves this prayer. It's a beautiful prayer. Certainly a large majority of the country loves the literature of the Bible; and it's certainly one of man's outstanding works. And therefore it gives us, I think, a great deal of discomfort to have to face the fact that perhaps this ceremony, which most people adore, is an unconstitutional ceremony, because it is a religious ceremony. And it is not a secular study. There is no reason, and I've seen it lamented many times—it has been lamented in the brief of the respondent in the *Schempp* case which follows, in a footnote; and I think it was footnote 9—referred to in a footnote to the respondent's brief, to the attorney general's *amicus* brief—that study of the Bible, study of religion, that religiousness is out of the schools; that things are too neutral.

A Baltimore sage who is well-known, Gerald W. Johnson, I recall, writing a letter to a newspaper about a year ago lamenting the same fact, when this issue first came to the fore, that the trouble with Biblical study in the school is that there are too many sects who are contesting, and, as a result, he lamented the fact that every time study of the Bible as literature or as history or as historical or cultural history, is tried in the schools, that these various sects object to it. That is not the fault of the petitioners. It seems to me that perhaps the resolution of this matter, if this practice is unconstitutional, is for the sects to not be so selfish, so centered on their own dogmas that they would raise these objections to the study of the Bible in school, to the use of the Bible in English class, to the study of religions. We have no objections to this. There can be no constitutional objection when it is carried on as a secular study.

I would like to get to a point which the—

THE COURT: Does the complaint there rely entirely on the establishment clause?

MR. KERPELMAN: No, it relies on the establishment clause,

and the free exercise clause. And Your Honor is about to ask, I assume, how can an atheist freely exercise his religion?

THE COURT: No, no, I understand that you can. I know about the *Torcaso* case. And I join you—

MR. KERPELMAN: Sorry—

THE COURT: You're entirely free to disbelieve in God.

MR. KERPELMAN: Yes, sir. I guess I'm getting a little gun-shy with this case. People have been attacking me for a long time—

[Laughter]

THE COURT: Now you have a constitutional protection to disbelieve in God.

MR. KERPELMAN: Yes, Your Honor.

The petitioners have put forth an argument which I would like to treat of, and that is that they have said that this ceremony should be allowable because it is not a very religious ceremony. And they have said that it actually "transcends religion." They use language saying that the religiousness of a ceremony is a matter of degree. And I suppose the implication is that nobody would argue, for example, that to conduct a Protestant communion service in the school would be unconstitutional. Nobody would argue that to conduct a Catholic mass in the school would be unconstitutional. But they have put forth the argument that this ceremony is only "somewhat religious" and that it has only a "shade of religiousness." Well, Your Honor, I think that that argument, Your Honors, must fail. The Constitution recognizes no "somewhat" abuse of—"abuse of"—due process; no "somewhat" illegal search; recognizes no "somewhat restrictive restriction on free speech or press." Either a matter is a restriction of a constitutional guarantee, or it is not.

And what surprised me, as I read further in the respondent's brief, was that after arguing that this matter of religiousness can take on any shade in a spectrum and be "slightly" religious, or "extremely" religious, they then go on to argue that the dissenter, his right to be free from coercion does not exist; that he has an absolute right to endure the coercion.

They said, on pages 32 and 33 of their brief:

> The dissenter cannot ask that the source of disapproval or of the alleged factors of compulsion be eliminated so that he will be spared the burden of any disapproval. It makes no difference that the sensibilities and feelings of

> children are involved. [I'm still quoting, Your Honors] This is, by choice, the dissenter's problem—adult or child. The conviction of the dissenter must, of necessity, be sufficiently strong to permit him to effectuate his dissent and to bear the disapproval of others.

And I say, Your Honors, that I am shocked by this argument. Here they have admitted that William Murray, a junior high school boy when this case was filed, still an infant of the age of about 15, a junior in high school, has been regarded with aversion; he has been subjected to insult; his morality has been brought into question; his good citizenship has been brought into question—and although the respondents argue that the religiousness of the ceremony is a matter of degree, that the necessity for the infant to endure this compulsion is an absolute.

THE COURT: [Inaudible]

MR. KERPELMAN: Your Honor, it does not seem to me that would impinge on the constitutional prohition against establishment. There is some question as to whether this is a recognition of religion or all religions, but is seems to me it's quite possible that that would be a constitutional procedure, providing it is not something imposed from above by the school authorities entirely, but something which perhaps wells up from within the classrooms. I don't know. Of course, unfortunately, I feel that I cannot completely answer that question; that is not this case. But it seems to me that such a practice probably would be constitutional.

THE COURT: I suppose there's no earthly way that the law could enforce a prohibition against a man thinking and praying silently to himself, is there?

MR. KERPELMAN: No question about it, Your Honor. Thoughts come to men unbidden; prayers come to men unbidden. A man sends them on to his Maker frequently as a prayer when they come to him. No one, certainly, can—prayer itself cannot be unconstitutional.

What we ask in this case is that the school confine itself to secular functions, that it leave matters of spiritual training, spiritual faith, matters of religion, to the home, to the schools, to the religious institutions which have always, by American tradition, had great honor in this country and which always, by the American tradition, all of us have had respect for the power of. And that is not what we are objecting to—

THE COURT: Are you familiar with the Northwest Ordinance?

MR. KERPELMAN: I'm afraid not, Your Honor.

THE COURT: Because I think you're—there's no point in getting into an argument about history, but I think the religion and the schools have historically been fairly closely connected, historically.

MR. KERPELMAN: Oh, yes, Your Honor. Your Honor is referring to the fact that the schools originally were set up as adjuncts, usually, of church institutions. When they were cut loose from being church institutions, they still had a great deal of sectarianism connected with them. That was better than no schools, I would say, Your Honor, but certainly not better in present-day society than schools without a sectarian or a religious—

THE COURT: Secular.

MR. KERPELMAN: —orientation. No, I say it's not better than a school without sectarian orientation. I would rather see a school set up with secular orientation. Leave the sectarian matters, the matters of faith, to the home and to the priesthood and the rabbinate and the Protestant clergy.

THE COURT: Well, there's a constitutional right to have parochial schools, isn't there?

MR. KERPELMAN: Yes, Your Honor.

THE COURT: You're not arguing against that constitutional right?

MR. KERPELMAN: No, Your Honor, but in my opinion, I think that the preservation of secular schools, teaching secular subjects only, is very important to our society. I personally feel that when doctrinal subjects pervade the teaching of secular subjects that it's bad for the doctrine and it's bad for the secular subject. But that is a matter of opinion.

THE COURT: You're expressing a personal opinion—

MR. KERPELMAN: An entirely personal opinion.

THE COURT: —that is constitutionally irrelevant.

MR. KERPELMAN: Yes, Your Honor, absolutely. There certainly is no constitutional prohibition against parochial schools.

THE COURT: What if 99 percent of the children, with the consent of participation of their parents—what if there were no law, no Baltimore law or ordinance whatsoever, but that in the Baltimore schools, 99 percent of the students, under their student leadership or voluntarily it welled up within the class, decided to get together and say the Lord's Prayer every morning before they be-

gan; got to school two minutes early or three minutes early and said the Lord's Prayer there in the classroom every morning because they wanted to?

MR. KERPELMAN: As hypothesized by Your Honor, I think that would be perfectly constitutional. Exactly as this Court, having certain autonomous powers, certain rights to decide what its procedure will be, what it will do—when this authority does not extend to compelling someone who attends—

THE COURT: Well—

MR. KERPELMAN: This Court has the authority to say a prayer in the morning, to have the Crier say, "God save the—

THE COURT: I couldn't agree with you more. If there were any compulsion, if there were any compulsion, because that would interfere with the free exercise of the religion of your client, or the nonreligion, which is the same thing. But this statute contains a specific, explicit provision that you can walk away from this.

MR. KERPELMAN: Well, Your Honor, I think that Your Honor's hypothesis, where the ceremony comes from the class, would be constitutional. If the ceremony is imposed by the school authorities, which thereby give it their sanction, their approval, their—the—all the advantages flowing from approval by the authorities, then it would be unconstitutional. And I think that that would be the distinction.

THE COURT: Well, shouldn't this—might it not be wise to remand this case to take evidence and to see whether or not there was any compulsion on your client? All we have are the allegations now of your pleading admitted by the demurrer.

MR. KERPELMAN: Well—

THE COURT: And to take evidence as to who wanted to say these prayers in the morning and with whose—with the free exercise of whose religion striking down this ordinance would interfere?

MR. KERPELMAN: Well, it's been admitted by demurrer that the allegations are true.

THE COURT: I understand that.

MR. KERPELMAN: And if the case were remanded, we'd come back up here with the same set of facts, if Your Honor please, because the facts are as alleged. The facts are very much as alleged.

THE COURT: Well, there's no evidence at all that anybody wants to say this prayer now.

MR. KERPELMAN: Well, I would ask the Court to decide the case on the basis that we assume there must be people who want to say it—

THE COURT: It got here on a demurrer—

MR. KERPELMAN: Yes, sir.

THE COURT: —on your pleading and a demurrer—

MR. KERPELMAN: Yes, sir—

THE COURT: —and there's no—

MR. KERPELMAN: —but I think it's quite clear, perhaps even clear enough for the Court to take judicial notice, that most people would like to have this prayer.

THE COURT: In the exercise of their religious beliefs?

MR. KERPELMAN: Well, they would like to have this prayer. This is one of the most—

THE COURT: They would like to have the State use its schools, paid for by taxpayers' money, to carry out their religion.

MR. KERPELMAN: Their religion; yes, Your Honor. As long as they are the majority. If they were the minority, they would not feel that way, I think.

THE COURT: Well, what if the minority wanted to say a prayer in school?

MR. KERPELMAN: They have no right to do so. They have no right to have the school—

THE COURT: They have a constitutional right to do so, don't they? So long as they're not interfering with anybody else?

MR. KERPELMAN: Oh, they have a right to say a prayer as long as they are not interfering with the orderly conduct of the school's business. They have no right to have the school authorities make everyone say this prayer.

