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# RELIGIOUS LIBERTIES

## THE PRODIGAL ARGUMENT: *McCOLLUM V. BOARD OF EDUCATION*

INTRODUCTION BY GERARD V. BRADLEY\*

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Judges, lawyers, and scholars all cite the 1947 case, *Everson v. Board of Education*, as the cornerstone of Establishment Clause doctrine. They are right to do so. The *Everson* Court took two path-breaking steps: incorporation and strict separation. The justices there held, for the first time, that the Fourteenth Amendment made the Establishment Clause applicable to state action. Then they offered a novel account of what non-establishment meant. In sweeping language (which you can find at 330 U.S. 15 - 16) they held that it meant more than equality among religions. By requiring that all government authority in the United States be neutral as well between religion and non-religion, the *Everson* Court called for a secular public square.

*Everson* was a curious platform for such grand pronouncements. The case had neither been briefed nor argued as an Establishment Clause dispute. The issue brought to the Supreme Court was instead whether New Jersey's paying for Catholic schools kids' bus rides was a public expenditure for a "private" purpose. The most relevant case was *Cochran v. Board of Education*, a Louisiana textbook matter decided in 1931. Perhaps most curiously, the school kids *won* in *Everson*. Under what we would call a "child-benefit" doctrine – and much resembling the Court's non-discrimination analysis in later cases such as *Rosenberger* – a bare majority upheld the law.

All these factors made for a showdown the next term. The Court agreed to decide whether Champaign, Illinois public school authorities could constitutionally invite local religious leaders into the schools for voluntary religious instruction. One local free-thinker thought not. Vashti McCollum sued on behalf of her son, who was obliged by her beliefs to wait outside the classroom while the instruction took place. (Another of her sons—Daniel—grew up to be Mayor of Champaign.) The Illinois courts upheld local practice. The Supreme Court reversed.

*McCollum v. Board of Education* is really the decisive Establishment Clause case. Why? The result in *Everson* left many wondering just what non-establishment meant. The worriers included the dissenting justices. They welcomed *McCollum* as a chance to consolidate the rhetorical beachhead carved out in *Everson*. They succeeded.

Champaign's lawyers argued that *Everson's* expansive language was *dictum*. They seized the opportunity to supply the briefing *Everson* lacked. They argued, too, in a masterful 168 page brief by an extraordinarily able local lawyer named John Franklin, that non-establishment did not entail secularism, the godless public square. (Incorporation was challenged, too, but with much less vigor.) The other

side responded with briefs nearly as able. A full dress rehearsal of all the relevant history was placed before the Court. This central question – whether the Clause originally meant sect equality, or neutrality between belief and unbelief – was never before so well presented. And it has not been since.

Hugo Black had written the majority opinion in *Everson*, and he wrote it again in *McCollum*. He laid out (at 333 U.S. 211) Franklin's contentions: *dictum*, dis-incorporation, and, by far the most urgently pressed, that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions."

The Court's response, just about in its entirety: "After giving full consideration to the arguments presented we are unable to accept either of these contentions".

*McCollum* was surely *received* as decisive – to the relief of some, and to the chagrin and anger of many. The nation's religious leaders responded to it – and not to *Everson* – as the clarion call. A typical reaction is recorded in John McGreevy's excellent book, *Catholicism and American Freedom*. McGreevy himself asserts that *McCollum* "erected a putative 'wall of separation' between church and state". He reports on an "off-the-record meeting of religious leaders held in the wake of "the decision." At the meeting, John Courtney Murray, one of the leading American Catholic intellectuals of that, or any other time, "emphasized that the *McCollum* decision was a victory for secularism and as such should be of great concern to Catholics, Jews and Protestants." It was.

We have always had the briefs in *McCollum*. You can get them, probably off microfiche, at any good law library. Now, with this issue of *Engage*, we have the Oral Argument, too. Through hard work and sheer luck I secured recently a copy of the transcript, and made it available to the Federalist Society. I do not think you can get it anywhere else.

Here is the short story of our quest. For a research project a couple years ago – and not knowing any better – I blithely asked my research assistant (Anthony Deardurff, Notre Dame Law Class of 2003) to get me a copy of the oral argument in *McCollum*. I had seen reference to it in one other scholarly work, James O'Neill's book, *Religion and Education Under the Constitution*. From what O'Neill said, it was obvious that he had seen a transcript. When Anthony reported that no copy could be found (the Court did not preserve arguments in those days) I was surprised and disappointed. And determined. The search was on.

We enlisted the able help of Librarian Dwight King. He and Anthony trailed many leads to dead ends. Dwight tried, for example, to locate O'Neill's survivors, or anyone at Brooklyn College (where he taught) who might have access to his papers. Nothing. I tried to locate someone in the McCollum family who might help. No one knew anything about the case files. From O'Neill's reference we knew that one Althea Arcenau, a shorthand reporter whose address was listed as the National Press Building, took the argument down. She, too, had disappeared without a trace we could find. No one we talked to in DC had any idea where her notes might be.

Finally I suggested to Anthony that he check and see if Franklin's law firm in Champaign was still around. It was not. But, because I had lived there for nine years while teaching at Illinois, I figured out that an extant firm was, basically, the successor to Franklin's outfit. A legal secretary there (almost miraculously) remembered that many of Mr. Franklin's papers were lodged in a storage shed on the edge of town. She generously agreed to go out there and look.

The fruits of her good deed appear below:

#### **OPENING ARGUMENT ON BEHALF OF APPELLANT.**

MR. DODD: May it please the Court:

This Court has presented to it for the first time the issue as to whether freedom of religion as guaranteed by the Fourteenth Amendment, and interpreted to make the prohibitions of the First Amendment applicable to state action, permits sectarian teaching in public schools, during school hours, and in regular school rooms.

The more essential facts apply to the fourth, fifth and sixth grades of the grade schools. Religious teachers come in for a half hour each week to take over the public school classes. Solicitation to become a religious class member is through a parent's Request Card, bearing the name of the Champaign Council of Religious Education, asking the parent to "please permit" the pupil to attend a class in Religious Education. The cards are distributed by the public school teachers and are collected by the public school teachers.

MR. JUSTICE FRANKFURTER: Asking the parent to permit, or the parent asking the teachers to permit?

MR. DODD: The Request Card goes to the parent from the public school teachers, asking that the parent permit the child to be admitted to the religious class.

MR. JUSTICE RUTLEDGE: Asking "that" or asking "whether"?

MR. DODD: The card says, "please permit" the pupil, naming the pupil, to attend a class in Religious Education.

MR. JUSTICE FRANKFURTER: But the request comes from the parent?

MR. DODD: I would say the request is made through the school. The public school teacher gives to the pupil a card to take home, and the card says "please permit" the pupil to attend a class in Religious Education, and the teacher is supposed to get that card back.

MR. JUSTICE REED: Who signs the card?

MR. DODD: The parent signs the card.

MR. JUSTICE REED: Then the parent asks the school to permit the child to attend a class in religious instruction?

MR. DODD: Yes. The form is "please permit" your child.

MR. JUSTICE REED: "Your" child or "my" child?

MR. DODD: Whichever you may prefer.

MR. JUSTICE FRANKFURTER: Mr. Dodd, isn't the fact that these cards are circulated through the school, through a method of circulation, but they get into the parent's hands so that the parent may express a desire that the child attend this class? Isn't that the fact?

MR. DODD: No. Your Honor, it isn't.

MR. JUSTICE FRANKFURTER: Then please state what is the fact.

MR. DODD: The school organization distributes the cards through the public school teachers.

MR. JUSTICE REED: Does the school pay for the printing?

MR. DODD: Well, they did some printing once on their own paper, for which this Religious Council paid, I believe, \$1.25 for certain expense of photostating, or something of that sort.

MR. JUSTICE REED: What are you contending here, that the school pays for the printing of the cards, or the Religious Council pays for the printing of the cards?

MR. DODD: The Religious Council paid for the cost of printing. The school furnished the paper. The school furnishes the rooms, and it furnishes the organization to have the cards circulated.

MR. JUSTICE REED: Is that by order of the School Board?

MR. DODD: No. I will come to some further facts about that in just a moment.

I am going to repeat, just for a moment, the statement that I had made here:

Solicitation to become a religious class member is through a parent's Request Card, bearing the name of the Champaign Council of Religious Education, asking the parent to "please permit" the pupil to attend a class in Religious Education.

MR. JUSTICE FRANKFURTER: Your opening statement was that the school asked the parent to allow its child to attend religious classes, but from the little I knew about it, I assumed the contrary, that the request came from the parents of the students.

MR. DODD: The cards are given by the teachers to the pupils, asking the parents to "please permit" and the card is supposed to be returned to the teacher.

MR. JUSTICE FRANKFURTER: The form of the card is "Please permit Johnny Jones to attend" and the signature is Maria Jones?

MR. DODD: Yes. They are asking the parent to approve the card. The cards are distributed by the public school teachers and are collected by them.

The religious teacher takes over a classroom during regular school hours, and the public school teacher sponsors the teaching by remaining in the room, if substantially all of her pupils have joined the class.

Small Catholic classes are almost always moved to small rooms, and no public school teachers join them.

In this school district there were about 850 Protestants and between 18 and 22 Catholics, and although the Jews had been a part of this plan originally, there had been no Jewish instruction since the second year.

MR. JUSTICE FRANKFURTER: Did the Catholics avail themselves of this religious teaching?

MR. DODD: There were from 18 to 22 Catholic pupils who went to little meetings on their own.

MR. JUSTICE FRANKFURTER: In the school building?

MR. DODD: Yes.

MR. JUSTICE FRANKFURTER: And they had a religious teacher?

