COMMON SCHOOL RELIGION: JUDICIAL NARRATIVES IN A PROTESTANT EMPIRE

MICHAEL DEHAVEN NEWSOM

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I. INTRODUCTION

The United States of America was and still is a Protestant Empire.[1] The basic character and purpose of this Protestant Empire flow from a series of Religious Settlements dating back to 1534.[2] Religious Settlements are acts of a State, first England and later the United States, that "have as their primary objective the establishment and maintenance of a Protestant Empire."[3] These Religious Settlements are the constitutive elements or dimensions of the American Protestant Empire. They reflect the underlying reality of a Protestant Empire, a state that seeks to perpetuate and extend the Anglo-American Reformation, the Protestant Reformation as it manifested itself in England and in the United States. These Religious Settlements did not always settle matters of church and state. Indeed, most of them fell apart, particularly in England, sometimes leading to strife, bloodshed, and civil war. The Settlements did, however, resolve some matters. Over the long sweep of history from the 1530s until the present, they confirmed and supported the growth and development of a Protestant Empire, first in England, then in the United States.

The American Protestant Empire, fueled by the Anglo-American Reformation and shaped by these Religious Settlements, exhibits five major "procedural" characteristics. The first is an opposition to Roman Catholicism. The second consists of a dedication to convert the people of the United States to Protestantism. The third is a fluctuating commitment to the idea that the various Protestant denominations constitute an affinity group participating in a complex tapestry of competition and cooperation. The fourth amounts to a belief that the perfect society, the "purified" Protestant Empire, is only one or more social reforms away. The fifth is a pragmatic commitment to attrition and restraint to achieve the goals of the Protestant Empire, rather than the use of the most violent forms of coercion

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[1] Michael deHaven Newsom, *The American Protestant Empire: A Historical Perspective*, 40 WASHBURN L.J. 187, 187 (2001).

[2] *Id.* at 192–94.

[3] *Id.* at 194.

in furtherance of those goals, though these forms remain in the background.[4]

Two of the Religious Settlements are relevant here: the Settlement at the Founding and the Settlement at the Incorporation of certain provisions contained in the Bill of Rights into the Fourteenth Amendment. The Religious Settlement at the Founding established the following Tentative Principle: "*allocate much of the work of the Anglo-American Reformation to the states and other institutions*[5] *and not the federal government*."[6] It enabled the characteristics of the Protestant Empire to work themselves out through our national history even as it imposed imprecise limitations on the ability of the federal government to aid in the work of the Protestant Empire. Thus, religion in the common schools, a matter of the utmost importance to the avatars of the Protestant Empire, would be managed by the states and other institutions; not by the federal government. Pursuant to the Tentative Principle, the forces of the Protestant Empire were free to work their will in the common schools.

As was generally true of the Anglo-American Religious Settlements, however, the settlement at the Founding was not retained. The Supreme Court of the United States, in a series of cases involving religion in the common schools,[7] modified the Religious Settlement made at the Founding.[8] The Court established a Revised Tentative Principle: "*allocate much of the work of the Anglo-American Reformation to the states and other institutions and not the federal government, but allocate none of the work of the Anglo-American Reformation to the officials, administrators and teachers in the common schools*."[9] Not only were questions concerning religion in the common schools to be determined by the federal courts, but the work of the Anglo-American Reformation in the common schools would have to be done, largely, if at all, by individuals who were not public school officials.

In order to grasp the meaning of this last Religious Settlement, it is necessary to consider the reasons for its adoption. Among other concerns, the Court reacted to Protestant overreaching in the matter of religion in the common schools. The Court sought to redirect the energies of the minions of the Protestant Empire in such a way as not to damage the ability of the

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[4] All five of these characteristics are discussed in Newsom. *Id. passim*.

[5] The reference to "other institutions" is largely, although not exclusively, to denominational institutions which, beginning in colonial times, had come to have great influence by the Founding. *Id.* at 250–52. The term, however, can encompass informal groups and even individuals dedicated to a religious agenda.

[6] *Id.* at 250.

[7] *See infra* Part IV.A.

[8] The Religious Settlement at the Incorporation, unlike those that preceded it, was effected by the United States Supreme Court. It was not, however, effected by the legislature, the executive, or any combination of the two, or by the "people" in any sense of the term. All of the previous Anglo-American Religious Settlements found sanction in constitutional or statutory text, or in bloody civil war. *See* Newsom, *supra* note 1, *passim*.

[9] *Id.* at 263.

nation to win wars and survive in a dangerous world.[10] This reasoning constitutes a strategic or "management" justification for the Revised Tentative Principle that changes the rules whereby the work of the Protestant Empire of the Anglo-American Reformation might proceed.

Lord Bryce identified two other reasons that justified the Revised Tentative Principle. The first, the *political principle*, "sets out from the principles of liberty and equality," and rests upon a "conception of individual freedom and the respect due to the primordial rights of the citizen which modern thought has embraced."[11] The second, the *religious principle*, "starts from the conception of the church as a spiritual body existing for spiritual purposes, and moving along spiritual paths" and with respect to which "[c]ompulsion of any kind is contrary to the nature of such a body, which lives by love and reverence, not by law."[12] Lord Bryce provided the starting point for a useful analytical framework for thinking about the Revised Tentative Principle.

Bryce's principles implicate two kinds of harm with which the Revised Tentative Principle might concern itself. The first involves harm to status, the essence of the political principle. The second concerns harm to feeling, sensibility, and the psyche, the essences of the religious principle. Bryce concluded that the political principle "much more than the latter . . . has moved the American mind."[13] These two forms of harm, however, intersect, with the former reinforcing the latter. For example, injury to status, such as racial segregation, produces psychological injury, or low self-esteem in the victims. This phenomenon is a central teaching of *Brown v. Board of Education*.[14]

The principles that pertain to race also apply to questions involving religion.[15] Thus, injury to status, governmental rules, policies, and practices that favor certain religious or other equivalent belief systems in the common schools, produce psychological injury to students and their families who adhere to different religions or equivalent belief systems. Such psychological injuries include stigma, affront to conscience, and interference with parental rights to control the religious formation of their children.

The Court has paid insufficient attention to Bryce's religious principle, as reinforced by his political principle. Consequently, the Court has paid

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[10] *Id.* at 259–63.

[11] 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 767–68 (new ed. 1924).

[12] *Id.* at 768.

[13] *Id.*

[14] 347 U.S. 483, 494 (1954).

[15] *See* Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491, 491-493 (1994); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 STAN. L. REV. 1, 66 (1991); David E. Steinberg, *Religious Exemptions As Affirmative Action*, 40 EMORY L.J. 77, 78 (1991); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 127–35 (1997). *But see* Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L.J. 551, 585–89 (1998) (arguing that race and religion are not treated the same way in college and university admissions decisions).

insufficient attention to the categorical reality of psychological harm that the avatars of the Protestant Empire have visited upon school children belonging to minority religious groups and their families.[16] This failure on the part of the Court is most readily apparent in *Zorach v. Clauson*,[17] *Board of Education v. Mergens*,[18] and *Good News Club v. Milford Central School*;[19] where aggressive, typically majoritarian religious groups prevailed. This failure also appears in *Illinois* ex rel. *McCollum v. Board of Education*,[20] *Engel v. Vitale*,[21] *School District v. Schempp*,[22] *Epperson v. Arkansas*,[23] *Stone v. Graham*,[24] *Wallace v. Jaffree*,[25] *Edwards v. Aguillard*,[26] *Lee v. Weisman*,[27] and *Santa Fe Independent School District v. Doe*,[28] in which the Court restrained the minions of the Protestant Empire.[29]

The two lines of cases turn on a formalist distinction. The *McCollum* line of cases denies the forces of the Protestant Empire the *direct* instrumental assistance of "the officials, administrators and teachers in the common schools."[30] Such assistance would have enabled these officials, administrators and teachers to do the work of the Protestant Empire directly, without the intervention of "other institutions."[31] The denial of *direct* instrumental assistance forces the "other institutions" doing the work of the Protestant Empire to find other means by which to reach the students in the public schools.

The *Zorach* line of cases allows these "other institutions" to have the *indirect* instrumental assistance of "the officials, administrators and teachers in the common schools."[32] In this circumstance, the "other institutions" do the work of the Protestant Empire regarding public school students, but with the *indirect* instrumental assistance of these officials. The cases describe this situation as an "accommodation."[33]

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[16] *See, e.g.*, RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY 167 (1996) (stating that "[p]rayer in public school . . . inevitably constrains the religious freedom of some students").

[17] 343 U.S. 306 (1952).

[18] 496 U.S. 226 (1990).

[19] 533 U.S. 98 (2001).

[20] 333 U.S. 203 (1948).

[21] 370 U.S. 421 (1962).

[22] 374 U.S. 203 (1963).

[23] 393 U.S. 97 (1968).

[24] 449 U.S. 39 (1980).

[25] 472 U.S. 38 (1985).

[26] 482 U.S. 578 (1987).

[27] 505 U.S. 577 (1992).

[28] 530 U.S. 290 (2000).

[29] In *Doremus v. Board of Education*, the United States Supreme Court dismissed an appeal from a New Jersey Supreme Court decision upholding Bible reading in the common schools. 342 U.S. 429 (1952). *See infra* notes 465–471 and accompanying text for a discussion of this case.

[30] *See supra* note 9 and accompanying text.

[31] *Id.*

[32] *See supra* note 9 and accompanying text.

[33] *See* Zorach v. Clauson, 343 U.S. 306, 313–14 (1952) (insisting "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events

The distinction between *direct* and *indirect* instrumental assistance is a distinction without a difference, as the five major characteristics of the Protestant Empire[34] demonstrate. If the common schools are in fact an instrument, *direct* or *indirect*, of the forces of the Protestant Empire, then these forces can: (1) pursue anti-Roman Catholicism; (2) strive to convert school children belonging to minority religions to some form of evangelical Protestantism; (3) reinforce the affinity of various Protestant sects or denominations by their shared political and legal control of the common schools; (4) advance any social reform that serves the interests of the Protestant Empire through the process of public school education; and (5) wear down opposition to the goals and objectives of an American Protestant Empire.

The characteristics of the Protestant Empire fundamentally constitute a psychological attack on those whom the Empire seeks to convert to evangelical Protestantism. The ultimate weapon of the Empire is a subtle and sophisticated mixture of coercion and suasion, of attrition and restraint against a backdrop of coercion, force, and violence. The great genius of the Empire lies in its willingness to wait out, wear down, and watch the opposition die, while firmly controlling the levers of state power, force, and coercion. Elizabeth I perfected this strategy, though its origins can be traced to the regime of her father, Henry VIII.[35] It has survived through the centuries, finding expression in the writings of American defenders of the Empire.[36] Under these circumstances, it makes no difference if the common schools provide *direct* or *indirect* instrumental assistance to the forces of the Protestant Empire. As Elizabeth I clearly understood, it is the fact that this assistance exists that has direct psychological impact.[37]

The psychological dynamics of the Protestant Empire, though extraordinary, are not unique to Anglo-American evangelical Protestantism. *Any* majoritarian religion or majoritarian belief system that functions as a religion can, by the simple expedient of being majoritarian, visit psychological harm on the followers of minority religions or belief

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to sectarian needs, it follows the best of our traditions" because "it then respects the religious nature of our people and accommodates the public service to their spiritual needs.").

[34] *See supra* note 4 and accompanying text.

[35] *See* Newsom, *supra* note 1, at 204–213, 222–27.

[36] *See* ROBERT BAIRD, RELIGION IN AMERICA: OR, AN ACCOUNT OF THE ORIGIN, PROGRESS, RELATION TO THE STATE, AND PRESENT CONDITION OF THE EVANGELICAL CHURCHES IN THE UNITED STATES 318–21 (1844) (arguing that Protestantism would win out over Catholicism due to Sunday schools, Bible classes, religious societies, Home Missionary Societies and Boards, Maternal Associations, and, most importantly, the preaching of the Word); LYMAN BEECHER, A PLEA FOR THE WEST 63–64, 91, 175–76, 180–89 (1835) (arguing that by virtue of both assimilation and resistance, Protestantism will triumph over Catholicism, but also arguing that immigration laws need to be reformed so as to limit the number of future, presumably Catholic, immigrants); JOSIAH STRONG, OUR COUNTRY (Jurgen Herbst ed., Harvard University Press 1963) (1886) (bemoaning the impact or influence of Catholicism in American life and predicting a "hard conflict" between Protestants and Catholics in the future).

[37] *See* Newsom, *supra* note 1, at 222–27.

systems.[38] Accommodation of any majoritarian religion or belief system necessarily presents serious problems of psychological harm. This is particularly true in cases involving Protestant Empires or other amalgams of religion and state with the goals of evangelism.

The status of being a member of a religious minority group subjects a person to majoritarian and peer group pressure. The relevant question is whether the state, *directly or indirectly*, makes matters worse. Only when the instrumental assistance, without regard to form, does not make matters worse can it pass constitutional muster.[39] Unfortunately, the Supreme Court failed to make this requisite showing in the three "accommodation" cases, *Zorach*,[40] *Mergens*,[41] and *Good News Club*.[42] It does not appear that the Court has adequately considered the problem of majoritarian coercion or peer group pressure as applied to school children and their parents belonging to religious minorities.[43] Instead, the Court has merely considered whether the instrumentality of the state, "the officials, administrators and teachers in the common schools," was direct or indirect.[44] This is empty formalism at its worst.

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[38] *See* ROBERT S. ALLEY, WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS 18 (1996) (noting that "the most egregious abuses against fellow citizens have occurred in those communities where the overwhelming number of residents belonged to a single religious tradition"); THIEMANN, *supra* note 16, at 4 (stating "[a] single religious tradition can so dominate public life as to threaten the dissenting beliefs of other religions and of the nonreligious").

[39] For an earlier statement of this test or standard, see William W. Boyer, Jr., *Religious Education of Public School Pupils in Wisconsin*, 1953 WIS. L. REV. 181, 244 (quoting 15 OPS. WIS. ATT'Y GEN. 483, 488 (1926) to the effect that the Wisconsin Constitution is only violated "when the teachers or the school machinery are connected either directly or indirectly with the dissemination of religious instruction"). *See also* FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS 148–50 (1999) (proposing a model statute to protect the civil rights of religious minorities, providing, inter alia, that facilitation of discrimination "whether that discrimination be perpetrated by [common school] employees, students, or others," be actionable under the model statute).

[40] 343 U.S. 306 (1952).

[41] 496 U.S. 226 (1990).

[42] 533 U.S. 98 (2001).

[43] Careful commentators on the matter of religion in the common schools, as litigated in the state courts prior to Incorporation, have noted that the distinction between those courts upholding prayer and Bible reading in the common schools and those courts striking it down largely turned on "the attitude of the particular court concerning the respective rights of majority and minority religious groups in society." Robert Fairchild Cushman, *The Holy Bible and the Public Schools*, 40 CORNELL L.Q. 475, 478 (1955). Cushman and Boles have influenced my thinking, and thus the analysis of the cases here owes much to their work. I, however, have modified the analysis and placed it in the setting and context of the Protestant Empire. Thus while Cushman favors a focus on status-based harm, *see id.* at 497, my thesis is that the focus properly should aim at psychological harm, informed, of course, by status-based harm. *See also* DONALD E. BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS 113 (1961) (stating that "[t]he courts holding Bible reading to be illegal show a deep concern for the rights of minority groups, and their decisions reflect an earnest attempt to work out some solution whereby no one's religious freedom is trampled under the foot of majority might").

[44] The infirmity of any analysis that fails to recognize the overarching linkages between direct and indirect action in this matter is seen in a student note suggesting that "public support of religion" is "direct" in cases involving Bible reading and prayer, but only "indirect" in cases involving just Bible reading. S*ee* Richard Augenbaugh, Note, *Bible Reading in Public Schools Held Unconstitutional*, 20 OHIO ST. L.J. 701, 703–04 (1959).

Perhaps the Court has found the strategic or "management" rationale for the Revised Tentative Principle to be sufficient.[45] The Court may still adhere to the goals of the American Protestant Empire, though it has changed the majoritarian winner-take-all rules[46] by which that Empire had previously used the common schools, by using the direct instrumentality of the officials, administrators, and teachers in the common schools to do the work of the Anglo-American Reformation. Thus, the Court would not consider Bryce's political and religious principles[47] particularly relevant. Instead, the Court would be concerned about giving the forces of the Protestant Empire the opportunity to wage a psychological war of attrition against common school students by way of *indirect* instrumental assistance of public school officials.

Perhaps the Court is concerned about the resistance to the Revised Tentative Principle. The adoption of the Principle continues to engender conflict.[48] Religion in the common schools is one of the subjects of the culture wars[49] that divide the nation. Thus, the Court may have read the Revised Tentative Principle narrowly, leaving room for these forces of the Protestant Empire to maneuver in the common schools, notwithstanding the limitations that the Revised Tentative Principle places on the direct instrumentality of the "officials, administrators and teachers in the common schools."

Perhaps the Court failed to appreciate the full scope of the problem of psychological harm for a different reason. Instead of turning to the body of case law developed by the state courts in the pre-Incorporation régime in which the rationale for the Protestant Empire was some times questioned, the Court went out on its own, with predictably unsatisfactory results. While the state law in general is far from perfect, coherent, or even correct,[50] it contains the elements necessary to construct a powerful narrative in support of a reading of the Court's Religious Settlement (its Revised Tentative Principle), a narrative that adequately accounts for the interests of religious minorities. Most state court judges bobbled, fumbled, fudged, and stubbed their toes, yet some of them found bits and pieces of

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[45] *See* Newsom, *supra* note 1, at 259–63 and accompanying text.

[46] *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 9 (1991) (noting that in "its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town"). *See also* W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 BYU L. REV. 421 (1993); Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998).

[47] *See supra* notes 11–12 and accompanying text.

[48] *See* ROBERT S. ALLEY, SCHOOL PRAYER: THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT 220-233 (1994).

[49] For a discussion of our current culture wars, see JAMES W. FRASER, BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA 155–82 (1999); THIEMANN, *supra* note 16, at 145 (describing the subject matter of those wars—"abortion, welfare reform, race relations, women's rights, [and] homosexuality").

[50] *See* Harry N. Rosenfield, *Separation of Church and State in the Public Schools*, 22 U. PITT. L. REV. 561, 571 (1961).

the truth, even though one[51] managed to retreat from the truth. The Court, however, failed to take advantage of the lessons learned by these judges because it suffers from a combination of myopia and hubris.[52]

First, the common school, throughout its history, has been under attack. The most sustained attack came from Roman Catholics who were obliged to establish a comprehensive system of parochial schools.[53] Some of the concerns of Roman Catholics regarding common schools were addressed by the Revised Tentative Principle. Although the Revised Tentative Principle operates to deprive the forces of the Protestant Empire of the *direct* instrumental assistance of public school administrators, officials, and teachers, the Court has apparently decided to allow *indirect* instrumental assistance. Today, the attack on the common schools comes from other sources, primarily white, conservative, evangelical Protestants.[54] This latest attack raises the question whether the common school can survive in its current form. The possible transformation may be desirable to the extent that the new institutional arrangements[55] can realistically celebrate religious diversity[56] and religious freedom for all Americans, while recognizing the social value of religion and other functionally equivalent belief systems.[57] The uplifting of both religious freedom and religion itself depends upon the overthrow of winner-take-all rules by which religious majorities traditionally have ridden roughshod over religious minorities. The Court has largely overturned such rules, at least as far as the direct instrumentality of public school officials, administrators, and teachers is concerned. However, the Court's failure to show sustained concern for religious minorities undermines much of the good within the Revised Tentative Principle regarding alternative institutional arrangements.

Second, and equally important, the failure to account for psychological harm means that family values get short shrift. The families harmed are those that belong to minority religions or to functionally equivalent belief systems, but these families are American families nonetheless. Life is hard

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[51] *See infra* Part III.D.

[52] Both of these faults, quite apart from other serious faults, were on vivid display in *Bush v. Gore*, 521 U.S. 98 (2000).

[53] *See infra* notes 139–140 and accompanying text.

[54] *See* CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL 262–88 (1988); Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 BYU L. REV. 569; Ned Fuller, *The Alienation of Americans from Their Public Schools*, 1994 BYU EDUC. & L.J. 87.

[55] *See* THIEMANN, *supra* note 16, at 152–53 (discussing the need for mediating institutions that will teach civic virtue).

[56] Achieving this goal may prove to be difficult. Thiemann correctly notes that the Founders failed to articulate "a . . . theory of virtue acknowledging the positive nature of cultural and social pluralism" thus making "it difficult to identify any particular constitutional doctrine affirming the good of diversity." *Id.* at 149.

[57] The value and importance of both religion and religious freedom give rise to a "dilemma." *See generally id.* Thiemann, however, qualifies the matter of value. He argues that faith is not "private." *Id.* at 155–57. He goes on to say that only certain kinds of "nonabsolutist" religions have a legitimate claim of a right to participate in political discourse. *Id.* at 161. He claims Christianity is "nonabsolutist." *Id.* at 163. The "dilemma" for Thiemann is an aspect of the larger question of toleration. *See* Newsom, *supra* note 1, at 236–40.

enough for members of minority groups, solely by virtue of that status, and no good reason exists for the state to make matters even worse.[58] If the Court continues to ignore the fact of psychological harm, then the Court has a common cause with those attacking minority families or at least their religious beliefs. Perhaps "family values" only refers to the values of certain families.

The unfortunate decision in *Good News Club*[59] presents the occasion to take a good look at religion and the common school and the way that American judges have dealt with this combustible mixture. Part II will provide critical background information. It will discuss the common school in the American Protestant Empire. It will also analyze the resistance of minority religious groups to the Protestantizing goals of the common schools and the persistence of majority religious groups in pursuing those goals. Part III will review the state court opinions that left the forces of the Protestant Empire largely untouched and those opinions limiting the reach of the American Protestant Empire. These cases emerged from the dynamic of resistance and persistence discussed in Part II. The review in Part III will proceed in terms of the characteristics of the Protestant Empire. Part IV will parse the opinions of the United States Supreme Court. It will demonstrate how the Court fails to construct the narratives that would support and sustain a reading of the Revised Tentative Principle defending the core values of religious freedom and religious conscience, Lord Bryce's political and religious principles. Part V will

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[58] Professor Choper proposed a similar test. He argued: "when the state or federal government adopts a solely religious program—whose only immediate effect is the promotion of religion and in which benefit to religion is a condition precedent to any possible public benefit—it has approached the brink of its constitutional power." Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 347 (1963). He concluded: "when this governmental activity unavoidably results in pressures on the immature to abandon their conscientious scruples, or in the influencing of free religious choice, the establishment clause should be deemed violated." *Id.* There are several problems with his standard. First, it is necessary to evaluate the "immediate effect" of the program complained of. Experience with the Lemon test has demonstrated the difficulty, if not the inappropriateness, of such an analysis. Second, his standard fails to make clear that the question of instrumentality should not turn on whether it is "direct" or "indirect." Third, his standard focuses solely on the "immature," thus he fails to address the question of psychological harm to parents and families. Indeed, Professor Choper specifically dismissed the question of psychological harm to nonchildren: "Appellant [Vashti McCollum] satisfied the existing standing prerequisites by alleging the infringement of a constitutionally protected right—the right of her child to be free from certain inherent pressures to participate in a solely religious governmental activity irrespective of any direct coercion." *Id.* at 355 (Professor Choper's reference here to "direct" versus 'indirect" merely refers to the psychological workings or dynamics of the program under attack, and not to instrumentality or the identity of the actors making the program work as does my test). Finally, Professor Choper fails to adopt a strict categorical view regarding psychological harm, instead suggesting in some cases that the fact of such harm remained to be established. *See id.* at 403, 405–06. Professor Choper's test, unlike the one presented here, led him to misjudge the graduation prayer situation. *Id.* at 408. He failed to appreciate the problematic nature of programs supposedly designed to teach about religion. *Id.* at 381–83. Professor Choper failed, essentially, to measure the narrative of the Court, which he sought to rationalize and defend, with the narratives generated by the state courts in the pre-Incorporation era. While correctly identifying psychological harm as an important factor, Professor Choper nonetheless hedged his bets—unnecessarily so.

[59] 533 U.S. 98 (2001).

briefly discuss the larger overarching themes that emerge from a close reading of the opinions of judges who have addressed the question of religion and the common schools. This part will argue that the Court's balancing act undermines a power-sharing dialogue that posits that certain questions relating to the religious formation of children remain open and are not for the common schools to answer, and that might enable American families to find a way to celebrate both religion and religious freedom.

II. THE COMMON SCHOOL IN THE AMERICAN PROTESTANT EMPIRE

The common schools are a cultural battleground.[60] They have served as an "arena of conflict between majority and minority faiths."[61] Various "tensions—between unity and diversity, insiders and outsiders, and majority rule and minority rights—have convulsed American education and American religion for much of the nation's history. At the deepest level they reflect tensions endemic to the American experience as a whole."[62] One commentator opines that "God's place within the public schools of the United States has been debatable, and subject to controversy, for as long as there have been public schools."[63] Perhaps this state of affairs could have been avoided, but this Part will explain how this situation arose and provide a context for the analysis of the narratives constructed by the courts.

A. RELIGION AND THE COMMON SCHOOL

1. *The Colonial Origins*

The predecessor to the modern common school was a sectarian institution.[64] In Colonial America, it may or may not have been a religious institution in the same sense that the church and the family were.[65] In New England, however, "ministers played the leading roles on local school committees, and instruction was permeated with the themes and content of Puritan theology."[66] In other colonies, the theology of the dominant forms of local Protestantism profoundly shaped teaching aims and methods.[67]

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[60] Gordon Butler, *Cometh the Revolution: The Case for Overruling* McCollum v. Board of Education, 99 DICK. L. REV. 843, 880–82 (1995); Duncan, *supra* note 54, at 586.

[61] Jonathan D. Sarna, *Introduction: The Interplay of Minority and Majority in American Religion*, *in* MINORITY FAITHS AND THE AMERICAN PROTESTANT MAINSTREAM 8 (Jonathan D. Sarna ed., 1998).

[62] *Id.* at 9.

[63] FRASER, *supra* note 49, at 3.

[64] *See* Thomas J. Trimble, Note, *Bible Reading in Public Schools*, 9 VAND. L. REV. 849 (1956).

[65] GLENN, *supra* note 54, at 147. *But see* Joseph W. Harrison, *The Bible, The Constitution and Public Education*, 29 TENN. L. REV. 363, 366 (1962). "In colonial America virtually all schools were church schools." *Id.*

[66] GLENN, *supra* note 54, at 147.

[67] WILLIAM KAILER DUNN, WHAT HAPPENED TO RELIGIOUS EDUCATION?: THE DECLINE OF RELIGIOUS TEACHING IN THE PUBLIC ELEMENTARY SCHOOL, 1776–1861, 18 (1958). *See also* Fuller, *supra* note 54, at 88 ("Beginning with these first [New England] public schools and into the Eighteenth Century, public and private schools taught from a religious perspective.").

Furthermore, teachers were frequently required to have the sponsorship of a suitable religious organization.[68] Not surprisingly, "[t]he textbooks of colonial times bear eloquent testimony to the preponderance of religious instruction."[69]

While the prototype of the modern common school was distinctly religious in character, it engendered relatively little social controversy because so few children attended school of any kind, religious or otherwise.[70] The seeds of conflict had been planted, however, by the growing religious diversity that came to characterize the American colonies.[71]

2. *The Founding*

The Founding did not usher in an era of controversy over the place of religion in the common schools, because the religious character of education was a given. Indeed, one commentator has remarked that "[f]or most in the revolutionary generation, religion, schools, and good government were inextricably linked."[72] It also remained the case that relatively few children received a formal education.[73]

The establishment of a federal form of government did not lead to a paradigm shift, nor did it engender social conflict over the role of religion in education. The new Constitution did not make education a federal responsibility.[74] Thus, patterns established in colonial times remained undisturbed. The Tentative Principle,[75] reflecting the grand compromise of the Founding, makes the states, not the federal government, the primary locus of any religious disputes that might arise.

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[68] DUNN, *supra* note 67, at 17.

[69] *Id.* at 18. Various evangelical Protestant catechisms and the Bible or extracts therefrom appear to have been the major textbooks. *Id.* at 18–20. Thus, "the students had a great amount of religious material before them." *Id.* at 20. Similar patterns can be found in colonial New York. *Id.* at 22–23. Even as the political power of the Puritan church waned during the colonial period, the "schools maintained their religious emphasis" in New England and elsewhere. *Id.* at 24.

[70] *See* DAVID MADSEN, EARLY NATIONAL EDUCATION: 1776–1830, 93 (1974) (arguing that private efforts to educate the poor failed to reach "a very large number of children in the cities and fewer still in the rural areas").

[71] *See* ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA, 1776–1990: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY 22–53 (1992).

[72] FRASER, *supra* note 49, at 23; David Fellman, *Separation of Church and State in the United States: A Summary View*, 1950 WIS. L. REV. 427, 443. This understanding of the relation between religion, schools, and good government persisted well beyond the Founding. *See* Cushman, *supra* note 43, at 476. Indeed, it persists to this very day, in some quarters at least. *See* Butler, *supra* note 60, at 929, 935, 941; James E. Harpster, *Religion, Education and the Law*, 36 MARQ. L. REV. 24, 63–64 (1952).

[73] *See* MADSEN, *supra* note 70, at 93.

[74] *See* Nina J. Crimm, *Core Societal Values Deserve Federal Aid: Schools, Tax Credits, and the Establishment Clause*, 34 GA. L. REV. 1, 50-53 (1999); Elisabeth Jaffe, *A Federally Mandated National School Curriculum: Can Congress Act?*, 24 SETON HALL LEGIS. J. 207, 220–28 (1999). The first comprehensive federal aid to primary and secondary education arrived in 1965. *See* FRASER, *supra* note 49, at 151–52.

[75] *See supra* note 6 and accompanying text.

3. *The Early National Period, the Modern American Common School, and the Emergence of Common School Religion*

The American common school, as we know it, came into being in the 1830s and 1840s.[76] At this time, religious conflict also emerged. Large-scale immigration of Roman Catholics to the United States had begun, concerning many Protestants.[77] The grand compromise of the Founding, whereby liberal and evangelical Protestants ignored their differences, also unraveled.[78] Thus, three groups, Roman Catholics, evangelical Protestants, and liberal Protestants, sought to play a role in the development of the modern common school.

More precisely, each group wanted its own religion taught in the common schools.[79] The Roman Catholics clearly lost.[80] This was the logical outcome in an American Protestant Empire driven by an animus against Roman Catholicism.[81] The more interesting issue concerns the nature of the Protestant religion that came to dominate the modern American common schools.[82] Sectarianism lost because of growing religious diversity, Protestant and otherwise. Some scholars believe that liberal Protestantism shaped and informed common school religion,[83] while others believe that a pan-Protestant form of evangelicalism defined it.[84]

Horace Mann, who played a central role in the development of the modern American public school,[85] was a Unitarian by conversion.[86] One

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[76] FRASER, *supra* note 49, at 23–47; GLENN, *supra* note 54, at 150; John W. Whitehead & Alexis I. Crow, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and* Tinker *Doctrines*, 28 TULSA L.J. 149, 172 (1992).

[77] *See* BEECHER, *supra* note 36 *passim*.

[78] *See generally* William G. McLoughlin, *Religious Freedom and Popular Sovereignty: A Change in the Flow of God's Power, 1730–1830*, *in* IN THE GREAT TRADITION, IN HONOR OF WINTHROP S. HUDSON: ESSAYS ON PLURALISM, VOLUNTARISM, AND REVIVALISM 173–92 (Joseph D. Man & Paul P. Dekar eds., 1982) (demonstrating how the "democratization" of American evangelical Protestantism led to a political and cultural separation of liberal rationalist evangelical Protestantism and pietism revivalist evangelical Protestantism).

[79] *See* GLENN, *supra* note 54, at 146.

[80] *See infra* notes 133–137 and accompanying text.

[81] *See supra* note 5 and accompanying text.

[82] The argument that the modern American common school was in essence a secular enterprise has been made often. *See* R. FREEMAN BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 211 (1950); Fellman, *supra* note 72, at 443; Rosenfield, *supra* note 50, at 578; Jesse E. Wood, Jr., *Religion and the Public Schools*, 1986 BYU L. REV. 349, 352; Robert J. Coan, Note, *Bible Reading in the Public Schools*, 22 ALB. L. REV. 156, 173 (1958). The argument has been made most famously by Felix Frankfurter in *Illinois* ex rel. *McCollum v. Board of Education*, 333 U.S. 203, 214–20 (1948) (Frankfurter, J., concurring). *See infra* notes 524–19 and accompanying text. The secular narratives concerning the development of public education in America, however, are simply wrong. The Revised Tentative Principle proves that the secular narrative is erroneous.

[83] *See generally* GLENN, supra note 54, at 10; Bertram Wyatt-Brown, *Prelude to Abolitionism: Sabbatarian Politics and the Rise of the Second Party System*, 58 J. AM. HIST. 316, 318 (1971).

[84] *See generally* FRASER, *supra* note 49, at 23–47; Virginia Lieson Brereton, *Education and Minority Religions*, *in* MINORITY FAITHS AND THE AMERICAN PROTESANT MAINSTREAM 281 (Jonathan D. Sarna ed., 1998).

[85] *See* GLENN, *supra* note 54, at 146–78; FRASER, *supra* note 49, at 23–47.

[86] DUNN, *supra* note 67, at 305; FRASER, *supra* note 49, at 26–27.

critic of Mann remarks that he and the other liberal Protestant reformers were concerned about "spiritual disunity, the growing gap between their own 'enlightened' values and stubborn vestiges of what they regarded as superstition and fanaticism. It was this that led them to see rural Calvinists and immigrant Catholics as a profound threat to the emerging national society."[87] He adds that Mann

> appears sincerely not to have recognized the extent to which his own belief in human goodness and the centrality of morality to religion constituted an alternative faith— essentially that preached . . . in Unitarian churches—which could not fail to conflict with orthodox beliefs, whether of Protestants or of Roman Catholics.[88]

Mann's prescription for religion in the common schools, "a program which urged the imparting of ethical instruction and such 'basic Christianity' as might be gleaned from the reading of the Bible to the pupils,"[89] was a program "not unlike the sectarian position of Horace Mann as a member of the Unitarian Church, and seems to have been an epitome of [Mann's] own religious creed."[90] Mann failed "to understand the degree to which he was really proposing to make the public schools of Massachusetts a kind of Unitarian parochial school system that would mirror his own deeply held Unitarian beliefs."[91] To the extent, therefore, that Bible reading coupled with moral instruction constitutes an expression of Unitarianism, a form of liberal Protestantism, and became the normative mode of religious exercises in the common schools, one might conclude that common school religion was a form of liberal Protestantism.[92]

This supposition, however, fails to account for the role, views, and theology of evangelical Protestants. Evangelical Protestants both resisted Mann and made the common school an instrument of their own religious preferences. They trumped the conceit that "core Christianity" was tantamount to Unitarianism[93] and transmuted the idea of such a form of Christianity into evangelical pan-Protestantism for which they had both historical and pragmatic warrant.[94]

Much of the orthodox evangelical Protestant objection to Mann's reforms and to the common school religion that Mann favored was rooted in theology.[95] Some objected to "the removal [from common school religion] of sin and redemption from the very center of the religious view of life."[96] Others resisted not only Mann's religious program but also the

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[87] GLENN, *supra* note 54, at 8.