THE COURT: But each one of us, whether we're one or whether we're ten million, have a right to the free exercise of our religion. Isn't that correct? Doesn't the Constitution—

MR. KERPELMAN: Providing it does not impinge on another person—

THE COURT: —it doesn't help to talk about minorities or majorities in this case.

MR. KERPELMAN: Providing it does not impinge on other person's constitutional freedoms, Your Honor.

THE COURT: Well, if that's right as applied to this case, why only have five or ten minutes? If the majority want to have it for religious pruposes, why not use the whole day? If they vote, the majority votes to do it, they could use it the whole day, couldn't they?

MR. KERPELMAN: Well, of course, the majority is there—

THE COURT: If it would interfere with the free exercise of their religion.

MR. KERPELMAN: Yes, of course, Your Honor. The pupils are there to learn; they're there to study secular subjects. If they're going to devote the whole day to religious ceremony, they apparently, they obviously have no right to do that just by a majority vote. I think likewise—

MR. CHIEF JUSTICE WARREN: We'll recess now, Mr. Kerpelman.

[Whereupon, the argument in the above-entitled matter was recessed, to reconvene the same day.]

AFTERNOON SESSION

MR. CHIEF JUSTICE WARREN: Mr. Kerpelman, you may proceed.

MR. BURCH: I understand Mr. Kerpelman, Mr. Chief Justice, does not propose to argue any further at this time.

MR. KERPELMAN: I intend to offer rebuttal; I intend to save my remaining time for rebuttal, yes, sir.

MR. CHIEF JUSTICE WARREN: Very well.
Mr. Burch?

ORAL ARGUMENT BY FRANCIS B. BURCH, ESQ., ON BEHALF OF RESPONDENTS, NUMBER 119

MR. BURCH: Mr. Chief Justice, may it please the Court, at the outset, I would like to state that the respondents do not intend to waive the question of the jurisdiction of this Court in this matter. We covered this in our brief in opposition to the granting of the writ. We did not repeat our argument, however, in the brief that we submitted on the merits of the case.

I merely say that by way of passing. I understand that the Court in *Engel* has in effect indicated that the Court has jurisdic-

tion in a case such as this. But simply for the record, I would merely like to point out that we do not, by having failed to mention it in our brief on the merits, intend to waive it.

Now—

THE COURT: Mr. Burch, the plaintiff, the petitioner—there are two petitioners: William J. Murray III, who was then and now still is in the Baltimore school system—is that right?

MR. BURCH: Yes, Mr. Justice.

THE COURT: Suing through his mother; and his mother individually is also a petitioner.

MR. BURCH: Yes, sir.

THE COURT: And they both allege that they're atheists; is that correct?

MR. BURCH: Yes, sir.

THE COURT: And that the ordinance is, or rules of the Baltimore school system interfere with the exercise of their belief or disbelief?

MR. BURCH: That's correct, sir.

THE COURT: You come down to the *Doremus* case from New Jersey; is that right?

MR. BURCH: The *Doremus* case held, of course, that there was no violation except that the question with respect to the individual child's rights was moot because the child had then graduated from the school.

THE COURT: But this child is still in school?

MR. BURCH: This child is still in the school.

Our position is simply this: That the establishment clause of the First Amendment is a matter of degree. In other words, the wall of separation between church and state is a matter of degree. It is not an absolute, fixed, finite wall. And this Court has so stated on several occasions. As a matter of fact, in *Zorach* it was stated that when you get into the question of the separation between church and state, it is indeed a matter of degree. And it was because of this very factor that this Court in *Everson* held that though religious exercises or religiousness was involved, that it still did not violate sufficiently the establishment clause as to constitute an abridgment of that clause. The same was true in *McGowan*, the Sunday Blue Law cases. The Court in that case held that historically there was no question about it but that the Sun-

day Blue Laws were laws which were established for the benefit of religion. It was a day of rest to keep holy the Sabbath day. As a matter of fact, under the Maryland statute in *McGowan*, the statute provides the day of rest in order not to profane the Lord's Day.

So we have this question of religiousness in *McGowan*; but this Court stated in that case that there was not a sufficient degree of abridgment of religiousness, so to speak, as to violate the establishment clause.

Now, let's go, if we may, to the case at Bar. This is the *Murray* case. It is true that the rule of the Baltimore City schools provide that there shall be the Lord's Prayer and the reading of passages from the Bible. This is a long established practice which goes far beyond the rule itself. Historically it can be shown, were this not a case up on demurrer, it can be shown that the practice goes back at least as far as 1836, throughout the schools of Maryland.

Now, the practice, we maintain, has something in it other than religiousness itself. It is true that the Lord's Prayer, it is true that the Bible sounds in religion, has its roots in religion. This we do not deny. We point out, however, that the use of the Bible, the use of the Lord's Prayer, in the morning exercises has a significant salutary effect in several respects. First of all, it has a traditional teaching of moral and ethical values. This I believe even my brother Mr. Kerpelman admitted when he stated that it was a beautiful prayer, the most beautiful prayer ever composed—or at least many people believed that it was; that the literature of the Bible was historical and that it was the most widely read book of all books ever composed. Now—

THE COURT: [Inaudible]

MR. BURCH: The Lord's Prayer is said in unison. The individual child who conducts the opening exercise of that day—which includes not only the prayer but the salute to the flag—the individual child will probably say his version, and those who join in will probably say their version.

THE COURT: [Inaudible]

MR. BURCH: It is recited together. Now, I cannot say that this may absolutely be true in every school. Of course, we have no record in this case, but my understanding is that basically a child is selected for the particular day to conduct the morning exercises, and then everybody recites the prayer together. They can say their version, if they prefer one, or they can say nothing, even if they are not excused or do not wish to take advantage of the right of excuse.

THE COURT: [Inaudible]

MR. BURCH: I think basically the King James version is the one that is used most often. There is, of course, provision in the rule itself which says the Douay version may be used by those who prefer it. But the King James version, I believe, is the one that is used in most instances.

THE COURT: The teacher reads it in each classroom?

MR. BURCH: Generally, the students who are conducting the morning exercises will read passages from the Bible, and they will also start the Lord's Prayer and start the salute to the flag.

THE COURT: Is this the one where it's broadcast through the school, or is that the next case?

MR. BURCH: No. Whenever there's an assembly, it is broadcast and all of the students are there together and it is done in unison in the assembly. In some of the schools I believe it is broadcast; in others, I'm not sure. I believe it might be conducted within the classroom itself.

THE COURT: In each individual classroom?

MR. BURCH: In each individual classroom.

THE COURT: You say a student rather than the teacher reads the Bible?

MR. BURCH: A student generally is the one who conducts the opening exercise. Now, this is the best of my information. Of course, we are at a disadvantage because—

THE COURT: We don't have a record.

MR. BURCH: —we don't have a record because it came up on demurrer.

THE COURT: Would your argument vary, Mr. Burch, if this—instead of the Bible, it was the Koran that was being read every day in the schools?

MR. BURCH: Mr. Justice Douglas, my argument would not change, sir.

We say this, that the school is charged with the responsibility of doing what it considers proper within the framework of the school system to develop the children under their care. The school then has the right to make a reasonable selection as to what it thinks will do both in the way of the courses conducted and in the material used, whether it be in history or whether it be in this area in the morning exercises. They may use, for instance, the hymn

"America" instead of using the salute to the flag. They may use the King James version or the Koran instead of using the Douay version.

Our position is that this is a matter that rests within the discretion of the school authorities, and unless it can be shown that this constitutes a violation of the establishment clause, that it is then within the prerogative of the school to do that which they think is proper for the best interests of the children.

THE COURT: [Inaudible]

MR. BURCH: Excuse me, sir?

THE COURT: [Inaudible]

MR. BURCH: No. Mr. Justice Douglas was inquiring whether or not my view would be the same or my argument would be the same if that particular version could be used, or if that reading could be used.

THE COURT: [Inaudible]

MR. BURCH: I'm sorry, I didn't get your question, sir.

THE COURT: I say, would not section six preclude reading from the Koran?

MR. BURCH: In that it specifically provides that it may be used, that is, the Douay version may be used, it might be construed to say that all other instruments may not be used. I don't think that's a proper construction and, as a matter of fact, I doubt very seriously whether the board or the school principal would so construe it.

THE COURT: Well, it says, "...shall be opened by the reading of a chapter in The Holy Bible and/or the use of the Lord's Prayer."

MR. BURCH: And/or the use of the Lord's Prayer.

THE COURT: Do you think that might be interpreted to authorize reading from the Koran?

MR. BURCH: I think that it—if you are going to say that there shall be a complete strict construction of that particular rule, then maybe it cannot be used, the Koran.

THE COURT: Cannot be used to open the exercises, but there's nothing there to say—

MR. BURCH: In the opening exercise—

THE COURT: —this couldn't be used to close them or at any time during the exercises; but I don't see what that has to do with this case.

MR. BURCH: It may be used during the exercise or—actually, we say that the morning exercises are not there for a religious purpose. Now, we do not deny that maybe they began—because historically, if you go back, there was always religion in the schools and of course this is one of the reasons why, as I understand it, back in the pre-Revolutionary days the schools were not secular, they were really religious schools. This, I understand, is why you had the First Amendment, the establishment clause, so that they could not have religion taught in school as religion *per se*. Now subsequently, when you got into your common schools and your public school system, the school authorities, although not required to by law or regulation, as a matter of either religiousness at that particular time or as the combination of religiousness plus the inculcation of these moral and ethical values within the student, decided that this was a good practice for the benefit of the whole child.

Beyond that, we have the indication in the brief which we have filed that Dr. Bain, the superintendent of the public schools in Baltimore City, has indicated that these exercises, these morning exercises, have an extremely salutary effect upon the children coming into the school. It puts them in a frame of mind, there is a sobering influence; it puts them in a frame of mind when they can approach the school day with some sobriety.

THE COURT: But you could do that with—

MR. BURCH: They have a respect for authority—excuse me, sir?

THE COURT: You could just give them tranquilizer pills, if that's—if that's the purpose.