MR. DODD: Yes.

MR. JUSTICE FRANKFURTER: Did the religious teacher wear a religious garb?

MR. DODD: I don't know. If a Father in the Catholic church were doing the teaching, I think you can be sure he would have the costume of a Father.

MR. JUSTICE REED: Who were the Protestant religious teachers?

MR. DODD: I will come to that later.

The religious teacher takes over a classroom during regular school hours, and the public school teacher sponsors the teaching by remaining in the room, if substantially all of her pupils have joined the class.

MR. JUSTICE REED: Do all regular school activities such as reading, writing and arithmetic cease during this time?

MR. DODD: What happens is this: A definite program is provided for each of these religious meetings. The religious meetings are by grades and by the schedules. Here is, let us say, a fifth grade of 30 pupils, and all 30 have been "permitted" as the cards state, to attend. The religious teacher comes for a fixed half hour, takes over the class, and if there aren't other pupils to look after, the public school teacher remains with the class.

MR. JUSTICE REED: Was there any room where all pupils in the room elected to take this religious instruction?

MR. DODD: I think so, and in others all but one or two.

MR. JUSTICE REED: Let us say there is a room of 30 pupils and one of the 30 is not taking the instruction. As I understand, only those whose parents have requested that they be given religious instruction get it. What happens if one boy's parent does not permit him to take the instruction?

MR. DODD: That is one of the things important in this case. I don't like to reach all the facts in the first paragraph. But what happened to the son of the appellant here was the first time he was sent out in the corridor. Later times he was put in a music room, where he was alone. Later, under objections and complaints, there were two classes of the same grade, and he was sent up the other one. I was going to speak of that later.

I spoke of the small Catholic classes being practically always moved to smaller rooms, because they were smaller in number. There was no occasion on which a whole class would be made up of Catholics. The Jews have had no class since the second year from the beginning.

Through a taxpayer's action, appellant sought a mandamus to compel discontinuance of the religious classes. Such mandamus was denied by the trial court, and its judgment

was sustained by the Supreme Court of Illinois.

In view of the close interrelation between church and state in this case, and of its close relation to the performance of the most important function of government, the Appellees base their argument mainly on a contention that a state may establish and maintain religion, provided it treat all religious sects equally. That is, it must treat the various groups equally.

Appellant denies any state right to establish and maintain religion, and also contends that if there were power to establish religion there is no possibility of treating all sects equally so long as some dominate in numbers and some exist only in small numbers.

The case is largely one of fact. The state here operates sectarian teaching in the public schools and must do so in proportion to the sectarian numbers.

In connection with some of the more detailed facts:

This case involves the Board of Education of the City of Champaign, Illinois.

MR. JUSTICE REED: Are there any regulations of the School Board in connection with this religious education?

MR. DODD: No such regulations were issued.

MR. JUSTICE REED: And none appear in this record?

MR. DODD: None appear in this record, and I think it is clear from the record that none were issued.

Champaign, Illinois, has a city population of about 25,000. There are ten grade schools and one junior high school in that school area.

The Champaign Council of Religious Education was created in 1940. This is the body with which we are dealing. Permission was given on June 6, 1940, to send religious teachers into the public schools.

MR. JUSTICE JACKSON: How was that permission given?

MR. DODD: By an action on the part of the School Board.

MR. JUSTICE JACKSON: Then there is some documentary evidence?

MR. DODD: What you have is this: The Chairman, or President, of the School Board testified that their records show that on June 6, 1940, they approved these religious teachers coming into the schools.

CHIEF JUSTICE VINSON: Can you give us the record on that?

MR. DODD: I think so. Record 127.

MR. JUSTICE REED: but no one called upon them to produce the record?

MR. DODD: He was called upon to indicate what they had done.

MR. JUSTICE REED: They did it by resolution, I take it?

MR. DODD: I assume that they did, but the testimony did not show any specific resolution.

CHIEF JUSTICE VINSON: It does show that the minutes show that?

MR. DODD: It shows that the minutes show the granting of permission on June 6, 1940, to send religious teachers into the public schools. That was testimony by the presiding officer of the organization. Also, it is the basis on which they have operated since then.

CHIEF JUSTICE VINSON: Was there anything in writ-

ing presented to the School Board upon which this action was taken?

MR. DODD: I don't think the record gives any indication of that. They applied to the Board and the minutes agreed to it.

MR. JUSTICE FRANKFURTER: You have an underlying statute of Illinois that authorizes the School Board to do that, do you not?

MR. DODD: No.

MR. JUSTICE FRANKFURTER: No statute at all?

MR. DODD: There are a number of school statutes which authorize the local school boards to make regulations. There isn't any one that specifically authorizes religious teaching.

MR. JUSTICE FRANKFURTER: The authority of the School Board is derived from the general education law of the state?

MR. DODD: Yes.

MR. JUSTICE FRANKFURTER: Under that general education law of the state there is a certain amount of home rule by the Board of Education?

MR. DODD: That is right; that is true.

MR. JUSTICE FRANKFURTER: And this action was taken by reason of discretionary authority on the part of the School Board

MR. DODD: Yes, that is true.

As I have indicated, the religious teaching was for the fourth, fifth, and sixth grades in the grade schools, and the seventh, eighth, and ninth grades in junior high school, but it had primarily to do with the grade schools.

MR. JUSTICE REED: Are the facts you have stated uncontradicted?

MR. DODD: I think the facts I have stated are uncontradicted.

MR. JUSTICE REED: Are there any findings of fact by the court?

MR. DODD: There are a number of findings by the trial court, which are quoted in the briefs.

MR. JUSTICE JACKSON: Is there any dispute about those?

MR. DODD: I would say substantially no dispute. What I was trying to do was to give a sort of preliminary notion of what the facts are.

MR. JUSTICE REED: I think it would be better to have a copy of the resolution.

MR. JUSTICE FRANKFURTER: There isn't any dispute, is there, as between the two sides, that in this city there was an inter-faith Council whereby parents would request that their children be admitted to one of three forms of religious instruction – Catholic, Protestant generally, and Jewish – and as a result of that, religious teachers of the different sects did in fact give religious instruction to the children of the three faiths? Is that the situation?

MR. DODD: There is one thing I wish to add, and that is that the distribution of the cards was by the public school teachers, who would receive the cards back; and also the fact that where practically all of a grade group obtained the cards, then the public school teacher usually remained in the classroom.

MR. JUSTICE FRANKFURTER: Would it make any dif-

ference to your position if the cards, signed by the parents and addressed to the school authorities, had come entirely from without; if the circulation of those cards had been through the inter-faith Council and the first the school knew about the cards was when it received them from the parents? Would that make any difference?

MR. DODD: I would say yes. If the situation there is common to that which exists throughout the country, the teacher has an influence with the pupils.

MR. JUSTICE FRANKFURTER: Would it make any difference if the teacher were out of it?

MR. DODD: I think it would make some difference. I don't think it would be controlling. Do you get my point?

MR. JUSTICE FRANKFURTER: I get it.

MR. JUSTICE REED: You said pupils of the Protestant, Catholic, and Jewish faiths would be given this religious instruction. Does that mean the other faiths did not occur in this school?

MR. DODD: I would like to speak of that relationship, but first I want to indicate how the Council was made up.

MR. JUSTICE REED: Do you mean that only three faiths occurred in this school – Protestant, Catholic and Jewish?

MR. DODD: The Protestant group was the general Protestant group.

MR. JUSTICE REED: That is one; then the Catholics and the Jews; taking those as three. What about the Buddhists, Confucians, and so forth? Didn't they occur in this school?

MR. DODD: I will indicate in just a moment that the head of the School Board and the school superintendent stated that any bodies could come in the school who wished to.

MR. JUSTICE REED: Do you contradict that?

MR. DODD: There are some things in the record that I think would indicate there was not the same encouragement given all groups.

MR. JUSTICE REED: Who paid the teachers?

MR. DODD: The religious teachers?

MR. JUSTICE REED: Yes.

MR. DODD: They are paid by this Council of Religious Education.

MR. JUSTICE REED: Have they indicated if there was a Buddhist at the school they had a teacher for this group?

MR. DODD: I wish to refer to one case of that type, if I may. Your point is whether they are treating all possible groups alike?

MR. JUSTICE REED: Yes. I assume the School Board passed a resolution saying that any religious group could have religious education on school property during school hours if they applied.

MR. DODD: I think the whole record shows that the action has been almost continuously through this body. The superintendent of schools did make a statement as a witness to the effect that it would be very difficult to work with the individual organizations, and therefore it was practically necessary to work through an organization of this character. But I did wish to refer to an instance of operation with reference to that.

This Council of Religious Education was made up, as I have indicated, of Jews, Catholics, and Protestants. The

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Jews were to have separate teaching, which they have been unable to continue after the first two years. The Catholics have separated teaching with, as I have indicated, between 18 and 22 pupils. The Protestant group is composed of Methodists, Presbyterians, Episcopalians, Disciples of Christ, Baptists, Congregationalists, Four Square Gospel, United Brethren, and Christian.

The churches, which were not in the original plan and may not come into it, are: Lutheran, Christian Science, Unitarian, Jehovah's Witnesses, Quakers, and Twin-City Bible Church.

MR. JUSTICE FRANKFURTER: Do I understand there is intercommunication between all those Protestant faiths, associated together to form a Protestant group?

MR. DODD: You mean the group of Protestant churches I mentioned as being in the Council?

MR. JUSTICE FRANKFURTER: Yes. You gave us a list of various Protestant faiths. Do they represent the population of Champaign?

MR. DODD: They are listed in their statement of the original creation, but the two I noted last were different.