[88] *Id.* at 166.

[89] DUNN, *supra* note 67, at 305.

[90] *Id.* at 305.

[91] FRASER, *supra* note 49, at 27.

[92] It has been suggested that Mann and other liberal reformers were influenced by the broad sweep of early Nineteenth Century European liberal reform. GLENN, *supra* note 54, at 147.

[93] FRASER, *supra* note 49, at 26–27.

[94] The history of the Anglo-American Reformation is, in large part, the story of the growth and development of an Anglo-American pan-Protestantism. *See generally* Newsom, *supra* note 1.

[95] GLENN, *supra* note 54, at 180–96.

[96] *Id.* at 182.

idea of the common school itself, preferring a system of Protestant religious schools.[97] The latter idea never took root in the evangelical Protestant imagination until the recent rapid growth of so-called "Christian" Academies. This orthodox evangelical Protestant objection to Mann's program collapsed largely because of its fear of non-Protestant immigrants. Irish and German Roman Catholics "contribute[d] heavily to forming a 'united front' among Protestants who otherwise might have been at each other's throats."[98]

Evangelicals embraced the idea of the common school and took the lead in developing public schools in those precincts on the American frontier far away from the Atlantic seaboard: "it was in the west of the great Mississippi Valley, in the settlement of what is now known as the Midwest, that the common school took hold most firmly as an instrument of education and as a means of creating a civic religion for the new nation."[99] Thus, the evangelicals were content to have "the right form of civil religion" taught in the common schools:[100]

> Protestant support for the public schools as they were developing in the 1830s and 1840s was based on "a new religious synthesis, one which would give members of the diverse sects a common Faith." And this religious synthesis was being built by the evangelicals themselves. Thus as the frontier opened in Ohio and farther west, "Missionaries attempted to provide a Protestant paidea for settlers on the frontier: a total education through the common school, sectarian academies and colleges, Sunday Schools, the pulpit, religious reading, and a number of formal and informal associations."[101]

This "religious synthesis" is nothing other than pan-Protestantism of an evangelical sort that found expression as early as the days of the Tudors.[102] While the sense of common identity between various Anglo-Protestants collapsed spectacularly during the English Civil War, it reemerged from time to time, largely for pragmatic reasons, and sometimes for principled or theoretical reasons. Pan-Protestantism took shape in America because of the broad sweep of the Great Awakenings[103] and because of the explosive growth in the number of Protestant denominations in America. It coexisted with interdenominational conflict,[104] but the idea of pan-Protestant cooperation in the Protestantizing of American school children, a central objective of the American Protestant Empire, was irresistible. Hence the "religious synthesis," born out of the processes of history itself.

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[97] *Id.* at 182–83.

[98] *Id.* at 170.

[99] FRASER, *supra* note 49, at 31.

[100] *Id.* at 33.

[101] *Id.* (citations omitted).

[102] *See generally* Newsom, *supra* note 1.

[103] *See id.* at 241.

[104] *See* Fred J. Hood, *Evolution of the Denomination Among the Reformed of the Middle and Southern States, 1870–1840*, *in* DENOMINATIONALISM 139-160 (Russell E. Richey ed., 1977); Charles Newton Brickley, The Episcopal Church in Protestant America, 1800–1860: A Study in Thought and Action (1946) (unpublished Ph.D. dissertation, Clark University) (on file with the Bishop Payne Library, Virginia Theological Seminary).

Mann may have fancied himself particularly clever in forming an alliance with the American Bible Society, "an unquestionably evangelical though nonsectarian organization."[105] Indeed, this alliance provided Mann with ample weapons in his struggle with evangelicals opposed to his reform program. Ultimately, however, Mann outfoxed himself.

Unitarians in Mann's Boston parish may have thought that they could read the Scripture in its entirety and understand it through the prism of liberal Protestantism, but it is questionable that this was a tenable position. For example, when St. John's Gospel triumphantly proclaims Jesus as Word-God made Flesh,[106] it is difficult to see how Unitarians are going to get around this text. Doing so requires a certain intellectual agility. Hence reading the First Chapter of St. John's Gospel to elementary school children is likely to produce a recognition of the divinity of Christ.

Evangelicals had the numbers,[107] the missionary zeal,[108] and most importantly, the Bible on their side. Dunn writes:

> Reliance upon the Bible as the sole criterion of faith is one of the most fundamental dogmas of Protestantism. Added to this is the principle of "private judgment." Many Protestants believe that the Holy Spirit will illumine the mind of the individual as to what God wishes him to understand from the passage which he is reading. No authoritative interpreter on this earth, acting as God's commissioned representative, is necessary or desirable.
>
> In the light of these two dogmas one can understand the earnest desire upon the part of Protestants that the child hear the Scriptures, and hear them directly. Many Protestants would, perhaps, feel that, if a thorough program of Bible reading could be maintained in the common schools, not only would this be enough in the way of a religious instruction program, but it would be sufficient to insure the continuance of the public schools as essentially Protestant institutions. Actually there is evidence to show that there were some Protestants who, rejecting the idea of Protestant parochial schools, pressed for Bible reading as the solution of the dilemma—keep religion in the schools, but keep sectarian indoctrination out.[109]

Once Bible reading was accepted as a part of common school religion, this religion would be shaped by evangelical Protestants, rather than liberal

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[105] GLENN, *supra* note 54, at 195.

[106] Stated:

> In the beginning was the Word, and the Word was with God, and the Word was God. He was in the beginning with God. All things came into being through him, and without him not one thing came into being. . . . And the Word became flesh and lived among us.

John 1:1–3, 14 (New Rev. Standard Version).

[107] *See* FINKE & STARK, *supra* note 71, at 54–108.

[108] Unitarians in Mann's day were complacent and did not proselytize. GLENN, *supra* note 54, at 151.

[109] DUNN, *supra* note 67, at 259 (citations omitted). *See also* Coan, *supra* note 82, at 161 (pointing out that "[b]ecause of the traditional Protestant practice of placing great emphasis on Bible reading, it remained in the schools almost as a symbol of the Protestant domination of the public school system").

Protestants. Thus, the common school religion that emerged was a variation of pan-Protestantism of the evangelical Protestant sort.

Theology is not the only evidence of the nature of common school religion. One merely has to consider the parties to disputes over religion in the common schools. One finds religious minorities and nonbelievers locked in a struggle with majoritarian religious forces that cannot be characterized as liberal Protestants by any stretch of the imagination. It is difficult to imagine that the people responsible for religion in the common schools, for example, in Iowa in the 1880s,[110] in Wisconsin[111] and Michigan[112] in the 1890s, and in Nebraska,[113] Kansas,[114] Kentucky,[115] Texas,[116] and Illinois[117] in the first decade of the Twentieth Century, were sectarian liberals, Unitarian or otherwise. Critics of common school religion have correctly understood that the majoritarian religious groups backing that religion were evangelical Protestants. Thus, "[t]he common-school curriculum promoted a religious orthodoxy of its own that was centered on the teachings of mainstream Protestantism,"[118] and "the original purposes of public education in the United States [were] promoting republican/protestant morality and civil literacy."[119] Finally, "[l]arge numbers of Protestants considered schools as central to the creation and support of a homogeneous, moral, and politically enlightened democracy. For many, morality, national unity, and democracy were virtually synonymous with Protestant Christianity."[120] Perhaps most telling, there has been a "long-term sense of loss and uncertainty" that "white Protestant Americans" have suffered as a result of "the Supreme Court's ban on official prayers in schools."[121] These "white Protestant Americans" tend to be overwhelmingly evangelicals, not liberals.[122] Liberal Protestantism of the present day, by contrast, tends to support this ban.[123] Thus, the basic fact that common school religion is a form of evangelical Protestantism shapes more than 150 years of struggle over the legitimacy of that religion in the common schools.

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[110] Moore v. Monroe, 20 N.W. 475 (Iowa 1884).

[111] State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967 (Wis. 1890).

[112] Pfeiffer v. Bd. of Educ., 77 N.W. 250 (Mich. 1898).

[113] State *ex rel*. Freeman v. Scheve, 93 N.W. 169 (Neb. 1903).

[114] Billard v. Bd. of Educ., 76 P. 422 (Kan. 1904).

[115] Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792 (Ky. Ct. App. 1905).

[116] Church v. Bullock, 109 S.W. 115 (Tex. 1908).

[117] People *ex rel*. Ring v. Bd. of Educ., 92 N.E. 251 (Ill. 1910).

[118] Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 666 (1998).

[119] Butler, *supra* note 60, at 919.

[120] Brereton, *supra* note 84, at 282.

[121] FRASER, *supra* note 49, at 47.

[122] *See* WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT 1–23 (1996).

[123] *See* FRASER, *supra* note 49, at 150.

B. RESISTANCE TO AND PERSISTENCE IN SUPPORT OF COMMON SCHOOL RELIGION

In order to place the state court opinions in context, a brief review of Roman Catholic and Jewish resistance to common school religion follows. Roman Catholic resistance dates back to the earliest days of the republic[124] and, in one form or another, continues to the present time.[125] Jewish resistance became a fixture of Twentieth Century America.[126] By the same token, persistence in advancing common school religion has been a continuing fact of American life to the present time. This subpart will consider this persistence as it manifested itself until the time of the Incorporation and the United States Supreme Court decisions in *Engel v. Vitale*[127] and *School District v. Schempp*.[128] Persistence in the face of these and other Court decisions limiting the ability of evangelical Protestants to use the common schools to advance their religious and political agenda will be discussed in Part V.

1. *Resistance*

Roman Catholic opposition to common school religion took several forms.[129] The earliest form sought to curb the excesses of the common schools through cooperation, hoping "that Catholics would be able to unite with members of other denominations in the establishment of schools that would be acceptable to all. No doubt, the new conditions led to the expectation of the appearance of a spirit of complete equality for all denominations."[130] Because ecumenical cooperation was sorely lacking,[131] the Catholic Church leadership quickly became convinced of the necessity of developing a strategy to counter efforts to protestantize Roman Catholic school children.[132]

New York provided the venue for testing one method for curbing protestantizing programs. By the late 1830s, the state had adopted a system of state aid to "schools maintained by most Protestant denominations."[133]

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[124] DUNN, *supra* note 67, at 205–20.

[125] *See, e.g.*, Jay Dolan, *Catholicism and American Culture: Strategies for Survival*, *in* MINORITY FAITHS AND THE AMERICAN PROTESTANT MAINSTREAM, *supra* note 61, .

[126] Brereton, *supra* note 84, at 290.

[127] 370 U.S. 421 (1962).

[128] 374 U.S. 203 (1963).

[129] *See* GLENN, *supra* note 54, at 197 (examining "the evolving reasons given by Catholic leaders for their demand, at first, that common schools be purged of 'sectarian' Protestant teaching and, subsequently, that Catholic children be educated in explicitly Catholic schools, if possible with public financial support").

[130] DUNN, *supra* note 67, at 206–07.

[131] In some localities, however, grand arguments yielded to practical accommodations. *See* Brereton, *supra* note 84. But these were clearly the exception and not the rule.

[132] DUNN, *supra* note 67, at 207–09.

[133] R. LAURENCE MOORE, RELIGIOUS OUTSIDERS AND THE MAKING OF AMERICANS 55 (1986). Interestingly enough, New York had previously provided aid for Roman Catholic parochial schools, but that aid was terminated in the 1820s and Roman Catholics "suffered in silence for fifteen years." FRASER, *supra* note 49, at 52–55.

Archbishop Hughes, reasonably enough, sought to extend the principle of religious pluralism to include Roman Catholic schools. The New York City Public School Society, however, refused to fund Catholic schools.[134] The resulting struggle produced a mixed verdict. Hughes destroyed the Society, but he failed to gain state financial aid for Roman Catholic parochial schools.[135] Indeed, the "no aid" principle became embedded in the American psyche because it accorded with the anti-Roman Catholic bias of the American Protestant Empire.[136] On the positive side, by destroying the Society, Hughes eliminated a biased Protestant influence on state-supported elementary and secondary education. He also persuaded New York officials to confront "blatant anti-Catholic references in school textbooks," and to challenge the practice of reading the King James Version ("KJV") in New York public schools without note or comment, a practice which reflected a Protestant point of view.[137]

Neither a secularist nor a nonsectarian solution would satisfy Roman Catholic concerns. Church leaders consistently criticized both solutions as "Godless" and corrupting of the Roman Catholic faith.[138] In light of the "no aid" principle, the only realistic answer left to the Church was the establishment of a vast system of parochial schools.[139] By 1884, the American Roman Catholic hierarchy firmly committed itself to such a program.[140] Even so, the Church "kept attempting forays—largely unsuccessful—into the public treasury to augment funding for that system."[141] Some members of the hierarchy sought an accommodation, harkening back to the first response of the American Roman Catholic Church, whereby Roman Catholic children could attend the common schools.[142] This represented a distinctly minority view; lurking behind it was the belief, stated or unstated, that Roman Catholics needed to assimilate into an American culture. The "conservatives" in the hierarchy believed that no such need existed at all. Archbishop Hughes insisted that "Catholics did not have to become American. They already were."[143]

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[134] MOORE, *supra* note 133, at 55.

[135] *Id.*

[136] It is only in our time that the principle has come under sustained assault under the banner of vouchers. *See* Keith Syler, *Parental Choice v. State Monopoly: Mother Knows Best—A Comment on America's Schools and Vouchers*, 68 U. CIN. L. REV. 1331 (2000).

[137] MOORE, *supra* note 133, at 55. Times change. A century or so later, a New York court upheld a 1901 New York statute permitting Bible reading in New York City public schools. The law permitted, in ways not altogether clear, readings from Catholic and Jewish, as well as Protestant, Bibles. *See* Lewis v. Bd. of Educ., 285 N.Y.S. 164, 172 (App. Div. 1935).

[138] DUNN, *supra* note 67, at 216–17.

[139] *See generally* FRASER, *supra* note 49, at 57–65.

[140] *See* Documents of Plenary Council, Title VI, Chap. I, Sec. 199, *in* BERNARD JULIUS MEIRING, EDUCATIONAL ASPECTS OF THE LEGISLATION OF THE COUNCILS OF BALTIMORE: 1829–1884, at 301 (Bernard Julius Meiring trans., 1978) (decreeing that "[n]ear each church, where it does not exist, a parochial school is to be erected within two years from the promulgation of this Council"). *See also* Brereton, *supra* note 84, at 289.

[141] Brereton, *supra* note 84, at 280.

[142] Dolan, *supra* note 125, at 73–74. *See also* FRASER, *supra* note 49, at 60–65.

[143] MOORE, *supra* note 133, at 56.

Roman Catholic teachings about Bible reading furnish the most direct link to the state law cases at issue here:

> On the question of Bible reading in the public schools, Catholic leaders formulated a policy of objection to the practice on two scores: the reading without comment, and the reading to Catholic children of a version of the Scriptures which was not approved by the Catholic Church.
>
> Reading the Holy Scriptures without comment, given especially the historical background of the common school, implied acceptance of the principle of private interpretation. . . . Moreover, the English language edition read in the schools was almost without exception the "King James" Version, generally accepted by all Protestants speaking the English tongue, but not approved by the Catholic Church.[144]

In 1840, the American Catholic bishops indicated that Roman Catholics "reject the principle of 'private interpretation' on two counts . . . : first, the principle denies the commission to teach which Christ gave to the Church, and, second, it assumes that the right to make such interpretations lies with the individual rather than with the Church."[145]

This position posed practical problems for the hierarchy. It appeared to some Protestants that Roman Catholics opposed Bible reading in the common schools altogether. Actually, the position was somewhat more pragmatic, if not nuanced. It sufficed, as Bishop Kenrick of Philadelphia wrote in 1842, not that the Roman Catholic version of the Bible be adopted for general use, but that its use, rather than that of the King James Version, by Roman Catholic common school students be respected. Kenrick asked that the Philadelphia public school authorities "provide Catholic children with the Catholic version."[146] Kenrick's request, even if granted,[147] would not have adequately responded to the problem of private judgment overwhelming the teaching authority of the Church. The hierarchy, however, had also called for a home-based, parent-driven program of Bible reading and study.[148] In particular, "the children were to learn, not by indiscriminate reading of the parts they would scarcely be able to understand, but by having pointed out to them simple and edifying parts which would make them aware of the book's rich treasures."[149] Fortified with adequate home training, Roman Catholic common school children could manage reading from the Roman Catholic version of the Bible in school without suffering too much damage as a result of the siren-call of private judgment.

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[144] DUNN, *supra* note 67, at 267–68.

[145] *Id.* at 268.

[146] *Id.* at 271 (quoting Bishop Francis P. Kendrick). Note that the New York law upheld in *Lewis v. Board of Education*, essentially adopted Kenrick's recommended approach, although the mechanics of access to various translations of the Bible under the New York law are not clear. 285 N.Y.S. 164 (App. Div. 1935).

[147] In fact, the request was denied. DUNN, *supra* note 67, at 271.

[148] *Id.* at 270.

[149] *Id.*

The call for such Bible reading is risky, considering the Roman Catholic position on private interpretation. Indeed, this problem of the "Catholic version option" would come to haunt several Roman Catholic litigants in their challenges to reading the KJV in the common schools.[150] It is equally the case that Kenrick's call simply constituted an effort to make the best of a bad situation. If Roman Catholic school children must be exposed to Bible reading not under the control of the Roman Catholic Church, or of Roman Catholic families, then at least expose these children to the authorized Roman Catholic version of the Bible. The fact still remains that this situation is tailor-made for the American Protestant Empire and its willingness to wear down its religious opponents by a war of attrition in which the KJV was shoved down the throats of American public school children.

Jewish resistance to common school religion differed from that of the Roman Catholics. Ultimately, American Jews concluded that they had enough of common school protestantization.[151] Many were sufficiently concerned about assimilation into a Christian world to decide that resistance was necessary.[152]

American Jews, however, never fully embraced the Roman Catholic idea of a comprehensive and widespread system of Jewish parochial schools. Indeed, by the 1870s, most Jewish schools had closed, as Jewish children flocked to the public schools.[153] Differences between Jewish and Roman Catholic theology on the subject of religious teaching authority may explain the differences in modes of resistance to common school religion, but the Jewish resistance is real and has lasted into our time.[154] One writer finds much in "the Jewish encounter with Protestant America" to be concerned about.[155] He sees "Christianization" of the common schools as "further isolat[ing] American Jews."[156]

Jewish litigants have raised a simple and straightforward objection to common school religion: it is not their religion. It is not even a variant or heretical or schismatic form of their religion. This objection has always tested the limits of the claims of American religious majoritarianism. Thus Jewish resistance has been of particular value in the fight for religious freedom and equality. Roman Catholics frequently found themselves arguing about competing claims of Christian truth, inadvertently blunting the power and force of their objection to common school religion. Given

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[150] *See infra* notes 188, 264–271 and accompanying text.

[151] Mark A. Noll, *The Bible, Minority Faiths, and the American Protestant Mainstream, 1860–1925*, *in* MINORITY FAITHS AND THE AMERICAN PROTESTANT MAINSTREAM, *supra* note 61, at 199–200.

[152] Sarna, *supra* note 61, at 1–3.

[153] *Id. See also* Brereton, *supra* note 84, at 291.

[154] *See* FRASER, *supra* note 49, at 144–45 (citing the July 1995 testimony of Howard Squadron, a prominent American Jewish leader, about what it meant to grow up with common school religion in the 1950s).

[155] EGAL FELDMAN, DUAL DESTINIES: THE JEWISH ENCOUNTER WITH PROTESTANT AMERICA 243 (1990).

[156] *Id.*

the pervasive anti-Roman Catholic bias of the American Protestant Empire, one can think of many reasons why the Roman Catholic objection would all too often fall on rocky soil.

It is tempting to conclude that resistance worked. The Supreme Court has established a Revised Tentative Principle[157] that largely undoes common school religion. This conclusion, however, overlooks the possibility that the Revised Tentative Principle responds largely to Protestant concerns, not the concerns of Roman Catholics, Jews, Free-Thinkers, and others who have challenged common school religion over the years.[158] When the interests of those Protestants favoring the Revised Tentative Principle and the interests of the resistors begin to diverge, then we shall see whether resistance gained more than a temporary victory resting in a brief or momentary convergence of interests.[159]

2. *Persistence: 1840 to 1960*

The resistance of religious minorities engendered a countervailing persistence and insistence on having pan-Protestantism of an evangelical sort in the common schools. This persistence, during the years in question, took two forms: use of extra-legal procedures, including violence, and use of the legislative process to mandate common school religion of the kind described.

Bishop Kendrick's call for an accommodation, to have Roman Catholic children read from the Douay or Catholic version of Holy Scriptures, not only fell on deaf ears,[160] but led directly[161] to anti-Roman Catholic rioting in Philadelphia in the 1840s.[162] The "Philadelphia Bible Riots of 1844" took over fifty lives.[163] A "rallying cr[y] of the Nativist mobs was 'The Bible in the Public School.'"[164] Ten years earlier, trouble erupted in Boston: "an angry Boston mob burned down [a Roman Catholic] Convent in 1834 because Catholics has protested Bible reading and prayer recitals in public schools."[165] Ugly, crude, anti-Roman Catholicism did not disappear, but it flared up at regular intervals. In the 1890s, the American Protective

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[157] *See* Newsom, *supra* note 1, at 263.

[158] *See infra* Part III.A.

[159] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 532–33 (1980); Mary L. Dudziak, *Desegregation As a Cold War Imperative*, 41 STAN. L. REV. 61, 64 (1988).

[160] *See supra* note 147 and accompanying text.

[161] It has been suggested that broader economic and political tensions spawned the Philadelphia riots, "[y]et the anti-Catholic bitterness of those days . . . seems to have made the Bishop's efforts the occasion, if not the direct cause, of [the riots]." DUNN, *supra* note 67, at 273.

[162] *See* V.T. THAYER & MARTIN LEVIT, THE ROLE OF THE SCHOOL IN AMERICAN SOCIETY 409 (1966). "[In] Philadelphia in 1844, for example, Catholic schools were burned by an irate mob in answer to a Catholic bishop's suggestion that public schools exempt Catholic children from the necessity of reading from the Protestant version of the Bible." *Id.*

[163] RAVITCH, *supra* note 39, at 4, 6. *See also* ALLEY, *supra* note 38, at 227.

[164] DUNN, *supra* note 67, at 272.

[165] Viteritti, *supra* note 118, at 667.

Association took the lead in mounting a virulent attack on Roman Catholics.[166] Bias against Roman Catholics has continued ever since.[167]

In more recent times, the resort to extra-legal means to guarantee common school religion of evangelical Protestant's liking took the form of evasion of restrictions designed to guard against overreaching by evangelicals. In a study of religious instruction in Knoxville and Knox County, Tennessee in 1960, the author found much about which to worry.[168] Ministers were frequently invited to give talks in the schools.[169] Most schools invited only Protestant ministers who gave sectarian talks from which dissenting students were not excused.[170] The author concluded that majoritarian religion was in control, particularly in the rural parts of Knox County.[171] Most importantly, he concluded that "[i]t is unlikely that any of the practices described . . . will be eliminated voluntarily from the public schools."[172] There is little reason to believe that Knoxville and Knox County differed substantially from many other parts of the country, especially where evangelical Protestants constituted the overwhelming majority of the local population.

The riots and the subterfuge serve as bookends for the other basic mode of persistence. Bible reading in the public schools was a common event, sanctioned by most of the court cases decided in the Nineteenth Century.[173] At the dawn of the Twentieth Century, however, there is some reason to think that either the incidence of Bible reading fell off or that a legal command requiring Bible reading in the common schools was missing in most American states.[174] This decline halted in 1913,[175] as there occurred "a period of reversion to the required reading of the Bible and the recitation of prayers in public schools."[176] By 1950 or thereabouts, the vast majority of American states had come to require or permit Bible reading in the common schools.[177] Resistance to the "reversion" in the form of lawsuits came at a steady pace from 1900 until 1935. Litigation picked up again in

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[166] Robert T. Handy, *Majority-Minority Confrontations, Church-State Patterns, and the U.S. Supreme Court*, *in* MINORITY FAITHS AND THE AMERICAN PROTESTANT MAINSTREAM, *supra* note 61 at 315.

[167] *See* Newsom, *supra* note 1, at 256–57.

[168] *See generally* Harrison, *supra* note 65, at 395–410.

[169] *Id.* at 403.

[170] *Id.* at 404.

[171] *Id.* at 410.

[172] *Id.*

[173] *See infra* Part III.A.

[174] *See* THAYER & LEVIT, *supra* note 162, at 410 (noting that "[b]y 1900 Massachusetts was the only state . . . in which morning prayers and Bible reading were required by statute, although, to be sure, in many schools throughout the nation these practices were engaged in without statutory sanction or prohibition.").

[175] *Id.*

[176] *Id.* at 457. *See also* BUTTS, *supra* note 82, at 187 (remarking that "since 1900, and especially since the First World War, the demand has grown insistently that some forms of religious instruction should be given in the public schools").

[177] *See* BUTTS, *supra* note 82, at 192; Boyer, *supra* note 39, at 181,184; Fellman, *supra* note 72, at 464; Harpster, *supra* note 72, at 43.

the 1950s until the Supreme Court ended state-sponsored common school prayer in 1962[178] and Bible reading in 1963.[179]

III. STATE COURT CASES ON COMMON SCHOOL RELIGION

Subpart A will briefly discuss the state cases. Subpart B will review the narratives constructed by the state courts in support of common school religion (hereinafter referred to as "Pro Narratives"). Subpart C will construct the narratives that one can glean from the state court opinions in opposition to common school religion (hereinafter referred to as "Counter Narratives").

A. THE STATE CASES SUMMARIZED

The common features of the state cases are (1) state-sponsored or state-led Bible reading without comment, (2) prayer, or (3) both Bible reading and prayer together, as an integral part of the program of instruction in the public schools.[180] This subpart will sort the cases on the basis of the official school exercise in question and the outcome of the case. It will also note the rules regarding attendance at or participation in these exercises and any dissenting opinions. In all three categories, the weight of authority upheld common school religion.

1. *The "Bible" Cases*

The eight Bible cases fall into three subcategories. The first involves the use of the Bible, or portions or extracts therefrom, for the purposes of reading instruction. The second and the third involve the use of the Bible, or portions or extracts therefrom, as an opening or closing school exercise. The difference between the second and the third class of Bible cases

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[178] Engel v. Vitale, 370 U.S. 421, 421 (1962).

[179] Sch. Dist. v. Schempp, 374 U.S. 203, 203 (1963).

[180] There are two cases that do not fit into the factual patterns heretofore discussed. Nevertheless, these cases restrain, to some extent, the ability of the American Protestant Empire to work its will on American school children.

In *Washington* ex rel. *Dearle v. Frazier*, 173 P. 35, 35 (Wash. 1918), the court examined a state school program whereby Bible study done outside of school would be given school credit. The state promulgated a syllabus of Bible study and conducted examinations of the students participating in the off-campus Bible study. *Id.* at 35–36. Plaintiffs, parents of school children participating in such Bible study, sought a writ of mandate to compel the school board to give an examination in the course of Bible study and to give academic credits therefore. *Id.* The local school board had apparently refused to comply with the plan. The court found for the local school board. *Id.* at 35–40.

In *Tudor v. Board of Education*, 100 A.2d 857, 859 (N.J. 1953), parents of public school students brought suit seeking, inter alia, an injunction against the distribution of the Gideon Bible in public school. One plaintiff was Jewish and the other was Roman Catholic. *Id.* As to the Roman Catholic plaintiff, the issue became moot when, after the action was commenced, the Roman Catholic child transferred from the public school to a Roman Catholic parochial school. *Id.* The Gideon Bible consists of extracts from the King James Version ("KJV"), "containing all of the New Testament, all of the Book of Psalms from the Old Testament, [and] all of the Book of Proverbs from the Old Testament." *Id.* at 858. The court held for the Jewish plaintiffs. *Id.* at 866–69.

concerns the version or versions of the Bible theoretically available for use in those exercises.

The version of the Bible employed in these cases is almost invariably the KJV.[181] The Epistle Dedicatory to the KJV makes it clear that it was meant to be a weapon of the Church of England, the Anglicans, in the continuing struggle between Anglicans and Roman Catholics on the one hand and between Anglicans and radical separatist Protestants on the other hand.[182] Over time, however, the KJV became the standard form of the Bible for American Protestantism, both Anglican and Evangelical.[183] In the first two subcategories of Bible cases, the version of the Bible at issue was the KJV. In the third subcategory, other versions, one Roman Catholic[184] and one Jewish,[185] were available for use.[186]

The first subcategory of Bible reading cases involved reading instruction using the KJV. The lone case in this subcategory, *Donahoe v. Richards*,[187] upheld common school prayer.[188] Of the five cases in the second subcategory, the class of cases in which the KJV was read to students as part of an official school exercise, four of the cases, *McCormick v. Burt*,[189] *Pfeiffer v. Board of Education*,[190] *Kaplan v. Independent School District*,[191] and *People* ex rel. *Vollmar v. Stanley*,[192] upheld common school

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[181] The KJV was prepared by English Protestant scholars and theologians and published in 1611, during the reign of King James I. People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 253–54 (Ill. 1910).

[182] The translators refer to "Popish Persons at home or abroad" who would traduce and malign the translators, and to "selfconceited Brethren" who respect no authority but their own. *The Epistle Dedicatory*, *in* THE HOLY BIBLE CONTAINING THE OLD AND NEW TESTAMENTS TRANSLATED OUT OF THE ORIGINAL TONGUES: AND WITH THE FORMER TRANSLATIONS DILIGENTLY COMPARED AND REVISED, BY HIS MAJESTY'S SPECIAL COMMAND, at vi (Eyre and Spottiswoode Ltd. & A.J. Holman Co. ed.). For a discussion of the conflicts between Anglicans, Roman Catholics, and separationist Protestants, *see* A.G. DICKENS, THE ENGLISH REFORMATION 362–77 (2d ed. 1989); CHARLES J. GEORGE & KATHERINE GEORGE, THE PROTESTANT MIND OF THE ENGLISH REFORMATION, 1570–1640, at 375–418 (1961).

[183] *See* PHYLLIS CORZINE, THE KING JAMES BIBLE: CHRISTIANITY'S DEFINITIVE TEXT (2000).

[184] The Roman Catholic version is the Douay Bible. *See* Noll, *supra* note 151, at 198, 204.

[185] English language Jewish versions of the Old Testament emerged in the late Nineteenth and early Twentieth Centuries. *Id.* at 201–04.

[186] The procedures and mechanisms for choosing versions of the Bible are not indicated in most of these cases.

[187] 38 Me. 376 (1854).

[188] *Donahoe* is actually two separate cases. In the first case, the action was brought by a father on his own behalf for damages due to the expulsion of his daughter from her local public school. *Id.* at 376–79. In the second case, plaintiff was a Roman Catholic schoolgirl. *Id.* at 380. Through her father as next friend, plaintiff sued the local school officials to recover damages for her expulsion from school for refusing to read the KJV in a reading instruction class. *Id.* at 380. The school officials had ordered that it be used. *Id.* The applicable rules do not appear to have permitted the student to leave the classroom during the reading instruction (hereinafter referred to as the right to "opt out"). This matter the father apparently did not pursue, for he was prepared to have his daughter read in the common school from the Douay Version of the Bible. *Id.* at 400. In this regard, he was following the strategy of Bishop Kenrick. *See supra* notes 144–149 and accompanying text. The strategy did Donahoe no good. The court ruled for the defendants, upholding the use of the KJV. *Donahoe*, 38 Me. at 413.

[189] 95 Ill. 263 (1880).

[190] 77 N.W. 250 (Mich. 1898).

[191] 214 N.W. 18 (Minn. 1927).

[192] 255 P. 610 (Colo. 1927).

religion.[193] One case, *State* ex rel. *Weiss v. District Board*,[194] struck it down.[195] Of the two cases in the final subcategory, where various versions of the Bible were theoretically available for use, one case, *Lewis v. Board of Education*,[196] upheld common school religion.[197] The other case, *Board of Education v. Minor*,[198] upheld a rule prohibiting common school religion.[199]

2. *The "Prayer" Cases*

The two cases in the second category, the "Prayer" category, *Billard v. Board of Education*[200] and *Engel v. Vitale*,[201] upheld common school religion.[202]

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[193] In *McCormick*, plaintiff, a Roman Catholic student, sued to recover damages for having been suspended from school because of his refusal to follow the school's rules in connection with a school exercise involving reading from the KJV (hereinafter "KJV Reading"). 95 Ill. at 263. The rules permitted the plaintiff to opt out, or to remain in the classroom, but "lay aside his books and remain quiet" (the right to refrain from participation). *Id.* at 264. The plaintiff refused to do either. *Id.* at 264–65. The court held for the defendant. *Id.* at 266–67.

In *Pfeiffer*, the plaintiff, a taxpayer and parent of a school boy, sought mandamus to compel the defendant to stop KJV Reading. 77 N.W. at 250. The students had a right to opt out. *Id.* at 250–51. The court, minus one dissenting opinion, held for the school board. *Id.* at 253.

In *Kaplan*, the plaintiffs filed suit for an injunction to compel the School District to end KJV Old Testament Reading. 214 N.W. at 18. The religious affiliation, if any, of the plaintiffs was not disclosed, and the students had the right to opt out. *Id.* The court found for the defendant. *Id.* at 21. One judge dissented. *Id.* at 22 (Wilson, C.J., dissenting).

In *Vollmar*, the relator, a Roman Catholic, sought mandamus to end KJV Reading. 255 P. at 610. The court denied the relief sought but granted the plaintiff and his children the right to opt out of the exercises complained of. *Id.* at 618. Two judges dissented, holding that the exercises were valid and there should be no right to opt out. *Id.* at 618–22 (Adams, J., dissenting).

[194] 44 N.W. 967 (Wis. 1890).

[195] In *Weiss*, the plaintiffs, Roman Catholics, sought mandamus to require the public school officials to discontinue KJV Reading. 44 N.W. at 967. Despite a right to opt out, the court granted the relief sought. *Id.* at 976.

[196] 285 N.Y.S. 164 (App. Div. 1935).

[197] In *Lewis*, a taxpayer brought suit, inter alia, to restrain Bible reading in the common schools. 285 N.Y.S. at 164. The Douay Version (Roman Catholic), the KJV, Bible Readings, International Bible, and portions from the Isaac Lesser translation of the Hebrew Bible were available for use. *Id.* at 172. It is not clear how the version to be read was selected, and by whom. It is also not clear whether students had the right to opt out. The objecting taxpayer lost, the single-judge court finding for the defendant. *Id.* at 174.