[Laughter]

MR. BURCH: Dr. Bain says that what this does, it establishes a discipline tone, it establishes a respect for authority; and it also has the value of giving them the inculcation of moral and ethical precepts. This he considers to be a very, very significant effect to begin the school day with.

THE COURT: Let us take a state like Hawaii. Hawaii has a large percentage of people of Japanese origin, a large percentage of people of Chinese origin. And in many places in the island there will be a vast majority of either Chinese or Japanese in their public schools. Do you say that in schools of that kind that it would be proper to have a—in the Chinese school to have a Buddhist ceremony that all children, including the Christians, must conform to? Or have their parents disavow it? Or the Shinto religion, so far as Japan is concerned?

MR. BURCH: Our position, Mr. Chief Justice, is this: That if the school authorities in that particular jurisdiction should determine that morning exercises will serve a significant purpose, other than pure religiousness itself, then we say that they then have the right to make such selection of material as the school authorities in that instance think will best accomplish that purpose.

THE COURT: Your answer would be yes, then, that they could do that.

MR. BURCH: They could do that—

THE COURT: Yes.

MR. BURCH: —if the purpose is not to teach religion, not to instruct in religion, but simply to set the tone of the day and to give them the benefit of the discipline tone, to give them the benefit of respect for authority, which is one of the most significant things that is needed in the school sytem, whether it be secular, whether it be parochial, whether it be private.

THE COURT: [Inaudible]

MR. BURCH: I would say that it is one of the effects of the exercise, but it is only one of the many effects of the exercise. And as long as there is a purpose which can be served—as a matter of fact, Mr. Justice Black in *McGowan* stated:

> "It is equally true that the establishment clause does not ban Federal or State regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or State legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation."

This is our position.

THE COURT: Of course you've got to recognize that in *McGowan* the Court laid great emphasis on the fact that although these Sunday laws had their origin in religion, that over the years they had departed from that origin and had taken on the characteristic of simply a legislative determination that a day of rest was an appropriate thing to have in the community. And therefore, the real question there was as to whether or not it was permissible, given that transmutation in the original background, to select Sunday because it happened to coincide.

MR. BURCH: Mr. Justice Harlan, my reading of *McGowan* indicates to me that the Court recognized that there was a mixture; there was religiousness, it was religious in its origin—it had not been completely obliterated, the religious aspect—but that there was this other civic or civil purpose that was to be accomplished. And I might say that *McGowan* was a case where there was a very severe penalty imposed upon those who did not wish to abide by the rule. And even going down to the latest amendment to the Sunday Blue Laws in Maryland, which was involved in *McGowan*, this Court pointed out that there was the reference in there that it was to prevent profaning the Lord's Day, which indicates the religious undercurrent that the Sunday Blue Laws were intended to effect. And true, it has a civil aspect to it.

This is what we say: As long as the Court can find a reason or that there was justification by the legislature or the State body to rationalize or to justify the use of this particular exercise for some effect other than religion, that it then does not conflict with the establishment clause. As a matter of fact, that very statement was made in *McGowan* where Mr. Justice Black, at page 425, stated:

> "A statutory discrimination will not be set aside if any state effects reasonably may be conceived to justify it."

Now, I know that was in relationship to the equal protection clause, but it—

THE COURT: But we also pointed out in *McGowan*, didn't we, that the State had departed so far from religious purposes that it specifically authorized the sale of liquor and the keeping open of a dancing saloon and a few other—gambling—and a few other questionable things; and didn't we point out in there that that was evidence of having been a real departure from the religious purposes that went back into the ages?

MR. BURCH: Well, yes, Mr. Chief Justice—

THE COURT: But when you come to saying that it had a basis in religion, couldn't we say the same thing for practically all of our basic crimes? Are they not, do they not stem from a violation of the Ten Commandments?

MR. BURCH: I say that they do stem from a violation of the Ten Commandments, but the mere fact that they are made crimes by law doesn't mean that they are in violation of the First Amendment.

THE COURT: But *McGowan* went on the theory that there was

such a departure from the original concept that they were in that category.

MR. BURCH: Mr. Chief Justice, I agree that there was a departure in *McGowan*, and I say that the legislature and the State body is entitled to the presumption of constitutionality where it can be shown that the particular exercise, the particular service, or whatever you might wish to call it, has a basis other than in religion itself.

THE COURT: Is there any departure whatsoever in your case from religious purpose?

MR. BURCH: The only departure that—

THE COURT: If there is, I wish you would state it.

MR. BURCH: —we can point to specifically in the same light as *McGowan* is on the excuse provision, in which the rule was amended to provide that the child who did not wish to attend could be excused. I don't say that this is the same type of departure as existed in *McGowan*.

I would like—

THE COURT: May I ask you this—

MR. BURCH: Yes, sir?

THE COURT: If it's to depend on the majority of the people in the school district, doesn't it necessarily follow that the religious doctrine that would be taught would naturally follow the majority in the district? And there are so many different sects in this country that you would have different public schools teaching different religions in every one. And then these people who are so anxious to have this particular one taught would probably not be so anxious to have the other one taught.

MR. BURCH: Mr. Justice Black, may I say that I think this was basically answered in your opinion in *McGowan* when you said the mere fact that it may, a particular practice may or may not coincide with the views of some or all religions—

THE COURT: That's right, that's right; and I—

MR. BURCH: —that doesn't make it unconstitutional.

THE COURT: Well, I call your attention to this fact: For many years we've had a fight on in this country to have more time for working men to get off from work. And it so happened that this seventh day had been the one where they'd gotten off from work. And the habit had been established in this country, which I took

note in several pieces of legislation I offered, that it's though to be good that there be holidays. And the mere fact that at one time people thought the seventh day was the only day you could have a holiday wouldn't make it any different if you provided that that holiday should be on Tuesday or Wednesday. That might conflict with somebody else, but the basis of those opinions, at least my viewpoint, was very simple: It was a power to protect people from being employed too long hours in one day or too many days in one week. It's a well recognized power. And there could be one written up in such a way it said we're going to have it on the Sabbath Day and we're going to have it from—a holiday from ten until twelve o'clock to let people go to a certain church—why, you'd have a different question. But so far as I'm concerned, your argument here doesn't—my position in *McGowan* has nothing to do with this case.

MR. BURCH: I'm not drawing on *McGowan* as being the absolute authority. I am drawing on *McGowan* to try to persuade the Court that basically if we are in a position to show that this will perform a function other than pure religiousness itself—

THE COURT: Are you disavowing, are you disavowing for the State of Maryland that which I had understood to be generally acknowledged from everything I've read about it in all the communications that have been transmitted about it that this is because, they want to do this because it impresses the Lord's Prayer, which many of us have repeated very often, and requires the reading of the Bible? Are you disavowing that the purpose is to increase the interest in that particular religion?

MR. BURCH: I'm not disavowing anything in that respect. What I am—

THE COURT: You could not, could you?

MR. BURCH: —saying is that I believe that school authorities feel that although it has its basis in religion, although it is in the nature of a religious prayer, as far as the Lord's Prayer is concerned or the passages of the Bible, it is calling upon these ancient documents which set forth many moral lessons and ethical values, and that these help inculcate the spirit of morality and the ethics within the child himself.

THE COURT: So do the Koran, and so do the Veda.

MR. BURCH: Yes, I—

THE COURT: Do you think there's the slightest possibility that in Baltimore, the people there will ever have one of those books

read as a part of a religious ceremony?

MR. BURCH: One of—

THE COURT: Either the Koran or the Veda, or the Buddhist doctrine?

MR. BURCH: It would be pure speculation on my part to say whether they would or whether they wouldn't—

[Laughter]

MR. BURCH: I can conceive where they would; I can conceive where they would. I would say that in the society in which Baltimore exists, that the likelihood is, in the discretion of the school board in selecting a work which it thinks would be most in tune with the spirit of the people of the State of Maryland or the city of Baltimore—

THE COURT: The religious principles—

MR. BURCH: Pardon me?

THE COURT: With the religious principles, of course.

MR. BURCH: I think—

THE COURT: It seems to me like—

MR. BURCH: I think it's a combination of both—

THE COURT: —you'd do better if you'd face the issue. I don't know what's the answer to it, but how can you assert seriously or argue or ask us to consider seriously this is not a religious ceremony based on the Bible and the Lord's Prayer? Those who are strongest for it I doubt, would not hesitate to say that.

MR. BURCH: Mr. Justice Black, if I may, sir, I would like to say that I do not think it partakes of a religious ceremony. I think it has religion in it.

THE COURT: Mr. Burch—

MR. BURCH: I think it does not partake of religious instruction; I think it does not partake of religion as such. I think it has these other values. I think that it is intended for the children to know the Lord's Prayer and to know certain things pertaining to passages from the Bible. I think it's intended for a spirit to start off the school day, and I think that's the only basic purpose. It coincides with religion; this I cannot deny.

THE COURT: [Inaudible]

MR. BURCH: But Mr. Chief Justice, we take the position that if

it serves a secular purpose within itself, the mere fact that it may be framed in religion does not constitute an abridgment of the establishment clause.

THE COURT: Wouldn't a full religious ceremony constitute or accomplish the same purpose?

MR. BURCH: If it's a full religious ceremony for religion itself—

THE COURT: No, no; just to promote the welfare of the students and to put them in a proper frame of mind for their work throughout the day. Wouldn't a full religious ceremony accomplish the same purpose?

MR. BURCH: It's conceivable that it could, sir.

THE COURT: And couldn't it be justified on your argument just as well?

MR. BURCH: Again I say that I think it goes again to a matter of degree. As this Court has said, what the wall separates is a matter of degree.

THE COURT: Could they go at all beyond the reading of the Lord's Prayer and reading of the Bible? As a matter of degree.

MR. BURCH: I think that if there's any comment—

THE COURT: I beg your pardon?

MR. BURCH: If there's any comment that partakes of the nature of instruction or discussion in these opening exercises—that it might well be an abridgment of the First Amendment, to the establishment clause—this is one of the factors that we have here. It is not—there is no comment with respect to these prayers. This is different from *Engel*. In the *Engel* case the very—and if I may take a moment to mention to the Court, as I know the Court is aware of the record in the *Engel* case, that on the regents' statement on moral and spiritual training in the schools which was recommended by the chief administrative officer of the New York State board of education, they said this:

> "In our opinion, the securing of the peace and the safety of our country and our State against such dangers points to the essentiality of teaching our children as set forth in the Declaration of Independence that Almighty God is their creator. We believe that the oath of allegiance be joined with this act of reverence to God."