MR. JUSTICE FRANKFURTER: The various Protestant sects clubbed together to form a religious body?

MR. DODD: No. They are a part of this Council of Religious Education.

MR. JUSTICE FRANKFURTER: But when Protestant children are to be taught, they are all clubbed together?

MR. DODD: They are grouped together except for the ones I speak of. I want it borne in mind it is not all of them.

MR. JUSTICE FRANKFURTER: There are some twelve or fourteen Protestant sects in Champaign, and the religious teaching the Protestant children get is not individualized as to the various Protestant sects; is that right?

MR. DODD: Yes. I believe there are nine instead of twelve.

CHIEF JUSTICE VINSON: I understand there are some Protestant sects that are not in and never were in the teaching plan. Do the Protestant children who are not members of the group who formed the Council get the teaching of their sects?

MR. DODD: Well, they could get cards and they could join.

CHIEF JUSTICE VINSON: Join what?

MR. DODD: In any of these classes that were operated by this group.

MR. JUSTICE FRANKFURTER: But as to the Protestants there is a common denominator of religious instruction?

MR. DODD: Well, they say any others, Jehovah's Witnesses, and so forth, are permitted to do their baptizing in one of the school buildings. Several other churches are not in this Council. They could come in separately and won't.

MR. JUSTICE FRANKFURTER: In a separate room?

MR. DODD: I will come to that.

MR. JUSTICE REED: I don't see why it would be difficult to furnish us the record of what this plan was. I don't understand what it is.

MR. DODD: The plan to a large extent has to be shown by the way it is operated. There was nothing brought into

the record, which showed any definite outline in writing of the plan, and it seems to me that it is necessary to proceed on the basis of how it was operated.

MR. JUSTICE REED: Was there any exception to the superintendent's ruling that he would let any sect in the school who wanted to?

MR. DODD: Both he and the head of the School board said that all of the space was available to any bodies.

MR. JUSTICE REED: Somebody had something to say about what religious teachers could come in the door and start teaching. What was that?

MR. DODD: The superintendent.

MR. JUSTICE REED: How did the religious teachers get into the school? Did they apply to the superintendent?

MR. DODD: What was done was that this group of Protestants worked as a common group, and they had a committee on personnel.

MR. JUSTICE REED: Whom did they go see if they wanted a religious teacher to come into the school?

MR. DODD: They handled that with the superintendent; and so far I think there has been nothing except what might be regarded as an immediate acceptance of those who have been offered. The plan seems to have operated without serious difficulty as to the teachers.

I repeat that the group of Protestants who constitute the group I spoke of, this Council, organized within themselves for the getting of teachers and the paying of teachers and the determination of what the teachers should teach. They take that up with the superintendent, and there has been very little question as to the teachers whom they recommended. I should not say "recommended", but whom they offered and whom they paid.

MR. JUSTICE REED: Who determined what they should teach?

MR. DODD: They had a curriculum committee that determined that. The Catholics determined what they should teach the Catholics, and the Jews – there was just a handful – determined what they should teach. The Protestant group had a curriculum committee.

MR. JUSTICE REED: Is their curriculum in the record?

MR. DODD: No.

MR. JUSTICE REED: That is not in the record?

MR. DODD: No.

MR. JUSTICE REED: Then we don't know what they taught?

MR. JUSTICE FRANKFURTER: Presumably, a Catholic teacher would teach Catholicism, a Rabbi would teach Judaism; and a Protestant teacher would teach Protestantism.

MR. DODD: I presume so.

A good many of the questions asked me have been regarding matters I was at the point of trying to reach. I had wanted to outline the more general things and they get into the more specific things, if I could do so.

I want to add that there were 35 of these religious classes in the regular school system of this district in 1945. That is shown in the record at pages 91 to 150. Three of the 35 classes were Catholic, and one of the three was in junior high school.

The classes were for thirty minutes in grade school and

fifty minutes in junior high school.

There were six Protestant classes in one grade school.

As to the practice of religious instruction – I have referred to this and wish to proceed because I am afraid that the time is restricted – I think we can say this:

The religious teachers come from outside – the Catholic teachers from their church and the Protestant teachers from the personnel committee of the Protestants in the Champaign Council of Religious Education.

Pupils are registered through distribution to and collection from them by the public school teachers of parent's Request Cards, asking the parent to "please permit" the pupil to attend a class in Religious Education.

Rooms for classes are determined by school authorities, who usually determine the regular public school classroom if all or nearly all have registered; but there is no such possibility with respect to the Catholics.

Where all or nearly all pupils attend the religious class, the public school teacher remains in the room, but here again there is no such possibility with respect to the Catholics.

It is alleged that this is voluntary religious education, and I wish to make a remark or two about that.

The Supreme Court of Illinois says that the religious classes are conducted "upon a purely voluntary basis." Solicitation by the regular class teachers and presence by such teachers at the religious lessons would, under this view, be free from the influence, which school teachers usually have with their young pupils.

Nor is weight given to embarrassment resulting from withdrawal from the room – in one case, as to appellant's son, withdrawal to sit alone in the corridor. In this case the boy's teacher recommended to his mother that the son take the religious work. You can say it is voluntary, but you do have some factors that make it look otherwise.

The trial court recognized the embarrassment which came from one leaving the room, and the statement by the Supreme Court of Illinois in *Ring v. Board of Education*, 245 Ill. 334, decided in 1910, until recently the law of Illinois, is still a true statement supported by the highest courts of Missouri, Iowa, Louisiana and Wisconsin, with respect to voluntary absence from religious services in public schools:

"The exclusion of the pupil for this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated."

The Attorney General of Illinois has put in an amicus curiae brief in which he has made reference to this, that this was a compulsory plan.

With reference to the development of religious friction, the trial court in this case said:

"The Jewish classes of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teachings of the Catholic religion, and are not shared by other students who are Protestants or Jews. The teaching in the Protestant classes would undoubtedly, from the evidence, teach some doctrines that would not be accepted by the other two religions."

Anti-Semitic and anti-Catholic views may be trained into children at the age when such education is a danger not only to them but to the future of this country. And such result will be accomplished by religious segregation in the grade schools.

Jehovah's Witnesses may come to public school without saluting the flag, and they have been permitted to have baptisms and some other practices in these buildings, but if they were permitted to come in –

MR. JUSTICE FRANKFURTER: They are not before us. We can't argue that.

MR. DODD: They may have a right to come in, but if they did come in and were permitted to create a class for the purpose of teaching against the saluting of the flag, that would add to the friction of the organization.

This Court fully recognizes the right to have religious or non-religious views. Appellees say:

"The law does not protect against any social consequences of choosing atheism." (Appellees' Brief, p. 23.)

This has to do with the consequences in public schools, and appellees' view applies to all groups, religious or non-religious.

Now, it is claimed that there is equality as to all sects. The President of the School Board testified that all religious groups were to be treated alike, and the superintendent of schools said that classrooms are available to a person who believes in no religion, and that "the school buildings are now available to all religious denominations in this community to be used while they are being used by students."

MR. JUSTICE RUTLEDGE: I take it from that they would not be allowed to use the school buildings for the teaching of atheism?

MR. DODD: It would appear that way.

More reasonably, the superintendent added that it would be hard "to work with a lot of different groups" and that "all the groups should work together." He would permit Jehovah's Witnesses, but appeared in doubt as to saluting the flag.

The trial court found from the evidence that a group must make application to the superintendent of schools "who in turn determines whether or not it is practical for said group to teach in said school system." This covers one point that was being raised on me just a moment ago. You will notice a discretion in the superintendent.

But the record shows a dominance of the Protestant members of the Champaign Council of Religious Education in the right to teach and what is to be taught. The minister of the Lutheran Church met with the Council to suggest separate teaching of the children of his faith. He said as a witness:

"When I offered this suggestion, no action was taken on the part of the Council, but I was assured that if and when there were sufficient children desiring instruction according to the Lutheran faith, time would be granted us."

There were between 25 and 30 children of Lutheran faith, and that, presumably, was not enough.

A Presbyterian minister, who was chairman of the personnel committee of the Council, testified at page 162 of the transcript:

"I said that the Lutherans may participate in the organization and may teach in the schools too. I do not know whether they want to do so now or not. I said I heard it. I am

ready to approve to them sending a teacher into the school. I would welcome the Lutherans but the Council”

—this big Protestant body—

“reserves the right in its cooperative movement with the Lutherans represented upon it, that no prejudicial personalities or materials be put in the course.”

The Lutheran Church could have continued its religious education at its church on Saturday morning, but a smaller group would be in difficulty unless it joined with the Protestant majority.

Appellees say that the conduct of the Council is immaterial.

Even if it were assumed that each religious or non-religious group or individual has an equal right to instruction as to its views in public schools and during school hours, it is obvious that such groups cannot be treated equally, for several reasons:

(1) There is not separate space enough for such teaching and the regular school work.

MR. JUSTICE REED: Is this testimony?

MR. DODD: No. I am speaking of what I have already indicated as to what is happening. I was seeking to summarize that. To repeat:

(1) There is not separate space enough for such teaching and the regular school work.

(2) Except for a consolidation of religious groups, as among the larger Protestant groups in Champaign, there will not be pupils enough in each group for religious classes, and there will be a shortage of religious teachers to meet the approval of the superintendent of schools. Jewish teaching was abandoned for these reasons.

(3) The mere presence and sponsorship of the public school teacher who obtained the child’s registration and who lives with the child on every school day, has an essential effect upon the child.

(4) The use of regular classrooms and removal of those not participating in the religious class subjects them to a religious stigma referred to by the Supreme Court of Illinois in the *Ring* case; and the transfer of small groups or of individuals elsewhere establishes a sectarian grouping which often brings religious prejudices among children, especially with respect to a small group of Catholics in the basement, and one boy of the class being placed in the corridor.