[198] 23 Ohio St. 211 (1872).

[199] In 1869, the Cincinnati, Ohio Board of Education adopted a rule banning religious instruction and the reading of religious books, including the Bible, in the common schools of Cincinnati. *See* Handy, *supra* note 166, at 317; P. Raymond Bartholomew, Note, *Religion and the Public Schools*, 20 VAND. L. Rev. 1078, 1083–84 (1967). The Board also repealed a rule that permitted teachers to read from the Bible, or to permit students to do so. If students were chosen to read from the Bible, the old rule explicitly stated that they could select the version their parents might prefer. It is not clear under this now repealed rule which version or versions of the Bible the teachers might use in these opening exercises, because the old rule was silent on this point. The old rule did not in so many words, however, mandate teacher use of the KJV. The new rule was challenged in *Minor*, 23 Ohio St. at 211, by Cincinnati taxpayers seeking to enjoin the Board from carrying out the new rules which effectively banned Bible reading in the Cincinnati common schools. On appeal, the Ohio Supreme Court ruled in favor of the Board. *Id.* at 254

[200] 76 P. 422 (Kan. 1904).

3. *The "Service Exercises" Cases*

Thirteen cases involved public school exercises, typically at the opening of the school day, at which the Bible, almost invariably the KJV, was read and prayers were said, usually by the teacher (hereinafter "Service Exercises"). In addition, there may have been hymn singing or other activities of a similar nature. It may be useful to consider these cases with reference to the right to opt out, or to refrain from participating in the offending religious exercises. The first set of cases in this third category involved situations in which there was no right to opt out, no right to refrain, or no right to do either. The fact patterns are remarkably similar. The second set of cases here involved circumstances where there was a right to opt out. Again, the fact patterns in this second set are remarkably similar.

Of the six "no-right-to-opt-out" Service Exercise cases, three—*Spiller v. Inhabitants of Woburn*,[203] *Church v. Bullock*,[204] and *Carden v. Bland*[205]—upheld common school religion,[206] two—*State* ex rel. *Freeman v. Scheve*[207]

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[201] 176 N.E.2d 579 (N.Y. 1961), *rev'd*, 370 U.S. 421 (1962).

[202] In *Billard*, the exercises complained of consisted, in relevant part, of saying the Lord's Prayer and the Twenty-third Psalm. 76 P. at 422. Both prayers are found in the Bible. The Lord's Prayer is found at *Matthew* 6:9–13 and at *Luke* 11:2–4. The Twenty-third Psalm is found in the *Book of Psalms*. But they are both prayers, meant to be spoken by the one praying, and the words said are addressed to God. *See* THOMAS AQUINAS, SUMMA THEOLOGICA *IIa Question 83 (Paul J. Glenn trans.), *reprinted in* Paul J. Glenn, A Tour of the Summa (5th prtg. TAN Books and Publishers 1978) (defining "prayer" as "a petition, a beseeching, . . . an act of reason . . . 'exhort[ing] us to do what is best'") (citation omitted). The rules apparently did not permit objecting students to opt out, and required them "to refrain from their regular studies and to preserve order during [the exercises]." 76 P. at 422. The plaintiff's son was permitted to opt out by administrative order, but after a time he returned to the classroom and apparently failed to comply with the terms of the "refrain" rule. *Id.* He was subsequently expelled. *Id.* The plaintiff sought mandamus to compel the board to readmit his son and to agree that his son not be required either to opt out or to refrain. *Id.* The court denied the relief. *Id.*

In *Engel*, plaintiffs, taxpayers and parents, sued to compel the school board to discontinue the practice of reciting, at the beginning of the school day, a prayer drafted by New York State public school officials. 176 N.E.2d at 580. The students had the right to opt out. *Id.* The New York Court of Appeals ruled against the plaintiffs. *Id.* at 282. Two judges dissented. *Id.* at 583 (Dye, J., dissenting). The United States Supreme Court granted certiorari and reversed. *Engel*, 370 U.S. at 421.

[203] 94 Mass. (12 Allen) 127 (1866).

[204] 109 S.W. 115 (Tex. 1908).

[205] 288 S.W.2d 718 (Tenn. 1956).

[206] In *Spiller*, a parent sought damages in tort for the expulsion of his daughter from the local grammar school by the local school authorities. 94 Mass. at 127. The school committee regulations required Service Exercises. *Id.* The facts do not indicate the form or version of the Bible read in this case. In response to the plaintiff's objections, the school committee permitted the student to refrain from bowing her head during the prayer portion of the Exercises. *Id.* The plaintiff did not seek the right to refrain, and directed his daughter not to bow her head, whereupon she was excluded from school. *Id.* The court held for the school committee. *Id.* at 129–30.

Church was a suit for mandamus brought by parents objecting to Service Exercises. 109 S.W. at 115. Students were free to refrain from participating in the Exercises, provided that they were present and "behave[d] in an orderly manner." *Id.* at 116. One parent did "not believe in the inspiration of the Bible." *Id.* Two of the parents were Roman Catholic and two were Jewish. *Id.* The court found for the school board.

In *Carden*, the plaintiff, parent of a school child, sought to enjoin Service Exercises. 288 S.W.2d at 718. Additional practices in this case included keeping track of attendance at Sunday school and

and *People* ex rel. *Ring v. Board of Education*[208]—struck down common school religion,[209] and one, *State* ex rel. *Finger v. Weedman*,[210] using language highly critical of common school religion, limited or restricted it by requiring that religious minorities be given the right to opt out.[211]

Of the seven "right-to-opt-out" Service Exercise cases, six, *Moore v. Monroe*,[212] *Hackett v. Brooksville Graded School District*,[213] *Wilkerson v. City of Rome*,[214] *Doremus v. Board of Education*,[215] *Murray v. Curlett*,[216] and *Chamberlin v. Dade County Board of Public Instruction*,[217] upheld common school religion.[218] One case, *Herold v. Parish Board of School Directors*,[219] struck down common school religion.[220]

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penalizing nonattendance, and querying the students about the contents of the KJV passages read. *Id.* at 719. The defendant conceded the impropriety of these additional practices. *Id.* The court held for the defendants. *Id*. at 725. *See also* Harrison, *supra* note 65, at 363 (discussing practices in and around Knoxville, Tennessee at or about the time that *Carden* was decided).

[207] 93 N.W. 169 (Neb. 1903).

[208] 92 N.E. 251 (Ill. 1910).

[209] In *Freeman*, a teacher conducted what she admitted was religious worship. 93 N.W. at 171. Relator, a taxpayer and parent, sought mandamus to compel the school board to stop the Service Exercises. *Id.* at 170. The court held for the relator. *Id.* at 171–72.

In *Ring*, relator and his children were Roman Catholics. 92 N.E. at 251. Relator sought mandamus to require the defendant to discontinue the Service Exercises. *Id.* The court held for the relator. *Id*. at 257. Two judges dissented. *Id*. (Hand and Cartwright, J.J., dissenting).

[210] 226 N.W. 348 (S.D. 1929).

[211] In *Finger*, relator and his son were Roman Catholics. *Id.* at 348. The boy had been expelled from school for refusing to attend Service Exercises. *Id.* Relator brought mandamus to compel the school board to readmit the boy and thereafter to permit him "to absent himself" during the Service Exercises. *Id.* The court granted the relief sought, in effect converting a no-right-to-opt-out case into a right-to-opt-out case. *Id.* at 354. Two judges dissented, denying that relator was entitled to the right to opt out. *Id.* at 366–71.

[212] 20 N.W. 475 (Iowa 1884).

[213] 87 S.W. 792 (Ky. Ct. App. 1905).

[214] 110 S.E. 895 (Ga. 1922).

[215] 75 A.2d 880 (N.J. 1950). It is difficult to reconcile *Doremus* and the later New Jersey case, *Tudor* (1953), 100 A.2d at 857. *Doremus* upholds common school religion, and *Tudor* strikes it down. There may be, however, sufficient factual differences to explain the two decisions. For a discussion of *Doremus* and *Tudor*, see BOLES, *supra* note 43, at 86–94; Cushman, *supra* note 43, at 486–88.

[216] 179 A.2d 698 (Md. 1962), *rev'd* 374 U.S. 203 (1963).

[217] 143 So. 2d 21 (Fla. 1962), *vacated by* 374 U.S. 487 (1963).

[218] In *Moore*, the version of the Bible used during the Service Exercises was not specified. 20 N.W. at 475. Plaintiff, a taxpayer and parent, sought injunctive relief. *Id.* at 475–76. The court held for the school district. *Id.* at 476.

In *Hackett*, the Bible used in the Service Exercises was the KJV. 87 S.W. at 792. The plaintiff was a parent, and he and his children were Roman Catholics. *Id.* at 792–93. He sued for injunctive relief. *Id.* The court held for the school district. *Id.* at 798.

In *Wilkerson*, the City sought mandamus to compel the local school officials to carry out a City ordinance requiring Service Exercises. 110 S.E. at 904–05. The *Wilkerson* majority held for the plaintiff City. *Id.* at 905. Two judges dissented. *Id.* (Hines, J., dissenting).

In *Doremus*, only the Old Testament was used during Service Exercises. 75 A.2d at 880–81. One plaintiff was a taxpayer, and the other was the parent of a school child. *Id.* They sought a declaratory judgment testing the constitutionality of the statutes requiring the Exercises. *Id.* at 880. The court held for the defendant school board. *Id.* at 889. The United States Supreme Court dismissed an appeal of the case. Doremus v. Bd. of Educ., 342 U.S. 429 (1952).

In *Curlett*, plaintiffs, a taxpayer parent and a student, were atheists. 179 A.2d at 699. They sought mandamus to end Service Exercises. *Id.* The court held for the defendants. *Id*. at 704. Three

B. CASES SUPPORTING COMMON SCHOOL RELIGION: THE PRO NARRATIVE

The Pro Narrative constructed by state court judges lacks introspection and any explicit awareness of the enormous intellectual, moral, and ethical problems raised by a Protestant Empire narrative regarding the nature and significance of religion and the nature of the relationship between majorities and minorities (i.e., the nature of religious freedom). The Pro Narrative is best described as an ideology[221] of insult—a remarkable demonstration of disrespect for religious minorities.

1. *Anti-Roman Catholicism (and by Extension Other Religious Minorities)*

In the vast majority of the cases, the only translation of the Bible allowed was the KJV, the Protestant Bible. In only three of the twenty-three cases did the applicable rules and regulations permit the use of other versions of the Bible.[222] State and local legislatures and public school officials sent a message to non-Protestants, Roman Catholics in particular, that the preferred version of the Bible was the Protestant one. The message condemned and rejected Roman Catholicism and Judaism, not to mention non-Bible religions.

Some judges sought to soften the message by rhetorically minimizing the differences between Protestantism and Roman Catholicism or other minority religious groups.[223] Their argument cannot withstand close

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judges dissented. *Id.* (Brune, C.J., dissenting). On appeal, the United States Supreme Court reversed. Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

In *Chamberlin*, plaintiffs, parents of Dade County public school children, sought an injunction to debar Service Exercises. 143 So. 2d at 23. One of the plaintiffs was an agnostic, the others were Jewish and Unitarian. *Id.* The court ruled for the school board. *Id.* at 35–36. The United States Supreme Court vacated the opinion and remanded the case for further consideration. Chamberlin v. Dade County Bd. of Pub. Instruction, 374 U.S. 487 (1963). The Florida Supreme Court reaffirmed its earlier opinion. Chamberlin v. Dade County Bd. of Pub. Instruction, 160 So. 2d 97 (Fla. 1964). Thereafter, the United States Supreme Court summarily reversed. Chamberlin v. Dade County Bd. of Pub. Instruction, 377 U.S. 402 (1964).

[219] 68 So. 116 (La. 1915).

[220] In *Herold*, the version or versions of the Bible permitted to be used in the Service Exercises was unclear. 68 So. at 116. The plaintiffs alleged that the Bible referred to in the relevant regulations is the KJV. *Id.* at 116–17. The defendant school board claimed that the teachers under those regulations could read any Bible. *Id.* The three plaintiffs, taxpayers and parents of school children, sought injunctive relief. *Id.* One of the plaintiffs did not presently have children in attendance at the public schools, but intended to send his children to the local public schools. *Id.* Two of the plaintiffs were Jewish and the third was a Roman Catholic. *Id.* The court found for the plaintiffs because the Service Exercises discriminated against the children of the two Jewish plaintiffs. *Id.* at 116, 120. Had the plaintiffs been Roman Catholics only, it is not clear that they would have prevailed.

[221] *See* Michael deHaven Newsom, *Independent Counsel? No. Ombudsman? Yes: A Parable of American Ideology and Myth*, 5 WIDENER L. SYMP. J. 141, 149 (2000) (defining "ideology" as a social-cultural-political macro-narrative).

[222] *See* Bd. of Educ. v. Minor, 23 Ohio St. 211 (1872); Lewis v. Bd. of Educ., 285 N.Y.S. 164 (App. Div. 1935); *Curlett*, 179 A. 2d at 698.

[223] *See* People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 265 (Ill. 1910) (Hand and Cartwright, J.J., dissenting) (claiming that sectarian differences were "rapidly disappearing from the religious world");

scrutiny. The defeat of Al Smith in 1928 was driven, in no small part, by the fact of his Roman Catholicism.[224] Perhaps more importantly, Roman Catholics and other religious minorities continued to file lawsuits seeking relief from an imposed hegemonic evangelical Protestant common school religion.

Other judges claimed that the choice of versions of the Bible merely involved literary preference,[225] similar to reading Greek or Roman mythology, the Koran, or certain secular literary works.[226] This argument cannot withstand close scrutiny. One of the fundamental beliefs of evangelical Protestantism is that the Bible is the center of the religion.[227] The Bible, therefore, cannot be compared with any other literary work, religious or otherwise, given its unique and special meaning for evangelical Protestants, the avatars of common school religion.

Judges upholding common school religion constantly belittled the religious minorities who had filed lawsuits seeking relief from hegemonic Protestantism.[228] *Donahoe* made no attempt to hide its negative and patronizing feelings about Roman Catholics, fretting about the need to assimilate them.[229] The court allowed that the process of assimilation[230]

Kaplan v. Indep. Sch. Dist., 214 N.W. 18, 20 (Minn. 1927) (insisting that "[w]e are not concerned with nice distinctions between sects, nor as to how among them the different authorized versions of the Bible are regarded," taking notice that "they are at variance," but concluding that "we do feel that the intolerance which drove so many to seek an asylum in America has gradually abated and is not now so intense").

[224] *See* Michael R. Belknap, *God and the Warren Court: The Quest for a "Wholesome Neutrality"*, 9 SETON HALL CONST. L.J. 401, 406–07 (1999).

[225] Donahoe v. Richards, 38 Me. 376, 401–02 (1854).

[226] *See Donahoe*, 38 Me. at 399 (referring to mythology and the Koran); Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792, 794 (Ky. Ct. App. 1905) (comparing the Bible to "the writings of Confucius or Mahomet"); Wilkerson v. City of Rome, 110 S.E. 895, 903 (Ga. 1922) (expressly following *Donahoe*); People *ex rel.* Vollmar v. Stanley, 255 P. 610, 616 (Colo. 1927) (arguing that to exclude the Bible would require excluding Shakespeare and Milton because their works "have a religious basis"); State *ex rel.* Finger v. Weedman, 226 N.W. 348, 359 (S.D. 1929) (Sherwood, P.J., dissenting) (arguing that to exclude the Bible would require excluding "the Declaration of Independence, the singing of America, and even the reading of section 1, article 21, of our Constitution, because each affirms the existence and supremacy of God.").

[227] *See* BAIRD, *supra* note 36, at 613 (defining evangelical Protestantism as "the Bible, the whole Bible, and nothing but the Bible"); MARK A. NOLL, A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA (1992); THE EVANGELICALS: WHAT THEY BELIEVE, WHO THEY ARE, WHERE THEY ARE CHANGING (David F. Wells & John D. Woodbridge eds., 1975).

[228] The judges got some backing from the legal academy. *See* HENRY SCHOFIELD, *Religious Liberty and Bible Reading in Illinois Public Schools*, 6 ILL. L. REV. 17, 108-109 (1911), *reprinted in* 2 ESSAYS ON CONSTITUTIONAL LAW AND EQUITY AND OTHER SUBJECTS 506 (Faculty of Law of Northwestern University eds., Da Capo Press 1972) (1921) [hereinafter ESSAYS].

[229] *Donahoe*, 38 Me. at 413 (bemoaning the fact that "[l]arge masses of foreign population are among us, weak in the midst of our strength," insisting that "[m]ere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name," and arguing that "[i]n no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools, which are alike open to the children of the rich and the poor, of the stranger and the citizen").

[230] The process of assimilation is problematic and contested. *See generally* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1963). For an "anti-Protestant Empire" understanding of assimilation, see THIEMANN, *supra* note 16, at 146 (stating

should take place "with magnanimous liberality and Christian kindness"[231] in accordance with, oddly enough, the Golden Rule.[232] *Chamberlin* unfavorably contrasted religious dissenters with "the more rugged pioneers of the Nation,"[233] but with no appeal to *Donahoe*'s "magnanimous liberality." Instead, this court took a swipe at the "sophistries of agnosticism."[234] Other judges characterized plaintiffs as "intolerant" for seeking to eliminate common school religion.[235] Still others impugned their motives and integrity.[236] The demonization of religious minorities also included mischaracterization of their religious views in the most unflattering or prejudicial light possible.[237]

2. *Protestantization*

In making the case for using schools to protestantize American common school children, the Pro Narrative used two different levels of setting: some judges appealed to the broad tradition of American civil religion as it manifested itself in people's public lives, while others looked to common school education. Still others used both settings.

a. The Broad Tradition of American Civil Religion

Donahoe framed the question of the broad tradition in terms of general statutes[238] regulating primary behavior from a Christian perspective with

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that, at least for whites, "[t]he genius of the American experience has not been that immigrant populations were required to abandon their previous identities . . . but that the framework of American democracy was sufficiently flexible to allow new citizens to understand themselves as both Irish and American, Polish and American, and so on").

[231] *Donahoe*, 38 Me. at 413.

[232] *Id.* The Golden Rule is found at *Matthew* 7:12 and *Luke* 6:31.

[233] Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 31–32 (Fla. 1962), *vacated by* 374 U.S. 487 (1963).

[234] *Id.* at 32.

[235] Pfeiffer v. Bd. of Educ., 77 N.W. 250, 250–51 (Mich. 1898); Kaplan v. Indep. Sch. Dist., 214 N.W. 18, 18, 20 (Minn. 1927).

[236] *See* Moore v. Monroe, 20 N.W. 475, 476 (Iowa 1884) (stating that "[p]ossibly the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible"); Lewis v. Bd. of Educ., 285 N.Y.S. 164, 167 (N.Y. App. Div. 1935) (characterizing the plaintiff as some sort of "God attacker," declaring that "[u]ndisguised, the plaintiff's attack is on a belief and trust in God and in any system or policy or teaching which enhances or fosters or countenances or even recognizes that belief and trust").

[237] The plaintiffs in *People* ex rel. *Ring v. Board of Education* were Roman Catholics. 92 N.E. 251 (Ill. 1910). But this inconvenient fact did not deter the dissenting judges from complaining that "atheists" would somehow benefit if the plaintiffs prevailed. *Ring*, 92 N.E. at 265 (Hand and Cartwright, J.J., dissenting).

Similarly in *Doremus v. Board of Education*, the plaintiffs apparently never indicated what their religious or other beliefs were. 75 A.2d 880 (N.J. 1950). This court felt that it was entirely proper to treat the plaintiffs as if they were beyond the pale. First the court referred to "religious groups other than the Jewish, the Roman Catholic and the Protestant," and declared that "in this country [these other groups] are numerically small and, in point of impact upon our national life, negligible." *Id.* at 887. Not willing to deny such groups their constitutional rights, the court nonetheless "t[ook] the instance of an atheist" in ascertaining just what those rights might be. *Id.*

[238] *Cf.* Employment Div. v. Smith, 494 U.S. 872 (1990).

few, if any, statutory exceptions for non-Christians.[239] The idea that the United States is a Christian nation, more precisely an evangelical Protestant Empire, found expression in later cases.[240] *Hackett* found a powerful parallel between evangelical Protestant doctrine and Constitutional jurisprudence, holding that the state constitution taught the Protestant doctrine of private judgment.[241] Whatever the phrase "Christian nation" actually means, *Hackett* gave it constitutional significance. Thus, religious minorities had better get used to the fact that their zone of autonomy or privacy must yield to the imperatives of a constitutionalized evangelical Protestantism.

Hackett also analyzed the broader tradition as seen in the customs, and habits of American public life. The court appealed to the fact that "[m]eetings of the General Assembly are opened by prayer, and other state institutions authorize the worship of God."[242] The reference to custom and habit became standard in the Pro Narrative.[243] Thus, common school religion is merely an example of the broad tradition of American civil religion. This point of view gives rise to grave difficulties. For the broad American tradition, the relevant civil religion strongly resembles Unitarianism.[244] In circumstances in which chaplains are involved, the

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[239] Donahoe v. Richards, 38 Me. 376, 410 (1854). The court referred to laws against polygamy, and laws establishing a day of rest as a civil institution. With regard to judge-made exceptions, the court took a strict view, framing the issue in terms of the self-preservation of the state. *Id.* at 412. The court reached a broad and sweeping conclusion typical of Nineteenth Century thought on the matter:

> The conscientious belief of religious duty furnishes no legal defence [sic] to the doing or refusing to do what the State within its constitutional authority may require. If it were so, the obligations of a state would depend not upon the will of the State, but upon its conformity with the religious convictions of its members.

Id.

[240] *See Pfeiffer*, 77 N.W. at 252; *Kaplan*, 214 N.W. at 19. Later cases, attempting to capture something of the greater religious diversity in America without yielding the hegemonic control of evangelical Protestantism rooted in demography and institutional arrangements, put the question in terms of belief in God as an article of American faith. *See Doremus*, 75 A.2d at 888; Engel v. Vitale, 176 N.E.2d 579, 581 (N.Y. 1961) *rev'd*, 370 U.S. 421 (1962); Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 27 (Fla. 1962), *vacated by* 374 U.S. 487 (1963). *See also* 2 ESSAYS, *supra* note 228, at 480–84.

[241] Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792, 794 (Ky. Ct. App. 1905).

[242] *Id.* at 793.

[243] Church v. Bullock, 109 S.W. 115, 118 (Tex. 1908); *Kaplan*, 214 N.W. at 20; *Doremus*, 75 A.2d at 882–83; Carden v. Bland, 288 S.W.2d 718, 725 (Tenn. 1956); *Engel*, 176 N.E.2d at 581; Murray v. Curlett, 179 A.2d 698 (Md. 1962), *rev'd sub nom.*, Sch. Dist. v. Schempp, 374 U.S. 203 (1963); *Chamberlin*, 143 So. 2d at 27.

Interestingly, some of the later state cases cited United States Supreme Court opinions. The court in *Carden v. Bland* quoted approvingly from Justice Reed's dissenting opinion in *People* ex rel. *McCollum v. Board of Education*, 333 U.S. 203, 253–54 (1948) (Reed, J., dissenting). 288 S.W.2d 718, 725 (Tenn. 1956). In *Engel*, the New York Court of Appeals referred to *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("[w]e are a religious people whose institutions presuppose a Supreme Being"), and to *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

[244] *See* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2096 (1996) (noting that the conception of God in this civil religion is "rather 'unitarian'").

relevant religion may be denominational or sectarian.[245] Common school religion, however, whether or not it is civil religion, is *not* Unitarian, but rather an expression of evangelical pan-Protestantism.[246]

The opinions supporting common school religion at this level of classification uniformly failed to appreciate this critical difference. This is not to say that the "Unitarian" civil religion of the Declaration of Independence or of the motto "In God We Trust" is necessarily more acceptable to religious dissenters than is common school religion. The protestantizing impulse of this religion is not nearly as strong as that of common school religion, if only because the civic ceremonies and other events in which that variation on a Unitarian theme appears are not compulsory. The question at hand is whether and to what extent that impulse impacts the lives of school children, most of whom are obliged to attend the common schools, and their families.[247] At best, the analogy is imperfect, and ultimately unsatisfactory; as is the narrative in which it is embedded.

b. *Common School Religion*

The evident weakness of a defense of common school religion at the level of generalization or characterization of the broad American tradition of civil religion invited consideration of an alternative rhetoric. The language of the Northwest Ordinance[248] led some supporters of common school religion to pitch their arguments at a more specific level of setting, that of the American public education enterprise. The Ordinance provides: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged."[249] The textual linkage of religion, morality, and knowledge contained in the Northwest Ordinance became the raw material for a polite rationale of the imposition of common school religion as a means of inculcating civic virtue. This rationale, however, obscures the true purpose of common school religion—the protestantization of American school children.[250]

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[245] *See, e.g.*, 10 U.S.C. § 6031(a) (2000) (providing that "[a]n officer in the [Navy or Marines] Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member").

[246] *See supra* notes 107–109 and accompanying text.

[247] In the mid- to late 1980s, eighty-seven percent of American school children attended public schools. GLENN, *supra* note 54, at 284.

[248] NORTHWEST ORDINANCE, *adopted by* Continental Congress, July 13, 1787, *reenacted at* 1 Stat. 50 (1789). For a general discussion of the Ordinance, see Dennis P. Duffey, Note, *The Northwest Ordinance As a Constitutional Document*, 95 COLUM. L. REV. 929 (1995).

[249] NORTHWEST ORDINANCE, art. III.

[250] *But see* Fuller, *supra* note 54, at 89 (insisting that "[t]he Northwest Ordinance evidences the subtle, yet, important shift from schooling for spiritual growth purposes to schooling for civil stability purposes").

The Pro Narrative easily linked religion and morality, holding that the Bible was "consonant to the soundest principles of morality."[251] Thus, if morality was a proper subject in the common schools, then so too was religion.[252]

Some courts extended the religion-morality analysis in order to embrace the "knowledge" prong of the Northwest Ordinance, producing a broad, sweeping default rule: the common schools are competent to teach religion, morality, and knowledge unless there is a clear constitutional expression to the contrary.[253] The dissenting judges in *Ring* put the Northwest Ordinance argument best: "there are certain fundamental principles of *religion* and *morality* which the safety of society requires should be imparted to the youth of the state, and that those principles may be properly taught in the public schools as a part of . . . secular *knowledge*."[254] They also argued that common school religion would be

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[251] Donahoe v. Richards, 38 Me. 376, 400 (1854). One commentator stated, "For some unproved and seemingly unprovable reason morality for these courts equals the moral teachings of the religion of the majority." Thomas Gallagher, Note, *Nineteenth Century Judicial Thought Concerning Church-State Relations*, 40 MINN. L. REV. 672, 676 (1956). *See also* Spiller v. Inhabitants of Woburn, 94 Mass. 127, 128 (1866) (arguing that Bible reading and prayer are the best way "to impress on the minds of children and youth . . . the principles of piety and justice, and a sacred regard for truth"); Billard v. Bd. of Educ., 76 P. 422, 422–23 (Kan. 1904) (declaring that "[t]he noblest ideals of moral character are found in the Bible" and that "[t]o emulate these is the supreme conception of citizenship"); Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792, 794 (Ky. Ct. App. 1905) (noting the "sublime sentiments" and the "great moral influence" of the Bible"); Kaplan v. Indep. Sch. Dist., 214 N.W. 18, 18 (Minn. 1927) (referring to the Bible as that Book "which for ages has been regarded by the majority of the peoples of the most civilized nations as the fountain of moral teachings"); People *ex rel.* Vollmar v. Stanley, 255 P. 610, 621 (Colo. 1927) (Adams, J., dissenting) (claiming that the Bible is a good source of "instruction in good government"); State *ex rel.* Finger v. Weedman, 226 N.W. 348, 360 (N.D. 1929) (Sherwood, P.J., dissenting) (stating that "[n]o more complete code of morals exists than is contained in the New Testament").

[252] *See Spiller*, 94 Mass. at 128–29; Church v. Bullock, 109 S.W. 115, 116 (Tex. 1908); Carden v. Bland, 288 S.W.2d 718, 725 (Tenn. 1956) (declaring that "we think that the highest duty of those who are charged with the responsibility of training the young people . . . in the public schools is in teaching both by precept and example that in the conflicts of life they should not forget God"); *Finger*, 226 N.W. at 363 (Sherwood, P.J., dissenting) (rejecting the idea that instruction designed to "develop religious and Christian character" is unconstitutional).

[253] Pfeiffer v. Bd. of Educ., 77 N.W. 250, 252 (Mich. 1898). The court in *Pfeiffer* stated that

> the language of this instrument, when read in the light of the fact that this was at that date a Christian nation, is such as to preclude the idea that the framers of the constitution, "in conformity with the principles contained in the ordinance," intended, in the absence of a clear expression to that effect, to exclude wholly from the schools all reference to the Bible.

Id.

Hackett narrowed the rule, providing some protection, however minimal, for Establishment Clause values. 87 S.W. at 793. While it was not clear that the Kentucky constitution "was intended to keep religion out of the school, . . . it is apparent that one aim, at least, was to keep the 'church' out." *Id.* at 793. It is fair to conclude that the court determined that that religion was not "church." As an historical proposition, that conclusion is barely plausible. Pan-Protestantism demonstrates, from time to time, a level of competition and conflict that cannot easily square with any coherent idea of "church." When evangelicals cooperate across denominational lines, however, one might, for sound policy reasons, say that there is "church" for the purposes of comprehending Establishment Clause values. *See supra* note 104.

[254] People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251 (Ill. 1910) (Hand and Cartwright, J.J., dissenting) (emphasis added).

the only religion that some children would be taught.[255] They sought to temper the rhetoric of insult with an appeal to the self-preservation of the state.[256]

The Pro Narrative did not rest solely on the Northwest Ordinance. It also relied on the argument of educational custom. As early as 1898, courts were beginning to make this argument. The common school had come into existence in the 1840s,[257] so there had been enough time at the end of the Nineteenth Century to identify a common school custom or tradition.[258] As time went by, other judges embraced the argument.[259] *Lewis* put it in simple straightforward terms: "Progress often demands innovation. The mutations of the times call for the discarding of outmoded policies. Antiquities are jettisoned for improvements. But these axioms are harnessed to the admonition that [w]e do not readily overturn the settled practice of the years."[260]

3. *Pan-Protestantism and the Rhetoric of Nonsectarianism*

Professor Cushman argued that the cases upholding Bible reading relied on three major arguments: "*first*, the state constitutions did not intend to bar nonsectarian religion from the schools; *second*, the religious exercises involved were in fact nonsectarian; and *third*, such exercises did not discriminate against anyone or otherwise abridge . . . civil rights or religious liberty."[261] The first two propositions implicate pan-Protestantism. The third proposition is considered later.[262]

Cushman correctly described the textual problem confronting the state courts. Their constitutions tended to bar "nonsectarianism,"[263] but this

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[255] *Id.* at 266. *See also* State *ex rel.* Finger v. Weedman, 226 N.W. 348 (S.D. 1929) (Sherwood, P.J., dissenting).

[256] The issue of the self-preservation of the state arises in connection with the subject of social reform. *See infra* notes 285–290 and accompanying text.

[257] *See supra* note 76 and accompanying text.

[258] *Pfeiffer*, 77 N.W. at 252.

[259] *Finger*, 226 N.W. at 355 (Sherwood, P.J., dissenting); Lewis v. Bd. of Educ., 285 N.Y.S. 164, 173 (N.Y. App. Div. 1935); Doremus v. Bd. of Educ., 75 A.2d 880, 888–89 (N.J. 1950).

[260] *Lewis*, 285 N.Y.S. at 173 (internal quotation marks omitted).

[261] Cushman, *supra* note 43, at 478.

[262] *See infra* notes 300–310 and accompanying text.

[263] State constitutional text concerning sectarianism had little to do with the decision to support or strike down common school religion. *See generally* Cushman, *supra* note 43, at 477. The Wisconsin constitution provided: "The Legislature shall provide by law for the establishment of district schools . . . and no sectarian instruction shall be allowed therein." WIS. CONST. art. X, § 3. A Wisconsin court struck down common school religion. State *ex rel.* Weiss v. Dist. Bd., 44 N.W. 967, 980 (Wis. 1890) (Orton, J., concurring). The Colorado constitution, with virtually identical language, provided: "No sectarian tenets or doctrines shall ever be taught in the public schools." COLO. CONST. art. IX, § 8. A Colorado court, however, supported common school religion. People *ex rel.* Vollmar v. Stanley, 255 P. 610, 614 (Colo. 1927).

Several states had constitutional language essentially prohibiting the use of public funds for the benefit of religious sects. Among these states, some upheld common school religion. *See, e.g.*, *Pfeiffer*, 77 N.W. at 251 (MICH. CONST. art. IV, § 40; Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792 (Ky. Ct. App. 1905) (KY. CONST. § 159); Church v. Bullock, 109 S.W. 115, 117 (Tex. 1908) (TEX. CONST. art. I, § 7): Wilkerson v. City of Rome, 110 S.E. 895, 901 (Ga. 1922) (GA. CONST. art. I, § 1, ¶ 14).

word itself has a contested meaning. Pan-Protestantism, however, provides the key to the analysis. If pan-Protestantism is nonsectarian, because it encompasses Presbyterians, Methodists, Baptists, and other evangelical Protestants, then common school religion is also nonsectarian. If pan-Protestantism is sectarian because it excludes Roman Catholics, Eastern Orthodox Christians, not to mention non-Christians, then common school religion is also sectarian.

If common school religion is nonsectarian, then the exclusion of non-evangelical Protestants is legally defensible. The question becomes whether the Pro Narrative can elaborate a rationale that can explain or justify the exclusion of non-evangelical Protestants from the forging of common school religion. The cases utterly fail to do so.

a. *The Bible*

i. The Old and New Testaments

Here, the Pro Narrative divides. Some opinions favored bright-line rules regarding the nature of the Bible, even if the rules misrepresented its character, while others respected the nature of the Bible, but underestimated the problems of management and enforcement.

The bright-line rule invariably was that the Bible, as a whole, was nonsectarian,[264] even in the face of the incontrovertible fact that there was no agreement among the various religious groups as to the text of the Bible, much less its meaning. *Hackett* was reduced to the untenable proposition that the question of textual variation simply did not matter, for "[o]therwise it would inevitably lead to the state that any book not favored by some church authority, or which may be supposed by it to be hostile to its teachings, would be sectarian."[265] *Hackett* treated the Bible as *urtext*, a very evangelical Protestant idea,[266] defined as a set of verbal or conceptual meanings that somehow transcend history, religious strife, disagreements about text, and quite different views about the functional relation between the Bible and the authority of the church.[267] As if this treatment were not

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Other states having similar constitutional text, struck down common school religion. *See, e.g.*, People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 257 (Ill. 1910) (ILL. CONST. art. VIII, § 3); *Finger*, 226 N.W. at 350 (S.D. CONST. art. VI, § 3).