And then they follow with the regent's prayer.

> "We believe that thus constantly confronted with the basic truth of their existence, the children will be properly prepared to follow the faith of their fathers. We believe that thus the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child the love of God, for parent and for home, which is the mark of true character in training. We believe that this statement will be subscribed to by all men of good will."

This was clearly intended for the purpose of teaching religion within the opening exercises in the school.

THE COURT: Isn't that merely paraphrasing—

MR. BURCH: This is the statement of the—

THE COURT: Isn't that merely paraphrasing and enlarging upon the letter of your superintendent?

MR. BURCH: I say that the only place that the letter of our superintendent approaches this, in that it says it recognizes the existence of God, but it goes on and establishes the salutary effects that this has with respect to the conduct of the school day. This is what the important part is, in our opinion: how it helps the school to get on with the work of that day.

THE COURT: Well, Mr. Burch, Chief Judge Fuld wrote this opinion, which was:

> "There seems to be no substantial room for dispute that the reading of passages from the Bible and the recital of the Lord's Prayer are Christian religious exercises."

Now, is there anything in the court opinion below which takes issue with that conclusion of Judge, Chief Judge Fuld?

MR. BURCH: Mr. Justice Brennan, there is not, and I might say that again, this is because we are at the disadvantage of being without a record in the case.

THE COURT: Well—

MR. BURCH: In other words, we didn't have—

THE COURT: —it didn't seem to concern Chief Judge Fuld, did it?

MR. BURCH: Excuse me, sir?

THE COURT: Chief Judge Fuld had no difficulty concluding they were religious exercises.

MR. BURCH: This was his conclusion; this was his conclusion and I respectfully suggest—

THE COURT: Well, I don't find anything in the court opinion which—

MR. BURCH: —that it was a dissenting conclusion.

THE COURT: Well, I don't find anything in the court opinion which takes issue with that.

MR. BURCH: This was an assumption that he made, and there may have been some basis for his assumption. We take the position that it does have, and if it can be determined or if it can be found that it does have this salutary effect, then we say this rests within the prerogative of the school board to allow this particular type of morning exercise to be conducted.

THE COURT: I think it would be helpful if, starting from the premise that this is a religious exercise, you could enlighten some of us as to whether you think this case can be distinguished from the other cases in this field that the Court has decided, starting with *Everson, McCollum, Zorach, Torcaso, Engel*; and whether, if you think that it cannot be, whether you're asking us to overrule those cases and to reexamine this whole problem of this aspect of the First Amendment—Fourteenth Amendment; I beg your pardon.

MR. BURCH: Well, Mr. Justice Harlan, I might say this, sir, that to get into the question of the degree of the separation between church and state, now we can make, without any problem whatsoever, a very significant distinction between the exercises in the Baltimore City schools and those which were conducted in New York with the regents' prayer. That clearly was a prayer which was composed by the authorities in question. This was, as the Court pointed out in *Engel*—the Book of Common Prayer changed from king to king and queen to king. This was one of the dangers of letting the State get into the business of actually composing a prayer. This is what I conceive to be one of the basic reasons why this Court struck down the 22-word prayer in *Engel*. In our case, we don't have a State putting its hands into the composition of a prayer. This is a prayer, the Lord's Prayer, traditional, 2,000 years old. The Bible going back even beyond, although the versions have changed somewhat between the Holy Scriptures and

the King James version and the Douay version. In substance they are basically the same, although there are some differences in terminology. We're talking about a traditional exercise; we're talking about a traditional prayer. And I would say this, I would not ask this Court to uphold the right of a State to enter into the field of composing prayers because I say that if it did so, it would be opening the door to the slanting of the prayer to suit the particular area or the particular teacher or the particular jurisdiction in which it is composed. This I have no problem with. I think *Engel* is no authority for the position that we find ourselves in this case.

THE COURT: [Inaudible]

MR. BURCH: I say that I believe that the most that can be said about *Engel* is that as long as it doesn't get involved in the composition of an official prayer or the sanctioning of an official prayer—which we believe the Court truly meant a new prayer, a modern prayer; some prayer that did not have its origins in history; some prayer that did not have its origins which had been read as the most widely read prayer. It has beauty which, although all of them may have some of the beauty that the Lord's Prayer has, none of them can get together and put all of that beauty into one prayer.

THE COURT: What did you do with the *McCollum* case?

MR. BURCH: *McCollum*, I find no difficulty with because this was a case where religious instruction was actually conducted on the school premises by religious teachers. And the *McCollum* case was simply a case where the Court says we will not permit the taxpayers' money to be used to permit religious instruction by religious people on the school premises. But they said if you go off, as it did in *Zorach*, if you remove yourself from the premises, and they permit on the release time to go away where the State's pocketbook is not involved, then we see no violation.

THE COURT: I thought you said that religious instruction, in your opinion, was the thing that differentiated this case from the situation that you'd have if this was a religious exercise and an avowal of faith.

MR. BURCH: I'm not quite sure I understood your question, Mr. Justice Harlan.

THE COURT: I thought you said your case was different and did not come under the Fourteenth Amendment because this was not a religious exercise, but merely instruction—

MR. BURCH: I say it is not instruction. We don't say that this is

religious instruction. We say that this is the opportunity for the children at the beginning of the school day to partake a bit of the history of the Bible, to partake a bit of raising their minds, as they do in the Lord's Prayer, to God—I cannot deny this—but that it serves a purpose of inculcating these moral and ethical precepts and values within the children themselves and it gives them a tone for the beginning of the day.

In the—we're talking about in *McCollum* a 45-minute release time program to go into the classroom with religious teachers to study religion, the religion of the choice of the particular student: using the taxpayers' money for that purpose. This, I think, was the defect in *McCollum*.

Torcaso? I have no problem with because *Torcaso* was simply a case where the oath was held—the oath itself was not held to be bad. It merely said that you cannot compel the oath to be taken by this particular man who has the right to this particular office, except for that oath.

The same thing is true of *Barnette*.

THE COURT: What do you say to the fact that according to some religious creeds, it is more offensive to read the Bible without discussion than to discuss the Bible?

MR. BURCH: May I say, with all due respect, Mr. Justice Goldberg, I have never heard that statement made; at least it hasn't been made to me.

THE COURT: Well, that happens to be true.

MR. BURCH: But I would say this, that I think that there can be danger in discussion, and I recall Mr. Justice Stewart's question to Mr. Kerpelman about compulsory, a compulsory course in religion, compelling all the children to take a course in religion. And Mr. Kerpelman said he saw no constitutional abridgment there. And yet, in my own personal opinion, if I may express a personal opinion, I think the danger in that area would be so far greater than the mere recitation of the Lord's Prayer and reading of passages of the Bible without comment because there is the opportunity for the particular teacher with the particular views to get in and really drive home this religious philosophy that he or she may entertain.

THE COURT: Mr. Burch—

MR. BURCH: And this is the problem that we see ourselves in. Where does it lead?

THE COURT: I didn't mean to interrupt you.

MR. BURCH: No; excuse me, Your Honor, I didn't realize—

THE COURT: You've devoted all your time to discussing the question of whether or not this violates the establishment clause of the First Amendment, insofar as that provision might be incorporated in the Fourteenth Amendment. You haven't said a word about the free exercise clause. Is somebody going to—

MR. BURCH: Mr. Justice Stewart, I was going to say that Mr. Baker had—

THE COURT: Fine, fine.

MR. BURCH: —intended to address his remarks to that particular question, and I see I have really gone beyond the time that has been alloted, and with the permission of the Court, Mr. Baker will pick up the discussion concerning free exercise.

THE COURT: Would it be an overstatement to say that if you face this problem frankly, that what these cases really present us with is whether we're going to reexamine the premises, right or wrong, of our past cases in which these issues have been decided?

MR. BURCH: I think this case—

THE COURT: Is that an overstatement?

MR. BURCH: —is certainly a question of reexamination and how far did the Court go—

THE COURT: Well, isn't that—that's the real problem in this case, isn't it?

MR. BURCH: Yes, Mr. Justice Harlan, I don't think there's any question but that's the problem.

THE COURT: I think so, too.

I understood you to say you didn't quarrel with *Vitale*, that you—

MR. BURCH: I do not quarrel—

THE COURT: —believe that's perfectly all right; that our decision was all right.

MR. BURCH: I—yes, I do, sir.

THE COURT: Then why do you want us to reexamine it?

[Laughter]

MR. BURCH: No, no. I didn't mean—not reexamine *Vitale*. I meant reexamine the implications of *Vitale*, the questions which were left unanswered.

In the very beginning of *Vitale*—

THE COURT: Well, that's all right, but I understood you to answer Mr. Justice Harlan that you want us to reexamine these cases, and—

MR. BURCH: Only in the light of how far are we ultimately going to go and where does it put us today. I don't—I cannot disagree with *Vitale*.

THE COURT: Well, Mr. Burch, I thought Mr. Justice Harlan started out his question to you on the premise that this was a religious exercise. And if you start out on that premise, the question was whether or not that didn't require a reexamination of our prior cases.

MR. BURCH: Well, I—

THE COURT: [Inaudible]

MR. BURCH: I might say—well then I didn't understand Mr. Justice Harlan's question to be exactly that. I thought what he said: Are we in effect not confronted in this case with the question of reexamining the whole area and deciding exactly where we are and where we have to go? This is what I understood the question—and I apologize if I answered the question without completely understanding it.

Thank you, sir.

THE COURT: Mr. Baker?

ORAL ARGUMENT BY GEORGE W. BAKER, JR., ESQ., ON BEHALF OF RESPONDENTS, NUMBER 119

MR. BAKER: Mr. Chief Justice, may it please the Court, I would like to comment on the question of the free exercise clause Mr. Justice Stewart asked about.