MR. JUSTICE FRANKFURTER: Is there anything in the record to show that the school authority uses any judgment — I wanted to use “control” but that is a loaded word — is there anything in the record to show that the school authority uses any judgment in passing on the curriculum that the religious teachers employ? I gather from the record that the curriculum is formulated by this curriculum committee.

MR. DODD: The record shows that those are matters for this organization and not for the superintendent.

MR. JUSTICE FRANKFURTER: Is there anything in this record that shows any veto power or any kind of collaboration by the school authority, or does the school authority accept the teacher who turns up, selected by the personnel committee?

MR. DODD: There is a general statement on the part of the superintendent that they must be able to use good English.

MR. FRANKFURTER: And he passes on that?

MR. DODD: Apparently they had no difficulty on that, because the teachers chosen were college graduates and presumably knew how to read, although I am not altogether sure.

The time is limited, but I wish to make one or two other statements:

Under the plan in the Champaign School District, there were in the religious classes of the grad schools more than 80 of the Protestant group who largely remained in their regular school rooms with the presence of their public school teachers; about 20 who went from their regular school rooms to separate rooms for Catholic instruction; and a small number of Jews who bore the stigma of leaving their classrooms when the religious teachers arrived.

You have there a situation, which is likely to continue. If sectarian groups are permitted to teach in the public schools, there will always be a dominating group of that character.

It is obvious that a state establishment and maintenance of religion will give a control to the religious group that has the greater number of members, or to the groups which may unite into such greater numbers.

A state has no power to establish a religion or to maintain religious groups, and such power, if it did exist, cannot be exercised in the effort to establish or maintain religion without giving an advantage to the religion or religions that are dominant. The aid to such religions through the resources of public schools constitutes in fact an establishment of religion, which violates the Fourteenth Amendment both directly and as embracing the liberties guaranteed by the First Amendment.

Even if the elaborate discussion by appellees should cause all members of this Court to change their opinions and to determine that the First Amendment does not apply to states, in their construction of the Fourteenth Amendment, this Court, in order to maintain freedom of religion in the states, must find the same principle against “an establishment of religion” in the Fourteenth Amendment itself.

MR. JUSTICE BURTON: Can we disapprove the plan now before us without interfering with the New York plan, which does not use school buildings?

MR. DODD: I don’t think so.

There is a brief filed by Mr. Charles H. Tuttle of New York, which gives a description of the New York plan. New York specifically prohibits any transactions of this kind within the schools.

MR. JUSTICE REED: What is the New York plan?

MR. DODD: They have a plan that lets the pupils out one hour early on Wednesday to permit them to attend classes in religious instruction outside the school buildings and grounds.

MR. JUSTICE FRANKFURTER: That would apply to all students, would it not?

MR. JUSTICE REED: In New York, the school children take religious instruction outside of school hours?

MR. DODD: Yes, and he must do it under the statute of New York.

MR. JUSTICE REED: You don’t mean that, do you, that the statute of New York requires him to rake religious instructions?

MR. DODD: The statute of New York permits him to take that hour off. Mr. Justice Frankfurter said: "That would apply to all students, would it not?"

MR. JUSTICE REED: Otherwise would they have to stay in the schools and study?

MR. DODD: Ordinarily that has been the situation.

In California that situation came up, and it was said that the children who did not go to religious instruction could, if they desired, remain at school and continue their school work. That is perhaps unusual.

I wish to make one more remark now, and perhaps to have a few minutes later.

Appellees specifically recognize and say, at page 159 of their brief:

"We have pointed out in our argument on the meaning of the 'establishment of religion' cause of the First Amendment that no law, whether it imposes a tax or not, is invalid under such amendment unless in addition to or as a part of the imposition of the tax, it prefers one religion over another."

Appellees have already excluded non-religions, and their position that "The law does not protest against any social consequences of choosing atheism" necessarily applies to any unpopular religions just as well. What you practically have is, they say there may be a state establishment of religion, with a tax in support, but only with religions as members, and non-religions paying a part of the taxes.

Can this Court, or can any other court, approve of a plan of that sort?

This Court has recognized that there is a public duty to children of school age, whether they go to public or private schools. Equality of educational facilities may be required in all religious schools, with use of the same textbooks. And perhaps there could be no objection to vocational education made equally accessible to all. This Court has sustained equality in transportation, and may face equality in school lunches; but it has never indicated a use of public schools for sectarian education, which is what is shown in this case.

MR. JUSTICE JACKSON: If your position is sustained, how would that affect the Released Time Plan in New York?

MR. DODD: The Released Time Plan has been sustained since 1929 in New York. It has recently been sustained in Illinois, and more recently sustained in California. I don't think it would be affected by an adverse decision relative to this situation.

MR. JUSTICE FRANKFURTER: Would you mind stating in your own words what you deem to be the crucial elements which, in combination, make this an infringement of the First Amendment and the fourteenth Amendment, separating church from state?

MR. DODD: It is establishing a religious organization in your public school system which is almost of necessity, by virtue of its numbers, going to control the situation.

MR. JUSTICE FRANKFURTER: You said the New York system could survive although this system should fall. What are the decisive elements that differentiate the two?

MR. DODD: The point is that, here they are to take their religious lessons in groups in the schools, where there will be, somewhat of necessity, unless the world has changes as to religion, some development of friction and trouble as between religious groups.

MR. JUSTICE FRANKFRUTER: Is one of the crucial factors that there must necessarily be some collaboration between the school authorities and the Religious Council?

MR. DODD: You can't have religious work of this sort without that collaboration.

MR. JUSTICE FRANKFURTER: That is true in New York. You have to have collaboration. What is the crucial thing? Is it the use of the school buildings? Is it the fact the card goes to the parent from the school?

MR. DODD: The first thing I would say is that which was said by the Supreme Court of Illinois in the statement I quoted from the *Ring* case. If you have what may almost be a play-up between the pupils in the regular school day, you are going to have an effect, which is quite different from that of letting the group go out an hour early.

Take the matter referred to in the *Ring* case, of which I spoke. Here is a religious service. The youngster is permitted to get an excuse to be excused from the religious service. He gets excused, and every other pupil in the class sees it, and unfortunately our human relationships are such that the youngsters make a good deal out of it.

CHIEF JUSTICE VINSON: Mr. Dodd, you may have an additional 15 minutes if you so desire. Do you want it now?

MR. DODD: I would prefer some time for my conclusion, but I am wondering somewhat about the point Mr. Justice Frankfurter has made.

The general experience, I think, is that in certain parts of this country, and some in Illinois, a sharpening of the difference between the Jewish and non-Jewish pupils oftentimes leads to serious difficulty. There is some anti-Catholic sentiment also.

MR. JUSTICE JACKSON: Does the state have the right to commandeer the time of a pupil and then rebate part of it?

MR. DODD: That is right; and can a state establish a religious system as a part of its public school system?

MR. JUSTICE FRANKFURTER: Mr. Dodd, this Court has held, in the *Pierce* case, that the child's time in the parents' and not the state's, except that the state may require certain educational standards. Why can't the parents work out a scheme whereby they will divide the time with the state and give the state what the law requires for a secular education. One way is to divide the time with the state, or take it all.

MR. DODD: Your education in the public schools, unless you go to a private school that is approved, is compulsory.

MR. JUSTICE FRANKFURTER: It is compulsory, but the state says it is not compulsory except for so many years.

MR. DODD: May I terminate now, because I will need some extra time.

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**ORAL ARGUMENT ON BEHALF OF APPELLEE BOARD  
OF EDUCATION OF SCHOOL DISTRICT  
No. 17, CHAMPAIGN COUNTY, ILLINOIS**

MR. FRANKLIN: May it please the Court:

I represent the Board of Education of School District No. 71, Champaign County, Illinois. My colleague, Mr. Rall, represents the other appellees, Mr. and Mrs. Elmer C. Bash and their minor child Wanda I. Bash, who are citizens and residents of this School District. Mr. Rall and I will divide our



time before the Court in this argument.

Your Honors, I am not here because of any profound legal ability on my part. I am the School Board attorney. I took part in the trial of this case. It is quite understandable that Mr. Dodd is not thoroughly acquainted with the facts because he did not have that advantage.

I should be helpful to Your Honors on factual questions, if not on the law, and I will try to state what the facts are in this case; and though it is not necessary, I would like your questions on the facts to be sure the Court understands those facts.

The Champaign Council of Religious Education is a Council made up of all religious faiths in the school district who desire to affiliate themselves with this kind of program.

MR. JUSTICE REED: You invited questions. How do you know that?

MR. FRANKLIN: The record tells you so.

MR. JUSTICE REED: Where?

MR. FRANKLIN: You Honor, I suppose I bit off too much. I do not have it offhand in mind. The record shows it.

Let me say to Your Honors that this is not such a record as Your Honors are used to in handling corporate or business litigation. This record does not set forth any verbatim resolution of the Board of Education. Your Honors will have to bear with our record, because the record in the first instance was made by the appellant, who introduced her case with a dissertation on her atheistic views, and her record was developed as her attorneys wished it developed, and we had to accept the record as the appellant made it.

MR. JUSTICE FRANKFURTER: Weren't you allowed to develop your side?

MR. FRANKLIN: Yes, Your Honor.

MR. JUSTICE REED: Do I understand there is no resolution of the School Board by which we can tell what authority the principal has to allow the religious teachers into the school?

MR. FRANKLIN: There is no verbatim resolution in the record. There is the testimony of the President of the School Board that application was made by this group and that it was granted.

MR. JUSTICE REED: Do you know what the group is?