[264] *See, e.g.*, Donahoe v. Richards, 38 Me. 376, 398–99 (1854) (insisting that because no doctrines were taught, "[t]he creed of no sect was affirmed or denied," and that this was so because "[t]he Bible was used merely as a book in which instruction in reading is given"); *Kaplan*, 214 N.W. at 21.

[265] *Hackett*, 87 S.W. at 794.

[266] On the contrary, rejecting the *urtext* idea, Roman Catholicism teaches that "[t]he New Testament does not exist as a body sealed off from everything around it. It exists in the Church (but not under it), and as a unique and privileged moment of tradition." JOSEPH T. LIENHARD, THE BIBLE, THE CHURCH, AND AUTHORITY: THE CANON OF THE CHRISTIAN BIBLE IN HISTORY AND THEOLOGY 101 (1995).

[267] The idea of *urtext* appears repeatedly in cases. *See Vollmar*, 255 P. at 621 (Adams, J., dissenting) (claiming that "the Bible antedates creeds and sects"); *Finger*, 226 N.W. at 360 (Sherwood, P.J., dissenting) (claiming that "[t]he Bible antedates all sects founded on it" and that the Bible "did not make [the sects]").

bad enough, *Hackett* dismissed the Catholic understanding of the relation out of hand.[268]

Other judges conceded that at least parts of the Bible were sectarian, but they assumed that by proper management or enforcement, only the nonsectarian portions would be read.[269] These judges took it upon themselves to determine which portions of the Bible were not sectarian, paying absolutely no attention to the unseemliness of secular judges making theological judgments about the text of various versions of the Bible.

ii. The Old Testament

Doremus provided the opportunity to consider whether the Old Testament was sectarian. *Doremus* adopted a bright-line rule, concluding that the Old Testament was nonsectarian. The court's justification plowed new ground on the question of sectarianism: "We consider that the Old Testament, because of its antiquity, its content, and its wide acceptance, is not a sectarian book when read without comment."[270] *Doremus* noted that the Old Testament "is accepted by three great religions, the Jewish, the Roman Catholic and the Protestant, and, at least in part, by others."[271] Setting to one side the court's slight of non-Bible religions,[272] the plaintiffs do not appear to have placed in issue the version or translation of the Old Testament used in the common schools. Thus, the opinion could be read to have substituted pan-Bible religion for pan-Protestantism. This subsection, however, is no more defensible than the older teaching that common school

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[268] Another particularly egregious example of the manipulation of history can be found in the two dissenting opinions in *Finger*. The dissenting judges each took note of the argument that the dedication to the KJV attacks the papacy in harsh and unforgiving terms. One judge dismissed the argument, declaring that "[t]he dedication was no part of the Bible. There was no proof offered showing or tending to show, that any part of it had ever been read in school, or called to the attention of any pupil. It was not authorized, much less required, to be read." *Finger*, 226 N.W. at 357 (Sherwood, P.J., dissenting). The other dissenting judge pressed the point, noting that "so far as it has come under my notice [the dedication of the KJV] is not commonly included in editions . . . which are printed and published in the United States." *Id.* at 370 (Brown, J., dissenting). It distorts history to suppose that the anti-Roman Catholic bias of the KJV is limited to the dedication. The efforts of Sixteenth Century evangelical Protestant reformers to "protestantize" the Bible are too well known to be ignored, even by judges. *See* H. MAYNARD SMITH, HENRY VIII AND THE REFORMATION 276–321 (1948). One can only attribute the views of these two judges to an anti-Roman Catholic animus, so typical of a Protestant Empire.

[269] *See, e.g.*, *Church*, 109 S.W. at 116 (stating that it would suffice if the teachers had been warned "not to read anything that would be objectionable from the New Testament"); *Vollmar*, 255 P. at 615–17 (arguing that while a small part of the Bible might be "sectarian," there was no problem separating the sectarian teachings "as practically as those of any other book," and insisting that the court had no right "to say that the whole is [sectarian] when we know that part is not"); *Kaplan*, 214 N.W. at 22 (Stone, J., concurring) (noting that the management problem existed, but that the problem was one of "policy rather than legality" and thus the courts could not interfere); *Finger*, 226 N.W. at 368 (Brown, J., dissenting) (taking it upon himself to determine that portions of the Bible were nonsectarian and thus "valuable for secular instruction").

[270] Doremus v. Bd. of Educ., 75 A.2d 880, 886 (N.J. 1950).

[271] *Id.* at 886.

[272] *See supra* notes 233–237 and accompanying text.

religion was pan-Protestant as not all Americans belong to a "pan-Bible" religion.

b. The Lord's Prayer and Service Exercises

Common school religion involves more than Bible reading. The Service Exercises complained of frequently included prayer, in particular, the Lord's Prayer. The intellectual dishonesty continued apace.

The Lord's Prayer consists of seven petitions. The fourth appears differently in the Douay Bible and in the KJV. In the Douay Bible, the fourth petition reads, in *Matthew* 6:11, "Give us this day our supersubstantial bread,"[273] and in *Luke* 11:3, "Give us this day our daily bread."[274] The Douay commentary to *Matthew* 6:11 states that the phrases "supersubstantial bread" and "daily bread" refer to "the bread of life, which we receive in the Blessed Sacrament [the Eucharist]."[275] Another Catholic commentary states that the language "can refer to daily needs, the messianic banquet, or as in early Christian interpretation, the eucharist as a foretaste of the messianic banquet."[276] In the KJV the petition reads, in both *Matthew* and *Luke*, "Give us this day our daily bread."[277] There can be little doubt that from a Roman Catholic perspective, the word "daily" as used in the fourth petition refers to the Eucharist and to transubstantiation. Given Protestant theology, however, this term cannot refer to the Eucharist.[278] The common use of the word "daily" in both versions of the Bible simply cannot settle the matter. Context helps Protestants and Roman Catholics understand what their respective faith communities mean by the term "daily." Thus, the choice of Bible can make a great difference even in connection with the Lord's Prayer. A Roman Catholic context will help the one who prays to understand the word "daily" in the fourth petition as referring to the Eucharist, something that a Protestant context surely would not.

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[273] *Matthew* 6:11 (the Douay Bible).

[274] *Luke* 11:3 (the Douay Bible).

[275] THE HOLY BIBLE TRANSLATED FROM THE LATIN VULGATE (Richard Challoner ed., 1749–1752).

[276] THE NEW JEROME BIBLICAL COMMENTARY 645 (Raymond E. Brown, Joseph A. Fitzmyer, & Roland E. Murphy eds., 1990).

[277] *Luke* 11:3 (KJV); *Matthew* 6:11 (KJV).

[278] There is much that one could say about the Protestant Reformations, but surely the rejection of transubstantiation is one of their common threads. Protestant eucharistic theologies, while they do not agree with each other, all reject transubstantiation. *See* Newsom, *supra* note 1, at 196 n.65 (discussing Roman Catholic and Protestant understandings of the Eucharist). Some Anglo-Catholics—ultra high-church Anglicans—accept the doctrine of transubstantiation. *See* ALF HÄRDELIN, THE TRACTARIAN UNDERSTANDING OF THE EUCHARIST 1 (1965). But they are unique in this regard among Protestants, and not all Anglo-Catholics accept the Roman Catholic doctrine. *See generally* JOHN KEBLE, ON EUCHARISTIC ADORATION (2d ed. 1867) (adopting the doctrine of consubstantiation, which teaches that at the consecration *both* the substance of the Body and Blood of Christ and the substance of the elements, the bread and wine, are present). Given the generality of Protestant thought, it is also the case that Protestant eucharistic theology tends to undervalue the Eucharist. As a consequence, Protestants tend to have "a very exalted view of preaching." JAMES F. WHITE, PROTESTANT WORSHIP AND CHURCH ARCHITECTURE: THEOLOGICAL AND HISTORICAL CONSIDERATIONS 35 (1964).

The two dissenting judges in *Finger* demonstrated the lack of even a minimal appreciation for the foregoing issue. The first resorted to Webster's dictionary to define the word "supersubstantial," notwithstanding the fact that the Douay Bible gives a definitive Roman Catholic understanding of the word.[279] Thus, he missed the only thing that matters—the Eucharist. The second dissenting judge, making a complete hash of the facts, decided that Jesus Christ used the terms "supersubstantial" and "daily" interchangeably,[280] ignoring the fact that "daily" has a contested meaning.[281]

The folly exhibited in the two dissenting opinions in *Finger* descends to even lower depths in *Doremus*. The *Doremus* court took it upon itself to demonstrate that the Lord's Prayer is nonsectarian even as to Jews, claiming that the Lord's Prayer is merely a form of a Jewish prayer.[282] *Doremus* insulted Jews terribly, for it is the belief as to the nature and character of the Author of the Prayer that separates Christians and Jews. Until Jews start saying the Lord's Prayer and viewing it merely as a variation on the Kaddish, judges ought to refrain from equating them.

Service Exercises typically consisted of Bible reading and prayer, and occasionally hymns.[283] At least one defender of the Pro Narrative concluded that perhaps Service Exercises were not defensible, although he sought mightily to defend and uphold Bible reading.[284] The Pro Narrative itself largely treated Service Exercises as a mere combination of Bible reading and prayer. Thus, it generated little to no discourse unique to Service Exercises.

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[279] State *ex rel.* Finger v. Weedman, 226 N.W. 348, 361 (S.D. 1929) (Sherwood, P.J., dissenting).

[280] *Id.* at 366 (Brown, J., dissenting).

[281] This judge correctly pointed out that the Roman Catholic relator had failed to mention any of this matter in his testimony, remarking that it "remained for his counsel in the argument to seize upon this phrase, and magnify it into a matter of vital importance for their contention on the appeal." *Id.* (Brown, J., dissenting). Sloppy lawyering hurts. The relator's lawyer in *Finger* should have made sure that the trial record contained a discussion of the connection, in Roman Catholic eyes at least, between the fourth petition and the Eucharist, and thus transubstantiation, the great bugbear of the Protestant Reformers. But sloppy treatment of history by judges also hurts. To equate Jesus Christ with a human translator has profound theological implications, and there is reason to wonder whether judges should indulge in theology without at least admitting that that is what they are doing.

[282] Doremus v. Bd. of Educ., 75 A.2d 880, 887–88 (N.J. 1950) (arguing that "the Lord's Prayer . . . is used by Roman Catholics and Protestants with slight variations" but "nothing therein is called to our attention as not proper to come from the lips of any believer in God, His fatherhood, and His supreme power.") The *Doremus* court further stated that:

> Christ was a Jew and He was speaking to Jews; and it is said, on excellent Jewish authority, . . . that the prayer was based upon the ancient Jewish prayer called "the Kaddish" . . . . We find nothing in the Lord's Prayer that is controversial, ritualistic or dogmatic. . . . It does not contain Christ's name and makes no reference to him. It is in our opinion, in the same position as is the Bible reading.

Id. at 888.

[283] *See supra* Part III.A.

[284] *See* 2 ESSAYS, *supra* note 228, at 471 n.17.

4. *Social Reform: Education As the Social Dimension of Protestantization*

The three elements of the Pro Narrative previously considered here, anti-Roman Catholicism, protestantization, and pan-Protestantism, address the question of social reform. Social Reform is an expression of the social dimension of evangelical Protestantism. To "protest" is to call for reform. Hence, Protestantism contains within its interior logic a call for social reform as evidence of protestantization. The substance or subject matter of the reform counts for little. The test, or the marker, of a particular social reform is merely whether it advances the interests of the Anglo-American Reformation and the interests of the American Protestant Empire.

Education is a necessary social reform, especially in the context of a Protestant Empire characterized by substantial numbers of immigrants from non-Anglo-Protestant countries. The reality of such immigration, however, is but one example of a larger theme in American history. At various times, sometimes with good reason, America has felt herself to be at risk in the world. Immigration, in the eyes of the minions of the Protestant Empire, was and is such a risk.[285] International Communism was also a risk in the eyes of many Americans, Protestant and non-Protestant alike.

Most of the later cases, which were decided during the Cold War, reflected this fear of Communism, which allowed the courts to find another rationale or justification for common school religion. Earlier cases had established a link between common school religion and the self-preservation of the state,[286] but in the 1950s, the argument from self-preservation took on a greater urgency. Thus, *Doremus* declared that it is important that the nation be theistic in the face of a challenge from "[o]rganized atheistic society."[287] Another judge slyly accused his dissenting brother, who would strike down the Regent's Prayer, of "the interpolation of a Marxist concept."[288] *Chamberlin* took a Manichean view of the world, concluding that "there are now in the world just two forms of government, loosely denominated Democracy and Communism."[289]

The Cold War became an excuse for any number of retrograde programs and policies.[290] Religious minorities were not dupes of the

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[285] *See* John M. Hartenstein, *A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools Is an Establishment of Religion*, 80 CAL. L. REV. 981, 1002–03 (1992); Symposium, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467, 531 (1998).

[286] *See supra* note 256 and accompanying text. *See also Finger*, 226 N.W. at 354, 366 (Sherwood, P.J., and Brown, J., dissenting).

[287] *Doremus*, 75 A.2d at 888 (1950).

[288] Engel v. Vitale, 176 N.E.2d 579, 583 (N.Y. 1961) (Burke, J., concurring), *rev'd*, 370 U.S. 421 (1962).

[289] Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 33 (Fla. 1962), *vacated by* 374 U.S. 487 (1963).

[290] *See* Aryeh Y. Brown, *Obscured by Smoke: Medicinal Marijuana and the Need for Representation Reinforcement Review*, 22 SEATTLE U. L. REV. 175, 227 n.298 (1998).

worldwide communist movement, though these opinions in the spirit of the rhetoric of insult did their best to create that impression.

5. *Attrition and Restraint: The Interplay of Majorities and Minorities*

With the paradigm of social reform, the idea of attrition and restraint gives expression to the external dimensions of evangelical Protestantism and the Protestant Empire. The opinions supporting common school religion reflect a strong commitment to the rights and prerogatives of the religious majority, while paying little attention to the interests of religious minorities. The basic position of these opinions is captured by *Chamberlin*: "an anti-religious attitude in the schools [would] substantially injure the well being of the majority of the school children."[291]

a. Majoritarianism

The rhetoric and discourse of opinions upholding common school religion frequently refer to the opportunities that religion affords the majority. Thus, the opportunity afforded to the majority to hear the Bible read trumps any harm that might be visited upon religious minorities.[292] The minority cannot deprive the majority of the right to have their children "instructed in the moral truths of the Bible."[293] One judge insisted that preventing voluntary prayer "is an interference by the courts, contrary to the plain language of the Constitution, on the side of those who opposed religion."[294] The basic rule is that the majority decides the nature and use of common school religion.[295]

Revealing the dark side of a blind majoritarianism, *Moore* held that the dissenters could not prevail so as to keep majorities from being disturbed and avoid "unseemly controversies."[296] The dissenting judges in *Finger* insisted that Bible-reading does not lead to strife.[297] In a somewhat milder form, the opinions routinely criticize religious minorities for being spoilsports or hecklers[298] attempting to veto programs established by the majority.[299]

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[291] *Chamberlin*, 143 So. 2d at 32.

[292] *See* Pfeiffer v. Bd. of Educ., 77 N.W. 250, 251 (Mich. 1898).

[293] Church v. Bullock, 109 S.W. 115, 118 (Tex. 1908).

[294] Engel v. Vitale, 176 N.E.2d 579, 583 (N.Y. 1961) (Burke, J., concurring), *rev'd*, 370 U.S. 421 (1962).

[295] Donahoe v. Richards, 38 Me. 376, 403–04 (Me. 1854); People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 265 (Ill. 1910) (Hand and Cartwright, J.J., dissenting); Lewis v. Bd. of Educ., 285 N.Y.S. 164, 174–75 (N.Y. App. Div. 1935), *appeal dismissed*, 12 N.E.2d 172 (1937).

[296] Moore v. Monroe, 20 N.W. 475, 475 (Iowa 1884).

[297] State *ex rel.* Finger v. Weedman, 226 N.W. 348, 355 (S.D. 1929) (Sherwood, P. J., dissenting).

[298] For a discussion of the persistent tendency to belittle religious minorities see *supra* notes 228–237 and accompanying text.

[299] *Donahoe*, 38 Me. at 376; Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792, 794 (Ky. Ct. App. 1905); Church v. Bullock, 109 S.W. 115, 118 (Tex. 1908); People *ex rel.* Vollmar v. Stanley, 255 P. 610, 619 (Colo. 1927) (Adams, J., dissenting); *Finger*, 226 N.W. at 364–65 (Sherwood, P.J., dissenting); Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 33 (Fla. 1962), *vacated by* 374 U.S. 487 (1963).

Expressed in terms of harm and remedy, the minority cannot visit harm on the majority, whether that harm be in the form of lost opportunities or discomfort. The remedy available to the majority under these circumstances is the right to have its way and to use whatever mixture of restraint and attrition suits it.

b. Minority Rights and Duties: Harm and Remedy

Again, two inquiries present themselves here. The first concerns the nature of the harm, if any, suffered by religious minorities as a result of religious exercises in the common schools. The second involves the remedy, if any, for harm that may have been suffered. There are two major classifications of harm: the psychological and the status-based.[300] Stigma, ostracism, interference with parental control, and interference with conscience form the core of psychological harm. Religious freedom, liberty, due process, equality, and non-discrimination lie at the center of status-based harm. Assuming that there is harm for which a remedy may be had, the remedies theoretically available include: the right to refrain from participating, though remaining present, during the religious exercises (the *"refrain from participation" remedy*); the right not to be present during the exercises (the *"opt out" remedy*); and the right to bar or prohibit the exercises altogether (the *"mandamus/injunction" remedy*[301]).

On the question of psychological harm, the cases are divided into three groups. The first group of cases grants the existence of psychological harm,[302] the second group denies it,[303] and the third group, primarily

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[300] *See supra* notes 14–15 and accompanying text.

[301] The vast majority of the lawsuits brought challenging religious exercises in the common schools, quite without regard to outcome, either sought writs of mandamus, *see* State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967 (Wis. 1890); Pfeiffer v. Bd. of Educ., 77 N.W. 250 (Mich. 1898); State *ex rel*. Freeman v. Scheve, 93 N.W. 169 (Neb. 1903); Billard v. Bd. of Educ., 76 P. 422 (Kan. 1904); *Church*, 109 S.W. at 115; People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251 (Ill. 1910); Wilkerson v. City of Rome, 110 S.E. 895 (Ga. 1922); *Vollmar*, 255 P. at 610; *Finger*, 226 N.W. at 348, or sought injunctions, *see* Moore v. Monroe, 20 N.W. 475 (Iowa 1884); Hackett v. Brooksville Graded Sch. Dist., 87 S.W. 792 (Ky. Ct. App. 1905); Herold v. Parish Bd. of Sch. Dir., 68 So. 116 (La. 1915); Kaplan v. Indep. Sch. Dist., 214 N.W. 18 (Min. 1927); Carden v. Bland, 288 S.W.2d 718 (Tenn. 1956). The "mandamus/injunction" remedy was sought in virtually all these cases, but was denied in the majority of them.

[302] *Moore*, 20 N.W. at 476 (noting that the plaintiff's "real objection is that the religious exercises are made a part of the educational system, into which his children must be drawn or made to appear singular, and perhaps be subjected to some inconvenience"); *Carden*, 288 S.W.2d at 723–24 (stating that the court was "asked to banish the Bible from the public schools, not as an evil thing, but that it is embarrassing to parents who subscribe to some creed or ritual, and that their children may be prejudiced in some way against their religion"); Murray v. Curlett, 179 A.2d 698, 704 (Md. 1962) (noting "the embarrassment, the divisiveness or the psychological discontent arising out of nonconformance with the mores of the majority"); *Chamberlin*, 143 So. 2d at 31–32 (1962) (while rejecting "any measurable psychological trauma," characterizing the plaintiffs' efforts as designed to protect "the tender sensibilities of certain minorities" and to avoid suffering "some supposedly irreparable emotional stress if their classmates are permitted to hear the Bible read").

[303] *Vollmar*, 255 P. at 617–18 (rejecting the claim of religious stigma and disadvantage, claiming that "[t]he shoe is on the other foot" because the court has "known many boys to be ridiculed for

because the question or issue of psychological harm was not before the court, does not discuss the question at all.[304] The legal academy lent its support to the dismissive views of the judges constructing the Pro Narrative.[305] Regarding status-based harm, the cases largely deny its existence.[306]

On the question of remedy, in the vast majority of the Pro Narrative cases, there was none. Even if there had been some harm, particularly status-based harm, the Pro Narrative courts held that such harm fell within the reach of the maxim *de minimis non curat lex*.[307] In the instances in which psychological harm had been established, the paradigmatic form of

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complying with religious regulations but never one for neglecting them or absenting himself from them").

[304] *Donahoe*, 38 Me. at 376; Spiller v. Inhabitants of Woburn, 94 Mass. 127 (1866); McCormick v. Burt, 95 Ill. 263 (1880); *Billard*, 76 P.2d at 422; *Hackett*, 87 S.W. at 792; *Church*, 109 S.W. at 115; *Kaplan*, 214 N.W. at 18; Doremus v. Bd. of Educ., 75 A.2d 880 (La. 1950); Engel v. Vitale, 176 N.E.2d 579 (N.Y. 1961), *rev'd*, 370 U.S. 421 (1962).

[305] *See* 2 ESSAYS, *supra* note 228, at 459, 469–70, 493.

[306] *See, e.g.*, *Donahoe*, 38 Me. at 403–04, 408–13 (stating that selection of one translation of the Bible over another does not amount to an unconstitutional "preference" and that individual rights of religious conscience cannot trump general legislation); *Wilkerson*, 110 S.E. at 901–03 (stating that the exercises in question do not constitute an interference with religious freedom of conscience and freedom of civil status, nor is there discrimination, or appropriation of public monies to support a system of religion or a sectarian institution); *Vollmar*, 255 P. at 615 (stating that the use of the KJV was not a "preference" nor did the exercises make the school a "place of worship"); *id.* at 619 (Adams, J., dissenting) (arguing that "it is hard to see how the gift of a book which the courts say is good, and which is good without a court decree, can be said to *deprive* a person of life, liberty, or property without due process under the Fourteenth Amendment"); *Finger*, 226 N.W. at 363 (Sherwood, P.J., dissenting) (arguing that by virtue of the exercises complained of teachers do not become ministers, nor do schoolhouses become places of worship; stating that "we are unable to see how appellant's right to worship God is in any way infringed," that "we must also hold that no civil or political right, privilege, or position has been denied to appellant by these exercises," and that no "preference [has] been given by law to any establishment or mode of worship"); *id.* at 348, 367–68 (Brown, J., dissenting) (making much of the views of the framers of the state constitutional provisions at issue, noting that their sessions began with prayer, and that statutes provided for Bible reading in the common schools); Lewis v. Bd. of Educ., 285 N.Y.S. 164, 174 (N.Y. App. Div. 1935) (denying that "the practice of reading from the Scriptures destroy[] or weaken[] or affect[] the cleavage between church and state; the practice does not bridge or conjoin the two"); *Doremus*, 75 A.2d at 881–82 (noting that "no one is before us asserting that his religious practices have been interfered with or that his right to worship in accordance with the dictates of his conscience has been suppressed," and that the extra cost associated with the exercises complained of is *de minimis*); *Carden*, 288 S.W.2d at 722 (denying that the exercises complained of did not violate "the constitutional mandate").

Status-based harm may have been recognized in *Pfeiffer*, 77 N.W. at 250–51. The structure of the court's opinion suggests that there may have been such a harm—a restriction of the civil or political rights or privileges of such students as do not participate upon the exercises. The court, however, concluded that given the right to opt out there was no harm.

[307] *See, e.g.*, *Moore*, 20 N.W. at 476 (arguing that a "casual use of a public building" for religious services does not make the building a house of worship that the taxpayer-plaintiff is compelled to support); *Hackett*, 87 S.W. at 793 (stating that common schools do not become "places of worship" nor the teachers "ministers of religion" for purposes of §5 of the state constitution because of the exercises complained of); *Church*, 109 S.W. at 118 (holding that the schools do not become "places of worship" because of common school religion); *Kaplan*, 214 N.W. at 20 (denying that the exercises "convert the schoolhouse into a place of worship contrary to the constitutional provision" requiring that no one "be compelled to attend, erect or support any place of worship"); *Curlett*, 179 A.2d at 702 (arguing that the expenditure of public funds occasioned by the exercises complained of was "negligible").

relief granted was the right to opt out.[308] In the Pro Narrative, the sufficient remedy, if any, for either psychological or status-based harm consists of this right to opt out.[309] Some of the cases and opinions, however, take the position that this remedy is not required. Most of these cases and opinions contend that the right not to participate suffices.[310]

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[308] *Vollmar*, 255 P. at 610, recognized the due process right emanating from *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 534 (1925), whereby parents have the right to opt out of the public school system in whole or in part. *Vollmar* concluded: "We . . . cannot say . . . that the [Bible] itself is so essential to good citizenship that parents may not exclude it from the instruction of their children. . . . [C]hildren cannot be required, against the will of their parents or guardians, to attend its reading." 255 P. at 614. For a discussion of this due process right, see Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion:* Meyer, Pierce *and the Origins of* Wisconsin v. Yoder, 25 CAP. U. L. REV. 887 (1996); Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194 (1997). Prior to the decisions in *Meyer* and *Pierce*, at least one commentator, a strong defender of the Pro Narrative, took the position that there was no such right. *See* 2 ESSAYS, *supra* note 228, at 467, 471.

Where the harm is seen as stigmatizing or ostracizing a child, courts upholding common school religion still frequently find, either implicitly or explicitly, that the opt-out remedy will suffice. *See McCormick*, 95 Ill. at 264 (noting that "[n]o one was required to be present at or participate in [the Bible reading] exercise unless he chose to do so"); *Moore*, 20 N.W. at 476 (stating that "so long as the plaintiff's children are not required to be in attendance at the exercises, we cannot regard the object [to the exercises] as one of great weight"); *Pfeiffer*, 77 N.W. at 251 (asking, rhetorically, "[d]oes it harm one who does not, for conscientious reasons, care to listen to readings from the Bible, that others are given the opportunity to do so?" and "Is it not intolerant for one not required to attend to object to such readings?"); *Billard*, 76 P. at 422 (noting that by way of administrative action, plaintiff's son "was excused from attending these exercises"); *Wilkerson*, 110 S.E. at 901 (declaring that "when it is noted that pupils whose parents or guardians so request may, under the terms of the ordinance, be excused from attendance on Bible reading and prayers, the whole contention of plaintiffs . . . must crumble into nothingness"); *Kaplan*, 214 N.W. at 21 (stating that "[s]o long as no pupil is compelled to worship according to the tenets of any creed, or at all, and no sectarian belief is taught, courts should not hold that there is any violation of the constitutional guarantee of religious liberty"); *Doremus*, 75 A.2d at 887 (declaring that "[w]e have noted the absence of allegation or proof that the plaintiffs or either of them are harmed by the statute . . . and we . . . recall that no burden of participation is put upon a pupil by the statute"); *Engel*, 176 N.E.2d at 581 (noting that "[t]he order here appealed from contains adequate provisions to insure that no pupil need take part in or be present during the act of reverence, so any question of 'compulsion' or 'free exercise' is out of the case"); *Curlett*, 179 A.2d at 702 (arguing that the exercises

> are in the same category as the opening prayer ceremonies in the Legislature . . . and in the Congress . . . and [f]or these reasons, and particularly because the appellant-student in this case was not compelled to participate in or attend the program . . . . we hold that the opening exercises do not violate the religious clauses of the First Amendment);

Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 31–32 (Fla. 1962) (finding that the opt-out remedy was more than an adequate remedy for any harm sustained by the plaintiff's children), *vacated by* 374 U.S. 487 (1963).

[309] There is support in the legal academy for this view. *See* 2 ESSAYS, *supra* note 228, at 467, 504 (noting that the remedy would suffice, but that it is not required).

[310] *See* Donahoe v. Richards, 38 Me. 376, 406–13 (1854) (arguing that religious exemptions are inappropriate in connection with general laws regarding reading exercises); Spiller v. Inhabitants of Woburn, 94 Mass. 127, 129–30 (1866) (stating that the right to refrain from participation sufficed); *Church*, 109 S.W. at 118 (stating that the right to refrain from participation sufficed, in the interest of preserving majority rights); *Vollmar*, 255 P. at 621 (Adams, J., dissenting) (arguing that "[c]ompulsory attendance in lessons in good government" offends no constitutional principles, and that the right to opt out "promotes disorder and confusion"); *Kaplan*, 214 N.W. at 22 (Stone, J., concurring) (stating, "It is my present impression that it is simply considerate and tactful, rather than legally necessary, to permit certain children to absent themselves during the Scripture reading," and "there is no legal and

C. CASES STRIKING DOWN COMMON SCHOOL RELIGION: THE COUNTER NARRATIVE

The Pro Narrative is an insult. It pays excessive deference to majoritarianism, misrepresents facts and history, and minimizes claims of psychological harm. After all, insult is one way to inflict psychological harm. There are two responses. One way attempts to blend in and to accommodate the dominant narrative or ideology. This construction produces a weak Counter Narrative. The second way rests on a rejection of some or all of the underlying premises of the pro-common school narrative. This results in a strong Counter Narrative.

Two cases construct the weak Counter Narrative. Both *State* ex rel. *Freeman v. Scheve*[311] and *Herold v. Parish Board of School Directors*[312] strike down the common school religion exercises complained of, but do so in a way that suggests that the courts did not wish to interfere with the workings of the Protestant Empire any more than was necessary in light of the facts of the particular case. *Freeman* left open the possibility that common school religion might pass constitutional muster, provided that schoolteachers were not overeager in their zeal to proselytize school children.[313] *Herold* denied relief to the Roman Catholic complainant standing alone, but granted it to the Jewish complainants.[314] The demographics of Louisiana in the early Twentieth Century suggest that Jews were a very small minority, and most of them resided in New Orleans.[315] Therefore, it was likely that many school districts in Louisiana would be able to impose common school religion as Roman Catholics, standing alone, had no protection under *Herold*, and Jews, who were few in number, might eschew litigation to defend religious freedom and liberty.

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particularly no constitutional objection to such compulsion if it should be attempted"); *Finger*, 226 N.W. at 356, 362 (Sherwood, P.J., dissenting) (arguing that, in consideration of "confusion and disorder," a right to refrain would suffice); *Carden*, 288 S.W.2d at 725 (stating that "the highest duty of those who are charged with the responsibility of training the young people . . . is in teaching both by precept and example that in the conflicts of life they should not forget God").

[311] 93 N.W. 169 (Neb. 1903).

[312] 68 So. 116 (La. 1915).

[313] The testimony of the schoolteacher conducting the Service Exercises established that she intended them to be devotional. State *ex rel*. Freeman v. Scheve, 93 N.W. 169, 171 (Neb. 1903). It is not clear that she or any other teacher could have intended otherwise. The court, nonetheless, indulged in the pretense that it was possible to read the Bible as "mere literature" and to sing hymns as "a vocal exercise" and to offer up prayers "for the sake of their reflex influence." *Id.* at 171. *But see Church*, 109 S.W. at 116 (relying on testimony to the effect that teachers were warned "not to read anything that would be objectionable from the New Testament" and not to "read any sectarian passages from the Bible"). The Texas court never explained just how these warnings could be given practical, real world effect.

[314] At least one law professor concluded that Jews were entitled to no more relief than were Christians. *See* 2 ESSAYS, *supra* note 228, at 503–04.

[315] *See* BENJAMIN KAPLAN, THE ETERNAL STRANGER: A STUDY OF JEWISH LIFE IN THE SMALL COMMUNITY 42 (1957) (estimating the number of Jews in Louisiana as 12,723 in 1917 and 14,000 in 1957); Leonard Reissman, *The New Orleans Jewish Community*, *in* JEWS IN THE SOUTH 291–92 (Leonard Dinnerstein & Mary Dale Palsson eds., 1973) (noting that in 1958 there were 9,500 Jews in New Orleans constituting 1.2% of the population of that city).

The other cases and opinions striking down common school religion, however, generated a strong Counter Narrative, reflecting a deep dissatisfaction with common school religion, and seeking to remove it across the board. For example, in *Minor*, the school board majority banned Bible reading in the Cincinnati common schools.[316] The court could have affirmed the right of the school board majority to decide the question and left it at that. Had *Minor* done so, the case would have lined up with *Freeman* and *Herold*, leaving the door open for the exercise of common school religion under changed circumstances: less zealous teachers, an absence of Jews or other non-Christians, or different school board majority decisions. *Minor*, however, did no such thing. It constructed a narrative that left the Cincinnati school board, and any other Ohio school board, no choice but to bar common school religion, regardless of what the local majority might prefer.

The strong Counter Narrative tends not to cater to majoritarianism, inclines to get facts and history right, recognizes the magnitude of the harm visited upon religious dissenters by common school religion, and, most importantly, does not insult minorities.

1. *Anti-Roman Catholicism (and by Extension Other Religious Minorities)*

The strong Counter Narrative displays two distinct elements: it rejects attempts to belittle and insult religious dissenters, particularly Roman Catholics,[317] and it constructs a positive pro-immigrant narrative.

Lawyers representing school boards sometimes attacked the Roman Catholic Church.[318] The Counter Narrative, however, did not take the bait.[319] Earlier, *Finger* had reached the truth: "The Protestants are not worried for fear the Catholic children will receive no religious or moral instruction. Their objection is to the quality."[320] Simply put, the fear of the Protestant Empire was not so much that school children would not learn

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[316] Bd. of Educ. v. Minor, 23 Ohio St. 211, 238–40 (Ohio 1872).

[317] In *Herold*, the decision to reject the claim of the Roman Catholic complainant, standing alone, without reference to the Jewish complainants, may be due, in part, to a negative attitude by the court towards the advocacy skills of the former's lawyer. 68 So. at 118–19. *See also supra* note 281.

[318] *See* State *ex rel.* Weiss v. Dist. Bd., 44 N.W. 967, 973 (Wis. 1890) (involving school board lawyers calling the Roman Catholic Church "hostile to our common-school system"); State *ex rel.* Finger v. Weedman, 226 N.W. 348, 354 (S.D. 1929) (involving school board lawyers' veiled references to "a determined effort throughout the country to bar the Bible from the public schools . . . by religionists, who for a thousand years have fought bitterly every effort to give the Bible to the people in the vernacular").

[319] *See Weiss*, 44 N.W. at 973 (declaring the charge irrelevant and immaterial); *Finger*, 226 N.W. at 354 (stating that the lawyers' gambit constituted "a striking illustration of the bitterness that can and does grow out of religious disputes"). *See also* State *ex rel.* Freeman v. Scheve, 93 N.W. 169, 171 (Neb. 1903) (stating that whether the relator "was reasonable or unreasonable in objecting to his children actively or passively participating in the simple religious service conducted by the teacher is altogether immaterial").