Actually, there are two facets to the First Amendment as it applies to the States through the Fourteenth Amendment. One is the establishment—

THE COURT: You concede that both of the provisions of the First Amendment having to do with religion are incorporated in full force, in literal terms, into the Fourteenth Amendment as restrictions on the States?

MR. BAKER: I think this Court has, by prior decisions, has forced us to concede that, yes, sir.

THE COURT: I just wanted to be sure from what point we were beginning.

MR. BAKER: Yes, sir. We say the—as Mr. Burch has covered the

establishment clause relates to the church-state interrelationship and to what extent that may go. The free exercise clause relates to compulsion, requiring someone to do something which is contrary to his beliefs.

If the establishment clause is violated, then of course the free exercise may be immaterial. If the establishment clause is not violated, then we say that the free exercise clause is not violated as long as it is not compulsory, so long as there is a provision under which a person may be excused.

THE COURT: The difficulty here—excuse me; if I can just state at the outset, so perhaps you can meet my difficulty: The difficulty I see here is that in the complaint, if that's what you call it in Maryland, or the petition, whatever, it's alleged that the free exercise of this plaintiff's religion was interfered with and restrained by the operation of this board of education rule. And all we have is a demurrer to that, which by its terms admits these allegations. Now, in *Engel* against *Vitale* that was not a free exercise case; neither are the other cases which my brother Harlan has been talking about. They are establishment cases. But here you have a clear allegation of the impairment or the interference of the free exercise of this person's belief, or irreligion, if you will, which is admitted by the demurrer.

MR. BAKER: It only admits, if Your Honor please, those matters which are well pleaded, and I think that you have to take all of the allegations—I might say this, that in the lower court's opinion, you will notice in the order that Judge Prendergast said that since the plaintiff has said, the petitioner has said it could not improve its case by amending the petition, therefore it is, the demurrer is sustained without leave to amend. But there was that opportunity.

Now, if you take a look at this very situation, the rule is set forth which provides for the excuse. Now, this is no different than *Barnette*. In *Barnette*, a petitioner said, I am required to pledge allegiance; this is against my beliefs. Now, this Court didn't strike down the oath of allegiance. All this Court said was that under the free exercise clause he is entitled to be excused from participation. *Torcaso* was a similar thing. *Torcaso*—this Court didn't say no, you can't give an oath of office, but it did say no, you can't require him to take an oath of office in order to be a notary public. As a matter of fact, Article I of the Constitution provides for an oath of office. And if this Court please, when I was sworn in as a member of this Court, I took an oath; I called upon God to witness the fact that I would uphold the Constitution of the United States and that I would conduct myself properly in this

Court. Now clearly, I think that if I had had any aversion to taking that oath, that I would not have been required to do it. As a matter of fact, you could conceive of the situation where a Justice of this honorable Court might find that if offends his sensibilities to have to be here when it is said at the beginning of the opening exercises of this Court: "God save the United States and this Honorable Court."

Now, when you say—and this is one of the arguments that's raised by the petitioner—he says sure I can walk away; I can be excused, but this will hold me out as a dissenter and I lose caste and everything else. That same thing could happen to a Justice of this very Court who might object to the invocation: God save this Honorable Court. Suppose he objected to it? He just wouldn't come in while that's being said. Could he then say—and it would be embarrassing to him, I would imagine. At least people would say: Gee, he's different. But would he have the right to say that this Court cannot have that invocation because it offends his delicate sensibilities? I think the answer to that is quite clear. As long as he has the right to be excused, free exercise is not violated. He—

THE COURT: May I ask, Mr. Baker—this is an interruption, and I'm sorry. Did I understand you to suggest to Mr. Justice Stewart that the only question here, by reason of the allegations of this petition and the demurrer, is a free exercise question?

MR. BAKER: No, sir. I said both of them are involved—

THE COURT: Yes.

MR. BAKER: —but that if you—

THE COURT: But the establishment question is also here, isn't it, under these allegations?

MR. BAKER: Yes, sir. But if you get beyond the establishment clause, then the only thing—then if it doesn't violate the establishment clause, then under the free exercise clause there is no violation as long as you have a right to be excused.

THE COURT: Well, as I—know that there is that right expressed in the amendment, the 1960 amendment to the rules of the school board, but these allegations say in effect that's a phony: actually, we're not free of compulsion. And I should think that this is admitted by your demurrer and this would require a trial to see just what the facts were, what the compulsions were—

MR. BAKER: Well, it would be a conclusion—

THE COURT: —upon an atheist to conform to this thing.

MR. BAKER: No allegation that no one has permitted him to be excused—as a matter of fact, the petition alleges that after a complaint was made, the rule was amended whereby he was permitted to be excused. Now, to say that we are compelled without any facts is really a conclusion of law, particularly when you have already set forth the provision in the rule that you can be excused. Now, if there's any abuse of this, if there's any coercion and he can't be excused, then I would certainly think that that would be true; that you would have a different case entirely before this Court.

THE COURT: [Inaudible]

MR. BAKER: Yes, sir. And we—

THE COURT: Demurred.

MR. BAKER: We demurred to this. And even—let me say this: That anyone who dissents runs the risk of disapproval. Justice Jackson, Mr. Justice Jackson, in *McCollum*, expressed, I think, the rule there so very well when he said:

> "It may be doubted whether the Constitution, which of course protects the right to dissent, can be construed also to protect one from the embarrassment that attends nonconformity, whether in religion, politics, behavior or dress."

Mr. Justice Douglas, in *Zorach*, after referring to a similar rule, said that if you didn't, if you did away with the whole thing, that would be preferring those who believe in no religion over those who do believe.

THE COURT: I think—

THE COURT: That had to do with the establish—excuse me, excuse me.

THE COURT: I say, assuming this is true, the fact that a pupil is excused satisfies the freedom of religion clause; isn't that—

MR. BAKER: Yes, sir; yes, sir.

I would, before concluding my time, like to point out to this Court what the possible consequences of the petitioner's view would lead to.

As Mr. Justice Douglas said in *Zorach*, we are a religious people whose institutions presuppose a Supreme Being. If the Court fails to draw the line at this case, there's not much left. A Pandora's box of litigation will be opened, with inevitable confusion, with the ultimate result that the Court will be required to remove every vestige of our religious traditions from public life. Now, I'm not suggesting that this would all happen immediately, but those who now clamor for getting rid of these opening exercises won't stop if they have a victory here; they would continue. As Justice Frankfurter said, in dissenting in *Barnette*:

> "I am not borrowing trouble by adumbrating these issues nor am I parading horrible examples of the consequences of today's decision. I am aware that we must decide the case before us and not some other case, but that does not mean that a case is disassociated from the past and unrelated to the future. We must decide this case with due regard for what went before and no less regard for what may come after."

THE COURT: What do you think would come after if you should win?

MR. BAKER: I think you'd have, you'd have the question as to the use of coins: "In God We Trust"—

THE COURT: What do you think would come after in reference to the school ceremony? Is there any reason why if you can have three minutes you couldn't have forty? Or any reason if you could have forty, why you couldn't have six hours?

MR. BAKER: Well, of course you go back to—

THE COURT: And why you shouldn't have all of them taking from the sacred books of one religion rather than another?

MR. BAKER: Mr. Justice Black, it's a question of the purpose, as Mr. Burch mentioned—

THE COURT: I understood you were invoking the consequences as to what might happen if the decision were made one way or the other.

MR. BAKER: I think that if the decision is made that you can have this as a part of the opening exercises, that from there on—

THE COURT: Well, if you can have it in the opening exercises, why can't you continue to have it during the whole day? Why

can't you pick out all of your religious sacred documents from one particular religion or one particular sect of one religion?

MR. BAKER: Because if there—that, then, would be an abuse. The purpose is the same as the invocation in this Court: "God save the United States and this Honorable Court"—is the same thing with the students.

THE COURT: I've heard that before—

MR. BAKER: Sir?

THE COURT: I've heard that a million times.

[Laughter]

THE COURT: That's not a new argument.

MR. BAKER: Well, if you went on for an hour with that, it would be the same thing, if Your Honor please.

Thank you.

MR. CHIEF JUSTICE WARREN: Attorney General Finan?

ORAL ARGUMENT OF THOMAS B. FINAN, ATTORNEY GENERAL OF THE STATE OF MARYLAND, AS AMICUS CURIAE, URGING AFFIRMATION IN NUMBER 119

MR. FINAN: May it please the Court, I first wish to thank Mr. Burch for giving us a portion of his time to intervene here as *amicus curiae*, and also to thank the attorneys general of some 18 States of our sister States in the Union who have joined with us as *amicus curiae*.

The appendix to our brief also contains a compilation of some 39 sister States who have similar provisions concerning the devotional exercise of some type in the public schools. Mr Chief Justice asked a moment ago about Hawaii; in the appendix, there is a reference to the school in Hawaii which does permit a devotional exercise but forbids the teaching of religion in the public schools.

We go along with the city solicitor from Baltimore's contention that this is primarily an exercise within the school to create a climate of wholesomeness, of moral and ethical standards rather than essentially that of a religious service. However, we will go farther than his contention in that regard—I'll put it this way: We concur insofar as he goes in that. We will go farther and state that we feel before this Court is again in the situation as to whether they should reevaluate this entire position which they have taken, including the position of the Court in the *Engel* case. We feel this can be distinguished; I disagree with Mr. Burch and I didn't agree

with the Court's conclusion in the *Engel* case; but nonetheless, we feel that this case can be distinguished. However, I do feel that these lines of cases are bringing before the Court the question of religion way past its bones and to its very essence. I think the Court is forced into the conclusion of two concepts: whether it will consider that nontheism should override theism. The opponents in this case, the petitioners, have, of their own volition, and according to the decisions, I think, of the Court, particularly in the *Torcaso* case, have equated nontheism or atheism with a religion, which it is entitled to that position under the umbrella of the First Amendment to the Constitution of the United States.