MR. FRANKLIN: The group is the Champaign Council of Religious Education, made up, as Mr. Dodd has said, of representatives of nine different religious faiths in the community.

MR. JUSTICE REED: There are only nine faiths in the community?

MR. FRANKLIN: No, but only nine are represented on the Council.

MR. JUSTICE REED: Can the tenth faith come in if it wants to?

MR. FRANKLIN: Yes, the tenth, eleventh and fifteenth.

MR. JUSTICE REED: How do we know that?

MR. FRANKLIN: Because the record says that. The record says an invitation was sent to the representatives of every faith in the community, and they were invited to participate, and the record says time after time, in testimony by the President of the Board of Education and the superintendent of schools, that no application on the part of any faith, or on the part of any atheistic group, has ever been denied or dis-

couraged.

CHIEF JUSTICE VINSON: Do you infer that some of the groups did not want to come in?

MR. FRANKLIN: I don't know, what inference may be validly drawn. I see nothing in the record to indicate that any adherents of any faith, actual residents of School District No. 71, did not come in because they did not want to. It is very much like it is in any organization. If an organization is doing precisely what you want done, and doing it very well, you don't go out of your way to send representatives to it.

The record shows very clearly that 31 different faiths – which so far as the record shows and I know are every one of the faiths of those going to school in School District No. 71 – actually participated in the program by sending their children to it.

MR. JUSTICE BURTON: That is not what Mr. Dodd said.

MR. FRANKLIN: Mr. Dodd said the Lutherans had not send instructors. I didn't understand him to say they refused to participate in the program.

CHIEF JUSTICE VINSON: Is there a Lutheran Church in your community?

MR. FRANKLIN: There is a Lutheran Church. There is no Lutheran instructor that I know of. The Council employs but two teachers. What their religion is, I am not sure, except that they are Protestants.

MR. JUSTICE FRANKFURTER: You have some in the school who profess the Lutheran faith?

MR. FRANKLIN: Yes.

MR. JUSTICE FRANKFURTER: And it is a fact the Lutherans are not represented on the Council, whatever the reason?

MR. FRANKLIN: That is right.

MR. JUSTICE FRANKFURTER: And there are Quakers in the community?

MR. FRANKLIN: Not that I know of, but they found a Quaker in a neighboring town whom they brought in as a witness, and he said he did not care to participate, but he was not a resident of Champaign and not a part of the school district.

MR. JUSTICE RUTLEDGE: Let us say the Lutheran group does not want to participate in the Protestant group, but wants to participate in the program: Is there any provision in the plan whereby they could have the same services as the cooperating Protestant groups?

MR. FRANKLIN: When you say in the plan —

MR. JUSTICE RUTLEDGE: In the Council.

MR. FRANKLIN: In the Council, which the School Board has nothing to do with except it permits use of the school buildings.

MR. JUSTICE RUTLEDGE: Well, that is something.

MR. FRANKLIN: That is right. But the plan is not the School Board's plan. The plan is that of the Council of Religious Education.

MR. JUSTICE RUTLEDGE: Does the School Board extend identical privileges to non-cooperative sects?

MR. FRANKLIN: It does, Your Honor.

MR. JUSTICE RUTLEDGE: Could the Lutherans go to the superintendent of the School Board and say: "We don't want to play ball with this group, with this Council. We want

the same distribution of cards and services.” Does the School Board permit that?

MR. FRANKLIN: Yes. The record affirmatively and repeatedly says that.

MR. JUSTICE RUTLEDGE: In addition to those who cooperate through the joint effort?

MR. FRANKLIN: The record repeatedly says that any and every organization that desires to make use of the public school buildings for that purpose may do so.

MR. JUSTICE FRANKFURTER: May we pursue the Chief Justice’s question? May this Court take judicial notice of the fact that some sects, as a matter of conscience, are opposed to this scheme, and oppose collaboration, because they think it violates something very precious to them?

MR. FRANKLIN: Your Honors may take judicial notice of what the religious faiths have represented to you in their briefs.

MR. JUSTICE FRANKFURTER: The testimony of Rev. Alva R. Cartlidge refers to the Lutherans’ plan to start a Lutheran group. He says: “I have not observed the attitude of the Seventh Day Adventists toward the religious educational program in the Champaign schools. I did not even know they had expressed any attitude. I am not acquainted with them. I surmised there might be some in town but I do not know any of them. I do not claim to have taken in any of their doctrines into instruction because they have never applied to our Council for membership. I have not inquired as to the attitude of the Quakers with reference to the religious education in the schools because they have never inquired of us.”

It does not say whether you have Quakers or not.

“I have heard about the Unitarian church in Champaign.”

So there are four sects that he testified about that have communicants in your community that are not affiliated with the Council.

MR. FRANKLIN: Not exactly, Your Honor. He says he does not know if there are any Quakers.

MR. JUSTICE FRANKFURTER: There are some, possibly?

MR. FRANKLIN: Very possibly.

MR. JUSTICE FRANKFURTER: And this being very fluid testimony, I go back to the Chief Justice’s question: The fact they say they welcome any group raises a question whereby a choice must be made.

MR. FRANKLIN: Would it help to say that in the five years of the operation of this plan, not a single protest or objection was made by anyone except the appellant?

MR. JUSTICE FRANKFURTER: That would not help me.

MR. FRANKLIN: May I suggest to Your Honors that this case is one involving constitutional law. I believe a very great deal has been set forth in the briefs, particularly in the briefs of the friends of the Court, which has to do with the wisdom of the this scheme, or the wisdom of this plan, rather than any question of its constitutionality.

CHIEF JUSTICE VINSON: If you will permit, I would like to get clear on this: Did the Pastor of a Lutheran Church go before the Council?

MR. FRANKLIN: No, Your Honor.

CHIEF JUSTICE VINSON: Doesn’t the testimony show he did appear and indicated he wanted an instructor for the Lutherans, and they said they would consider it, and did nothing about it? That is the way I understood Mr. Dodd.

MR. FRANKLIN: I did not know that was the fact. At the recess time I will check the testimony very carefully.

I would like to go forward with an explanation of the facts.

This program was instituted in 1940 in a rather informal manner. The Council sent a delegation to the School Board, the School Board granted the use of school rooms for thirty minutes each week, and agreed that if the parents of any particular child signed a card specifically requesting that the child be excused from participation in the program for the space of thirty minutes each week, the request would be honored.

MR. JUSTICE REED: Was that action of the School Board informal also?

MR. FRANKLIN: No. There was Board action on it.

MR. JUSTICE REED: In the form of a written resolution?

MR. FRANKLIN: I understand there was, but it does not appear in the record.

MR. JUSTICE REED: Then we will have to treat it as an informal agreement. What was the form of the agreement?

MR. FRANKLIN: It was in the form of permission to use school buildings, the same as permission is granted for all manner of civic organizations that seek to use their property.

MR. JUSTICE RUTLEDGE: I don’t understand you to contend either that this is not Board action or State action?

MR. FRANKLIN: No, but the plan is no part of the School Board’s action.

MR. JUSTICE FRANKFURTER: The plan could not live and work except with the consent and collaboration of the School Board.

MR. FRANKLIN: That is right, but if a person applied to the sponsors of this plan and was denied participation, that does not charge the School Board with any lack of equality, because the School Board stands ready to grant the same free use of its facilities to all organizations, religious, or non-religious.

MR. JUSTICE RUTLEDGE: Then the Lutheran minister did not go far enough. He should have gone to the School Board?

MR. FRANKLIN: I don’t believe he was discouraged by the Council, but he could have gotten permission very readily by going to the School Board.

MR. JUSTICE RUTLEDGE: There is no contention that this is not the School Board’s or the State’s action?

MR. FRANKLIN: There is no such contention as that in the brief.

MR. JUSTICE RUTLEDGE: If, after the recess, you can reconcile the last two answers you have given, I will be glad to hear you on it.

(thereupon, at 2:00 p.m., a recess was taken until 2:30 p.m.)

AFTER RECESS

MR. FRANKLIN: Mr. Justice Rutledge, may I address myself to the seeming inconsistency which you found in my last two answers?

MR. JUSTICE RUTLEDGE: Yes.

MR. FRANKLIN: I must confess that I did not see the obvious inconsistency in them. Let me say this, if it will help to explain my point of view to Your Honor:

I do not believe that the plan of the Religious Education Council is in any sense that of the School Board. All that the School Board has done is to grant permission to this Council, in common with many other organizations, to make use of its school rooms at various times, and it has said that it would recognize an excuse from school attendance as an excuse from attendance at these religious education classes.

May I say on that point that the excuses which the Board of Education recognizes for non-attendance at school are myriad. They include measles, attendance at grandmother's funeral, dancing lessons, music lessons, and so forth. I do not believe it can be said that the compulsory school law is placed behind attendance at religious classes any more than it is placed behind measles or funerals or anything else.

MR. JUSTICE RUTLEDGE: He can't go to school if he has measles.

MR. FRANKLIN: But it is one of the excuses recognized by the Board of Education.

MR. JUSTICE JACKSON: Suppose a boy's people are not religious people and he does not have to attend the religious education classes, and he is put in a separate room and he starts home. The truant officer has to bring him back, doesn't he?

MR. FRANKLIN: That is a hypothetical case. That never has happened.

MR. JUSTICE JACKSON: What would you expect to happen?

MR. FRANKLIN: I have no doubt that the school authorities would recognize the parents, wishes and permit the child to go home during that time.

May I say the occasion mentioned by the appellant when her son was sent out in the corridor occurred but once, on one day, and promptly upon the mother's pointing it out, it was discontinued. I believe the evidence shows he was sent to the music room more than one day, but immediately upon this being pointed out by the mother, it was discontinued.