[320] *Finger*, 226 N.W. at 352.

religion, but that they would learn the "wrong" religion.[321] The pro-immigrant narrative rejects the paternalism of *Donahoe*.[322] *Weiss* described immigrants as "industrious, intelligent, honest, and thrifty; just the material for the development of a new state,"[323] and argued that the state had to respect their religious feelings and sensibilities.[324] The dissenting opinion in *Pfeiffer* referred to the religiously diverse immigrants in Michigan as "citizens . . . interested in the prosperity of the state and its institutions."[325]

2. *Protestantization*

The idea of separation of Church and State emerged at the Founding, if not earlier. It is explicit in the Tentative Principle, at least with respect to the federal government.[326] The question, however, is whether the idea ought to limit the powers of state and local government in general, or only with respect to particular functions of state and local government. The Counter Narratives apply the separationism idea to common school religion. In some cases, judges praised the separationism idea in the context of broad tradition, including the Protestant Empire itself, while others did so in the setting of common school religion.

a. The Separationism Idea and Broad Tradition

The legitimacy of the Protestant Empire itself came under close scrutiny. Two courts flatly rejected the idea that "true Christianity" forms an alliance with the State.[327] The court in *Minor* stated that "[t]rue Christianity asks no aid from the sword of civil authority."[328] In what has become a famous aphorism, the court declared: "*Legal* Christianity is a solecism, a contradiction of terms."[329] *Minor* made the case for separationism measured against broad tradition: "Let the state not only keep its own hands off [religion], but let it also see to it that religious sects keep their hands off each other."[330] In a similar vein, *Ring* declared that religion "asks from the civil government only impartial protection and concedes to every other sect and religion the same impartial civil right."[331] It is difficult to see how the legitimacy of the Protestant Empire can survive such language.

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[321] *But see supra* notes 255–256 and accompanying text (suggesting that the fear might have concerned teaching "no religion" rather than "wrong religion").

[322] Donahoe v. Richards, 38 Me. 376, 379 (1854).

[323] *Weiss*, 44 N.W. at 974.

[324] *Id.* at 975.

[325] Pfeiffer v. Bd. of Educ., 77 N.W. 250, 260 (Mich. 1898) (Moore, J., dissenting).

[326] The Tentative Principle "allocate[s] much of the work of the Anglo-American Reformation to the states and other institutions and not the federal government." *See supra* notes 5–6 and accompanying text.

[327] Bd. of Educ. v. Minor, 23 Ohio St. 211, 247 (Ohio 1872); People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 256 (Ill. 1910).

[328] *Minor*, 23 Ohio St. at 247.

[329] *Id.* at 248.

[330] *Id.* at 250–51.

[331] *Ring*, 92 N.E. at 256.

The far greater difficulty confronting the courts constructing the Counter Narrative and expanding the reach of the separationism idea was the reality that America was a Christian nation, a Protestant nation, if not in law, then certainly in demographic fact.[332] *Ring* rejected the idea of America as a Christian nation *in law*: "the law knows no distinction between the Christian and the Pagan, the Protestant and the Catholic. All are citizens. Their civil rights are precisely equal."[333] *Finger*,[334] however, stumbled on the point, raising some question as to whether the rights of a non-Christian were in fact equal to those of a Christian in religious controversies, taking the position that it need not decide the question.[335]

b. The Separationism Idea and Common School Religion

Through the narrower lens of common school religion, the Counter Narrative came into sharper focus, as did the reach of the expansion of the separationism idea. The factors that impacted the Counter Narrative included the Northwest Ordinance, the question of institutional competence to teach religion, the history and tradition of common school religion, and the impact of religious freedom on the state of religion in America.

i. The Northwest Ordinance

The triptych of religion, morality, and knowledge sitting at the center of the Northwest Ordinance provided the defenders of common school religion with an important element in their Pro Narrative. The text of the Ordinance fairly supports, though it does not compel, the conclusion that the business of the common schools is to teach all three subjects.[336] While the law is settled that the adoption of state constitutions superseded the Ordinance,[337] the ideology of the Ordinance survived, either in explicit state constitutional text[338] or as part of the legal tradition of some of the states carved out of the Northwest Territory.[339] The courts in the Ohio, Wisconsin, and Illinois cases and the dissenting judge in the Michigan case

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[332] *See Minor*, 23 Ohio St. at 246–47; *Ring*, 92 N.E. at 255; State *ex rel.* Finger v. Weedman, 226 N.W. 348, 349 (S.D. 1929). Some courts presaging and others echoing *Zorach v. Clauson*, 343 U.S. 306 (1952), characterized Americans as a "religious people." *See* Herold v. Parish Bd. of Sch. Dirs., 68 So. 116, 119 (La. 1915); Engel v. Vitale, 176 N.E.2d 579, 584 (N.Y. 1961) (Dye, J., dissenting).

[333] *Ring*, 92 N.E. at 255.

[334] *Finger*, 226 N.W. at 348.

[335] *Id.* at 349. The court's logic is weak on this point. It argues that in a Christian nation, reading the Koran would not be in worship whereas reading the Bible would. *Id.* Presumably, therefore, for a Muslim, reading the Bible would not be worship. This conclusion ignores altogether the reality of cultural suasion and coercion. *See generally* Newsom, *supra* note 1.

[336] *See supra* notes 248–250 and accompanying text.

[337] *See State* ex rel. *Weiss v. Dist. Bd.*, 44 N.W. 967 (Wis. 1890). *See also Ring*, 92 N.E. at 253.

[338] *See* Bd. of Educ. v. Minor, 23 Ohio St. 211, 241 (1872).

[339] *Ring*, 92 N.E. at 253. Some parts of the Ordinance remained in force in Michigan, "but no part of such ordinance repugnant to the constitution had any legal force." Pfeiffer v. Bd. of Educ., 77 N.W. 250, 254 (Mich. 1898) (Moore, J., dissenting).

either ignored the Ordinance or interpreted it in a way consistent with the separationism idea, rejecting a linkage between religion and morality.[340]

ii. Institutional Competence to Teach Religion

The text of the Northwest Ordinance forced the judges opposed to common school religion to confront the question of institutional competence. The separationism idea, however, does not depend on an interpretation of this text. Several courts stated the principle without regard to it, and the Ohio, Illinois, and Wisconsin courts participated in the development of a fuller defense of the separationism idea.

The categorical claim that the state lacked the institutional competence to teach religion became a central element of the Counter Narrative.[341] The rationale or justification for this categorical claim rested on several practical considerations. First, "[r]eligion, as a system of belief, cannot be taught without offense to those who have their own peculiar views of

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[340] The Ohio constitution declared it the duty of the state legislature to "encourage schools and the means of instruction." *Minor*, 23 Ohio St. at 241. It sufficed for *Minor* to note that "the legislature have [sic] never passed any law enjoining or requiring religious instructions in the public schools, or giving the courts power . . . to direct or determine the particular branches of learning to be taught therein." *Id.* The court, however, went on to consider the deeper question. It subsumed "religion" and "morality" under "knowledge," concluding that "[t]he fair interpretation seems to be, that true 'religion' and 'morality' are aided and promoted by the increase and diffusion of 'knowledge.'" *Id.* at 242–44. *Minor* opened the door to a jurisdictional separation, denying the authority of the state to teach religion. *Id.* at 248. The dissenting judge in *Pfeiffer* also separated the teaching of religion from the teaching of morality and knowledge, notwithstanding anything said in the Ordinance. 77 N.W. at 254–55 (Moore, J., dissenting). He also noted that "[i]t is no answer to the charge that the contemplated use of 'Readings from the Bible' is teaching religion, to say that the book also teaches morality." *Id.* at 257 (Moore, J., dissenting).

Weiss essentially ignored the Ordinance. 44 N.W. at 967. *Ring*, on the other hand, largely followed the reasoning in *Minor*. 92 N.E. at 253 (stating that the Ordinance

> recognized religion, morality, and knowledge as . . . essential to good government and the happiness of the people, and to secure those three things it enacted, not that religious instruction (which is not within the province of civil government) should be given by the states, but that the means of education should be encouraged, and thus the essentials of good government should be promoted).

[341] *See Weiss*, 44 N.W. at 976 (stating that "[t]he priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and, above all, by parents in the home circle"); State *ex rel.* Freeman v. Scheve, 93 N.W. 169, 170 (Neb. 1903) (stating that the "duty of the state with respect to religion—its whole duty—is 'to protect every religious denomination in the peaceable enjoyment of its own mode of public worship'"); *Pfeiffer*, 77 N.W. at 260 (Moore, J., dissenting) (stating that religion "is a branch of education which is not within the province of the state" as it "belongs to the parents, the home, the Sunday school, the mission, and the church"); *Ring*, 92 N.E. at 256 (declaring that the "truths of the Bible are the truths of religion, which do not come within the province of the public school"); *Finger*, 226 N.W. at 349 (insisting that "religious teaching is committed to individuals and religious organizations not supported by the state"); Engel v. Vitale, 176 N.E.2d 579, 588 (N.Y. 1961) (Dye, J., dissenting) (stating that the "inculcation of religion is a matter for the family and the church" because in "sponsoring a religious program, the State enters a field which it has been thought best to leave to the church alone"). One judge pressed the point and insisted that the common schools were secular. *Weiss*, 44 N.W. at 981 (Orton, J., concurring) (stating that as "the state can have nothing to do with religion except to protect every one in the enjoyment of his own, so the common schools can have nothing to do with religion in any respect whatsoever" because they are "completely secular").

religion, no more than it can be without offense to the different sects of religion."[342] Second, religious disputes did not belong in the public schools, where "of necessity all are to meet."[343] Third, "[a]bundant means are at hand for all who seek [religious] instruction for themselves or their children."[344]

Minor carefully noted that the categorical claim is institution specific: "Our charitable, punitive, and disciplinary institutions stand on an entirely different footing. There the state takes the place of the parent, and may well act the part of a parent or guardian in directing what religious instructions shall be given."[345] Thus, according to *Minor's* reasoning, the common school does not stand *in loco parentis*. The most important justification for the categorical claim lies in the rights of parents to control the religious formation of their children. It is not proper for the state to subject children to a state-preferred religion, even as the parents object. One of the delicious ironies, thus, is that the Counter Narrative is a "pro-family," "family values" narrative. The Pro Narrative essentially contends that too many parents have defaulted upon their responsibility to see to the religious formation of their children and that common school religion is better than no religion.[346] The Pro Narrative declaration of the state right to act *in loco parentis*, however, ignores the possibility that the state might have a duty to educate parents as to their responsibilities rather than subject school children to common school religion in typical Protestant Empire fashion.

iii. The Relevance of History and Tradition

The Counter Narrative struggled with the stubborn fact that America has a history and tradition of common school religion. First, judges appealed to textualism, arguing that the relevant constitutional text trumped history and tradition.[347] The Wisconsin court went further and concluded that there was less to the claim of history and tradition than met the eye for at least two reasons. The "tradition" had not become fixed,[348] and far more telling, "the practice [did] not prevail in the public schools in any of the larger cities in the state."[349] By the end of the Nineteenth Century, it was clear that American cities had become the centers of religious diversity.[350] In such venues, it is not surprising that common school religion might fare

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[342] *Weiss*, 44 N.W. at 981 (Orton, J., concurring).

[343] *Minor*, 23 Ohio St. at 253.

[344] *Ring*, 92 N.E. at 256. *See also Finger*, 226 N.W. at 350 (declaring that "[w]e have many churches whose function it is to teach religion").

[345] *Minor*, 23 Ohio St. at 253.

[346] *See supra* notes 255–256 and accompanying text.

[347] *See Weiss*, 44 N.W. at 974; *Pfeiffer*, 77 N.W. at 256 (Moore, J., dissenting).

[348] *See Weiss*, 44 N.W. at 974. *But see* Boyer, *supra* note 39, at 184–87 (stating that the "tradition" was decidedly mixed).

[349] *See Weiss*, 44 N.W. at 974.

[350] *See* STRONG, *supra* note 36, at 171–86. These cities are still, to this day, centers of diversity. *See infra* notes 729–732.

relatively poorly, though it thrived in some American cities[351] until the United States Supreme Court finally adopted the Revised Tentative Principle.[352]

iv. Religious Freedom and the Advancement of Religion

The Counter Narrative claims that the separationism idea is good for religion: "Christianity had its beginning and grew under oppression. Where it has depended upon the sword of civil authority for its enforcement it has been weakest."[353] Notwithstanding the smug complacency and the religious bias that appeared in the discourse, the rhetoric nonetheless sends a powerful message: if the state leaves people alone, they will find religion on their own. There is good reason to believe that this claim is in fact true.[354]

3. *Pan-Protestantism and the Rhetoric of Nonsectarianism*

The Pro Narrative rests considerably upon the idea of nonsectarian Christianity,[355] an immediate response to the commands of state constitutional text.[356] Not surprisingly, the weak Counter Narrative embraces the rhetoric of nonsectarianism. *Freeman* declared as a "cardinal truth that . . . Christianity is greater than creed,"[357] and *Herold* declined to trouble itself with differences between Roman Catholicism and Protestantism.[358] The courts constructing the strong Counter Narrative make it clear that the central reality is sectarianism.[359]

a. The Bible and Permissible Uses, if Any

The creators of the Counter Narratives had to answer an exceedingly difficult political, cultural, and philosophical question: What use of the Bible, if any, was permissible in the common schools? An outright ban of the Bible was the last resort and courts sought to avoid this answer. The problem, however, was that if the Bible is sectarian and religious in nature,

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[351] *See* Murray v. Curlett, 179 A.2d 698 (Md. 1962), *rev'd sub nom.*, Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (involving Service Exercises in Baltimore, Maryland).

[352] *See supra* notes 7–9 and accompanying text.

[353] People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 256 (Ill. 1910). *See also* Pfeiffer v. Bd. of Educ., 77 N.W. 250, 263 (Mich. 1898) (Moore, J., dissenting) (arguing that "[n]ever at any time in the history of the world was there as much pure religion as today," because "[i]n no country in the world are religious truths more generally entertained than in our own" and "[i]n no country in the world is there so complete a separation of the church and state as with us," concluding that "[t]he growth of religious truth is encouraged by the growth of religious freedom"); State *ex rel.* Finger v. Weedman, 226 N.W. 348, 349 (S.D. 1929) (declaring that the "advantage in separation of church and state is exemplified in our highly enlightened, free, and Christian nation").

[354] *See generally* FINKE & STARK, *supra* note 71.

[355] *See supra* Part III.B.3.

[356] *See generally* Cushman, *supra* note 43.

[357] State *ex rel*. Freeman v. Scheve, 93 N.W. 169, 170 (Neb. 1903).

[358] Herold v. Parish Bd. of Sch. Dir., 68 So. 116, 117 (La. 1915).

[359] *See* Bd. of Educ. v. Minor, 23 Ohio St. 211 (1872); State *ex rel.* Finger v. Weedman, 226 N.W. 348, 350 (S.D. 1929) (referring to "sects of the common national religion").

as it surely is, then the question is whether *any* use of the Bible in the common schools can escape sectarian and religious controversy.

Weiss first proposed an answer to the question, the court stumbled badly in the process. The court correctly stated that "there are differences between [the KJV and the Douay Bible] in many particulars, which the respective sects regard as material,"[360] and proceeded to discuss many of them.[361] The court went further, however, to argue for a religion beyond sect.[362] *Weiss* correctly identified as sectarian doctrine teachings on "the divinity of Jesus Christ, the eternal punishment of the wicked, the authority of the priesthood, [and] the binding force and efficacy of the sacraments." It utterly failed, however, to recognize the sectarian doctrinal and dogmatic dimensions of the nature and character of a Supreme Being and of the duties owed the Supreme Being. *Weiss* concluded that "there is much in the Bible which cannot justly be characterized as sectarian."[363] Hence, the *Weiss* doctrine was a disaster.

In *Church v. Bullock*,[364] a particularly artless opinion upholding common school religion, the court relied heavily on the testimony of a school official that he had "instructed the teachers that they must not read any sectarian passages from the Bible."[365] How the teachers were to determine which passages were sectarian was not discussed. *Weiss* did scarcely better on this point than *Church*.

In any event, *Weiss* "solved" the problem by relying on the fact that the regulations designated "the whole Bible without exception" for use in the common schools.[366] *Weiss* held that the Bible "as a whole" was sectarian and thus "the reading of selections therefrom in those schools . . . is

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[360] State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967, 972 (Wis. 1890).

[361] *See id*. at 972–73.

[362] The court argued that:

> To teach the existence of a supreme being, of infinite wisdom, power, and goodness, and that it is the highest duty of all men to adore, obey, and love Him, is not sectarian, because all religious sects so believe and teach. The instruction becomes sectarian when it goes further, and inculcates doctrine or dogma, concerning which the religious sects are in conflict.

Id. at 973

[363] *Id.* at 974. Not surprisingly, *State* ex rel. *Freeman v. Scheve*, a weak Counter Narrative opinion, embraced the *Weiss* view of the sectarian nature of the Bible. 93 N.W. 169, 171 (Neb. 1903) (asking "[w]hy . . . . the Bible [may not] be read without indoctrinating children in the creed or dogma of any sect," in light of the courts belief that the Bible's "contents are largely historical and moral" and its "language is unequalled in purity and elegance"). The other weak Counter Narrative opinion, *Herold v. Parish Board of School Director*, 68 So. 116 (La. 1915), ducked the question altogether. The court took the position that the differences "are not known to the ordinary lay reader beyond the fact that the Christian Bible contains the New Testament." *Id.* at 118. With respect to the differences between Roman Catholics and Protestants, the Louisiana court concluded that "they are not known to the ordinary lay reader; and the court is not called upon to point out these differences." *Id.* In this regard, *Herold* presaged *People* ex rel. *Vollmar v. Stanley*, one of the key Pro Narrative cases. *See supra* note 220.

[364] 109 S.W. 115 (Tex. 1908).

[365] *Id.* at 116

[366] *Weiss*, 44 N.W. at 972.

sectarian instruction"[367] even if the portions actually read were not sectarian. Unfortunately, if the legislature or the school board identified portions of the Bible that were nonsectarian, using *Weiss*' own guidelines, and limited the permissible Bible reading to those portions, the Wisconsin court would be hard-pressed to ban the reading of those passages. The result might be a truncated, sterile common school religion, but it would be common school religion nonetheless.[368] *Freeman* "solved" this problem by finding a "helpful fact" on which to hang its decision—the overzealous schoolteacher.[369]

Nothing in *Weiss* "solves" the problem in *Church*. One could say that *Church* merely followed *Weiss*' lead. In *Weiss*, a careless regulation overreached, whereas in *Church*, a school official properly warned the teachers. Hence, one could argue that there was no reason to apply the "as a whole" rule that ultimately controlled the outcome *Weiss*. Yet, a principled response to the problem of common school religion and the mistreatment of religious minorities should not hang by so slender a thread.

The concurring judge in *Weiss* flatly disagreed with the majority opinion. He held that the Bible "is a *sectarian* book,"[370] a view that came to dominate the Counter Narrative. *Ring* referred to the differences between the Protestant and the Roman Catholic Bibles,[371] recognizing that

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[367] *Id.* The court, using a clever rhetorical device, hoisted evangelical Protestants on their own petard:

> Any pupil of ordinary intelligence who listens to the reading of the doctrinal portions of the Bible will be more or less instructed thereby in the doctrines . . . . A most forcible demonstration of the accuracy of this statement is found in certain reports of the American Bible Society of its work in Catholic countries, . . . in which instances are given of the conversion of several persons from "Romanism" through the reading of the scriptures alone; that is to say, the reading of the Protestant or King James version of the Bible converted Catholics to Protestants without the aid of comment or exposition. In those cases the reading of the Bible certainly was sectarian instruction. We do not know how to frame an argument in support of the proposition that the reading thereof in the district schools is not also sectarian instruction.

Id. at 973.

The concurring judge made a different argument as to the meaning of Bible reading:

> Since every translation made by man must be more or less imperfect, and since the application of particular passages is liable to be made with partial apprehension, and biased, or even distorted, judgment, it is easy to perceive how texts of scripture may be read with such an emphasis and tone as to become excessively sectarian. While the members of any particular sect may be willing to have one of their own number read the Bible in the public schools, yet they are not always willing to concede the same to a member of a sect believing in an opposite faith or doctrine.

Id. at 976–77 (Cassoday, J., concurring). The main opinion focused on the hypocrisy of evangelical Protestants whereas Justice Cassoday addressed the biases of both evangelical Protestants and Roman Catholics.

[368] Interestingly, it does not appear that any school board in Wisconsin attempted this exercise. *See* Boyer, *supra* note 39. But, the danger was always present.

[369] State *ex rel*. Freeman v. Scheve, 93 N.W. 169, 171 (Neb. 1903).

[370] *Weiss*, 44 N.W. at 981 (Orton, J., concurring).

[371] People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 254 (Ill. 1910).

"[t]he differences may seem to many so slight as to be immaterial."[372] *Ring* also noted that "[d]ifferences of religious doctrine may seem immaterial to some, while to others they seem vitally important. Sectarian aversions, bitter animosities, and religious persecutions have had their origin in apparently slender distinctions."[373] Rejecting the *Weiss* doctrine as to the sectarian character of the Bible, *Ring* correctly observed that "[n]o test suggests itself to us, and perhaps it would be impossible to lay down one, whereby to determine whether any particular part of the Bible forms the basis of or supports a sectarian doctrine. Such a test seems impracticable."[374] Thus, *Ring* adopted an all-or-nothing approach and concluded that the Bible as a whole was sectarian.[375] Perhaps *Weiss* meant to do the same thing, but the majority never explicitly so held, relying instead on the convenient facts in the particular case, rather than analyzing the problem in broader categorical terms.[376]

The Counter Narrative did not rest on the holding that the Bible is sectarian. It also addressed the religious character of the Bible, without regard to its sectarian nature. *Ring* put it simply: "the Bible is the inspired word of God . . . . The historical and literary features of the Bible are of the greatest value, but its distinctive feature is its claim to teach a system of religion revealed by direct inspiration from God."[377] Even *Herold* pressed the point, connecting powerfully with both evangelical Protestant theology and Roman Catholic teaching:[378] "[a]s God is the author of the Book, He is necessarily worshipped in the reading of it."[379]

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[372] *Id.*

[373] *Id.*

[374] *Id.* at 255. The court went on to say:

> If any parts [of the Bible] are to be selected for use as being free from sectarian differences of opinion, who will select them? Is it to be left to the teacher? The teacher may be religious or irreligious, Protestant, Catholic, or Jew. To leave the selection to the teacher, with no test whereby to determine the selection, is to allow any part selected to be read, and is substantially equivalent to permitting all to be read.

Id.

[375] Of course, those judges upholding common school religion could use this approach and declare the Bible, in its entirety, nonsectarian. *See supra* notes 264–269 and accompanying text.

[376] Other courts followed *Ring* on this point. *See* State *ex rel*. v. Frazier, 173 P. 35, 38 (Wash. 1918) (stating "Bible history, narrative and biography cannot be taught without leading to opinion and ofttimes partisan opinion"); State *ex rel.* Finger v. Weedman, 226 N.W. 348, 351 (S.D. 1929) (declaring that "[w]hile the differences may seem inconsequential to many, they are sufficiently substantial to engender in the field of religion heated conflicts," and that "[w]e are satisfied that neither the evidence nor reason will justify us in . . . finding that the differences . . . are not substantial"); Tudor v. Bd. of Educ., 100 A.2d 857, 865 (N.J. 1953) (stating that the KJV is unacceptable to those of the Jewish faith, and there is no doubt "that the King James version of the Bible is as unacceptable to Catholics as the Douay version is to Protestants").

[377] *Ring*, 92 N.E. at 253.

[378] Evangelical Protestants see the Bible as the sum and substance of their religion. *See supra* note 109 and accompanying text. Roman Catholics believe that the Bible was "written down under the inspiration of the Holy Spirit. . . . [It has] God as [its] author and [has] been handed on as such to the Church herself." UNITED STATES CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH § 105.

[379] Herold v. Parish Bd. of Sch. Dir., 68 So. 116, 121 (La. 1915).

It would appear to follow that *any* reading of the Bible in the common schools would be unconstitutional. *Weiss*, however, consistent with its effort to avoid the total ban of the Bible in the common schools, struck a more accommodating pose:

> [Its views on the character of the Bible and of Bible reading] do not . . . banish from the district schools such text-books as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom. Such teachings and extracts pervade and ornament our secular literature, and are important elements in its value and usefulness.[380]

The Bible itself, though, cannot be properly used as a textbook.[381] Putting the parts of *Weiss* together, it appears that textbooks containing nonsectarian passages from the Bible may be used in common schools, but it remains an open question as to which passages might be included.

The dissenting judge in *Pfeiffer* approached the problem from a different doctrinal perspective. He found that the textbook in question, a collection of extracts from the Bible, intended to serve a religious purpose.[382] The school officials meant for the readings to "tend to the acceptance by those pupils of the statements in the selections as true,"[383] because the extracts were read as part of a religious exercise. There was "a plain and practical distinction between using these selections . . . as the basis for a stated religious exercise, and using extracts . . . incorporated into the text books of the schools because of the moral teaching and literary excellence contained therein," but not because of their "authority as religious doctrines."[384]

Apparently, the court in *Weiss* would accept reading of "nonsectarian" passages from the Bible in the common schools. The dissenting judge in *Pfeiffer* had a different test in mind: the purpose for and the use of the textbook. Presumably, the passages included in a permissible textbook would be noteworthy as much for "the excellence of the thought and beauty of its expression"[385] as for any religious message. This distinction, however, is far from clear and it is not definite by what means passages meeting this test could be identified. Thus, neither *Weiss* nor the dissenting judge in *Pfeiffer* produced a practical, workable test for determining the permissible use of the Bible in the common schools by means of "textbooks."

Freeman found fault with the teacher, not with the Bible or with Bible reading. Thus, Bible reading as such was permissible. "The point where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use has degenerated into abuse—where a teacher employed to give secular instruction has violated the

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[380] State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967, 973 (Wis. 1890).
[381] *Id.* at 975.
[382] Pfeiffer v. Bd. of Educ., 77 N.W. 250, 256 (Mich. 1898) (Moore, J., dissenting).
[383] *Id.* at 257.
[384] *Id.* at 260.
[385] *Id.*

constitution by becoming a sectarian propagandist."[386] This answer, however, presents its own set of difficulties. There is no easy way to monitor and evaluate the motivations of public schoolteachers when they are conducting Bible reading exercises.

It fell, more or less, to *Ring* to settle the question. *Ring* declared that "[t]he Bible has its place in the school, if it is read there at all, as the living word of God, entitled to honor and reverence."[387] The court agreed with *Weiss*[388] that school children "cannot hear the Scriptures read without being instructed as to" a variety of doctrines.[389] In keeping with its affinity for bright-line rules in this troublesome corner of the law, the Illinois court concluded:

> The only means of preventing sectarian instruction in the school is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise. The Bible is not read in the public schools as mere literature or mere history. It cannot be separated from its character as an inspired book of religion. It is not adapted for use as a text-book for the teaching alone of reading, of history, or of literature, without regard to its religious character. Such use would be inconsistent with its true character and the reverence in which the Scriptures are held and should be held. If any parts are to be selected for use as being free from sectarian differences of opinion, who will select them? Is it to be left to the teacher? The teacher may be religious or irreligious, Protestant, Catholic, or Jew. To leave the selection to the teacher, with no test whereby to determine the selection, is to allow any part selected to be read, and is substantially equivalent to permitting all to be read.[390]

At the very least, the Illinois court rejected the use of extracts from the Bible. It may well be that the court has called into serious question the use of "text-books . . . founded upon the fundamental teachings of the Bible,"[391] because the Illinois court rejected a permissible "literature-history" use of the Bible. If any permissible use of the Bible in the common schools survives after *Ring*, it has to be one in which biblical passages are wrenched from their context in the Holy Book and immersed in an entirely different, presumably secular, setting or background.[392]

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[386] State *ex rel*. Freeman v. Scheve, 93 N.W. 169, 172 (Neb. 1903).

[387] People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 254–55 (Ill. 1910).

[388] State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967 (Wis. 1890).

[389] *Ring*, 92 N.E. at 255.

[390] *Id.*

[391] *See Weiss*, 44 N.W. at 973. The "founded upon" limitation is the second prong of the *Weiss* test. *See supra* notes 383–384 and accompanying text.

[392] Other courts followed *Ring*. *See Herold*, 68 So. at 121 (seeking to limit relief to Jewish plaintiffs and deny it to the Roman Catholic plaintiff, nonetheless stating that the Bible "is not adapted for use as a textbook for the teaching alone of reading, history, or of literature, without regard to its religious character" for "[s]uch use would be inconsistent with the true character and the reverence in which the Scriptures are held, and should be held," concluding that "it is impossible to read from the New Testament without giving instructions in Christianity"); State *ex rel.* Dearle v. Frazier, 173 P. 35, 40 (Wash. 1918) (pointing to the bias of board of education and judges for "what would appear to be heretical or doctrinal to one may stand out as a literary gem or as inoffensive narrative to another"). *See also* State *ex rel.* Finger v. Weedman, 226 N.W. 348 (S.D. 1929). *Finger* found that in the case before it the purpose of the Bible reading was, inter alia, to develop the "religious and Christian characters of the

b. The Lord's Prayer (or Other Prayers) and Service Exercises

With regard to prayer and Service Exercises, the Counter Narrative is simple and straightforward. Thus, the Regents Prayer was "a form of State-sponsored religious education."[393] Service Exercises produced the same response. They "constitute worship because they are the ordinary forms of worship usually practiced by Protestant Christian denominations."[394] The dissenting judge in *Wilkerson* referred to Service Exercises as "a system of worshipping God,"[395] and the dissenting judges in *Curlett* described them as "Christian religious exercises."[396]

4. *Social Reform: Education As the Social Dimension of Protestantization*

The avatars of the Protestant Empire held the belief that to be a good American meant being white and Protestant.[397] The presence of an ever-growing white non-Protestant population was seen, by some, as a menacing peril.[398] It did not help that the Roman Catholic Church, having grown tired of the imposition of common school religion on its children, decided to establish its own separate parochial school system.[399] Resistance was beginning to take a serious toll on the hopes, dreams, and pretensions of white evangelical Protestants.

Other white Americans took different views on the process of Americanization. For them, the process did not depend on the imposition of common school religion.[400] It was just as important to these Americans that the process of Americanization continue in the common schools. The prospect of a nationwide, parish-based system of Roman Catholic parochial schools was unacceptable, just as it was for the minions of the Protestant Empire. The construction of the Counter Narrative reveals the struggle over the proper character and function of Americanization, and, perforce, of protestantization. Two main themes emerged in the Counter Narrative in

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pupils." *Id.* at 349. Writing more broadly, the court declared that to "use the Bible . . . as a mere code of morals or a book of history, would be to affront all Christian sects; to use it without explanation would be to use it in its generally accepted character. It is hardly adaptable for use in secular institutions without comment and analysis." *Id. Finger* correctly concluded that comment on the Bible would constitute religious instruction and would be impermissible in the common schools. *See id.* Thus, Bible reading without comment would be a religious exercise, and Bible reading with comment would be religious instruction. The inference is powerful, therefore, that Bible reading in any form or setting is impermissible in the common schools. Given the procedural posture of the case, however, *Finger* never had to decide the question. *See supra* note 211 and accompanying text.

[393] Engel v. Vitale, 176 N.E.2d 579, 586 (N.Y. 1961) (Dye, J., dissenting), *rev'd*, 370 U.S. 421 (1962).

[394] *Ring*, 92 N.E. at 252.

[395] Wilkerson v. City of Rome, 110 S.E. 895, 906 (Ga. 1922) (Hines, J., dissenting).

[396] Murray v. Curlett, 79 A.2d 698, 708 (Md. 1962) (Brune, C.J., dissenting), *rev'd sub nom.*, Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[397] *See generally* BAIRD, *supra* note 36; STRONG, *supra* note 36.

[398] *See* STRONG, *supra* note 36.

[399] *See* FRASER, *supra* note 49. *See also supra* note 140 and accompanying text.

[400] *See* Joseph H. Crocker, *Religious Instruction in the Public Schools*, *in* RELIGIOUS TEACHING IN THE PUBLIC SCHOOLS 137–52 (Lamar T. Beman ed., 1927).

its strong form. The first sought to avoid religious strife, and the second sought to reaffirm the role of the common school as the primary means of Americanization.

Minor framed the antistrife narrative element. The case could have easily been decided on simple majoritarian grounds without any discussion of the rights of religious minorities.[401] The court, however, felt compelled to address the matter in the interest of "the harmonious working of the state government, and particularly of the public schools of the state."[402]

On the broader issue of Americanization, the values of diversity trump protestantization, at least in the context of the common schools. Thus, "the common schools are free to all alike, to all nationalities, to all sects of religion, to all ranks of society, and to all complexions."[403] The best statement of this viewpoint is in the dissenting opinion in *Pfeiffer:*

> The elements of our population are [religiously] diverse . . . . It is for the interest of society and the State that all citizens should be interested in the public schools of the State; that all pupils of school ages should be instructed therein; and all citizens should take pride in, and be the active friends of, the schools. In no other way can the doctrines of republicanism and democracy—the equality of all people before the law—be so effectively promulgated as by having the children of the rich and of the poor, the children of eminent ancestry as well as those of humble origin, taught side by side, each made to feel and know that success in the schools comes to the diligent and worthy. The citizens of the state, irrespective of creed and religious belief, will accord to the public schools their hearty and cordial and loving support, when the schools are engaged in their true province, and content themselves with performing their proper functions.[404]

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[401] *See supra* note 316 and accompanying text.

[402] Bd. of Educ. v. Minor, 23 Ohio St. 211, 245 (Ohio 1872). Other courts fell in line. *See* State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967, 981 (Wis. 1890) (Orton, J., concurring) (noting that "the Protestant version of the Bible, or any other version of the Bible, is the source of religious strife and opposition"); State *ex rel.* Dearle v. Frazier, 173 P. 35, 37 (Wash. 1918) (declaring that the natural consequence of religious exercises is "religious discussion and controversy"); Kaplan v. Indep. Sch. Dist., 214 N.W. 18, 24 (Minn. 1927) (Wilson, C.J., dissenting) (stating that the majority's decision upholding common school religion "will not settle anything" but "merely adds fuel to the flames"); State *ex rel.* Finger v. Weedman, 226 N.W. 348, 350 (S.D. 1929) (holding that teaching religion "in public schools seems to be so fraught with difficulties and dissensions that it is not practical to undertake it"); Tudor v. Bd. of Educ., 100 A.2d 857, 868 (N.J. 1953) (stating that holding for the school board would "be renewing the ancient struggles among the various religious faiths to the detriment of all").