Now, assuming that it is, then we have two concepts which are so diametrically opposed as to be mutually exclusive. And although the petitioners would have us believe that there is a ground of neutralism, there is a vacuum, as it were, which could be maintained in this field so that nobody would be injured, so that nobody's sensibilities would be stepped upon, we assert that that is a fallacy, that once you say that you must remove the idea of theism —and for want of time to elaborate, let's call this a theistic approach or a theistic climate in the school—for when you do away with that, you are in effect giving in and surrendering to those who want a nontheistic climate. And that nontheistic climate is, in effect, by indirection, giving official sanction to their religion, which is nontheism. And I—

THE COURT: Do we have to decide this case on the basis of theism or nontheism? Aren't there very large religious groups who believe as fervently in God as those who composed this procedure who are opposed to this case?

MR. FINAN: Believe as fervently in what, Mr. Justice?

THE COURT: In God.

MR. FINAN: Yes.

THE COURT: That's the basis of theism, is it not?

MR. FINAN: Right.

THE COURT: Aren't there people who are opposed to this who are just as fervently, fervent in their belief in God as those who prescribe this oath, and who yet oppose it? Why do we have to make it an issue between atheism and Christianity?

MR. FINAN: Well, I don't think it's necessarily of atheism and Christianity—

THE COURT: We have briefs *amicus curiae* in this case—

MR. FINAN: That is correct, Mr. Chief—

THE COURT: Here's a brief of the Synagogue Council of America and National Community Relations Advisory Council—

MR. FINAN: That is correct, Mr. Chief—

THE COURT: And there are some millions of people of that faith in this country and they—

MR. FINAN: Right, Mr. Chief Justice Black—

THE COURT: And they oppose it just as fervently as these people who happen to be atheists—

MR. FINAN: Correct, but—

THE COURT: —so why do we have to put it in that context?

MR. FINAN: Theism is broader than Christianity.

THE COURT: I beg your pardon?

MR. FINAN: You said atheism as aversed to Christianity, and my point is theism is broader than Christianity—than the concept of Christianity.

THE COURT: But by reading the Lord's Prayer and reading the King James version of the Bible, we put the Christian concept of theism onto it, do we not?

MR. FINAN: Well, that is debatable, because you can read in the Kaddish, which is the ancient book of the Hebrews, almost verbatim—in fact, unless someone listens very attentively, they would not know the difference between the prayers in the Kaddish from the Lord's Prayer, which—

THE COURT: Why not use that one, then?

MR. FINAN: Pardon?

THE COURT: Why not use that one, then?

[Laughter]

MR. FINAN: I'm sure there would be no objection.

I would just like to conclude with this, because my time is running short, if I may: The Court asked Mr. Baker what would be the next thing to go, as it were, and I submit that the *Barnette* case, with which the Court is familiar, was tried in 1943, and that was the salute to the flag case up in West Virginia, and as a result of that case, it's been held that—or at least the construction placed on it is that to pledge allegiance to the flag of the United States, it can be a part of the ritual in the public schools as long as those

who do not wish to take it can be excluded. Now in 1954, the Congress of the United States inserted in the Pledge of Allegiance the clause, "one Nation under God," and that is what is in the official Pledge of Allegiance to the flag today. There has been no case since that was inserted, to my knowledge, by the Congress. And I state that I cannot see the distinction between a school system—and this prevails in practically every board of education in the United States—requiring a child to—or at least not requiring the child, but proposing that exercises open in the morning with a salute to the flag of the United States which carries in it the clause, "one Nation under God." Because that is the basic objection to which these people object right now, is the recognition of a Supreme Being over what I call theism; I think even Taoism would come under a broad term of theism. But I cannot see any difference between that case and what we have before the Court today, because you have the same outlet or freedom from exposure by walking out of the room. And it's true that this is in a more formal style, but it is still the same recognition of a deity, which is the basis of their objection rather than anything else. And—

THE COURT: Mr. Attorney General, let's assume that we agree with everything you've said with respect to the establishment clause and that's all that was involved in *Engel* against *Vitale*—you say that you disagree with that decision; as you perhaps know, I did, also—but you have a different case here. You have here allegations in a complaint of the interference with the free exercise of this petitioner's religion. That was completely absent in the *Engel* case, completely. That case involved establishment and only establishment. But here you have a free exercise allegation which is admitted by the demurrer. And it says—which says in effect that despite the amendment to the rule in 1960 there are still compulsions upon this person. In *Engel* against *Vitale*, it was held by the New York courts that there had to be provision under that system for the complete freedom from compulsion, including freedom from any psychological compulsion.

MR. FINAN: Mr. Justice, I think the answer to that might be in the proceedings or pleading and practice procedure in Maryland. We assume that all things that are well pleaded are admitted by a demurrer. And in that admission, not only are the bare facts as recited in the petitioner's bill of complaint, but you also must take into effect all the exhibits which are filed at the time that the demurrer is likewise filed. And at that posture of the case, the board of education, in its answer, were well aware, and as a part of the exhibits was the provision under rule six that he did not have to stay in the classroom when this was recited, that he could walk

out of the classroom. And knowing that that was a part and parcel of the rule, reading that also into the bill of complaint, the answer, I think, gets around the objection which, if I may, that Mr. Justice has just mentioned. At least that, in my mind, is the fact that it was a demurrable bill of complaint when you read into the bill of complaint this rule number 6 which is a part of the exhibits and was filed with the answer.

THE COURT: But it's a part, isn't it, of the complaint, actually? Perhaps not, but I know it was filed with the plea.

THE COURT: Did your supreme court base its decision on that ground?

MR. FINAN: Your Honor, Justice Horning, who rendered the majority opinion, based it primarily on the grounds—he mentioned that—but based it primarily on the grounds that he placed this exercise in the same category as the exercise which we use to open the Maryland Legislature or which Congress uses to open the branch of the House and the Senate. In fact, he used those specific analogies.

THE COURT: In other words, concluded the merits of the case.

MR. FINAN: Right.

THE COURT: Mr. Attorney General, as I read this complaint, it already contains an allegation that the rule was amended so as to release him from participation in these exercises. And it's after that allegation that he nevertheless says that his freedom of his religion has been restrained. And that is the allegation which was admitted by the demurrer, even right in the face of his own allegation that he had been released from the exercises.

MR. FINAN: Well, if it please Mr. Justice, I don't believe that the two allegations that he has there are consistent; that he can be released from it and not have to stay there and still it's interference—

THE COURT: Well, he makes allegations right on the, right on this, that in spite of his being released from the exercises that he was subjected to some harm. And these allegations were admitted.

MR. FINAN: Well, all well pleaded allegations are admitted, Mr. Justice, and it's our contention that there would be an inconsistency between the allegation where he says that his religion, his right to practice was interfered with, and the fact that he could be excused from the service.

THE COURT: Well, let me ask you one other thing: Do you really see a great deal of difference between the—as far as its being a religious exercise or not—between the prayer in *Vitale* and the prayer here—regardless of its source? I mean, just as its kind, the kind of an occasion it was.

MR. FINAN: Well, of course, Mr. Justice Black in the *Vitale* case said that any prayer or any official prayer composed by a group of officials or sanctioned by the State as an official prayer—

THE COURT: Yes, but that's assuming that it's a prayer—that it's a religious item. And you say—I gather you join Baltimore in saying that this wasn't a religious exercise at all.

MR. FINAN: No, I beg to differ, Mr. Justice. I concur in their stating this is not primarily a religious exercise, that it's part of our heritage and tradition; but I go farther than that and would state that assuming it is or was a religious exercise, I still feel—

THE COURT: So you say it was in part a religious exercise?

MR. FINAN: Right.

THE COURT: And is it as much a religious execise as it was in *Vitale?*

MR. FINAN: Yes, I definitely feel—

THE COURT: So there's really no distinction in terms of the kind of an exercise this was between *Vitale* and this case?

MR. FINAN: No, I think the two cases can be distinguished—

THE COURT: Oh, yes, I know in the sense—

MR. FINAN: —but I think they both involve a religious exercise; they both involve a religious exercise. But in the *Vitale* case, you had a prayer—

THE COURT: I understand that, I understand that.

MR. FINAN: —composed—

THE COURT: And of course, *Vitale*, the *Vitale* opinion said the State drafted or the State sanctioned it, didn't it?

MR. FINAN: It said a State-drafted or State-sanctioned official prayer. Now the question would be—maybe it's tautology to say official prayer, again goes back and means a prayer composed by officials, which was one of the bases which we thought perhaps distinguished it.

THE COURT: But I suppose the school board's rule here at least sanctioned the use of the King James version of the Bible.

MR. FINAN: It sanctioned that, yes; it said or the Douay may be—

THE COURT: Or it sanctioned the Lord's Prayer.

MR. FINAN: That is correct. But the question is, these are prayers of tradition. They were never any official prayer of any State or any group.

THE COURT: But these are clearly sectarian—

MR. FINAN: That's correct.

THE COURT: —unlike the prayer in *Engel*, which was not, I believe—

MR. FINAN: That's right, Mr. Justice. That's our situation on it.

THE COURT: There'd be very little sense of excusing anyone from the prayer, it seems to me, if it wasn't, if somebody didn't have the feeling that it was a sectarian situation. Or there would be very little reason of talking about the King James version of the Bible or the Douay version or the Lord's Prayer in the rule if there wasn't some feeling that it was a—giving others the permission to use the Douay version if they wanted to seems to me in itself to be a recognition this is, this has some sectarian aspects to it.

MR. FINAN: Well, Mr. Justice, I don't think that sectarian—at least I wouldn't agree to that definition as employed by the Court. I feel that we must admit and I freely admit that there was a theistic background in this exercise, which was objectionable to the petitioners. I mention that because I think that perhaps theism and sectarianism are two different terms.

THE COURT: I agree with you, but nevertheless, in the school board's rule which was promulgated, people were given permission to use different versions of the Bible.

MR. FINAN: That's right. That's come under the overall theory that we have of the case is that this was an exercise in which the students primarily indicate their belief in God and His benediction on what they're doing.

THE COURT: So you say, what you're really suggesting is that the only people who should have, who ever should have felt any urge to excuse themselves from this operation would be atheists?

MR. FINAN: That's right.

THE COURT: Is that the reason, do you think?