MR. JUSTICE FRANKFURTER: The practical considerations are that the arrangements for this religious instruction are made by the Religious Council and not by the School Board?

MR. FRANKLIN: That is right.

MR. JUSTICE FRANKFURTER: And the practical considerations of the Religious Council are their interests?

MR. FRANKLIN: I would say they had no interests other than those of the children.

MR. JUSTICE FRANKFURTER: The choices they made, as to which the School board is an indispensable part, would be those consistent with the laudable interests of the Council?

MR. FRANKLIN: If Your Honor wishes to suggest it is the interests of the Council that are paramount, rather than

the interests of the children, that is a conclusion, Your Honor, has to draw for yourself.

MR. JUSTICE FRANKFURTER: I don't mean the interest is unworthy, but the interest is the presupposition that religious education is most desirable?

MR. FRANKLIN: Undoubtedly.

MR. JUSTICE FRANKFURTER: The Religious Council is the instrument of promoting that purpose, and therefore they work out a scheme that best carries out that purpose. The school becomes a part of it, dictated not by the secular interest of the school, but dictated by the interest that the Religious Council has.

MR. FRANKLIN: I cannot agree this is a joint undertaking.

MR. JUSTICE FRANKFURTER: It could not be in effect without the collaboration of the School Board.

MR. FRANKLIN: I freely agree with that.

MR. JUSTICE FRANKFURTER: Go ahead.

MR. FRANKLIN: Mr. Justice Rutledge, is there anything unanswered in the question you put to me?

MR. JUSTICE RUTLEDGE: I won't take your time. Maybe your answer on the Lutherans will answer that.

MR. FRANKLIN: The record does not show that the Lutherans have in any way been incapacitated or that any obstacle has been put in their way.

Let me read two excerpts from the record.

At page 159 of the transcript, Rev. Alva R. Carlidge said: "I stated that not all denominations or religious beliefs are represented in the council. All are free to participate, and we are anxious to have them. No religious denomination or recognized church or belief has ever sought membership or participation in that council whose membership has not been freely accepted. All denominations that we knew about in the community were invited to participate. Letters were sent to all that we could find and personal calls were made. The St. John's Lutheran Church of the Missouri Synod, whose Pastor is Reverend Kaiser, is welcome to participate, and we would be delighted to have them."

Now, may I refer to what Reverend Kaiser himself said on that subject, so that we may be sure we have the whole picture. At page 121 of the transcript, Reverend Kaiser, who is the minister of this St. John's Lutheran Church mentioned by Reverend Carlidge, said:

"The system first came to my attention at the organization of this religious council. Pastor Carlidge of the First Presbyterian Church consulted me about the formation of this council for the purpose of religious education in our public schools. That was some three years ago. I did not attend any of the meetings of the council until this past summer. I approached the council to grant to the Roman Catholic people and other people of that faith in our community their separate instruction, and also to the people of the Jewish faith, or the Reformed Orthodox Church had an instructor. They would permit a flexible program, exceptionally so; they would allow these children of the Lutheran faith to receive instructions according to that faith. I have not as yet arranged to provide a teacher."

Then further on the same page, 121, he said:

"I have not made application to the Board of Education of School District No. 71 in connection with this matter, nor

have I pursued it any further than the religious Council. That is because I believe sufficient children must be in an individual school who desire Lutheran instruction before the Board of Education acts. I do not know how many there would be. The Lutherans do not now have a teacher of religious education in the public schools of Champaign.”

We submit to Your Honors that the record shows the Lutherans have always been welcome to participate in this program just as fully and as quickly as they will, and the evidence is that they intended to participate.

MR. JUSTICE REED: Do I understand it is only when there are sufficient children of a faith to make a class in that faith worthwhile that a teacher is admitted?

MR. FRANKLIN: No, Your Honor.

MR. JUSTICE REED: That is what I understood you to read.

MR. FRANKLIN: No. The minister was saying he did not think there were sufficient children desiring Lutheran instruction to warrant an instructor. That is the way I understand it.

MR. JUSTICE REED: If all religious sects sent an instructor, would there be room in the school buildings to take care of them?

MR. FRANKLIN: That is a hypothetical bugaboo, raised by the briefs, that there are 358 sects, and if they all wanted to send instructors, there wouldn't be room for them. That is true of automobiles; if they all wanted to use the highways at the same time, there wouldn't be room for them. Or if all organizations wanted to hold a meeting in the public park at the same time there wouldn't be room for them. But there is no evidence that there has not at all times been sufficient and ample facilities for all the religious education classes that were requested to be held in the schools. Does that answer your question?

MR. JUSTICE REED: Am I right in assuming that whatever child takes this religious instruction loses that time from his school work?

MR. FRANKLIN: I would like to offer the testimony of Mrs. Lakie B. Munson on that point. She points out there is a flexibility in the school system which more than allows for the time used in the religious classes. I think it was said that fifteen minutes are allowed for opening exercises, and only five minutes used, for example.

MR. JUSTICE REED: Suppose there are two children, one taking religious instruction, and one not. How many hours a week of school are required?

MR. FRANKLIN: I don't know.

MR. JUSTICE REED: Let us assume thirty hours a week. If one child takes religious instruction, he loses that time from his secular studies.

MR. FRANKLIN: I don't think we crowd our program with secular studies as closely as Your Honor seems to think. There are times not filled with secular education. The children do not go to school and study every minute. They are placed on their own resources very frequently to employ their time as they think best, in order to build healthy minds.

During certain times of the day there are library facilities, and they are free to study on their own account, without pursuing any course of study.

MR. JUSTICE REED: Do the pupils who take religious training have less time for library study?

MR. FRANKLIN: It gives them less time. But the laws of the State of Illinois do not require the children to go to school any particular number of hours a week. Some states do require a specific number of hours a week. Illinois does not. That is a matter of complete discretion in the local schools. If they wanted to, they could dismiss everybody at the end of 29 ½ hours and violate no statute. So this is a matter of absolute discretion on the part of the local School Board, and some pupils, in taking certain work, stay at school longer than others.

MR. JUSTICE REED: Would having the religious instruction outside of school hours satisfy the opposition?

MR. FRANKLIN: My impression is that nothing would satisfy the opposition that promoted religion in any way. I think Your Honor would find there still would be opposition to this program.

MR. JUSTICE BURTON: Would there be objection if school buildings were not used?

MR. FRANKLIN: The opposition lives in a community where we make use of the school buildings for many purposes. In appellant's brief they say it isn't the use of the school buildings that they object to, so I am not sure what it is they object to. On page 25 of appellant's brief they say:

“As a matter of fact it is not the use of public school buildings and of public school teachers which violates the constitution; it is the maintenance of instruction by religious groups in the public schools through the use of the resources of such schools.”

That does not draw a distinction that I can grasp.

Perhaps we have spent enough time on the facts of this case, except as they become incidental to the argument I would like to be heard upon.

MR. JUSTICE FRANKFURTER: May I ask this question. As far as I could gather from your argument up to this point, I did not detect any difference of opinion as between you and Mr. Dodd as to the basic facts. If there are any differences, I would be obliged if you would point them out. This is an attack upon a practice. Therefore, I was wondering if you had any disagreement with Mr. Dodd as to the practice.

MR. FRANKLIN: I will stop at this point to go over the things I disagree with Mr. Dodd on. I understood Mr. Dodd to say the public school teacher sponsors the classes of religious education by customarily remaining in the school room during the religious education classes. We do not believe the record substantiates any such statement. It is true the record shows isolated instances where the public school teacher remained working at her desk in the classroom while the pupils attended a religious class seems to be to be misleading.

I want to say that the trial court, made up of three judges, wrote a lengthy, and I believe Your Honors will find a careful, opinion setting forth the facts as they found them, and I understood Mr. Dodd to say he had no quarrel with those facts, and that is the best place to get the facts in this case, where they are assembled in an orderly fashion.

Mr. Dodd did not know whether Catholic instructors

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wore the clerical garb. I understand the two Catholic instructors wore clerical garb—clerical collar, collar reversed, and clerical vest.

MR. JUSTICE FRANKFURTER: Is that in the record?

MR. FRANKLIN: I think it is. If it isn't, I want the Court to know that it is the fact.

I perhaps need to straighten out one answer I made to the Court this morning. I did not mean to say there is a written resolution on this matter in the School Board minutes. The record shows that the President of the School Board testified that permission was granted to the Council on June 6, 1940, and I assume the minutes reflect the fact of that action, but it was not in the form of a resolution or any formal writing.

MR. JUSTICE REED: Does the School Board have a right to grant such permission?

MR. FRANKLIN: We believe in the State of Illinois, in general, that the public buildings should be open to all people and all organizations, regardless of religious faith. We have a statute in the State of Illinois which requires every public official charged with the care of public property to make the facilities under his charge open to all persons, regardless of race, religion, or creed. We do not believe that any public official has a right to require a religious test of any person before he opens up the public facilities.

It has been a practice in our State for one hundred years to hold church services on Sunday in school buildings in scattered communities where other facilities were not available. It has been our custom to open up the school buildings as community centers much more frequently than any other type of public building, and it has not been our practice to administer religious tests in connection with that practice.

MR. JUSTICE FRANKFURTER: Do they allow political meetings to be held in the school buildings?

MR. FRANKLIN: Yes. The school buildings are used for political meetings: Jehovah's Witnesses use the swimming pool for baptisms; the P-TA uses the buildings; it has been the practice to permit the use of the school buildings for every inoffensive purpose.

To be more specific in answer to your question, perhaps if Your Honor would put it more pointedly I could answer it.