[403] *Weiss*, 44 N.W. at 981 (Orton, J., concurring). Judge Orton's appeal to racial integration is noteworthy. *Plessy v. Ferguson*, 163 U.S. 537 (1896), and its wretched doctrine of separate but equal was soon to be decided.

[404] Pfeiffer v. Bd. of Educ., 77 N.W. 250, 259 (Mich. 1898) (Moore, J., dissenting). *See also Finger*, 226 N.W. at 352 (declaring that "if the state teaches religion, many parents will, because of their religious belief, keep their children from such teaching, and thereby be deprived of all public school privileges"). *But see* State *ex rel*. Freeman v. Scheve, 93 N.W. 169, 172 (Neb. 1903) (concluding, with reference to Bible reading, that "[e]ven where it is an irritant element, the question whether its legitimate use shall be continued or discontinued is an administrative, and not a judicial, question" for "[i]t belongs to the school authorities, not to the courts").

5. *Attrition and Restraint: The Interplay of Majorities and Minorities*

a. Majoritarianism

A clear defense of the constitutional rights of minorities emerges from the Counter Narrative. The Counter Narrative also avails itself of a disingenuous straw man argument, suggesting that if religious minorities were to become the majority they would behave as badly as religious majorities had behaved. Perhaps the judges wanted to assure the religious majority that a ruling against its interest was not a moral or ethical judgment on its works. There is some evidence that when Roman Catholics formed a local political majority, they behaved in the same thuggish way toward minority Protestants.[405] This rhetorical device may serve some practical purpose; the Counter Narrative and the corresponding holdings have had a largely negative impact on the plans of the religious majority to convert non-Protestants to the religion of the Protestant Empire. It still remains a cheap and tawdry device and there are better ways to defend the principles underlying the Counter Narrative.[406]

On the question of constitutional rights, *Minor*, once again, set the standard: "The 'protection guaranteed by the [Ohio constitution] section in question, means protection to the minority. The majority can protect itself. Constitutions are enacted for the very purpose of protecting the weak against the strong; the few against the many."[407] *Ring* reached the same conclusion,[408] as did the dissenting judges in *Engel*.[409]

b. Harm and Remedy

The single most powerful element of the Counter Narrative involves the harm visited upon religious minorities by common school religion. The

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[405] In *Hysong v. Gallitzin Borough School District*, 30 A. 483 (Penn. 1894), a school board hired Roman Catholic nuns as public schoolteachers and permitted them to teach in their distinctive religious garb, much to the consternation of Protestant families in that school district. The Pennsylvania legislature came to their aid and passed a law that overturned the practice. That law was upheld in *Commonwealth v. Herr*, 78 A. 68 (Penn. 1910). In *Zellers v. Huff*, 236 P.2d 949 (N.M. 1951), the court struck down a relationship between the Roman Catholic Church and the public schools where the Church, in effect, ran a parochial school system in the common schools.

[406] *See Pfeiffer*, 77 N.W. at 259 (Moore, J. dissenting) (declaring that if the State must teach religion, it has to decide what shall be taught, and that the question "can only be decided by the officers under whose control the law places the schools," thus,

> [t]he result will be, where the Protestants are in the majority, religious teachings acceptable to Protestants will be taught; and so, where the Roman Catholics, or the Hebrews, or people of any other religious belief, or of no belief at all, are in the majority, the minority will find taught to their children doctrines which they regard as error).

See also People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 255 (Ill. 1910); State *ex rel*. Dearle v. Frazier, 173 P. 35, 39 (Wash. 1918); Wilkerson v. City of Rome, 110 S.E. 895, 906 (Ga. 1922) (Hines, J., dissenting); Kaplan v. Indep. Sch. Dist., 214 N.W. 18, 23 (Minn. 1927) (Wilson, C.J., dissenting).

[407] Bd. of Educ. v. Minor, 23 Ohio St. 211, 251 (1872).

[408] *Ring*, 92 N.E. at 254.

[409] Engel v. Vitale, 176 N.E.2d 579, 587 (N.Y. 1961) (Dye, J., dissenting), *rev'd*, 370 U.S. 421 (1962).

concept of harm dominates the Counter Narrative. As noted earlier, there are two categories of harm: the psychological and the status-based.[410]

Be it cultural, economic, social, or political, psychological harm concerns itself with freedom of conscience, freedom from coercion, and more controversially, freedom from suasion. Majoritarian suasion, if not coercion, is an unavoidable fact of life. The relevant question asks how the state may impact this suasion. The Pro Narrative tends to ignore the question altogether or answers it in a way that suggests that the state may make this fact of life even worse for religious minorities. This is nothing more than the internal logic of the Protestant Empire at work—attrition and restraint against a backdrop of coercion.[411] The Counter Narrative, however, declares that the state, by means of public school officials, may not make matters worse for religious minorities. The majority will have to work its will without those officials.

Status-based harm does not exist solely as an abstraction, apart from real world consequences, including those that are psychological. The power of the Counter Narrative lies in its marriage of psychological harm with status-based harm, especially the violation of the principle of equality. Denial of equal treatment, after all, may amount to an inducement to change or modify behavior. This central truth about the interconnectedness of the two forms of harm animates the Counter Narrative.

Psychological harm has several forms: stigma and ostracism of students and parents, interference with the parental right to control the religious formation of children, and offense of the religious beliefs of students and parents. The Counter Narrative addresses each harm in a thorough, complete, and comprehensive way.

The stigma and ostracism heaped upon *students* belonging to religious minorities was recognized as a psychological harm in the Nineteenth Century. Thus, *Weiss* declared:

> When . . . a small minority of the pupils in the public school is excluded [pursuant to the opt out remedy], for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult.[412]

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[410] *See supra* notes 13–15 and accompanying text.

[411] *See supra* note 4 and accompanying text.

[412] State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967, 975 (Wis. 1890). *See also* Herold v. Parish Bd. of Sch. Dir., 68 So. 116, 121 (La. 1915) (stating that "[t]he exclusion of a pupil [by way of opt out] . . . puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief"); Kaplan v. Indep. Sch. Dist., 214 N.W. 18, 23 (Minn. 1927) (Wilson, C.J., dissenting) (declaring that "[t]he exclusion [by way of opt out] puts a child in a class by himself" because "[i]t makes him religiously conspicuous," "[i]t subjects him to religious stigma," and "[i]t may provoke odious epithets," thus "[h]is situation calls for courage," and concluding that "[t]he resulting hurt to the parent, as well as to the child, is a humiliation which I attribute to an 'interference with conscience,'" and stating that "[i]t is not for me to say that he who differs with me has an ignorant conscience").

The stigma and ostracism visited upon *parents* was also recognized early on:

> Parents and guardians who may be deists, atheists, or agnostics, and even Christians with strong convictions, may be loath to disclose their objection . . . for fear they might be subjected to criticism, if they were to request in writing that their children or wards be excused from attendance.[413]

The dissenting judge in *Kaplan* also referred to the resulting hurt and humiliation to the parent.[414]

The Counter Narrative, however, was far more concerned with the due process right of parents to control the religious formation of their children[415] than with the right of parents to be free from hurt or humiliation. *Weiss* laid the predicate with the observation that the conscientious beliefs of parents regarding the Bible cannot be said to be "entitled to no consideration."[416] *Freeman* built upon this idea, finding unacceptable that children were compelled to worship without the consent of the parent:

> [O]ver his protest, his children have been compelled to attend Divine worship, and to participate in it. They have been obliged to give homage to God, not according to the dictates of their own consciences or the consciences of their parents, but according to the dictates of the conscience of the [overzealous] teacher.[417]

Ring continued to construct the narrative of parental rights:

> What right have [school] teachers . . . to teach . . . children religious doctrine different from that which they are taught by their parents; Why should the state compel them to unlearn the Lord's Prayer as taught in their homes and by their church and use the Lord's Prayer as taught by another sect?[418]

Similarly, the dissenting judge in *Kaplan* remarked that "the thing of which complaint is here made will not directly prevent [plaintiff] from worshipping God according to the dictates of his own conscience when he is in his own sanctuary or home, but how soon will it pervert the child from the parental belief?"[419] The dissenting judge continued: "To require the Jewish children to read the New Testament which extols Christ as the Messiah is to tell them that their religious teachings at home are untrue."[420]

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[413] Wilkerson v. City of Rome, 110 S.E. 895, 906 (Ga. 1922) (Hines, J., dissenting).

[414] *See Kaplan*, 214 N.W. at 23 (Wilson, J., dissenting).

[415] *See supra* note 308.

[416] *Weiss*, 44 N.W. at 975.

[417] State *ex rel*. Freeman v. Scheve, 93 N.W. 169, 170 (Neb. 1903). In *Freeman*, there was no right to opt out. That fact, however, appears to have had no bearing on the outcome. Indeed, the court seemed to doubt that an opt-out remedy was possible. *Id.* (stating that "[a]s the morning exercises were conducted during school hours, it is difficult to see how [the relator's children] could attend the school without attending worship" and "in our view they were not only compelled to attend worship, but to participate in it"). But, *Freeman* clearly expresses a genuine concern for the right of parents to control the religious formation of their children.

[418] People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 255 (Ill. 1910).

[419] *Kaplan*, 214 N.W. at 22 (Wilson, J., dissenting).

[420] *Id.*

Finger further stated: "the parents' liberty of conscience is the controlling factor, and not that of the pupil."[421] The court then put it even more bluntly: "This case involves the right of the Protestants to read their translation of the Bible and conduct their form of worship in the common schools, and to compel the Catholic children to attend upon such services over the objections of their parents."[422] The dissenting judge in *Curlett* saw the interrelationship of the forms of psychological harm heretofore discussed:

> Hesitancy to expose a child to the suspicions of his fellows and to losing caste with them, will tend to cause the surrender of his and his parents' religious or nonreligious convictions and will thus tend to put the hand of the State into the scales on the side of a particular religion which is supported by the prescribed exercises.[423]

The third form of psychological harm, like the first, is perhaps less dependent upon an understanding of family dynamics. Offending the religious conscience of parents and students implicates the core concerns of religious conscience and liberty.[424] This form of harm connotes coercion, at least in a psychological sense.

Status-based harm does not escape the builders of the Counter Narrative. The conceptual idea that dominates the canon is equality understood as the absence of (1) preference and (2) discrimination on the basis of religious belief.[425] The Counter Narrative concretized the idea and rooted it in the historical and experiential reality of common school religion, particularly the psychological harm that common school religion causes. Virtually all of the Counter Narrative text on status-based harm is located in or near text concerned with psychological harm.

Thus, *Weiss* described the psychological harm caused by common school religion, and then immediately observed that "the practice in

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[421] State *ex rel.* Finger v. Weedman, 226 N.W. 348, 354 (S.D. 1929).

[422] *Id.*

[423] Murray v. Curlett, 179 A. 2d 698, 710 (Md. 1962) (Brune, C.J., dissenting), *rev'd sub nom.*, Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[424] *See* Herold v. Parish Bd. of Sch. Dir., 68 So. 116, 121 (La. 1915) (stating that "[t]he reading of the New Testament as the Word of God infringes on the religious scruples of the Jews"); Wilkerson v. City of Rome, 110 S.E. 895, 906 (Ga. 1922) (Hines, J., dissenting) (declaring that the "ordinance established a system of worship for the schools . . . and thus . . . controls or interferes with the individual worship of God," and that "[t]he reading of [the KJV] offends and molests the Catholics and the Jews. The reading of certain texts of this version will molest certain sects of Protestants" and "[t]he system of worship provided for will offend the deists, atheists, and agnostics"); *Kaplan*, 214 N.W. at 23 (Wilson, C.J., dissenting) (stating that the use of the KJV interferes with the "rights of conscience" of Roman Catholics, and noting that the practice complained of constituted "an endorsement of Protestantism and a repudiation of Catholicism"); Tudor v. Bd. of Educ., 100 A.2d 857, 868 (N.J. 1953) (stating that the actions complained of placed the state's "stamp of approval" on them).

[425] Some of the Counter Narrative cases and opinions discuss other status-based harms such as taxpayer rights. *See* State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967, 979 (Wis. 1890) (Cassoday, J., concurring); Pfeiffer v. Bd. of Educ., 77 N.W. 250, 257 (Mich. 1898) (Moore, J., dissenting); *Wilkerson*, 110 S.E. at 906 (Hines, J., dissenting). *See also* People *ex rel.* Ring v. Bd. of Educ., 92 N.E. 251, 252 (Ill. 1910) (stating that the "compulsory performance [of Service Exercises] would be a violation of the constitutional guaranty of the free exercise and enjoyment of religious profession and worship").

question tends to destroy the equality of the pupils which the constitution seeks to establish and protect."[426] The dissenting judge in *Pfeiffer* discussed the impact of reading from the KJV in the common schools:

> [The board] gives to those who accept as true the religious teachings of King James' version of the Bible the right of having their children taught a portion of those teachings at the expense of those who do not accept them as true. Can it be for one moment contended that this does not enlarge the civil rights and privileges of persons holding one religious belief, and diminish the civil rights and privileges of persons holding another religious belief? No one surely will contend that the right to be equally taxed is not a civil right.[427]

The judge restated the idea in a more categorical form: "It was the purpose of our constitutional provision to place all sects and all religions on an equal plane before the law, giving to none preference over the other."[428] He did so, however, only after concretizing the idea of equality. Additionally, *Ring*, after analyzing elements of the psychological harm at issue,[429] also made the categorical claim of equality, but tied it to the problem at hand.[430]

Herold, at least with reference to Jews, concluded that KJV readings gave "a preference to the children of the Christian parents, and discriminate[d] against the children of the Jews."[431] In a telling passage, the court indicated why the opt-out remedy constituted discrimination, connecting the conclusion to the fact of psychological harm:

> The answer . . . that . . . teachers might . . . have excused . . . the children of said [Jewish] plaintiffs . . . is an admission of discrimination against the children of those citizens whose consciences would not permit them to worship God as taught in the particular portion of the Scriptures selected and read by the teacher of the class in which the children of said citizens happened to be. . . . And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. *The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief.* Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious matters.[432]

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[426] *Weiss*, 44 N.W. at 975.

[427] *Pfeiffer*, 77 N.W. at 257 (Moore, J., dissenting).

[428] *Id.* at 259.

[429] *See supra* note 418 and accompanying text.

[430] *Ring*, 92 N.E. at 256 (declaring that "[a]ll sects, religious or even anti-religious, stand on an equal footing" because they "have the same rights of citizenship, without discrimination" and the "public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay").

[431] Herold v. Parish Bd. of Sch. Dir., 68 So. 116, 121 (La. 1915).

[432] *Id.* (emphasis added). *See also* Kaplan v. Indep. Sch. Dist., 214 N.W. 18, 23 (Minn. 1927) (Wilson, C.J., dissenting) (observing that "[t]o excuse some children [by way of an opt out] is a distinct preference in favor of those who remain and is a discrimination against those who retire," and

The logical force of the Counter Narrative leads to the conclusion that the opt-out remedy would not suffice.[433] Thus:

> [The constitutional] difficulty [is not] remedied by exempting from attendance at these readings the children whose parents object to it. Those parents and those children have equal rights in the schools with the parents and the children of a different religious belief. By exempting them from attending the readings . . . the children are simply deprived of the right of attending school and receiving instruction during the regular school hours. Those who accept the doctrine of the books receive from the public a religious instruction which is denied to those who reject it.[434]

And if there were, in fact, a duty of the schools to teach religion, then:

> [I]t is not easy to see how the schools can abdicate that function, and teach it to some of the pupils, and fail to teach it to the others. Neither would [the opt out remedy] obviate the difficulty growing out of the fact that the money of the taxpayer is taken from him to impart religious instruction of which he does not approve.[435]

D. RELEASED TIME: A REGRESSION

The Counter Narrative never squarely confronted the question of *direct* versus *indirect* instrumentality[436] as religious groups had not developed techniques, strategies, or programs that might have justified the inquiry. In the early years of the Twentieth Century, this changed with the appearance of "released time" programs. In essence, such programs called for an accommodation by the common schools of weekday religious instruction, usually sectarian, whereby students would be released or excused from regular school activities in order to attend that instruction, if their parents had given their written or signed approval or consent to such participation. Students who did not participate in the program, however, had to remain in school. From these programs, two major forms of released time emerged. The first involved religious instruction given in the schools. The second involved instruction given off-site. The precise nature of the accommodation, the role of the officials, administrators, and teachers in the

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connecting this status-based harm with the problem of stigma); State *ex rel.* Finger v. Weedman, 226 N.W. 348, 353 (S.D. 1929) (stating that the "mere selection of a disputed translation would seem to be a preference for the sects holding to such translation, and thereby aiding them in inculcating their doctrines," and connecting this formal harm with the violation of the rights of conscience and parental control of the religious formation of their children); Murray v. Curlett, 179 A.2d 698, 708 (Md. 1962) (Brune, C.J., dissenting) (finding an unconstitutional preference, which was linked to a broad discussion of psychological harm), *rev'd sub nom.*, Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[433] *But see Finger*, 226 N.W. at 348 (approving the opt-out remedy sought by the relator).

[434] Pfeiffer v. Bd. of Educ., 77 N.W. 250, 257 (Mich. 1898) (Moore, J., dissenting). *See also* State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967, 981 (Wis. 1890) (Orton, J., concurring) (finding that the opt-out remedy violates, among other things, equal protection); Wilkerson v. City of Rome, 110 S.E. 895, 906 (Ga. 1922) (Hines, J., dissenting) (stating that the opt-out remedy would not save an unconstitutional enactment).

[435] *Pfeiffer*, 77 N.W. at 260. Interestingly, some of the opinions upholding common school religion grant the point and deny the opt-out remedy, but require attendance at the exercises. *See supra* note 310 and accompanying text.

[436] *See supra* notes 30–37 and accompanying text.

common school in effecting the accommodation, varied widely, making any further generalizations difficult and unreliable.[437]

Released time clearly implicates the idea of indirect instrumentality. The point of the program was to use the schools and compulsory attendance as a way of rounding up students for the programs. Religious interests always had after-school religious instruction as an alternative. Apparently, school children tended not to participate in this instruction.[438] Therefore, the fundamental logic of released time entailed using the schools as a support or an indirect instrumentality.[439]

Participation by religious groups in released time programs depended upon a variety of factors. In theory, all religious groups were free to participate, but some small religious groups might not have had the wherewithal to participate in either form of released time. Other religious groups might not have agreed with the idea of released time itself. As a consequence, there was a good chance that for any given common school, some religious groups participated, while others did not.[440] Some of the programs that wound up in court involved participation by both Protestants and Roman Catholics.[441] Jewish groups sometimes participated.[442] It is more likely than not that the involvement of a variety of religious groups, especially Protestants and Roman Catholics, outweighed the fact that other religious groups did not or could not participate. Indeed, in *McCollum*, Jehovah's Witnesses and Lutherans were kept out of the released time program.[443]

Clearly, states embracing the Pro Narrative have no difficulty with released time programs in either form. Not surprisingly, New York and California upheld released time programs involving off-site religious

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[437] For a discussion of released-time programs, see *Illinois* ex rel. *McCollum v. Board of Education*, 333 U.S. 203, 220–26 (1948) (Frankfurter, J., concurring); Boyer, *supra* note 39, at 233–55 (arguing that released time programs cannot pass muster under the Wisconsin constitution); BOLES, *supra* note 43, at 159–62.

[438] As Justice Frankfurter put it, "children continued to be children; they wanted to play when school was out, particularly when other children were free to do so." *McCollum*, 333 U.S. at 222 (Frankfurter, J., concurring). Some school children, however, did avail themselves. When I was in elementary and high school, many of my Jewish fellow students regularly attended Hebrew School without any push, cooperation, or urging on the part of the school. Perhaps their parents took responsibility for ensuring that their children attended these religious schools during the week, for which they deserve praise.

[439] *See* Boyer, *supra* note 39, at 233 (correctly describing released-time programs as "manipulative practice[s]").

[440] *See* Stein v. Brown, 211 N.Y.S. 822, 827 (N.Y. Sup. Ct. 1925).

[441] *See* People *ex rel*. Latimer v. Bd. of Educ., 68 N.E.2d 305, 308 (Ill. 1946).

[442] *See* People *ex rel.* McCollum v. Bd. of Educ., 71 N.E.2d 161, 163 (Ill. 1947). But, the United States Supreme Court noted that "for the past several years there have apparently been no classes instructed in the Jewish religion." Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 208–09 (1948). *See also* Gordon v. Bd. of Educ., 178 P.2d 488, 489 (Cal. Ct. App. 1947) (stating "[t]here were a number of . . . denominations so represented, including Catholics, those of the various Protestant faiths, and Jews").

[443] Robert E. Rodes, Jr., *The Passing of Nonsectarianism: Some Reflections on the School Prayer Case*, 38 NOTRE DAME LAWYER 115, 119 (1963).

instruction.[444] The Illinois Supreme Court, however, abandoned much of the reasoning of *Ring* when it upheld an off-site released time program,[445] and an on-site program.[446]

In *Latimer*, the off-site released time case, the Illinois court distinguished *Ring* on the grounds that there was "no charge [in *Latimer*] that the action of the school board here is discriminatory or that any particular denomination or religious faith is favored, or that any part of the religious instruction is held in the schoolroom or on school property."[447] The court avoided the question of a second status-based harm—the discriminatory application of public funds—finding that the petition did not "clearly, definitely or with any degree of certainly state[] any exact time spent by the principals or teachers, or even a remote idea of how much money, if any, is used out of the public-school fund" to direct the released time program.[448] *Latimer* clearly followed the Pro Narrative on this point.[449] With regard to psychological harm, *Latimer* was entirely silent. Again, *Latimer* faithfully tracks the Pro Narrative.[450]

McCollum, involving on-site religious instruction, proved to be the defining case. Regarding status-based harm, the Illinois court applied the maxim *de minimis non curat lex* to avoid the difficult question regarding the expenditure of public funds in support of the released time program.[451] It aligned itself with the Pro Narrative on this point.[452] Regarding psychological harm, the plaintiff plainly put it in issue, claiming that "while the program is voluntary it results in segregation and embarrassment to those not participating, which amounts to interference with their religious freedom," specifically referring to the treatment of the matter in *Ring*.[453]

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[444] *See* People *ex rel*. Lewis v. Graves, 156 N.E. 663 (1927). In an earlier case, a trial court had struck down a released time program. *Brown*, 211 N.Y.S. at 826–88. Clearly, *Graves* called the result in *Brown* into serious question.

In California, the state supreme court had upheld the purchase of the KJV for common school library and reference purposes. Evans v. Selma Union High Sch. Dist., 222 P. 801 (Cal. 1924). This decision lines up with the Pro Narrative because it does not either require the school district to eliminate the KJV or require the school district to purchase other versions of the Bible for common school library and reference purposes. Not surprisingly, the released time plan passed judicial muster. *Gordon*, 178 P.2d at 494–95. *Gordon* is a particularly ugly case on the question of psychological harm, but one that is perfectly consistent with the Pro Narrative. The plaintiffs, on appeal, objected to "rulings by the trial court excluding evidence of sectarian antagonism and ill feeling resulting from the conduct of the plan." *Id.* at 495. The response of the California appellate court is particularly gross: "[w]hatever may have been the result of the application of the released-time plan is a matter of discretion of the Board of Education with which, in this case at least, the courts have nothing to do." *Id.* The rhetoric of insult, so characteristic of the Pro Narrative, reaches new heights here.

[445] *Latimer*, 68 N.E.2d at 306–10.

[446] *McCollum*, 71 N.E.2d at 161.

[447] *Latimer*, 68 N.E.2d at 309.

[448] *Id.*

[449] *See supra* note 307.

[450] *See supra* notes 302–306 and accompanying text.

[451] *McCollum*, 71 N.E.2d at 166.

[452] *See supra* note 307.

[453] *McCollum*, 71 N.E.2d at 164.

Again, the Illinois court distinguished *Ring*,[454] this time, however, noting that *Ring* was a "no-right-to-opt-out" case:[455]

> In the instant case, the religious education classes are voluntary and are not a part of the public-school program, and pupils are excused from their public-school classes while attending the classes in religious education. The religious education courses do not go to the extent of being worship services and do not include prayers or the singing of hymns.[456]

Addressing the question of stigma directly, the court essentially dismissed the matter. First, it took the view that the *Latimer* plan was, for "all intents and purposes exactly the same as that involved in the instant case, excepting only that the classes were held outside of the school-rooms."[457] On the question of stigma, the court concluded that the cases were the same.[458] But, the court avoided deciding the legal significance of the "subjection" of religious dissenters to stigma:

> That appellant's son was so subjected is refuted by appellant's own testimony wherein she testified, "As for religious education in the public schools, it would not have a bad effect upon Terry [meaning her son.] I do not know it would bother him one way or the other. I did not know it until in court."[459]

In fact, this testimony may not settle the question. The facts indicate that on one occasion Terry had been placed during the religious instruction period "at a desk in the hall where apparently he was teased by passing children who thought he was being punished. After his mother's complaint, this practice was promptly and permanently discontinued."[460] Perhaps once this outrageous practice ended, Terry was no longer teased by his peers, but other facts belie this conclusion. As Justice Frankfurter noted in his concurring opinion in *McCollum*, "[i]t deserves notice that in discussing with the relator her son's inability to get along with his classmates, one of his teachers suggested that allowing him to take the religious education course might help him to become a member of the group."[461]

Even if there were not other facts in the record that tend to counter or undermine the plaintiff's testimony, the Illinois court failed to confront the categorical nature of the claim of psychological harm found in *Ring* and in other cases constructing the Counter Narrative.[462] *McCollum* could have announced a plausible rule that the evidence in a particular case could overcome the categorical claim. All of the evidence, however, must be accounted for before finding that the presumption of psychological harm

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[454] *Id.*

[455] *See supra* notes 203–211 and accompanying text.

[456] *McCollum*, 71 N.E.2d at 164.

[457] *Id.* at 165.

[458] *Id.*

[459] *Id.*

[460] *Id.*

[461] Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 227 n.18 (1948) (Frankfurter, J., concurring).

[462] *See supra* notes 412–424 and accompanying text.

has in fact been overcome, if only because the premises underlying the categorical claim would suggest that the claim should hold in the interests of religious freedom and liberty, and the avoidance of unnecessary and gratuitous psychological harm to religious minorities. The psychological harm evidence, as a whole, in *McCollum* is at best ambiguous, and thus cannot serve as a basis for denying or overturning the categorical claim.

The Illinois court simply failed to come clean on the question. It clearly did not wish to overrule *Ring*, but taking all of the evidence into account, it necessarily limited *Ring* to the much narrower proposition that the right to opt-out was a sufficient remedy for psychological harm. Because the remedy was missing in *Ring*, the case was correctly decided. Where the opt-out remedy exists, however, a different result should follow. Thus, the Illinois court essentially lined up with the Pro Narrative side in the "right-to-opt-out" cases.[463] Of course, the problem remains that if *Ring* had meant to adopt this narrower view, it simply could have ordered the opt-out remedy. *Ring* did no such thing.

One can perhaps reconcile *Ring* with *Latimer* and *McCollum* on a different ground: the presence of common school religion in *Ring* and the absence of pan-Protestant common school religion in *Latimer* and *McCollum*. The fact that Roman Catholics participated in the *Latimer* and *McCollum* programs, might, given American history and experience, be an adequate basis for distinguishing the results. Indeed, Roman Catholic leaders were highly critical of the United States Supreme Court decision in *McCollum*,[464] but this surely cannot suffice to settle the matter. *Doremus* stands as an ironic reminder of the fact that the religious diversity in America cannot be comprehended by satisfying the sectarian needs of Protestants, Roman Catholics, and Jews.

Finally, one can plausibly argue that *Ring*, read with the other cases constructing the Counter Narrative, survives the limitations of *Latimer* and *McCollum*. The relevant question here is what the United States Supreme Court did or did not do with the cases and opinions discussed here. The Court was free to hold the Counter Narrative as the normative discourse on the question of common school religion, and the question of released time programs. After all, the Court overruled *McCollum*, and rightly so. The only mistake the Court made in this connection was its failure to use *Zorach* as a vehicle for getting rid of released time programs altogether, thus, overruling *Latimer*.

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[463] *See supra* notes 308–310 and accompanying text.

[464] *See* John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23 (1949) (dismissing, inter alia, the question of psychological harm to religious minorities, yet showing great concern for supposed harm to religious majorities). *See generally* BOLES, *supra* note 43, at 158, 188–90 (noting the unhappiness of Roman Catholics with *McCollum*); Fellman, *supra* note 72, at 470 (discussing Roman Catholic criticism of *McCollum*).

IV. UNITED STATES SUPREME COURT CASES ON COMMON SCHOOL RELIGION: THE MCCOLLUM AND ZORACH NARRATIVES

A. THE UNITED STATES SUPREME COURT CASES SUMMARIZED

The Supreme Court cases exhibit far greater factual variety than the state court cases treated in Part III. Four of the cases decided by the Court fit the dominant fact pattern. In *Doremus v. Board of Education*,[465] the Court dismissed, on ostensibly procedural grounds, an appeal from a New Jersey state court judgment[466] upholding Service Exercises. In *Engel v. Vitale*,[467] the Court, reversing a New York state court judgment,[468] struck down the Regents' Prayer as violating the Establishment Clause. In *School District v. Schempp*,[469] the Court, reversing, *inter alia*, a Maryland state court judgment,[470] held Service Exercises to violate the Establishment Clause.[471] In *Chamberlin v. Dade Country Board of Public Instruction*,[472] the Court, summarily reversing a Florida state court judgment,[473] struck down Service Exercises on the authority of *Schempp*. Two of the cases decided by the Court involved released time programs: *Illinois* ex rel. *McCollum v. Board of Education*,[474] reversing an Illinois state court judgment,[475] struck down an on-site released time program, and *Zorach v. Clauson*[476] upheld an off-site released time program.

Cases decided after *Engel* and *Schempp* involved efforts to limit, restrict, or overturn the holdings in those two cases. Most of them failed. In *Epperson v. Arkansas*,[477] the Court invalidated a statute that prohibited

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[465] 342 U.S. 429 (1952).

[466] Doremus v. Bd. of Educ., 75 A.2d 880 (N.J. 1950).

[467] 370 U.S. 421 (1962).

[468] Engel v. Vitale, 176 N.E.2d 579 (N.Y. 1961).

[469] 374 U.S. 203 (1963).

[470] Murray v. Curlett, 179 A.2d 698 (Md. 1962).

[471] The procedural grounds at issue in *Doremus v. Board of Education*, 342 U.S. 429 (1952)—failure to plead either psychological or status-based harm and mootness—were obviously inextricably linked with claims of substantive harm. It is possible, therefore, to read *Doremus* as speaking to the substance of those claims. *Doremus* thus arguably holds that the opt-out remedy suffices, 342 U.S. at 432, and that the de minimis *non curat lex* rule applies. 342 U.S. at 433–35. If this is the case, then *Doremus* would squarely line up with the Pro Narrative. *See supra* notes 308–310 and accompanying text (adequacy of opt-out remedy), and note 304 and accompanying text (de minimis *non curat lex* rule). Given the decisions in *Engel v. Vitale*, 370 U.S. 421 (1962), and *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963), however, outcomes that clearly line up with the Counter Narrative, little to none of the arguable teachings of *Doremus* survives. The opt-out remedy was not adequate. *See Schempp*, 374 U.S. at 224–25. The de minimis *non curat lex* rule fell as well. *See Engel*, 370 U.S. at 436.

[472] 377 U.S. 402 (1964).

[473] Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21 (Fla. 1962), *vacated by* 374 U.S. 487 (1963). Because of the summary disposition of the matter by the United States Supreme Court, *Chamberlin* will be considered further herein only *en passant*.

[474] 333 U.S. 203 (1948).

[475] People *ex rel.* McCollum v. Bd. of Educ., 71 N.E.2d 161 (Ill. 1947).

[476] 343 U.S. 306 (1952).

[477] 393 U.S. 97 (1968).

the teaching of evolution in the public schools as a violation of the First Amendment. In *Stone v. Graham*,[478] the Court found that a statute requiring the posting of the Ten Commandments in public school classrooms in Kentucky violated the Establishment Clause. In *Wallace v. Jaffree*,[479] the Court invalidated an Alabama moment of silence statute on Establishment Clause grounds because the history behind that law revealed a purpose to advance prayer in the public schools. In *Edwards v. Aguillard*,[480] the Court held that a Louisiana statute forbidding the teaching of evolution in public schools violated the Establishment Clause if not accompanied by the teaching of "Creationism". In *Lee v. Weisman*,[481] the Court held that a common school could not, consistent with the Establishment Clause, provide for prayers at graduation ceremonies where the school selected the clergyman and gave him guidelines for writing prayers. And finally, in *Santa Fe Independent School District v. Doe*,[482] the Court found that a common school regulation permitting student-led prayers at football games, pursuant to a vote by the students, ran afoul of the Establishment Clause.

Standing by themselves, *McCollum*, *Engel*, *Schempp*, *Chamberlin*, *Epperson*, *Stone*, *Wallace*, *Edwards*, *Lee*, and *Santa Fe*[483] form a relatively coherent body of law, adopting the separationism idea as the core concern of the Establishment Clause. These cases (hereinafter referred to as the "McCollum Narrative") fought common school religion at every turn. Thus, they line up with the strong Counter Narrative, at least with regard to outcomes, quite apart from the relative quality of the discourse found in the Counter Narrative and in the opinions of the Court. But these are not the only Supreme Court decisions concerning common school religion.

Common school religion found a sanctuary and a haven in three decisions. In *Zorach v. Clauson*,[484] as noted above, the Court upheld an off-site released time program. In *Board of Education v. Mergens*,[485] the Court upheld the Equal Access Act,[486] under which student religious groups meeting certain statutory conditions and standards are entitled to access to common school facilities during noninstructional time equal to that of nonreligious groups where the schools have established a "limited open forum." And, in the recently decided *Good News Club v. Milford Central School*,[487] the Court required a public elementary school to make its

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[478] 449 U.S. 39 (1980).

[479] 472 U.S. 38 (1985).

[480] 482 U.S. 578 (1987).

[481] 505 U.S. 577 (1992).

[482] 530 U.S. 290 (2000).

[483] *Doremus v. Board of Education*, 342 U.S. 429 (1952), is essentially a dead letter, thus it does not appear in this list of cases. *See supra* note 471 and accompanying text.

[484] 343 U.S. 306 (1952).

[485] 496 U.S. 226 (1990). One commentator has suggested that in light of *Zorach*, *McCollum* might not be good law. Note, *Constitutional Law: State Statute Requiring Bible Reading in Public Schools Held Unconstitutional*, 30 FORDHAM L. REV. 801, 803 (1962).

[486] 20 U.S.C. §§ 4071–4074 (2000).