MR. FINAN: Your Honor, Mr. Justice, I would certainly think the petition would indicate that that's the main reason that they object to this.

THE COURT: No, no; I say, did those who made the provision for the excuse have only atheists in mind?

MR. FINAN: No, Your Honor, anybody who might—

THE COURT: Catholics who didn't like the Protestant version, or Protestants who didn't like the Douay version—

MR. FINAN: That's right.

THE COURT: Jews who didn't like The Holy Bible.

MR. FINAN: That's correct. I might add that the actual practice of this, as Mr. Burch started to comment to the Court, the usual practice is it's rotated with each child each day to either lead the prayer or read the Bible. And it's quite likely there might be some child who might not want to read the Bible.

THE COURT: [Inaudible]

MR. FINAN: Yes, sir. Well, Mr. Justice, on the premise that if the people who compose the school board in that particular area felt that that expressed the majority wish of the people, that those who did not conform to the Mormon faith or who felt that reading The Book of Mormon was objectionable—I'm sure there are many parts of it that practically everybody would subscribe to—that they are free to walk out. I think that is the basic element that we have in this case, that they are free to excuse themselves.

THE COURT: Then the big contest would be which church could get control of the school board, I suppose.

[Laughter]

MR. FINAN: Mr. Justice, let me state this, I think that—I doubt very much that there would be any race in that direction because I think primarily people feel that if the children can have some religious overtones—take children that are in—What are we going to do with children who are in religious orphanages, in our correctional institutions, when we go along with completely removing any mention by anybody on the public payroll in any public institution anything about God?

THE COURT: You're suggesting, in effect, are you not, the Constitution leaves it open for the States to leave it to local option, in each local community, as to which particular brand of religion or which kind of religion will be read and taught in the schools? It's

kind of a local option; if the majority wants one, they can get it; the others can walk out.

MR. FINAN: Well, Mr. Justice—

THE COURT: It sounds to me like that's what you're suggesting, a local option on it.

MR. FINAN: Mr. Justice, let me state this, that I think we can carry any example to extreme, but I certainly feel that within the common bonds of men that we all have certain concepts, such as I mentioned, recognized works which recognize a deity: The Book of Mormon, the Koran, the Bible—

THE COURT: What would you think about its chance of being read in Baltimore?

MR. FINAN: What's that?

THE COURT: What would you think about the chance of having The Book of Mormon substituted for the King James version of the Bible in Baltimore?

MR. FINAN: Mr. Justice, frankness would compel me, if there had to be a choice between the two, it would probably stick to the Bible. But I would say this, that the Board of Education of Baltimore City might well go along with the reading of the Koran, the Bible, and The Book of Mormon.

THE COURT: You mean that's theoretically possible.

MR. FINAN: No, I would say that, Mr. Justice, that this rule was written back in 1906; it was amended later to allow an excuse. I feel that the basic thing that people feel today is that we must not set up a fetish against mentioning anything about religion in an exercise in the public schools. And I think that the public is willing—

THE COURT: I didn't understand the other gentlemen to say that they shouldn't mention anything about religion. I understood them to say that it was all right to teach religion as a subject. Their objection is to the fact that you pick out, if I may say, two things which I have known about from my earliest infancy and which I could agree with you easily should have a wonderful effect on people who read them and recite them, but other people don't feel that way. And what you have picked out, these two particular things, the Bible, King James version, and the Lord's Prayer, which one can hardly mention without reverence, at least who believes as I do, you pick them out and say people must in this school either listen to them and participate in them or walk out.

Now why can't you do that with reference to the Mormons, if they want to, where they are in the majority, or any others, where those people are in the majority?

MR. FINAN: Well, I will concur with the Court—

THE COURT: That's a local option in determining which particular religion will be taught in each particular community.

MR. FINAN: Now, if it is a sincere representation of that area—

THE COURT: Well, gentlemen, let's take a very practical situation, again in Hawaii where there are a great many Buddhists. Let us say there is a school where there are 51 Buddhist children and 49 Christian children. And because of the majority of Buddhists it's determined by the school to have a Buddhist ceremony comparable to this Christian ceremony that we have here. Would you think because they are in the majority that the 49 percent of them that are Christians in that school would have to walk out?

MR. FINAN: They would have the right to, and I would—

THE COURT: And you think they would have the right to have such a ceremony as a matter of school law?

MR. FINAN: Yes, Mr. Justice, because I feel that it is essential that we keep away from a complete secularism in our outlook to this thing. And if the Christians who were there wanted to have the right, which they would under the Constitution—and that is the—that is the sacred right as a minority, which they would be in that instance, which they would have the right to exclude themselves, the right not to be subjected to it; they have that right. I see no reason why you cannot reconcile, why it is not compatible to, under our Constitution, to permit such a practice.

THE COURT: Well, would you be willing to say that the States should go farther in that instance and release all of them from paying any part of taxes that went in to support the school?

MR. FINAN: Well, they would still be educated by the schools—

THE COURT: But they would walk out; they didn't want that part taught.

MR. FINAN: Well, they would only walk out for that portion—

THE COURT: Should they be released from taxes to carry out these views that the majority wanted and which they didn't want?

MR. FINAN: My children have never gone to the public schools and I'm not released from taxes, so I don't think they should be released from taxes.

THE COURT: But they have not gone there through choice.

MR. FINAN: Pardon?

THE COURT: They have not gone there through choice. The public schools are open to your children.

MR. FINAN: Well, you would exclude yourself—

THE COURT: They were open to your children—

MR. FINAN: That's right. I don't—I might just say this, if I may, in conclusion: And that is that I understand the fact that the petitioners would allow the Bible to be read as a work of literature or as a work of ancient religion, and our basic documents, such as the Declaration of Independence, to be read as a paper of state. Yet, if I understand their theory correctly, they would still object if we would dwell upon the Declaration of Independence and its "All men being created equal under God" and so forth, with the implication of a creator; that if we were to read that as a source of inspiration to awaken in us a spiritual belief that we're "one Nation under God," then that paper in itself would be objectionable. Only if it's looked upon as an abstract, pure state paper—the same way with the Bible as a piece of literature or ancient history.

MR. CHIEF JUSTICE WARREN: Mr. Kerpelman?

REBUTTAL ARGUMENT BY LEONARD J. KERPELMAN, ESQ., ON BEHALF OF PETITIONERS IN NUMBER 119

MR. KERPELMAN: Mr. Chief Justice, Your Honors—

THE COURT: Would your argument be the same if a Quaker pattern was followed and all students requested to remain silent for a minute or two minutes or three minutes?

MR. KERPELMAN: Your Honor, a question which is perhaps involved is the question of standing. Now, as I understand it, standing—

THE COURT: That wasn't my question.

MR. KERPELMAN: Well, I was going to say this, Your Honor, the Quaker ceremony would, it seems to me, be constitutional because it could—I don't see how it could possibly cause anyone any detriment. He does not have to stand up and profess a belief or disbelief in any religion.

THE COURT: Your client could stand there and think about his disbelief in God.

MR. KERPELMAN: Yes, he could, Mr. Stewart, Mr. Justice. And I do not think that that would be unconstitutional.

I'll go on with the question of standing, perhaps it's unnecessary, but let me—

THE COURT: If it were labeled a Quaker ceremony would it be unconstitutional?

MR. KERPELMAN: If it were labeled a Quaker ceremony, it would be clearly unconstitutional, Mr. Justice Goldberg. I understood the question to be that if we had this Quaker type of ceremony, not denominated as any such thing.

McGowan, I had thought, indicated that if an establishment of religion is made by the State and then some person suffers economic detriment, he would have standing to come into court and complain. I thought it also held that if the Sabbath observance law interfered with his free exercise of religion—it didn't serve a secular purpose primarily—he could come in and complain. That was my understanding of it. I understood that the question of whether it was the establishment clause or the free exercise clause goes mainly to the question of standing, and that was the reason I was contending, if Your Honors please, that both clauses apply to my client. The establishment has been made, it has caused him detriment. He has standing to complain. Also, his free exercise of religion has been interfered with.

Your Honors had posed a question of—I think Mr. Justice Harlan—of whether or not a reevaluation of the cases on this particular point was perhaps called for. Well, if Your Honors please, as a practicing member of the bar of this Court and of my State court, I am very proud of the line of cases as they now stand. I think that what is more needed, what there is more of a need for, is a reevaluation of the ethical and democratic principles which these cases set forth. I think there is more of a need for charity and love on the part of the people who are in the majority and who have, probably unknowing to themselves, been offending the minority. The democratic thing for them to do, the ethical thing to do, the religious thing for them to do, is clearly not to make such a bone of contention of this case. After all, they're overlooking the fact—

THE COURT: You're getting somewhat outside the Constitution.

[Laughter]

MR. KERPELMAN: So I am, Mr. Justice, and I'm sorry. But the case, of course, is a case which it so happens affects everyone by a small modicum and therefore there's a lot of interest in this case

and therefore a lot of people who are not professional learned in the law have misconstrued the precedents for this case, and they go outside the Constitution in their discomfort with the line of precedents up to this time. I feel that if they understood what this case on behalf of the petitioners does not say, that they would not be so alarmed and upset.

I would like to speak for a moment on the question of the demurrer which was filed in this case and whether it admits the allegations, and I want to do that simply by referring to page 45 of the record, which is the minority opinion—page 45—of the Maryland Court of Appeals; and that was a four-to-three decision. The minority—the only one that treated of this question as to whether the allegations were in truth admitted by the demurrer under Maryland rules of pleading—they said:

> "As to the first of these questions, it seems to me that under our ordinary rules of pleading, the allegations of the petition are not so insubstantial as to be brushed aside as mere conclusions of the pleader and that they are sufficient on demurrer."

In that same paragraph, incidentally—

THE COURT: What page is that on?

MR. KERPELMAN: Forty-five, Mr. Justice.

THE COURT: Thank you.

MR. KERPELMAN: The second paragraph.

In that same paragraph, the next sentence in that paragraph, states something to the effect that *Brown* versus *Board of Education* recognized the psychological effects on children when they are subjected to segregation.