MR. JUSTICE REED: Is it perfectly all right from your point of view for the religious instruction to go so far as to receive the child into a particular church?

MR. FRANKLIN: Why no, Your Honor.

MR. JUSTICE REED: Why not?

MR. FRANKLIN: Perhaps I did not understand you, but we do not believe it would be a proper use of school premises to hold a revival meeting, we will say, during school hours. I think the Court should know that the record in this case shows that the curriculum was one of education in religion rather than doctrinal or creedal matters. It was not for the purpose of getting the children to accept a doctrine or church. That is what is eliminated from the Protestant part of the program. There was no reference to how Baptists baptized or how Presbyterians baptized, but it was a course of study in the bible. For instance, there is no prayer saying, no hymn singing, in these classes. They are kept on an educational level.

MR. JUSTICE FRANKFURTER: How are you in a position, as counsel for the School Board, to make these characterizations of what was taught to the religious classes unless the School Board passed on it?

MR. FRANKLIN: It is particularly easy, Your Honor, because we have a 300 or 400-page record here in which anything and everything that might have been considered offensive by the appellant has been brought out and reduced to writing in testimony in court.

MR. JUSTICE FRANKFURTER: But the School Board wasn't present when a Rabbi taught the Jewish religion or a Father taught the Catholic religion. How do you know what was taught?

MR. FRANKLIN: We do not censor or supervise in any way —

MR. JUSTICE FRANKFURTER: You suggested that this religious instruction was not of a creedal nature but of an educational nature.

MR. FRANKLIN: As nearly as it could be, but in the Protestant classes there were things taught with which pupils of Catholic faith could not agree.

MR. JUSTICE FRANKFURTER: Then the classes could not be taught to the school children generally?

MR. FRANKLIN: No.

MR. JUSTICE FRANKFURTER: In these religious classes, what we call theological subjects were taught?

MR. FRANKLIN: Yes, except it was on the basis of interdenominational.

MR. JUSTICE FRANKFURTER: It couldn't be interdenominational, because it was broken into three groups.

MR. FRANKLIN: To that extent I agree with you.

MR. JUSTICE REED: My difficulty is to know just what was said and done in these classes.

MR. FRANKLIN: They teach principally the content of the bible, biblical stories, biblical verses committed to memory.

MR. JUSTICE REED: You tell me that, and I accept what you say, but can that be found in the record?

MR. FRANKLIN: Yes, Your Honor, you will find it set out lengthily; too lengthily, perhaps, relative to the curriculum.

MR. JUSTICE FRANKFURTER: Why do you not answer —

MR. FRANKLIN: I am sorry if I haven't, Your Honor.

MR. JUSTICE FRANKFURTER: I am asking this not to be critical of you, but why do you not answer a question like that of Mr. Justice Reed by saying it is none of the Board's business to know what is being taught, that all you do is hand over that hour out of the school's time so that the religious teachers can teach what they want to?

MR. FRANKLIN: It might be a very good answer, but it is this Court's business, and Mr. Justice Reed's business, to know what was going on.

MR. JUSTICE FRANKFURTER: You can't tell what was going on in the Catholic or Jewish classes, other than the Catholics were being taught the long historical background that represents Catholicism, and the Jews were being taught Judaism.

MR. FRANKLIN: All I can tell you is what is in the record.

MR. JUSTICE FRANKFURTER: Wasn't religious dogma taught in these classes, by various people with various ecclesiastical beliefs?

MR. FRANKLIN: I don't think that is a fair statement of what was taught, except if Your Honor means that everything in the bible is dogmatic. The bible is not all concerned with beliefs. The bible is concerned with history.

MR. JUSTICE FRANKFURTER: Here are three great religious groups, representing Judaism, Catholicism, and Protestantism. They combine to give adherents to those three great faiths religious education. How can we sit here and ascertain what the loyal representative of those three great faiths teach their children? What is the point of it?

MR. FRANKLIN: I think it is unimportant. I think as citizens of the United States and residents of this School District, they have the right to make use of this school property.

MR. JUSTICE REED: If they teach the children to join the Methodist Church, that is all right?

MR. FRANKLIN: Well, they do not do it, Your Honor. That is the only way I can answer that. It is not the purpose nor the plan. I don't want to go farther. I haven't given enough thought to that, since it is not involved in the record.

MR. JUSTICE REED: The teaching of religion is involved.

MR. FRANKLIN: The teaching of the contents of the bible is involved.

MR. JUSTICE REED: Biblical matter?

MR. FRANKLIN: Not strictly so. I think all sorts of things are taught in the Protestant classes, such as the divinity of Jesus Christ. In that, Mr. Justice Frankfurter is correct in saying it is dogmatic; but it is not correct to say that what the Baptists believe, as distinguished from what the Catholics believe, is taught, because it is not.

MR. JUSTICE BLACK: They teach nothing not in accordance with their own faith?

MR. FRANKLIN: That is true of the Catholic teacher and the Protestant teacher, they teach nothing not in accordance with their own faith. But in the Protestant group no effort is made to teach the particular beliefs of one Protestant religion as distinguished from another.

MR. JUSTICE FRANKFURTER: You say that the School Board of Champaign cannot discriminate against any faith that wishes to utilize the facilities and machinery of the schools, to the extent they are used by the School Board, for study and devotion to their own faith. You say that would be bad. But you say so long as there is no discrimination, so long as the School Board works out a system of working out a plan with all faiths, that is all right?

MR. FRANKLIN: That is right.

We are here only on the question of the interpretation of the American Constitution. The highest court of the State of Illinois has said that this offends nothing in the Constitution of the State of Illinois.

We are here asked to meet a new issue, and that is whether or not the First Amendment to the Constitution of the United States was violated. We are called upon to meet for the first time the issue that in some way the fact that the School Board had the unwritten reservation that these teachers of religious

classes must use the English language well constituted censorship. That issue was not raised in the courts of Illinois, but we are asked to answer it here.

It is our contention that the First Amendment of the Constitution does not prevent all aid of government to religion, but on the contrary means that government shall treat all religious groups equally.

MR. JUSTICE BLACK: Do I understand you to take the position that if the State of Illinois wanted to contribute five million dollars a year to religion they could do so, so long as they provided the same to every faith?

MR. FRANKLIN: Yes, and the State of Illinois does contribute five million dollars annually to religious faiths, equally, and more than five million dollars, and has during its entire history.

MR. JUSTICE BLACK: How does it do it?

MR. FRANKLIN: By tax exemptions specifically granted to religious organizations.

MR. JUSTICE BLACK: Your position is that they could grant five million dollars a year to religion, if they wanted to, out of the taxpayers' money, so long as they treated all faiths the same?

MR. FRANKLIN: Yes, Your Honor. That is our interpretation of the meaning of the first clause of the First Amendment.

MR. JUSTICE BLACK: Suppose, instead of a half hour, these religious teachers spent four hours in schools. Would that make a difference?

MR. FRANKLIN: No constitutional difference.

MR. JUSTICE BLACK: Or six hours?

MR. FRANKLIN: Or six hours.

MR. JUSTICE BLACK: It would not make a difference?

MR. FRANKLIN: No constitutional difference.

MR. JUSTICE BLACK: Suppose the children had one-half hour of secular work and 7 ½ hours of religious training, and the pupils who did not take the religious training had to study 8 hours and the others one-half hour, in your judgment the Federal Constitution would not prohibit that?

MR. FRANKLIN: No. It would be extremely unwise, but it would not be in violation of the Federal Constitution.

MR. JUSTICE RUTLEDGE: What does the First Amendment of the Constitution prohibit?

MR. FRANKLIN: It prohibits the preferment by law in any degree of one religion over another and one sect over another.

MR. JUSTICE RUTLEDGE: Is that the ruling of the *Everson* case?

MR. FRANKLIN: I believe the decision in the *Everson* case was only dicta.

MR. JUSTICE RUTLEDGE: Does the *Everson* case say that, or something else?

MR. FRANKLIN: I do not understand that the case was decided on that ground, so I believe that question still to be an open one for decision by Your Honors.

While I realize Your Honors have been deciding every case as it comes before you, I don't think it would hurt to consider in whole whether we shall interpret the First Amendment to mean that government can confer no benefit on religion, or that it means Congress shall pass no law relating to religion.

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Above Your Honors' heads in the central frieze is a figure which indicates that the Chief Justice of this Court then sitting believed that Justice was supported by the Ten Commandments; that Justice depended on it. Our whole Constitution has been based on respect for and interest in religion.

If you were to say that no public money may be spent for religion, and that no law may be passed relating to religion, you must not only strike out the printing on these cards that have been referred to by Mr. Dodd, but you must strike out the words "In God we Trust" on the coins minted by the United States, which coins have borne those words since 1865. Not only do you endanger if not wipe out all tax exemption on the part of religions, but you condemn the Congress of the United States for employing Chaplains which they have done continuously since the First Amendment was framed. On the same day, the First Amendment was framed, the Congress appointed a committee, on which James Madison served, which started the Chaplaincy, and every Congress since has employed a Chaplain, not to teach dogmatic religious education, but to worship, say prayers, open the legislative bodies with public worship.

Your Honors cannot strike down all of these things without striking a great deal more down.

What distinction, so far as the Federal Constitution is concerned, applies between the use of public parks and public school buildings? If Father Coughlin wants to use a public park, as he wanted to use Soldier's Field in Chicago, do you ask what his religion is?

Your Honors cannot strike out interest in religion, religious motivation, or religious opinion or expression.

MR. JUSTICE JACKSON: I think you are going too far. I understand a lot of people who are religious believe religion should not be supported by public funds and should not be under any form of compulsion.