[487] 533 U.S. 98 (2001).

facilities available to outside religious groups on the same terms that it did so for outside nonreligious groups, even though the religious group wished to start its program of religious instruction aimed at school children immediately after the close of the school day.[488] These three cases (hereinafter referred to as the "Zorach Narrative") demonstrate a marked affinity for the Pro Narrative.[489]

More importantly, the three Zorach Narrative cases reflect a bias in favor of some nexus between religion and the common schools. Professor Cushman correctly notes that *McCollum* is an "anti-equal access" case because only religious groups were granted access to the common schools.[490] *Zorach*, on the other hand, is also an "anti-equal access" case because only religious groups "are allowed to furnish a part of the official school curriculum while secular and nonbeliever groups are denied a like opportunity."[491] *Mergens* and *Good News Club* square with *Zorach* because the formalist neutrality of the Equal Access Act masks the fact that the Act was passed to further the interests not of secular and nonbeliever groups, but of religious groups.[492] The facts in *Good News Club* clearly show that the point of the decision was to benefit a religious group, and *Zorach* approved a program that excluded secular and nonbeliever groups. *Mergens* and *Good News Club* approved programs that formally included such groups. All three cases plainly benefit religious groups interested in access to public school children through the indirect instrumentality of common school administrators, officials, and teachers.

The Zorach Narrative may not technically involve common school religion because the "accommodation" of religion by public school officials, which is involved in all three cases, is the accommodation of one or more sectarian religious groups rather than of pan-Protestant religion.[493] The question to be decided, however, is whether by virtue of the accommodation, those sectarian religions become, in sum and substance, common school religion. The psychological harm visited upon religious minorities in the cases constructing the Zorach Narrative is indistinguishable from the psychological harm visited upon religious minorities in the cases constructing the McCollum Narrative. In a functional sense, therefore, without regard to form, accommodated religions may in fact best be characterized as common school religion.

The failure of the Court to appreciate this fact may be due, in part, to its failure to take seriously the work of the state court judges in the pre-

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[488] For these reasons, if no others, *Good News Club* is distinguishable from *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). In *Lamb's Chapel*, the outside religious group met well after the close of school and did not explicitly seek to attract school children. *Id.*

[489] *See* Cushman, *supra* note 43, at 492 (comparing the discourse of *Zorach* to that of the New Jersey decision in *Doremus*, a Pro Narrative decision).

[490] *See* Cushman, *supra* note 43, at 490.

[491] *Id.* at 491. *Zorach*, of course, is also a case involving indirect instrumental assistance. *See supra* notes 30–37 and accompanying text.

[492] *See infra* notes 720–722 and accompanying text.

[493] *See supra* notes 99–109 and accompanying text.

Incorporation régime. At least one Justice was contemptuous and patronizing in his treatment of their work.[494] The Court has failed to think deeply about the reality of psychological harm inflicted upon the religious conscience of dissenters and adherents of minority religions or of belief systems that serve as the functional equivalent of religion. The McCollum Narrative pays fitful attention to the question of psychological harm, whereas the Zorach Narrative pays little or no attention to it at all.

B. ANALYSIS OF THE *MCCOLLUM* AND THE *ZORACH* NARRATIVES

For purposes of this analysis, the McCollum Narrative derives from the majority opinions in the *McCollum* cases and the dissenting opinions in the *Zorach* cases. Similarly, the Zorach Narrative consists of the majority opinions in the *Zorach* cases and the dissenting opinions in the *McCollum* cases. Furthermore, the Narratives will be examined through the prism of the characteristic traits of the Protestant Empire. This is the same approach utilized in the construction of the Pro and the Counter Narratives. The Supreme Court Justices, however, frequently ignored many of the elements that comprise the Pro and Counter Narratives, the major theme of this Article.

1. *Anti-Roman Catholicism (and by Extension Other Religious Minorities)*

a. The McCollum *Narrative*

The McCollum Narrative does not address the characteristic anti-Roman Catholicism of the Protestant Empire, either to defend it, as the Pro Narrative did,[495] or to castigate it, as the strong Counter Narrative did.[496] The ambiguity of silence makes it difficult, if not impossible, to understand why because the Court has shown anti-Roman Catholic bias in the past.[497]

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[494] Sch. Dist. v. Schempp, 374 U.S. 203, 275 (1963) (Brennan, J., concurring) (stating that "the state constitutional prohibitions against church-state cooperation or governmental aid to religion were generally less rigorous than the Establishment Clause of the First Amendment," and that "[i]t is therefore remarkable that the courts of a half dozen States found compulsory religious exercises in the public schools in violation of their respective state constitutions"). Of course, after experiencing the handiwork of the Rehnquist Court, some commentators have urged those litigating human and civil rights cases to seek relief in state courts because of the higher standards created by many state constitutions. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1-1(a) (3d ed. 2000).

[495] *See supra* Part III.B.1

[496] *See supra* Part III.C.1.

[497] *See* Everson v. Bd. of Educ. of Ewing., 330 U.S. 1, 21–24 (1947) (Jackson and Frankfurter, JJ., dissenting) (arguing in effect that Roman Catholic parochial schools have as their primary objective the religious formation of their students, not granting or conceding that the education received might benefit society generally, and making the gross, vulgar and stupid claim that if, put to the choice, Roman Catholics would give up their "whole service for mature persons" [meaning the liturgy and the sacraments] "before [they] would give up the education of the young"); Lemon v. Kurtzman, 403 U.S. 602,622-623 (1971) (patronizingly arguing that "partisans of parochial schools" will provoke political divisiveness and "obscure other issues of great urgency"). *But see* Ira Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 385–88

With only one exception, the parties challenging the religious exercises were not identified as Roman Catholics.[498] Most of the exercises complained of in the McCollum Narrative cases tend to reflect a majoritarian religious agenda that depending on other factors, may have in fact reflected a Protestant Empire agenda.[499]

(1999) (arguing that "the anti-Catholic prejudice that drove [a certain] aspect of separationism has been progressively undermined in the last forty years").

[498] In *McCollum v. Board of Education*, the plaintiff was "an avowed atheist." 333 U.S. 203, 234 (1948) (Jackson, J., concurring). In *Doremus v. Board of Education*, the plaintiffs were a citizen and taxpayer, and a citizen, taxpayer, and parent. 342 U.S. 429, 431 (1952). In *Engel v. Vitale*, the plaintiffs were described only as "the parents of ten pupils." 370 U.S. 421, 423 (1962). The New York Court of Appeals provided a little more information about the plaintiffs—describing them as "all (except for one 'non-believer') . . . members of various religious bodies." Engel v. Vitale, 176 N.E.2d 579, 580 (N.Y. 1961). In *Schempp*, one plaintiff was a Unitarian and the other plaintiffs were "professed atheists." 374 U.S. at 206, 211. In *Epperson v. Arkansas*, the religious affiliation, if any, of the plaintiff schoolteacher and the intervenor parent were unspecified. 393 U.S. 97, 100 (1968). In *Stone v. Graham*, the religious affiliation, if any, of the plaintiffs was unspecified. 449 U.S. 39 (1980). In *Wallace v. Jaffree*, the religious affiliation, if any, of the plaintiffs was unspecified. 472 U.S. 38 (1985). In *Edwards v. Aguillard*, the plaintiffs were merely described as "parents of children attending Louisiana public schools, Louisiana teachers, and religious leaders." 482 U.S. 578, 581 (1987). The court in *Lee v. Weisman* did not specify the religious affiliation, if any, of the plaintiffs. 505 U.S. 577, 581–86 (1992). In *Santa Fe Independent School District v. Doe*, however, one plaintiff-family was "Mormon and the other . . . Catholic." 530 U.S. 290, 294 (2000).

[499] In *McCollum*, the on-site released time program involved Roman Catholics, Jews, and some of the Protestant denominations; however, there had been no participation by Jews for "several years." 333 U.S. at 207, 209. In addition, some "practicing sects . . . [were not] willing or able to provide religious instruction" in the program. *Id.* at 227 (Frankfurter, J., dissenting). The overwhelming majority of church members in Champaign County in the 1950s were Protestants. *See* BUREAU OF RESEARCH AND SURVEY, NAT'L COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AM., CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES: AN ENUMERATION AND ANALYSIS BY COUNTIES, STATES AND REGIONS tbl. 41 (1957). Any pressure to participate in the released time program would, most likely, come from Protestant quarters.

The New Jersey Supreme Court opinion in *Doremus* would suggest that the program complained of accommodated Jews, Roman Catholics, and Protestants. 75 A.2d 880 (N.J. 1950). Similarly, the Regents' Prayer at issue in *Engel* was designed to accommodate the same three religious groups. *See* 370 U.S. at 430–31. Of the prayers at issue in the cases combined in the *Schempp* case, the Pennsylvania prayer was designed to accommodate these same three religious groups, however, the Maryland prayer accommodated only Roman Catholics and Protestants. The Court stated:

> The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures.

Schempp, 374 U.S. at 207. In the Maryland case, the original practice was to have readings only from the KJV. At the insistence of plaintiffs, the rule was amended to permit the use of the Douay version by students who wished to use it. *Id.* at 211. *See also* Murray v. Curlett, 179 A.2d 698, 699 (Md. 1962) (the state court opinion in the Maryland case at issue in *Schempp*).

Whatever conclusions one might reach about the early McCollum cases, especially about the attempt to accommodate Roman Catholics, the post-Schempp cases more clearly reflect the efforts of the avatars of the Protestant Empire to evade the reach of *Engel* and *Schempp*. The Arkansas anti-evolution statute in *Epperson* "was a product of the upsurge of [evangelical Protestant] 'fundamentalist' religious fervor of the twenties," a surge which continued on. 393 U.S. at 98. The "Creationism Act" at issue in *Edwards* was clearly the work of evangelical Protestants. 482 U.S. at 590 (noting that "[t]here

The foregoing may or may not adequately explain the silence of the Court on the matter of the characteristic bias of the Protestant Empire. But, the absence of any discussion of this matter is troubling, particularly given the post-*Schempp* pattern in the McCollum Narrative, culminating in *Santa Fe*. Of even greater concern, is the fact that the Court failed to articulate a pro-diversity narrative of the sort seen in the strong Counter Narrative constructed by the state courts beginning more than a century ago.[500] Atheists, Free Thinkers, Jewish, and other non-Roman Catholic religious minorities are as precious and valuable as Roman Catholics and Protestants. The Court's failure to say so, despite abundant opportunities, gives one pause.

b. The Zorach *Narrative*

The Court's opinion in *Good News Club*[501] harkens back to the rhetoric of insult, belittling religious minorities, that so dominated the Pro Narrative. The Court "decline[s] to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."[502] Leaving aside the possible definitions of

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is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution[, and it] was this link that concerned the Court in *Epperson*").

Stone presents an analytical problem because the form of the Ten Commandments complained of in that case is not identified. There is no agreement among the religions of the Bible as to the enumeration of the Commandments. *See* Rosenfield, *supra* note 50, at 571; James L. Underwood, *The Proper Role of Religion in the Public Schools: Equal Access Instead of Official Indoctrination*, 46 VILL. L. REV. 487, 495–96 (2001). Consequently, there is no way of knowing which version or versions of the Ten Commandments were posted in the classrooms in Kentucky. The overwhelming majority of church membership in Kentucky in 1980 was evangelical Protestant. *See* BERNARD QUINN ET AL., CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES, 1980: AN ENUMERATION BY REGION, STATE AND COUNTY BASED ON DATA REPORTED BY 111 CHURCH BODIES Table 3 (1982). One might reasonably conclude that the version most often, if not invariably, encountered, was the evangelical Protestant form.

The moment of silence statute at issue in *Wallace* became a *cause célèbre* for evangelical Protestants. Leaving aside the politics of the decision of the Reagan administration to support the statute, several prominent evangelical Protestant organizations, including the Moral Majority, Inc., and the Christian Legal Society, filed *amicus curiae* briefs in support of the statute. On the other side were the American Civil Liberties Union and the American Jewish Congress. The Attorneys-General of several states filed briefs. Then Connecticut Attorney-General Joseph I. Lieberman sought to distinguish the moment of silence statute in Connecticut from the Alabama statute at issue in *Wallace*. *See* Brief of Amicus Curiae State of Connecticut, Wallace v. Jaffree, 472 U.S. 38 (1985) (Nos. 83-812 and 83-929).

The prayers of the rabbi in *Lee* were undoubtedly designed to accommodate Bible-based religions. 505 U.S. at 581–82, 589 (noting that the Court was "asked to recognize the existence of a practice of nonsectarian prayer . . . within the embrace of what is known as the Judeo-Christian tradition"). Thus, the case resembles the earlier cases, rather than the post-*Schempp* cases. The United States Catholic Conference filed an *amicus curiae* brief in support of the religious exercise complained of in *Lee*. *Lee* is the "odd" post-*Schempp* case because *Santa Fe* clearly returns the pattern heretofore established in the McCollum cases. It is enough to note that the threatened high school prayers in *Santa Fe* led a Roman Catholic family and a Mormon family to complain.

[500] *See supra* notes 323–325 and accompanying text.

[501] Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

[502] *Id.* at 119.

the word "modified," this language plainly tracks *Donahoe*[503] and evokes the contempt for religious minorities that animated the Florida court in *Chamberlin*. The *Chamberlin* court found that "the plaintiffs assume, inferentially at least, that minorities enjoy a peculiar susceptibility to psychological and emotional trauma and compulsions and are entitled to some peculiar and fatherly protection against the strange ways of the ordinary American citizen. But such is not the case."[504] The language of the Court in *Good News Club* cannot be defended by reference to free speech.[505] In determining whether the Free Speech Clause somehow trumps the Establishment Clause, a careful analysis of the facts and American history are indispensable. The Court in *Good News Club* failed to undertake this critical task.

2. *Protestantization*

The Counter Narrative richly confronts the characteristic trait of the Protestant Empire, that is, the effort to proselytize and convert the people to evangelical Protestantism. First, the Counter Narrative directly confronted the Protestant Empire by challenging the Empire's basic assumptions about the relation between Christianity and State.[506] With that predicate in place, the Counter Narrative proceeded to tackle the meaning of the Northwest Ordinance, the institutional competence of the state to teach religion, and the relevance of history and tradition in judging that competence. The Counter Narrative then went on to describe the benefits to religion that flowed from a separationist form of religious liberty.[507] In the course of the construction of these elements of the Counter Narrative, the state courts articulated a powerful rationale for separationism: religion cannot be taught without offense, the common schools should be free of religious disputes, and "other institutions" (as that term is used in the Tentative Principle[508] and the Revised Tentative Principle[509]) are sufficient to meet the needs for religious instruction.[510] Finally, the Counter Narrative's treatment of history and tradition laid bare the contours of a culture war, noting its geographical dimension as well.[511] The Pro Narrative, by

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[503] Donahoe v. Richards, 38 Me. 379, 409 (1854) (stating that "[t]he right as claimed [not to have to read the KJV as a part of reading instruction] undermines the power of the State").

[504] Chamberlin v. Dade County Bd. of Pub. Instruction, 143 So. 2d 21, 32 (Fla. 1962), *vacated by* 374 U.S. 487 (1963). The summary manner in which the Court disposed of the Florida court's decision deprives us of the opportunity to see what the Court's thoughts were about the intemperate language of the state court. But this gets at the heart of the problem, the Court has not thought deeply enough about the psychological harm visited upon religious minorities by the wiles of religious majorities.

[505] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[506] *See supra* notes 327–335 and accompanying text.

[507] *See supra* notes 243–354 and accompanying text.

[508] *See supra* note 6 and accompanying text.

[509] *See supra* note 9 and accompanying text.

[510] *See supra* notes 342–344 and accompanying text.

[511] *See supra* notes 347–352 and accompanying text.

contrast, sought justification in both a broad tradition more properly associated with civil religion, a religion different from common school religion, and in a narrower tradition associated with the common school.[512] Most importantly, the Pro Narrative combined religion and morality together,[513] whereas the Counter Narrative insisted on separating the two.[514]

a. The McCollum *Narrative*

The Supreme Court never quite got on track on the question of protestantization. Its opinions lack the insights of the Counter Narrative and ignore many of the questions that ultimately justify the Counter Narrative. With regard to the broad tradition of American civil religion, the closest the Court got in the *McCollum* cases was a footnote in Justice Black's opinion in *Engel*.[515] Justice Black clearly recognized the difference between civil religion and common school religion,[516] but he did not explain why the difference exists, nor did he place the distinction in a historical or legal context. Consequently, he provided no basis for understanding the legal consequences of the distinction. In a faint echo of *Minor*'s classic statement regarding "legal Christianity,"[517] Black remarked that "a union of government and religion tends to destroy government and to degrade religion."[518] But his language appears *tout en passant* and does not evince a careful consideration of the circumstances that warrant the categorical claims.

In the *McCollum* cases, the question of the linkage between religion and morality, a central point of disagreement between the Pro Narrative and the Counter Narrative, attracted the sole attention of Justice Brennan in his

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[512] *See supra* Part III.B.2.

[513] *See supra* notes 249–254 and accompanying text.

[514] *See supra* note 340 and accompanying text.

[515] Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962).

> There is . . . nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the state of New York has sponsored in this instance.

Id. Cf. Sch. Dist. v. Schempp, 374 U.S. 203, 294–300 (1963) (Brennan, J., concurring) (stating that "not every involvement of religion in public life violates the Establishment Clause," and distinguishing between the situation of the school child on the on hand and the isolated soldier or legislator on the other); Wallace v. Jaffree, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring) ("Presidential Proclamations are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination."). Justice O'Connor's views present problems largely because they ignore the deep and complex relationship between psychological pressure on children and resultant psychological pressure on their parents. There are situations, therefore, where even adults are susceptible to coercion when their children's wellbeing is at stake. The critical issue is the setting in which the message is received, not necessarily the susceptibility of the recipient.

[516] *See supra* notes 242–247 and accompanying text.

[517] Bd. of Educ. v. Minor, 23 Ohio St. 211, 248 (1872).

[518] *Engel*, 370 U.S. at 431.

concurring opinion in *Schempp*, who rejected the linkage.[519] The Court, however, did weigh in on the matter of institutional competence to teach religion. Thus, Justice Black wrote in *Engel*: "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."[520] Justice Black continued: "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[521] Justice Clark put the matter in sharper focus, more clearly aligning with the Counter Narrative: "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind."[522] *Lee* reinforced this position, placing it in a more general context: "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."[523]

With regard to the relevance, if any, of the history and tradition of religion in the common schools, Justice Frankfurter's influential concurring opinion in *McCollum* got the Court off to a terrible start. He never came to

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[519] Justice Brennan's analysis began with a rejection of the argument that the Service Exercises at issue "serve so clearly secular educational purposes that their religious attributes may be overlooked." *Schempp*, 374 U.S. at 278 (Brennan, J., concurring). The claim that only moral teaching was involved overlooked two considerations:

> The secular purposes which devotional exercises are said to serve fall into two categories—those which depend upon an immediately religious experience shared by the participating children; and those which appear sufficiently divorced from the religious content of the devotional material that they can be served equally by nonreligious materials.

Id. at 279–80.

[520] *Engel*, 370 U.S. at 425. This statement, while a correct statement of the separationism idea, is overbroad. It overlooks the fact of civil religion and of the texts, like the Pledge of Allegiance, the National Anthem, not to mention the Declaration of Independence and the Constitution, all of which give expression to religion and are frequently recited in public ceremonies. *See generally* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984). One might characterize those texts as, in part, being prayers, and one might characterize those public ceremonies as "religious programs." Again, the failure to think deeply about the problem in an historical context causes Justice Black to overshoot the mark.

[521] *Engel*, 370 U.S. at 435. Again, Black gets into trouble. Unlike the state courts which clearly identified the institutions competent to teach religion, Justice Black refers to "those the people choose to look to for religious guidance." The problem, of course, is that some people, rightly or wrongly, look to the State for that guidance.

[522] *Schempp*, 374 U.S. at 226. In one of the leading Counter Narrative cases, the court said: "[t]he priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and, above all, by parents in the home circle." State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967, 976 (Wis. 1890). *See supra* notes 341–346 and accompanying text.

[523] Lee v. Weisman, 505 U.S. 577, 589 (1992). Of course, the *Lee* text presents a problem because the line between public and private controls the outcome, and the Court has not, in these cases, or in the *Zorach* cases, drawn the line properly. In *Santa Fe Independent School District v. Doe*, the Court reaffirmed the *Lee* language. 530 U.S. 290, 310 (2000).

grips with, let alone recognized, nonsectarian pan-Protestantism.[524] For Frankfurter, there were only two choices: religious and secular. Unfortunately, this view overlooks the historical fact that "religious" had two connotations: sectarian and nonsectarian.[525] Put differently, Frankfurter failed to address the reality of common school religion and nonsectarian evangelical Protestantism, a monumental blunder on his part. Of course, nonsectarianism only existed in an evangelical Protestant *nomos*, but it existed.

Justice Brennan, in his concurring opinion in *Schempp*, managed to get the facts regarding common school religion more or less right,[526] and he understood the importance of history.[527] Brennan tied many of the elements of the Counter Narrative together.[528] Trying to minimize the relevance of any common school religion tradition, Brennan noted that the "[s]tatutory provision for daily religious exercises is . . . of quite recent

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[524] Justice Frankfurter declared that "[t]he modern public school derived from a philosophy of freedom reflected in the First Amendment." Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 202, 214 (1948) (Frankfurter, J., concurring). He continued:

> In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred form the common school to save it from being rent by denominational conflict. . . . [L]ong before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people.

Id. at 215. It is possible that Justice Frankfurter was, in some sense, addressing the acute sense of embarrassment that may have afflicted many who supported Incorporation. *See* Newsom, *supra* note 1, at 261 & n.602. Justice Frankfurter's answer may have been to pretend that Incorporation led to little in the way of significant change in the law as reflected in the feelings and mores of the people. Thus, Frankfurter was moved to write: "by 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation." *McCollum*, 333 U.S. at 217. Finally, for present purposes, Frankfurter wrote: "[z]ealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments, but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people." *Id.* at 215–16.

[525] *See supra* Part II.A.3.

[526] Justice Brennan wrote referring to "the eventual substitution of nonsectarian, though still religious, exercises and materials." *Schempp*, 374 U.S. at 269 (Brennan, J., concurring).

[527] Brennan correctly noted that the Service Exercises at issue in the case "have a long history. And almost from the beginning, Bible reading and daily prayer in the schools have been the subject of debate, criticism by educators and other public officials and proscription by courts and legislative councils. At the outset . . . we must carefully canvass both aspects of this history." *Id.* at 267.

[528] Brennan wrote:

> [E]ducators [understood] that the daily religious exercises in the schools served broader goals than compelling formal worship of God or fostering church attendance. The religious aims of the educators who adopted and retained such exercises were comprehensive, and in many cases quite devoid of sectarian bias—but the crucial fact is that there were nonetheless religious. While it has been suggested . . . that daily prayer and reading of Scripture now serve secular goals as well, there can be no doubt that the origins of these practices were unambiguously religious, even where the educator's aim was not to win adherents to a particular creed or faith.
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> Almost from the beginning religious exercises in the public schools have been the subject of intense criticism, vigorous debate, and judicial or administrative prohibition.

Id. at 271.

origin."[529] *Santa Fe* adopted a different approach in regard to the history and tradition of common school religion, using that history as a context for analyzing the regulations at issue in the case, but not for the purpose of legitimating those regulations.[530]

In regard to the relation between the separationist understanding of religious liberty and religion, the McCollum Narrative aligns with the Counter Narrative. But, the Court got off to a slow start, expressing the idea in far too abstract and sterile a fashion, a typical flaw in the opinions of the Court.[531] In *Lee*, Justice Blackmun's concurrence echoed the discourse of the Counter Narrative: "[R]eligion flourishes in greater purity, without than with the aid of Gov[ernment]."[532] Similarly, those dissenting in the *Zorach* cases tend to line up with the Counter Narrative regarding the relationship between separationist religious liberty and religion.[533]

b. The Zorach *Narrative*

Like the authors of the Pro Narrative, those dissenting from the *McCollum* cases drew upon the broad tradition of American civil religion[534] and upon the narrower common school religion tradition.[535] Justice Scalia argued that at least in the school graduation context, the broader tradition

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[529] *Id.* at 269. This effort, of course, fails. Common school religion was by no means dependent upon statutory authority. *See* Bd. of Educ. v. Minor, 23 Ohio St. 211 (1872); State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967 (Wis. 1890); Church v. Bullock, 109 S.W. 115 (Tex. 1908); People *ex rel*. Vollmar v. Stanley, 255 P. 610 (Colo. 1927).

[530] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000).

[531] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 433–34 (1962) (noting that "[i]t has been argued that to apply the Constitution in such a way as to prohibit . . . religious services in public school is to indicate a hostility toward religion or toward prayer," and insisting that "[n]othing, of course, could be more wrong"); *Id.* at 443 (Douglas, J., concurring) (stating that "[t]he First Amendment teaches that a government neutral in the field of religion better serves all religious interests"); *Schempp*, 374 U.S. at 214 (declaring that "[t]oday authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups").

[532] Lee v. Weisman, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (second alteration in original) (citation omitted).

[533] Justice Black stated that "[u]nder our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. . . . The spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy hand of government." Zorach v. Clauson, 343 U.S. 306, 319–20 (1952) (Black, J., dissenting). Justice Jackson declared that his "evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar." *Id.* at 324–25.

[534] *See* Illinois *ex rel*. McCollum v. Bd. of Educ., 333 U.S. 202, 238–56 (1948) (Reed, J. dissenting); *Engel*, 370 U.S. at 446–50 (Stewart, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 84–85 (1985) (Burger, C.J., dissenting); *Id.* at 91–114 (Rehnquist, J., dissenting); *Lee*, 505 U.S. at 631–45 (Scalia, J., dissenting); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting). In *Engel*, Justice Stewart describes the broad tradition as "deeply entrenched and highly cherished." 370 U.S. at 450. He does not discuss, of course, the inconvenient fact that there has been resistance to that tradition, at least in the context of the common schools.

[535] *See McCollum*, 333 U.S. at 238–56 (Reed, J., dissenting) (claiming that "[w]ell-recognized and long-established practice support the validity" of the released time program at issue in *McCollum*).

applies, as opposed to the narrower common school religious tradition.[536] Scalia, however, assumed that the ceremonial feature of the occasion trumps the setting or context in which it occurs—common school graduation exercises. Deeper thought about the psychological forces—an exercise that Scalia perversely eschewed altogether in *Lee*[537]—would call into question the correctness of Scalia's classification.

Although the Zorach Narrative has a unique discourse of accommodation and free speech, it reveals a strong affinity for the Pro Narrative with regard to the relation between religion and morality. In *Good News Club*, the Court downplayed the fact that the Club engaged in evangelical Protestant worship, arguing that the teaching of morals nonetheless takes place and that, in effect, such worship is merely a viewpoint on morals:[538] "[w]e conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values."[539] The decision is clearly aligned with those in favor of common school religion because it conflates religion and morality, legitimizing religious exercise on the grounds that it is merely moral instruction.

3. *Pan-Protestantism and the Rhetoric of Nonsectarianism*

The Counter Narrative consists of two major elements. First, the religious exercises complained of, primarily Bible reading, were sectarian and religious, and therefore unlawful. Second, the only permissible use of the Bible in the common schools required that "biblical passages [be] wrenched from their context in the Holy Book and immersed in an entirely different, presumably secular, setting or background."[540] The judges constructing the Counter Narrative struggled with this second point, vainly seeking to broaden the scope of permissible Bible use in common schools.

The Pro Narrative, by contrast, found that the exercises complained of—Bible reading and the Lord's Prayer—were nonsectarian, even though no intellectually honest predicate existed for such a conclusion.[541] The McCollum Narrative also addressed the question of sectarianism, although

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[536] Justice Scalia writes: "[o]ne can believe in the effectiveness of . . . public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it." *Lee*, 505 U.S. at 645 (Scalia, J., dissenting).

[537] *Id.* at 644 (Scalia, J., dissenting). Elsewhere in *Lee*, Scalia writes that to deprive the majority of graduation prayer "in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law." *Id.* at 646. Scalia, of course, is playing "shrink," indulging in psychological analysis. First, he concludes that the nonbeliever would suffer only a "minimal inconvenience." *Id.* Second, he concludes that the nonbeliever can, without any psychological damage, stress or conflict, sit in "respectful nonparticipation." *Id.* It is difficult to take Scalia seriously when he engages in such gross intellectual dishonesty.

[538] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–12 (2001).

[539] *Id.* at 112 n.4.

[540] *See supra* note 392 and accompanying text.

[541] *See* Harpster, *supra* note 72, at 46 (stating that "[t]he proper solution . . . seems to be that, for the good of the community in order that the Bible may be read, the Bible should be held nonsectarian[,] . . . even though [such a holding] is contrary to reason").

not altogether satisfactorily, and the Zorach Narrative ignored the matter altogether.

a. The McCollum *Narrative*

Justice Frankfurter's concurring opinion in *McCollum*, to the extent that it framed the contours of the McCollum Narrative, foreclosed the "nonsectarian" position altogether, a position completely contradictory to our history and experience.[542] Bad history, in this instance, had the virtue of finessing the nonsensical question of nonsectarianism altogether. The argument that the religious exercise complained was nonsectarian reemerged in *Engel*. Indeed, the Court erred in finding the Regents' Prayer "denominationally neutral."[543] The question of nonsectarianism appeared again in *Schempp*. Justice Brennan's concurrence rejected the question, with rhetoric identical to that of the Counter Narrative.[544] Alternatively, in *Lee*, Justice Souter echoed the approach taken over eighty years earlier in *Ring*, in an effort to clarify the Court's position.[545] Souter stated that trying to distinguish between sectarian and nonsectarian practices "invite[s] the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible."[546] Taken as a whole, however, the Court's inability to cleanly reject the idea of nonsectarianism reflects a failure to fully appreciate the principles of religious freedom at stake.

On the question of the religious or sectarian nature of the conduct complained of, the Court's answer is clear and unambiguous, and largely in accord with the Counter Narrative.[547] As a consequence, the McCollum

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[542] *See supra* Part II.A.3. *See also* DUNN, *supra* note 67, at 310–11.

[543] Engel v. Vitale, 370 U.S. 421, 430 (1962). But the Prayer is not nonsectarian. *See* Edmond Cahn, *On Government and Prayer*, 37 N.Y.U. L. REV. 981, 991–94 (1962) (dismantling the idea of "nondenominational" prayer); Larry H. Schwartz, Note, *Separation of Church and State: Religious Exercises in the Schools*, 31 U. CIN. L. REV. 408, 413 (1962) (arguing that "[e]ven among those who believe in the existence of a personal God, the Regents' Prayer cannot be said to be nonsectarian").

[544] Justice Brennan wrote:

> One answer, which might be dispositive, is that any version of the Bible is inherently sectarian, else there would be no need to offer a system of rotation or alternation of versions in the first place, that is, to allow different sectarian versions to be used on different days. The sectarian character of the Holy Bible has been at the core of the whole controversy over religious practices in the public schools throughout its long and often bitter history.

Sch. Dist. v. Schempp, 374 U.S. 203, 282 (1963) (Brennan, J., concurring). Brennan referred to the Regents' Prayer at issue in *Engel*, however, as "rather bland" and perhaps not as clearly sectarian as the Service Exercise at issue in *Schempp*. *Id.* at 266.

[545] *See supra* notes 371–375 and accompanying text.

[546] Lee v. Weisman, 505 U.S. 577, 616–17 (1992) (Souter, J., concurring).

[547] *Engel*, 370 U.S. at 424 (stating that the Regents' Prayer was "a religious activity"); *Schempp*, 374 U.S. at 224 (holding that the Service Exercises in that case had a "pervading religious character"). Interestingly, what Justice Brennan saw as the reason the Service Exercise was "sectarian"—the "system of rotation or alternation of versions" of the Bible—was the same reason that the Service Exercise was found "religious." Accordingly, Brennan saw Service Exercise as "religious" as well. *Id.* at 266. *See also* Epperson v. Arkansas, 393 U.S. 97, 107 (1968) (stating that the antievolution statute "sought to prevent . . . teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of

Narrative was forced to address whether use of the Bible, prayer, the Ten Commandments, and moments of silence in the common school were permissible. Justice Jackson's concurrence in *McCollum* reached the core of the issue, surpassing even the best in the Counter Narrative, by recognizing the educational significance of religion, yet questioning the ability of schoolteachers to teach religion.[548] The Court as a whole, however, was not prepared to go this far.[549] The Court was not prepared to categorically dismiss the possibility that teachers could discuss religion objectively.[550] Furthermore, Justice Brennan, echoing Jackson's view, left open the possibility that cases would arise in which school officials crossed the line between teaching and indoctrination, but insisted that "it will then be time enough to consider questions we must now defer."[551] The more

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man"); Stone v. Graham, 449 U.S. 39, 41 (1980) (holding that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature"); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (stating that the moment of silence statute had no secular purpose"); Edwards v. Aguillard, 482 U.S. 578, 591 (1987) (holding that the Creationism act had "[t]he preeminent purpose . . . to advance the religious viewpoint that a supernatural being created humankind"); *Lee*, 505 U.S. at 587 (stating that the graduation prayers constituted a "state-sponsored and state-directed religious exercise in a public school"); *Santa Fe*, 530 U.S. at 305 (holding that the policy that permitted invocations at football games "involves both perceived and actual endorsement of religion"). *But see Wallace*, 472 U.S. at 72 (O'Connor, J., concurring) (distinguishing between "[a] state-sponsored moment of silence in the public schools" and "state-sponsored vocal prayer or Bible reading" on the grounds that "a moment of silence is not inherently religious," for "[s]ilence, unlike prayer or Bible reading, need not be associated with a religious exercise").

[548] Justice Jackson argued:

> [I]t remains to be demonstrated whether it is possible, even if desirable, to . . . isolate and cast out of secular education all that some people may reasonably regard as religious instruction. . . . Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. . . . .
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> But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found "a Church without a Bishop and a State without a King," is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry.

Illinois *ex rel*. McCollum v. Bd. of Educ., 333 U.S. 202, 235–36 (1948) (Jackson, J., concurring).

[549] *Schempp*, 374 U.S. at 225 (stating that "the Bible is worthy of study for its literary and historic qualities[; n]othing we have said here indicates that such study of the Bible or religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment"). *See also Epperson*, 393 U.S. at 106.

[550] Teaching about religion, however, is problematic. *See, e.g*, FRASER, *supra* note 49, at 229–32 (noting the problem of the institutional competence of common schoolteachers, and thus stating that "we have not set ourselves an easy task when we seek to move forward" with teaching about religion); Philip Gleason, *Blurring the Line of Separation: Education, Civil Religion, and Teaching About Religion*, 19 J. OF CHURCH AND ST. 517 (1977) (concluding that teaching about religion will lead to teaching civil religion, thus establishing civil religion as common school religion); Harrison, *supra* note 65, at 417–18 (raising the question of the competence of common schoolteachers to teach about religion); Michael Clay Smith & Richard A. Hartnett, *Teaching Bible in the Public Schools*, 32 ED. LAW REP. 7 (1986) (describing teaching of religion as "a thorny thicket for school administrators and the courts alike").