I had the privilege, as many of us have, of attending the public schools—and I really mean the privilege—as a member of a minority group. It, I feel, has done things for my character, but I'm sure that if a psychiatrist got me on his couch he'd tell me that it had also done things to his psyche.

Some of the things involved in this case are very subtle psychological matters. For example: I have a young daughter and she comes home from school, and due to the conduct of this Maryland ceremony, she has the belief that Jesus was the Son of God. It so happens that I would prefer she did not have that belief. It doesn't worry me too much; she'll get over it, she will have her Sunday School training; but I would be much happier if the schools would refrain from this particular ceremony. Many people

feel that way. The point is that William Murray represents Catholics, perhaps, in a Protestant area where the Catholics find the Douay version—the King James version of the Bible offensive; William Murray, the petitioner, represents Protestants in a Catholic area where perhaps the Catholics decide to use the Douay version of the Bible; William Murray represents humanists, who have filed an *amicus* brief here; he represents minority groups of numerous sorts; the Synagogue Council of America has filed an *amicus* brief on behalf of members of the Jewish faith.

THE COURT: How many—I think I remember a figure of 250 religious sects in this country. Is that roughly right?

MR. KERPELMAN: I can't recall that figure, Your Honor. It was mentioned in a case of this Court; I can't recall it.

THE COURT: I think we had a—

MR. KERPELMAN: Two hundred and sixty-seven, according to Mr. Burch.

THE COURT: Two hundred and sixty-seven? Something of that order.

MR. KERPELMAN: Yes.

And the majority likes to go along thinking that they're only doing what's best for everybody. They overlook the fact that because they are the majority, the minority is there long suffering and quiet and it's only when a William Murray comes along that this thing raises its head. And the fact that the case was brought by an atheist, which is perhaps a very small sect in this country, does not mean that there are not other groups, as evidenced by the *amicus* briefs, who feel the same way.

THE COURT: [Inaudible]

MR. KERPELMAN: Your Honor, I have been a teacher in the Baltimore public schools for about six years while I was going to law school and I have also been a student in the public schools: That's not usually done, but we have done it. As a matter of fact, either the teacher or a student would lead the class in reciting in unison the Lord's Prayer and then reading a section from the Bible. Most teachers would either pick a section of the Bible, which I did myself when I was teaching, or they would allow a child to do so. Invariably—and the Bibles which were provided for us were the King James Bible. Invariably, in my experience, I have only seen the King James Bible used; I have only seen the King James Bible version of the Lord's Prayer used. Whether it's used anywhere else, I don't know; but I've never seen it.

THE COURT: Would your clients feel the same way about singing the verse of the Star Spangled Banner that refers to God [Inaudible]?

MR. KERPELMAN: Well, it's pretty strongly a religious verse: "Thus be it ever when free men shall stand"—Is that the verse, Your Honor? It's my favorite verse, it so happens. It certainly has a highly theistic significance. I suppose they would object to having it sung as a ceremony set forth by the school, and it seems to me they would be on good constitutional ground.

THE COURT: If you're right about this case and the establishment—

MR. KERPELMAN: Yes, Your Honor—

THE COURT: —phase of it, then I would agree with you—

MR. KERPELMAN: Well—yes, Your Honor—

THE COURT: —I think, but assuming one should disagree with your position that these rules of the school board violate the establishment clause of the First Amendment as incorporated in the Fourteenth, but should agree that on the allegations of your complaint these rules do violate, in your clients' case, the free exercise clause. I suppose what would be in order would be a remand for a trial, wouldn't it, to see just what compulsions there are, psychological or otherwise.

MR. KERPELMAM: Yes, Your Honor, we would have no difficulty whatever in proving them. The demurrer—

THE COURT: Well, that's not up to us, whether it should be difficult or easy for you to prove them or, from the other side, to disprove them.

MR. KERPELMAN: Yes—

THE COURT: But that would be the appropriate thing to do, would it not?

MR. KERPELMAN: Yes, Your Honor, but then, to quote a sage, we'd have to wind our weary way back here again, probably, after the case was heard. And it was fortunate for us that the case was heard on demurrer; it saved us a great deal of expense in printing up the record. But the case, I am quite sure, would be no different in its aspect.

THE COURT: [Inaudible]

MR. KERPELMAN: I can't go along with that, if Your Honor please, because here is a prayer which is taken—

THE COURT: [Inaudible]

MR. KERPELMAN: Oh, yes, Your Honor; yes, yes. I think we would have no standing if we had no detriment, but we definitely have suffered a detriment.

THE COURT: What's your detriment? Speaking purely now of the establishment clause. What is your detriment?

MR. KERPELMAN: A religion has been established and as a result of the establishment of that religion, my client has been treated with aversion—

THE COURT: Well, now you're getting into something else, aren't you?

MR. KERPELMAN: I beg your pardon, am I, Your Honor?

THE COURT: Well, I'm just asking you. The establishment clause itself, what—how—what detriment is that? In other words—

MR. KERPELMAN: Well, Your Honor, we contend—now, I may be entirely wrong on my—

THE COURT: I'm not talking about standing, in other words.

MR. KERPELMAN: Well, it seems to me that the—that if this prayer is a sectarian prayer, then it's an establishment of religion.

THE COURT: Yes, and how does that in and of itself cause a detriment to your client?

MR. KERPELMAN: It causes a detriment to my client by having him singled out and denominated as one who does not believe in this particular religion.

THE COURT: Well, because it interferes with his free exercise—

MR. KERPELMAN: No, because he doesn't believe in it.

THE COURT: Well, then what—how is it a detriment? As a taxpayer?

MR. KERPELMAN: We don't contend that the detriment is as a taxpayer. Now, we've been rather stubborn about that. I think that support of the schools doesn't consist in six cents added to the tax rate. It consists in trust, in confidence, in the feeling that you can send your children to the schools and they'll get the education you want; they won't have dogmas thrust upon them. We don't feel that that is—we certainly have not alleged or shown any increase in the tax rate from this applying of the King James Bible and the time it takes. The detriment, or the psychological, affects the young William Murray, who has been abused because of his belief.

THE COURT: And this, then, you get back to the free exercise.

MR. KERPELMAN: Well, I don't understand that, Your Honor. If the establishment of religion had not been made, he would not have been abused.

THE COURT: Well, wouldn't you agree with this: That under the Constitution, it would—no State could and no city, no county, could establish a church even though 100 percent of the population in that political unit wanted to do it and there were no nonconformists; they all wanted to do it; still, it would be unconstitutional, wouldn't it?

MR. KERPELMAN: It would be unconstitutional, but who would have standing to challenge it?

THE COURT: Well, that's what I'm—that's my question.

MR. KERPELMAN: Yes. Well, no one would have standing to challenge it if they—if there were no members of any minority. But with these 267 sects in the United States—

THE COURT: With or without dissenters, it's absolutely constitutionally invalid for a county—assuming that county were 100 percent Methodists, all of whom wanted an official Methodist church, and established one in Smith County, Maryland, or X County, New Jersey, that would be completely invalid constitutionally, wouldn't it?

MR. KERPELMAN: Yes, Your Honor, they'd have—

THE COURT: Not if you accept the local option argument.

MR. KERPELMAN: No, I do not accept it; I say it would be unconstitutional, and if one nonbeliever came into the county and started a case, I think he'd have a constitutional right to have the ceremonies halted.

THE COURT: The Constitution establishes the detriment.

MR. KERPELMAN: The Constitution establishes it.

THE COURT: Well now, what—wouldn't he have to sue as a taxpayer or—

MR. KERPELMAN: Well, there's been that language in the cases, Your Honor, and it grates on me every time I read them but it's probably the law. I don't think that the increment in taxes—it's like *Frothingham* versus *Mellon* that—was that the case that decided that there was such an insubstantial increase in Federal income tax that the taxpayer couldn't object to a grant-in-aid to a

State? I feel that our constitutional rights are worth a little bit more than a six cent increase—

THE COURT: What right would he be asserting? Now let's assume my imaginary case—

MR. KERPELMAN: Yes, sir.

THE COURT: —so that they are 100 percent Methodists and they set up an official Methodist church—

MR. KERPELMAN: Yes, sir.

THE COURT: —in this county, this imaginary county in an imaginary State—

MR. KERPELMAN: Yes, sir.

THE COURT: —in this Nation. And then an atheist moves into the county, and he continues his beliefs; he doesn't go to church, he doesn't go near it. What is his standing to object that?

MR. KERPELMAN: I think it would depend on the temper of the county. Now, if he went to school and this was a perfectly ethical county and no one sneered at him and no one rebuked him and no one cast aspersions on his lack of belief, he would not be able to come into court; he could show no detriment. But if it were otherwise, then I think that he could require that the Constitution be brought in for one person in a county.

THE COURT: Because his freedom was being interferred with; but until or unless that happens, he has no standing except perhaps as a taxpayer, does he?

MR. KERPELMAN: Yes, I think that the language in *McGowan* went that way, Your Honor: that economic detriment in that case was—of course, that was an economic situation where people were contending that because they had to close on Sunday, they couldn't make money on Saturday, or vice versa, I forget. But the Court did speak in that case in terms of economic detriment as to the establishment clause.

THE COURT: I don't see that we have much question of standing here, but I do not quite go with you when you say that a man has to be a nonbeliever in order to have standing.

MR. KERPELMAN: Oh, I absolutely did not intend to say that, Your Honor. I—

THE COURT: The Lord's Prayer comes from the sixth chapter of Matthew. There are many people who devoutly believe the admonition in that chapter that they should not pray in public—

MR. KERPELMAN: Yes, Your Honor.

THE COURT: —even though they are earnest, devout, God-fearing Christians.

MR. KERPELMAN: Yes, sir.

THE COURT: Because that chapter, three verses before the Lord's Prayer begins, advises not to pray as the hypocrites do, in public; go into your closet, there pray that God will hear you in secret and will answer you in secret. Why would not a man have a right—I've found that this is a very strong belief throughout the country in the last year, that people should not be made to pray in public, even some of the most earnest Christians. Why should they not have a right to challenge this?

MR. KERPELMAN: Thank you, Your Honor.

[Whereupon, argument in the above-entitled matter was adjourned.]