MR. FRANKLIN: I do not mean to make any such suggestion. I mean you impair people's ability to express their religious beliefs once you adopt the constitutional theory that government cannot aid religion, cooperate with religion, or extend any benefit to religion. Every purpose of national government is served by interpreting the first clause of the First Amendment to require absolute equality of treatment of all religious faiths. In our brief we have treated this matter very extensively, because of the dicta in the *Everson* case. We feel we have demonstrated that was the historical meaning to the framers of the First Amendment in 1789 and has been the meaning ever since, as elucidated by public practices, some of which I have mentioned; and now, 160 years after the framing, is too late to change it.

MR. JUSTICE JACKSON: Do I understand your contention is that you can establish religions, but you can't prefer one over another?

MR. FRANKLIN: No. Perhaps in my flight of oratory, I did not make myself clear. I believe the phrase "establishment of religion" had as well defined a meaning at that time as now, namely, the establishment of one particular church or religion, creating a monopoly. The framers could not have selected a better clause than "establishment of religion" if they had searched all the lexicons.

MR. JUSTICE BLACK: In your judgment, can this prac-

tice stand under the Constitution and be consistent with what was said, either in the majority or minority opinion, in the *Everson* case?

MR. FRANKLIN: Yes.

MR. JUSTICE BLACK: How?

MR. FRANKLIN: For the reason that the farthest the dicta has gone in that case is to say that if a tax is actually levied that is for the benefit of religion, it cannot stand in the face of the first clause of the First Amendment. But Your Honors did not say that once public facilities are established, religious organizations cannot enjoy the benefits of them. Thank God that was not said!

MR. JUSTICE FRANKFURTER: Your flight of oratory did not seem to me to be too flighty. I am led to ask this: Suppose everything you say is so about the place of religion in this country, another question arises of whether the public schools of the United States, bearing the relation that they do to the democratic way of life, are a good place to introduce it?

MR. FRANKLIN: This is not a group of legislative censors before whom I am arguing today. Your Honors have only the constitutional questions.

MR. JUSTICE FRANKFURTER: I put my question again: We have a school system of the United States on the one hand, and the relation it has to the democratic way of life. On the other hand, we have the religious beliefs of our people. The question is whether any kind of scheme which introduced religious teaching into the public school system is the kind of thing we should have in our democratic institutions?

MR. FRANKLIN: That is a proper question to ask. May I ask, though, that you depend to some extent on the record in this case for what is the proven result of this program. Variations of this program are in effect in at least one thousand school districts in 46 states, and there is nothing in this record or any actual facts pointed out in the briefs of the friends of the court to support the proposition —

MR. JUSTICE FRANKFURTER: You have a half dozen religious groups opposing this as offensive.

MR. FRANKLIN: Your Honor knows I am not permitted to argue the extent to which the briefs represent the feeling of those they purport to represent.

MR. JUSTICE FRANKFURTER: The very fact you raised this question shows that this kind of thing projects the public schools into religious controversy. What I am saying is that we have these briefs by the religious bodies. We can't go behind them. They purport to speak for those sects.

MR. FRANKLIN: May I ask you to consider only the law in those briefs and not consider them a supplement to the record?

One of the briefs we saw as we walked into the Clerk's office this morning, for the first time. One we saw two days ago for the first time. Your Honors can't charge us with the law they cite in them, least of all the facts.

CHIEF JUSTICE VINSON: Do you want some time in which to reply to those briefs filed today and a couple days ago?

MR. FRANKLIN: If, at the end of these arguments, we feel there is anything either not answered in the argument or not answered by our own brief, we would appreciate it very

much, but we have not had a chance to read them, so we do not know. Thank you very much for the offer, Your Honor.

Your Honors, I am very much embarrassed for taking up so much time.

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**ORAL ARGUMENT ON BEHALF OF APPELLEES  
ELMER C. BASH AND ALICE J. BASH, AND WANDA I.  
BASH, a minor, by ELMER C. BASH, her father and next  
friend.**

MR. RALL: If Your Honors please:

We have made no sharp division of time.

I represent the interveners Mr. and Mrs. Elmer C. Bash and their minor daughter, Wanda I. Bash, who believe this is a proper exercise of authority by the School Board, and who believe the plan is a good one for them.

We call attention to the fact that parents in the state of Illinois have the care, custody and tuition of their children, notwithstanding the existence of free public education.

As long ago as 1877, the Supreme Court of Illinois held a child was not a creature of the state, and that parents had control of the child's educational program to the extent that it did not interfere with the education of others.

We submit the rights involved are not absolute rights. This is not a question between the authority and the individual. This requires a balancing of rights.

On the one hand, we have 850 students and 850 sets of parents in the situation of my clients, who have approved this plan and wish it continued.

On the other hand, we have only one objector. I do not mean to say that if the plan is constitutionally invalid, that one objector should not be heard, but I say the rights are relative, and that in considering the action of the Court, the religious liberty of the 850 must also be put in the balance when the question of religious liberty as a matter of constitutional law is being decided.

This concerns the public schools, and of course we all have our personal views as to what is wise and what is unwise.

The State of Illinois gives very close local control to matters of educational policy, and traditionally this Court has done the same. We submit, if the Court pleases, that the wisdom of this plan – and practically all of the objections that are made run to the wisdom rather than the constitutionality – should be left to the School Board. There is no institution more carefully watched, there is no political body more carefully policed, than the School Board.

We do not believe this is a matter of constitutional law to be handled at the national level.

Thank you.

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**CLOSING ARGUMENT ON BEHALF OF APPELLANT**

MR. DODD: May it please the Court:

May I be sure of the amount of time that is available?

CHIEF JUSTICE VINSON: You have eleven min-

utes.

MR. DODD: Thank you. I will proceed at once.

With respect to one matter regarding briefs, I received three briefs this morning from the Clerk of the United States Supreme Court by visiting his office, and the night before I received a brief from the Attorney General of Illinois in opposition to the position we have taken. I understood that briefs are to be replied to. It may have to work both ways.

CHIEF JUSTICE VINSON: If there are any legal propositions in the briefs that have been recently received that you wish to reply to, you may have a few days to do it.

MR. DODD: Thank you.

I wanted merely to make one or two remarks about matters of fact. There are some differences of opinion, apparently, as to matters of fact; for instance, as to the regular school teachers attending in the rooms where the religious meetings are going on. There is a substantial amount of evidence on the part of the public school teachers and on the part of the religious teachers that that was being done.

With reference to this equality matter, I would ask the members of the Court to remember the quotations that I made from the transcript with reference to what the Lutheran minister said he accomplished by visiting this Council; and the statement of the gentleman in charge of personnel, saying explicitly that they would not let them in unless they could arrange agreements as to the principles to be considered.

We must remember also that the superintendent of schools, while he said that anybody could come in, explicitly said at the same time that it would practically be necessary to act in groups because it would be practically impossible to act otherwise.

I think those are the matters where there was perhaps some degree of difference.

Now if there is a little time available, I would like for Mr. Burke to close this case on our part.

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MR. BURKE: May it please the Court:

I would like to address myself, in the few moments that remain, primarily to the recent decision of this Court in the *Everson* case.

It seems to me that without any hesitancy, it can be said that unless this Court is now prepared to delete from the opinions in that case the strong language that was used, unless it is prepared to renounce the principles set out by the majority – and so far as that is concerned concurred in by the minority – then the decision in this case must necessarily be in favor of the appellant.

The *Everson* case is authority for the proposition – I don't think there is any question of that – that the states, no less than the Federal Government, must respect the right of the citizen to be free from the imposition of any religion, and must respect the right of the private citizen to enjoy complete freedom in religion; and I believe that is broad enough to include one who espouses no religion, whatever the belief may be.

The decision in the *Everson* case leaves no doubt in the mind of the reader that every member of this Court saw this matter of religious freedom in quite a different light than do the appellees in this case. Both the majority opinion and the



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minority opinion refer to the two-fold problem, that of aid to the sectarian school, and that of the introduction of religious training in the public schools. And all join in saying that this wall of separation between church and state must not be breached by a violation of either of these provisions.

There is a significant statement in the appellees' brief, but before referring to that, in the light of the interpretation of this Court of the First Amendment, and the clear exposition of the signification of law respecting the establishment of religion, it seems to us it is not significant to determine whether or not there is a proved separation of Church and State. What the Constitution of the United States prohibits, and what the State Constitution prohibits, is the making of any law, or action of any governmental authority in pursuance of such law, that involves the interlocking of official functions of the State with official functions of the Church.

Apply that test to the several examples referred to by counsel for appellees:

First, Congress selects a Chaplain. The House and Senate there are dealing with individuals. No arrangement is made with any Catholic, Jewish, or other religious body. There is no interlocking of official functions of the State with official functions of the Church. The same can be said of Chaplains for the Army.

So far as the exemption of property of religious and charitable bodies from taxation, that does not mean they are given a voice in the affairs of government. There is no interlocking of official functions of the State with official functions of the Church.

But when the state, acting through school boards, gives to a religious organization for the carrying on of its institutional functions public funds raised by taxation, however small the amount, it is giving tax funds to a religious organization by government to dispose of according to its own regulations.

On page 13 of appellees' brief, counsel uses this language: "The object (of the program) is to acquaint children with the history and factual content of religion on the same basis as other subjects such a philosophy, economics or history are taught in the school program, thus affording them a true and balanced picture of the relative place and importance of religion in life."

I see my time has expired. I will only say that if that were true, it would be unnecessary to set up this Council of Religious Education, because that kind of course could be given by the public school teachers themselves.

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(Thereupon, at 3:30 p.m., oral arguments in the above entitled cause were concluded.)

\*Gerard V. Bradley is a Professor at the University of Notre Dame School of Law.