[551] *Schempp*, 374 U.S. at 301 (Brennan, J., concurring).

relaxed view of the question prevailed in *Stone*,[552] and in Justice Powell's concurrence in *Edwards*.[553] Finally, in *Santa Fe*, with regard to *prayer*, the Court held that "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day."[554] This proposition is undoubtedly correct, but it fails to address the admittedly tougher questions concerning the use of the Bible and the Ten Commandments in public schools.

b. The Zorach *Narrative*

The Justices dissenting in the *McCollum* cases had little to say on the question of nonsectarianism and religious character. Justice Stewart declared that nonsectarianism exists, and that the Constitution accommodates it,[555] in much the same way that the Pro Narrative did.[556] Meanwhile, Justice Scalia argued in *Edwards* that "there is ample evidence that the majority is wrong in holding that the Balanced Treatment Act is without secular purpose."[557] The *Zorach* cases do not address the issues of nonsectarianism or religious character at all because the religious exercises at issue in those cases were formally sectarian,[558] and the question was whether the government could nonetheless "accommodate" them.[559]

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[552] *Stone*, 449 U.S. at 42 (stating that this "is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like").

[553] Edwards v. Aguillard, 482 U.S. 578, 606–08 (1987) (Powell, J., concurring) (declaring that school students may be taught "all aspects of this Nation's religious heritage," as well as the "nature of the Founding Fathers' religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government," following Stone's view on the permissible use of the Bible, and concluding that the "Establishment Clause is properly understood to prohibit the use of the Bible and other religious documents in public school education only when the purpose of the use is to advance a particular religious belief"). One commentator has suggested that the Court has held that the Bible must be used for "something other than religion," but that such use constitutes an invitation to camouflage. 2 DAVID NORTON, A HISTORY OF THE BIBLE AS LITERATURE: FROM 1700 TO THE PRESENT DAY 271–72 (1993).

[554] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000).

[555] *See Schempp*, 374 U.S. at 314 (Stewart, J., dissenting) (claiming that the "dangers both to government and to religion inherent in official support of instruction in the tenets of various religious sects are absent in the present cases, which involve only a reading from the Bible unaccompanied by comments which might otherwise constitute instruction").

[556] *See supra* Part III.B.3. The Pro Narrative lacked intellectual honesty on the point, as does Stewart's argument for all of the same reasons.

[557] *Edwards*, 482 U.S. at 619 (Scalia, J., dissenting). The presumed secular purpose was "academic freedom," "the freedom of teachers to teach what they will." *Id.* at 586. The problems with Scalia's assertion are manifold. For present purposes, one of them derives from the fact that there was no attempt by the supporters of Creation Science to explore the Creation Narratives in non-Biblical religious traditions. No protection is given, therefore, to teachers who might want to teach "what they will" about such Narratives, and the "Science" that those Narratives might generate. A second problem, which goes to the fundamental logic of the Incorporation, is that the national security needs of the nation required good science, something that Creation Science was not likely to provide. *See* Newsom, *supra* note 1, at 259–62. But perhaps Justice Scalia would disagree with this characterization of the security needs of the nation, or that Creation Science was unequal to the occasion.

[558] *But see supra* notes 484–488 and accompanying text.

[559] *See supra* note 493 and accompanying text (discussing the functional nature and character of accommodated sectarian religion).

4. *Social Reform: Education As the Social Dimension of Protestantization*

The fear of immigrants and fear of communism animated the Pro Narrative.[560] The Counter Narrative suggested a new and relatively more tolerant meaning of Americanization, one that did not involve the instrumentality of common school religion.[561] In addition, the Counter Narrative reflected a fear of the Roman Catholic parochial school system.[562] Finally, it placed great importance on avoiding religious strife, and, perhaps in response to the first two elements of the Counter Narrative, it reaffirmed the common school as the primary means of Americanization.[563] While the McCollum Narrative addressed some of these issues, the Zorach Narrative ignored them.

The recurring theme in the McCollum Narrative is the need to avoid strife and divisiveness.[564] Two Justices, Frankfurter in *McCollum*, and Brennan in *Schempp*, expressed a broader, more positive view of the social dynamics of public school education. They recognized the central importance of the common school in "promoting our common destiny"[565] and in "the preservation of a democratic system of government."[566]

Justice Frankfurter's failure to come to grips with the reality of common school religion[567] caused him to confuse the reality and the idea of the common school as the vital institution in a process of Americanization that does not depend on the agency of common school religion. But both the minions of the Protestant Empire and many of its critics would agree with Frankfurter's claim that the common school was "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people"[568] and that it had to be "free from entanglement in the strife of sects."[569] Again, the difference concerned

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[560] *See supra* Part III.B.4.

[561] *See supra* Part III.C.4.

[562] *See supra* note 400 and accompanying text.

[563] *Id.*

[564] *See* Illinois *ex rel*. McCollum v. Bd. of Educ., 333 U.S. 203, 217 (1948) (Frankfurter, J., concurring) (referring to the need to "preserv[e] . . . the community from divisive conflicts"); Engel v. Vitale, 370 U.S. 421, 442 (1962) (Douglas, J., concurring) (stating that "once government finances a religious exercise it inserts a divisive influence into our communities"); Lee v. Weisman, 505 U.S. 577, 587 (1992) (noting that "the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent"); Santa Fe Independent School District v. Doe, 530 U.S. 290, 311 (2000) (remarking that the "election mechanism . . . encourages divisiveness along religious lines in a public school setting"). Justice Stevens dissenting in *Good News Club v. Milford Central School*, saw how divisiveness operated in that case: "recruiting meetings may introduce divisiveness and tend to separate young children into cliques that undermine the school's educational mission. . . . School officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith pose the same risk." 533 U.S. 98, 128–36 (2001) (Stevens, J., dissenting).

[565] *McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring).

[566] Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

[567] *See supra* Part II.A.3.

[568] *McCollum*, 333 U.S. at 216 (Frankfurter, J., concurring).

[569] *Id.* at 217.

whether protestantization was a necessary element or precondition of national cohesion. The difference, of course, lies along the fault line of our culture wars.

Justice Brennan, with a surer grasp of history, implicitly recognized that the dynamic of resistance and persistence shaped the development of "the American experiment in free public education available to all children," a development that "has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve."[570] Justice Brennan put it all together: "the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions."[571] Brennan essentially added a new element to the Social Reform narrative: the availability of two different educational systems, one public and one private.[572]

5. *Attrition and Restraint: The Interplay of Majorities and Minorities*

a. Majoritarianism

The Pro and the Counter Narratives stand in sharp relief. The former essentially holds that opportunities for the majority to express its religion in the common schools trump any harm caused to minorities by such exercise. In essence, the Pro Narrative is a "free majoritarian exercise" narrative.[573] The latter teaches that constitutional provisions protect minorities, an

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[570] *Schempp*, 374 U.S. at 241.

[571] *Id.* at 241–42.

[572] Brennan wrote:

> The choice . . . is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment, the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice . . . our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. . . . [A] system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent.

Id. at 242. Brennan failed, however, to confront the full range of costs at issue in the choice that he sought to defend and protect. Parents who choose to send their children to nonpublic schools will more often than not have to pay tuition, whereas parents who choose to send their children to public schools do not. Parents who cannot afford tuition have no real choice. Second, it is fair to ask to what extent the nation can afford to have large numbers of American children schooled in values that may be at odds with "uniquely democratic values." Again, we are far from reaching any national consensus on these questions. Indeed, they are an important part of our culture wars. But the conflict is ancient. It finds expression in the tension and disagreement between the Pro Narrative and the Counter Narrative on the role of religion in general, and common school religion in particular, and in the formation of—or the Social Reform of—the American character. *See infra* Part V.

[573] *See supra* notes 292–299 and accompanying text.

"Establishment Clause" narrative. It also resorts to a straw man technique.[574]

i. The McCollum *Narrative*

Justice Frankfurter mirrored the basic attitude of the Counter Narrative on the question of the protection of minorities.[575] But the McCollum Narrative also parries the thrust of those claiming a majoritarian free exercise right. Thus, Clark wrote:

> [W]e cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, *it has never meant that a majority could use the machinery of the State to practice its beliefs.*[576]

In a similar vein, Justice Souter, concurring in *Lee*, observed that prayer was offered "'precisely because some people want a symbolic affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities.'"[577] And in *Santa Fe*, the Court correctly noted that the election procedures at issue guaranteed that "minority candidates will never prevail and that their views will be effectively silenced," placing "the students who hold such views at the mercy of the majority."[578]

Concurring in *Lee*, Justice Souter raised an interesting question concerning the meaning and function of nonsectarianism. He concluded that a "diversity based" or a "pluralistic" nonsectarianism would not pass constitutional muster either. In an argument that echoes the reasoning of Ring as to the nature or character of the Bible,[579] Souter states:

> Nor does it solve the problem to say that the State should promote a "diversity" of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each. In fact, the prospect would be even worse than that. . . . [T]he judiciary should not

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[574] *See supra* notes 405–409 and accompanying text.

[575] *See* Illinois *ex rel*. McCollum v. Bd. of Educ., 333 U.S. 202, 217 (1948) (Frankfurter, J., concurring) (stating that "Constitutional provisions [are] primarily concerned with the protection of minority rights").

[576] *Schempp*, 374 U.S. at 225–26 (emphasis added). Of course, the circumstances were worse than Justice Clark, writing for the Court, was prepared to acknowledge. The claimed right was not merely to "practice beliefs" but to proselytize school children.

[577] Lee v. Weisman, 505 U.S. 577, 630 (1992) (Souter, J., concurring) (quoting Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 844 (1992). For a general discussion of social symbolism, see GUSFIELD, *supra* note 230, *passim*.

[578] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 304 (2000).

[579] *See supra* notes 371–375 and accompanying text.

> willingly enter the political arena to battle the centripetal force leading from religious pluralism to official preference for the faith with the most votes.[580]

Souter appreciated the critical distinction between accommodating religion and accommodating *majoritarian* religion. The centripetal force to which he referred surely includes the social, cultural, political, and economic power of the Protestant Empire.[581] The Free Exercise claim becomes nothing more than a fig leaf covering the works of the Protestant Empire.

ii. The Zorach *Narrative*

The Justices dissenting in the *McCollum* cases clearly aligned themselves with the Pro Narrative, taking majoritarianism as a constitutional norm. For example, Justice Stewart argued:

> I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.[582]

Further, "there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible."[583] Justice Scalia,

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[580] *Lee*, 505 U.S. at 617–18 (Souter, J., concurring). *See also* Rodes, *supra* note 443, at 118–19 (discussing the practical difficulties in trying to effect a pluralistic solution). *But see* Rosalie B. Levinson, *The Dark Side of Federalism in the Nineties: Restricting Rights of Religious Minorities*, 33 VAL. U. L. REV. 47, 52 (1998) (arguing that the problem with a pluralistic approach is not one of practical difficulties but one of majoritarianism because "[w]hen government officials decide to display religious symbols, to offer prayers at public functions, or to institutionalize prayer in public schools, one can be assured that neither Buddhism nor Islamic prayers or symbols will be selected").

[581] The stubborn fact remains that Protestants form a substantial majority of the American population. White Protestants comprised fifty-six percent of the 2000 presidential electorate. *See* Michael Barone, *The 49 Percent Nation*, 33 NAT. J. 1710, 1714 (June 9, 2001). African American, Hispanic American, Asian American, and Native American Protestants merely add to the total.

[582] Engel v. Vitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting). Justice Stewart, of course, completely ignores the history of resistance to common school religion. He thus fails to be intellectually honest in his claims regarding "spiritual heritage." At most, he can mean the "spiritual heritage" of the majority, a rather different proposition altogether.

[583] Sch. Dist. v. Schempp, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting). Justice Stewart attempts to justify his position with the spurious claim that the system of public education monopolizes the time of school children to such an extent that if they cannot pray in school they are placed at a "state-created disadvantage." Presumably they would not have the time to pray anywhere else. *Id.* at 313. This is, of course, sheer and dangerous foolishness. Children can still pray at home, or in religious sanctuaries. And, thanks to *Zorach*, the state can "accommodate" prayer and religious instruction in those sanctuaries. But that, of course, will not satisfy those bent on using prayer in the common schools as a means of proselytizing their religion. Many of those not satisfied believe that *Zorach*-type released time programs are not as effective in "reaching" school children belonging to religious minorities as programs conducted on public school property would be.

Justice Stewart also uncritically referred to "the community's preference," without giving any thought to who belongs or does not belong to that "community" or to the rights, if any, of those members of that "community" who dissent from the "preference." *Id.* at 315.

Justice Black, in a curious passage in *Epperson*, seems to suggest that there was a majoritarian interest there that needed protection—the interest of those who believe that Darwinism is anti-religious

dissenting in *Lee*, argued that while the Court had addressed the "personal interest of Mr. Weisman and his daughter," it had said "very little about the personal interests on the other side. They are not inconsequential."[584] Scalia bemoaned the decision to "seek to banish . . . the expression of gratitude to God that a majority of the community wished to make."[585] Scalia then laid bare the heart of the Pro Narrative discourse, modified to take into account the sensibilities of Roman Catholics and Jews, but not those of adherents of belief systems that either are not based on the Bible, or find offense in public displays of prayer of the sort involved in *Lee*: "The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated."[586] Scalia joined with *Doremus*[587] in celebrating certain favored religions,[588] while ignoring, discounting, or dismissing other religions and functionally equivalent belief systems.

The *Zorach* cases also track the Pro Narrative. While not framing the issue in terms of majoritarian Free Exercise, the Court has utilized Free Speech as a substitute, perhaps to avoid the obvious intellectual problems that recourse to Free Exercise would entail.[589] Thus, "[t]here are countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are the free speech rights of the [Good News] Club and its members."[590]

b. *Harm and Remedy*

All of the elements of the four Narratives find their ultimate meaning in their discourse on harm and remedy. The Counter Narrative developed a rich and complex understanding of psychological harm. It identified stigma and ostracism heaped upon *students and parents*,[591] interference with the *parental* right to control the religious formation of their

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and who thus wish to keep it out of the common schools. Epperson v. Arkansas, 393 U.S. 97, 113 (1968) (Black, J., concurring).

[584] *Lee*, 505 U.S. at 645 (Scalia, J., dissenting).

[585] *Id.* at 646 (Scalia, J., dissenting).

[586] *Id.*

[587] *See supra* notes 270–272 and accompanying text.

[588] Just how "favored" Roman Catholicism and Judaism are in a Protestant Empire remains to be seen. *See* KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA 175–87 (1998).

[589] One might fairly argue that the Free Speech Clause is no proxy for the Religion Clause. *See* Steven W. Fitschen, *Religion in the Public Schools After* Santa Fe Independent School District v. Doe*: Time for a New Strategy*, 9 WM. & MARY BILL RTS. J. 433, 435–44 (2001) (a spokesman for the Religious Right finding pragmatic and strategic fault with equating free exercise and free speech); Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303 (2001) (arguing that a free speech analysis trivializes religion). But the question of the proper relation between Free Speech and the Religion Clause does not dispose of the ultimate question at issue: the constitutional significance of the psychological harm visited on religious minorities where occasioned by Free Exercise, Establishment, or by Free Speech.

[590] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001).

[591] *See supra* notes 412–414 and accompanying text.

children,[592] and offense and molestation of the conscience of both *children and parents*.[593] The McCollum Narrative focused almost entirely on the psychological harm done to *children*, downplaying or underestimating the significance of harm done to *parents*. The Zorach Narrative, like the Pro Narrative, ignored, dismissed, or undervalued psychological harm to religious conscience and freedom.[594]

The Counter Narrative almost invariably treats psychological harm as a judicial fact, rather than an evidentiary one.[595] The justification for a categorical claim of psychological harm ultimately rests on a set of assumptions about history, culture, and human nature. It suffices to note that the history of the Protestant Empire and its works strongly suggests that common school religion was intended to protestantize American school children. The Protestant Empire clearly meant to use suasion and attrition, against the backdrop of coercion and violence, in order to achieve its goals. These strategies, appearing first in Tudor England centuries ago,[596] and continuing into the present day, are aimed at the psyches of the intended targets—American public school children and their families. Justifiably, the Counter Narrative courts forced the Protestant Empire to find ways other than common school religion to do its work of protestantization by taking judicial notice of its psychological harm. The Supreme Court, by contrast, tends not to take judicial notice of this harm, but rather insists upon evidentiary proof in a particular case. This tendency lacks intellectual merit and warrant.

The second form of harm, status-based harm, is often driven by the relevant constitutional text. The First Amendment generates two discourses—Establishment and Free Exercise. The Establishment Clause discourse generated two philosophical or doctrinal approaches—separationism and accommodationism. In the context of religion in the common schools, separationism traces its origin to *McCollum*,[597] and

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[592] *See supra* notes 415–423 and accompanying text.

[593] *See supra* note 424 and accompanying text.

[594] *See* Schwartz, *supra* note 543, at 417–19, 431–32 (stressing the importance of psychological harm to public school children who are present in the schools due to the compulsion of the law, and criticizing *Zorach* precisely on the grounds that "New York was permitted to use its compulsory education law to induce students to take religious instruction").

[595] *See* State *ex rel*. Weiss v. Dist. Bd., 44 N.W. 967, 975 (Wis. 1890); State *ex rel*. Freeman v. Scheve, 93 N.W. 169, 170 (Neb. 1903); People *ex rel*. Ring v. Bd. of Educ., N.E. 251, 255 (Ill. 1910); Herold v. Parish Bd. of Sch. Dir., 68 So. 116, 121 (La. 1915); Wilkerson v. City of Rome, 110 S.E. 895, 906 (Ga. 1922) (Hines, J., dissenting); Kaplan v. Indep. Sch. Dist., 214 N.W. 18, 22–23 (Minn. 1927) (Wilson, C.J., dissenting); State *ex rel*. Finger v. Weedman, 226 N.W. 348, 354 (S.D. 1929); Tudor v. Bd. of Educ., 100 A.2d 857, 868 (N.J. 1953); Engel v. Vitale, 176 N.E.2d 579, 587 (N.Y. 1961) (Dye, J., dissenting), *rev'd*, 370 U.S. 421 (1962); Murray v. Curlett, 179 A.2d 698, 710 (Md. 1962) (Brune, C.J., dissenting), *rev'd sub nom.*, Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[596] *See* Newsom, *supra* note 1, at 204–13 (discussing the strategy of the régime of Henry VIII).

[597] Illinois *ex rel*. McCollum v. Bd. of Educ., 333 U.S. 202, 212 (1948) (stating that the released time program at issue there was "not separation of Church and State"). *But see* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (stating that "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'" (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878))).

accommodationism to *Zorach*.[598] But, as was the case with the Counter Narrative, the relevant question concerns not the form of the doctrine, but its relationship to the underlying stubborn truth of psychological harm.[599] Here, again, neither the McCollum nor the Zorach Narrative meets the high standard established in the Counter Narrative.

On the question of remedy, the McCollum Narrative clearly follows the Counter Narrative in rejecting the adequacy of the opt-out remedy.[600] The only remedy that would suffice is the mandamus/injunction remedy.[601] The Zorach Narrative, lining up with the Pro Narrative, concludes that the right to opt out or not to participate is an adequate remedy.[602]

i. Psychological Harm

The weaknesses in the Court's Narratives are evident when considering three questions: (1) the nature of the psychological harm; (2) its victims; and (3) the categorical quality, if any, of the harm. With regard to the first, four answers emerge: stigma and ostracism, offense to religious conscience, parental due process rights, and unspecified forms of psychological harm. With regard to the second, three answers present themselves: children; parents; and others. And with regard to the third, there are three answers: categorical; perhaps categorical, and perhaps not categorical, but dependent upon evidentiary fact; and not categorical, but dependent upon evidentiary fact. Finally, there is the position that psychological harm, without regard to its character or form, victims, and categorical character or nature, is irrelevant or insignificant.

The weaknesses become apparent in the commentators' remarks on the cases. More than a few have "read in" to the Court's opinions a systematic and comprehensive concern for the psychological harm visited upon

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[598] Zorach v. Clauson, 343 U.S. 306, 313–14 (1952) (stating that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions" because "it then respects the religious nature of our people and accommodates the public service to their spiritual needs").

[599] *See supra* notes 426–432 and accompanying text.

[600] *See Engel*, 370 U.S. at 430 (arguing that the opt-out remedy does not "serve to free [the observance of the Regents' Prayer] from the limitations of the Establishment Clause"); *Schempp*, 374 U.S. at 224–25 (following *Engel*, declaring that the opt-out remedy "furnishes no defense to a claim of unconstitutionality under the Establishment Clause"); *Lee*, 505 U.S. at 595 (stating that the student "could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (stating that while attendance at football games is voluntary, peer pressure operates to compel attendance, and those attending are coerced "to participate in an act of religious worship [the student-led prayer at the commencement of the football games]").

[601] *See supra* note 434 and accompanying text.

[602] *See Zorach*, 343 U.S. at 311 (stating that "[a] student need not take religious instruction" as "[h]e is left to his own desires as to the manner or time of his religious devotions, if any"); Bd. of Educ. v. Mergens, 496 U.S. 226, 288 (1990) (finding neither coercion nor endorsement, a majority of the Court implicitly held that the right of students not to join the student clubs is adequate); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 115 (2001) (holding that it is the parents who determine "whether their children will attend the Good News Club meetings," implicitly finding that they are free to decline to so choose, and that that fact suffices).

religious minorities in the cases. But interpretive analysis or deconstruction of the opinions indicates a failure of the Justices to adequately address the question of psychological harm.[603] Furthermore, this failure has led at least one commentator to utterly misapprehend the presence and the significance of psychological harm in *Engel*.[604]

(1.) The McCollum *Narrative*

(a) The Nature of the Psychological Harm

With regard to stigma and ostracism, the opinions constructing the McCollum Narrative tend to frame the issue in the gentler "pressure to conform" rhetoric. Euphemisms unfortunately have the effect, intended or otherwise, of understating and undervaluing the problem at hand. But the normative dominance of euphemistic language is quite clear. Thus, Justice Frankfurter, concurring in *McCollum*, stated that the released time program did "not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend."[605]

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[603] *See, e.g.*, EDWARD KEYNES, WITH RANDALL K. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION 179 (1989) (stating that "[t]he Court's decisions rest on the tacit, if not explicit, assumption that the primary and secondary school environment is categorically different from that of other public institutions," that the opt-out remedy will "single out, set apart, and stigmatize irreligious children or children who belong to nonconventional denominations" therefore harming children and their parents, and "[t]herefore, in the compulsory environment of the public school, virtually all forms of prayer breach the Court's standards and the essential purposes of the establishment clause"); Choper, *supra* note 58, at 343 (arguing that *Engel* could have been "more discretely decided specifically on the ground that, regardless of the dissenting student's right of nonparticipation, compulsion did exist; that a showing of actual compulsion was unnecessary because of the 'indirect coercive pressure' that this program exerted;" and that either offense to conscience or stigma and ostracism would result); Arthur E. Sutherland, Jr., *Establishment According to Engel*, 76 HARV. L. REV. 25, 33 (1962) (stating, "In retrospect . . . the interest of the appellant in *McCollum* seemed only to have been the personal oppression of the schoolchild, whose mother as plaintiff spoke for him. Illinois could be thought to have humiliated young Terry McCollum when singling him out as a classroom dissenter"); Comment, *The Supreme Court, the First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 93–94 (1963) (misreading *Engel*'s coercion test and stating: "The *Engel* opinion recognizes that 'the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain'; nevertheless, this observation, which might have led to a finding of unconstitutional compulsion, was not the ground of decision" because the Court stated that the Establishment Clause "does not depend upon any showing of direct governmental compulsion").

[604] *See* Sutherland, *supra* note 603, at 39, 41–42 (arguing that in *Engel* neither Justice Black nor Justice Douglas "seems to find sufficient oppression of the dissenting schoolchildren to justify a prohibition of the [saying of the Regents' prayer]; neither Justice so bases his reasoning, and this judgment seems sensible" and that the opt-out remedy would validate the saying of the Regents' prayer).

[605] *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring). Frankfurter returned to the point: "in discussing with the relator her son's inability to get along with his classmates, one of his teachers suggested that 'allowing him to take the religious education course might help him to become a member of the group.'" *Id.* at 227 n.18.

Other opinions made the same point.[606] Justice O'Connor resorted to the middling rhetoric of "endorsement," somewhat more biting than the bland rhetoric of conformism, but still less stark than the language of stigma and ostracism.[607] Justice Brennan, characteristically more influenced by the Counter Narrative than others on the Court, even as he deprecated it,[608] confronted the harsher reality of stigma and ostracism head on. Concurring in *Schempp*, he wrote of the distaste of children "to be stigmatized as atheists or nonconformists."[609]

Concerns about offense to religious conscience, the second category of psychological harm, find powerful expression in the McCollum Narrative. Here the Narrative more faithfully traces the rhetoric and discourse of the Counter Narrative. Justice Brennan, concurring in *Schempp*, referred to "children who do not wish to participate [in the Service Exercises] for any reason based upon the dictates of conscience."[610] Later in *Edwards*, writing for the Court, Brennan described a concern that "the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."[611] In *Lee*, Justice Kennedy, also writing for the Court, described the prayers at issue as "offensive to the student and the parent who now object."[612] Other opinions contribute to this element of the McCollum Narrative.[613]

With regard to parental due process rights, the McCollum Narrative was virtually silent. Only Justice Brennan, writing for the Court in

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[606] *See Engel*, 370 U.S. at 431 (referring to "the indirect coercive pressure upon religious minorities to conform"); Stone v. Graham, 449 U.S. 39, 42 (1980) (declaring that "[i]f the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments"); Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (stating that "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role modes and the children's susceptibility to peer pressure"); Lee v. Weisman, 505 U.S. 577, 593 (1992) (noting the "common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000) (reaffirming *Lee*'s "common assumption").

[607] *See* Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (objecting to "[d]irect government action endorsing religion or a particular religious practice . . . because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community'") (citation omitted).

[608] *See supra* note 494 and accompanying text.

[609] Sch. Dist. v. Schempp, 374 U.S. 203, 290 (1963) (Brennan, J., concurring).

[610] *Id.* at 289 (Brennan, J., concurring).

[611] *Edwards*, 482 U.S. at 584.

[612] *Lee*, 505 U.S. at 594.

[613] *See* Illinois *ex rel*. McCollum v. Bd. of Educ., 333 U.S. 202, 227 (1948) (Frankfurter, J., concurring) (noting that the Champaign, Illinois released time program did "not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain"); *Santa Fe*, 530 U.S. at 308 (reaffirming *Lee*'s doctrine of "offense" and adding that "[r]egardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval"). Justice Stevens underscored the scope and depth of the offense by pointing out that the winner-take-all majoritarian rule embodied in the student election process "guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." *Id.* at 304.

Edwards, addressed the matter: "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."[614] Justice Brennan does not probe and analyze the dynamics of psychological harm to the parental right to control the religious formation of their children. Beyond a doubt, the Counter Narrative did much better on this point. Furthermore, some of the opinions that construct the McCollum Narrative fail to adequately specify the nature of the psychological harm at issue, even when one opinion correctly noticed the problem of indirect instrumental assistance.[615] The same holds true for the dissenters in the *Zorach* cases.[616] Again, the Counter Narrative is stronger and more cogent.

Finally, some of the opinions constructing the McCollum Narrative dismissed the importance of psychological harm.[617] Concurring in *McCollum*, Justice Jackson stated that "it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress."[618] Justice Douglas, concurring in *Engel*, insisted that "there is no element of compulsion or coercion in New York's regulation" regarding the Regents' Prayer.[619] In *Lee*, Justice Kennedy drew a critical distinction that explains much of the doctrine that emerges from the McCollum and Zorach Narratives. First, psychological harm had to result from state action.[620] This proposition is necessarily correct, as far as it goes. The real question, of course, concerns the nature, ambit, contours, and scope of "state action." It is on this point that Kennedy unnecessarily delimited that scope. Kennedy wrote:

> We recognize that, at graduation time and throughout the course of the educational process, there will be instances where religious values, religious practices, and religious persons will have some interaction with the public schools and their students. But these matters, often questions

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[614] *Edwards*, 482 U.S. at 584.

[615] *See McCollum*, 333 U.S. at 212 (stating that "[t]he State . . . affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery"). *See also Schempp*, 374 U.S. at 224 (referring to Service Exercises as a "direct violation of the rights" of the dissenters"); *Id.* at 307 (Goldberg, J., concurring) (noting the pressure that could be brought to bear on "young impressionable children"); *Lee*, 505 U.S. at 604 (Blackmun, J., concurring); *Id.* at 609 (Souter, J., concurring).

[616] *But see* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 138–45 (2001) (Souter, J., dissenting) (noting the problem of "endorsement").

[617] *See infra* note 644 and accompanying text.

[618] *McCollum*, 333 U.S. at 233 (Jackson, J., concurring). Perhaps Justice Jackson's concurrence rested on a finding of formal harm. Whether that is true or not, Jackson never describes the precise character of the harm that warrants overthrowing the Champaign released time program.

[619] Engel v. Vitale, 370 U.S. 421, 438 (1962) (Douglas, J., concurring). Justice Douglas relented to some degree in *Schempp*, there conceding the possibility of indirect coercion, and therefore psychological harm. 374 U.S. at 228–29 (Douglas, J., concurring).

[620] *Lee*, 505 U.S. 597–98.

> of accommodation of religion, are not before us. The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform.[621]

The only test that does justice to a concern for psychological harm is one that asks whether a particular program or arrangement involving the common schools can be said to be one wherein the state has acted—directly or indirectly—to make the hard stubborn fact of majoritarian cultural suasion and coercion even worse. The bland assumption that there will be "instances where religious values, religious practices, and religious persons will have some interaction with . . . students" fails to capture the seriousness of the problem. On the other hand, Justice Kennedy's formulation fairly "accommodates" the Zorach Narrative. That, of course, *is* the problem.

(b) The Victims of the Psychological Harm

Virtually every case in the McCollum Narrative refers to children as actual or potential victims of one or more forms of psychological harm.[622] With regard to parents as victims, the Narrative is far too silent and still.[623] Justice Frankfurter did state that "[t]he children belonging to . . . nonparticipating sects will . . . have inculcated in them a feeling of

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[621] *Id.* at 598–99 (internal citations omitted).

[622] *See McCollum*, 333 U.S. at 212 (describing pupils as fodder for released time programs); *Engel*, 370 U.S. at 430 (rejecting the argument that the fact that students can opt out "can serve to free [the scheme] from the limitations of the Establishment Clause"); *Schempp*, 374 U.S. at 224–25 (referring to the "rights of appellees and petitioners," i.e. students and parents); *Stone*, 449 U.S. at 42 (referring to pressures on "schoolchildren"); Wallace v. Jaffree, 472 U.S. 38, 59 (1985) (stating that "[t]he legislative intent to return prayer to the public schools is . . . quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday"); Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (referring to "children's susceptibility to peer pressure"); *Lee*, 505 U.S. at 586 (stating that "[e]ven for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000) (declaring that "[t]o assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme'"). *But see* Epperson v. Arkansas, 393 U.S. 97 (1968). The Court made passing reference to the rights of students in other circumstances; however, this action was brought by a schoolteacher and focused on the rights of teachers. *Id.* at 105, 107–09.

[623] The Justices dissenting from the Zorach Narrative largely reasoned within the canon of the McCollum Narrative. Their dissents added little, therefore, to the *McCollum* canon on psychological harm. *See* Zorach v. Clauson, 343 U.S. 306, 316 (1952) (Black, J., dissenting) (arguing that the New York released time program "provide[d] pupils," but without specifying the nature of the psychological harm occasioned thereby); *Id.* at 324 (Jackson, J., dissenting) (contending that the program "serves as a temporary jail for a pupil who will not go to Church," but not specifying the form of psychological harm that would result from being required to remain in school while other students went off to church); Bd. of Educ. v. Mergens, 496 U.S. 226, 275 (1990) (Stevens, J., dissenting) (arguing that open fora "may be less suitable for [high school students] than for college students," resulting in an unspecified psychological harm); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 138–45 (2001) (Stevens, J., dissenting) (noting the risk "of introduc[ing] divisiveness and tend[ing] to separate young children into cliques that undermine the school's educational mission").

separatism . . . or they will have religious instruction in a faith which is not that of their parents."[624] Frankfurter also acknowledged that school officials tried to pressure the parent of a schoolchild to allow the child to participate in the released time program so that the child would "get along with his classmates."[625] But he never explored the implications of these remarks, and thus failed to elaborate a stronger and more substantial discourse on psychological harm to parents, and by extension, to families. Frankfurter devoted his energy to a narrative on psychological harm to children.[626] In *Schempp*, Justice Clark made a passing reference to the rights of "appellees and petitioners," which included both parents and students.[627] But Clark never developed the thought. Justice Brennan got closer to the truth than any other Justice when he recognized parental due process rights.[628] He necessarily recognized parents as victims of psychological harm in a meaningful and concrete way. But even so, Brennan did not make harm done to parents an important element in determining the outcome in *Edwards*. Finally, in *Lee*, Justice Kennedy referred to Daniel and Deborah Weisman, parent and child.[629] Like the other Justices who mentioned parents, however, Kennedy failed to develop the thought. He centered his opinion on the psychological harm done to the student, not to the parent.[630]

A smattering of the opinions discuss psychological harm done to others. Justice Brennan, concurring in *Schempp*, observed that "persons in every community—often deeply devout"—took offense at Service Exercises.[631] Justice O'Connor adopted a variation on this theme, identifying the "objective observer, acquainted with the text, legislative history, and implementation of the statute [at issue]."[632] Neither formulation is altogether satisfactory. Brennan's construct is too abstract, and tends to shift the focus away from students and their families. In any event, Brennan failed to develop the idea. Justice O'Connor's "objective observer" is hardly more than a pseudonym for a federal judge, and as such, adds little to a deeper understanding of the dynamics of psychological harm.[633]

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[624] *McCollum*, 333 U.S. at 227–28 (Frankfurter, J., concurring).
[625] *Id.* at 227, n.18.
[626] *See supra* note 605 and accompanying text.
[627] *Schempp*, 374 U.S. at 224–25.
[628] *See supra* note 614 and accompanying text.
[629] Lee v. Weisman, 505 U.S. 577 (1992).
[630] *Id.* at 594–96.
[631] *Schempp*, 374 U.S. at 283–84 (Brennan, J., concurring).
[632] Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).
[633] On the other hand, *Epperson v. Arkansas*, 393 U.S. 97 (1968), may have some real value in constructing a powerful narrative about psychological harm. The typical lawsuit involves an outraged parent seeking to prevent harm to herself and her children at the hands of religious majoritarians bent on proselytizing her children—and her—through, at, or, or by means of the common schools. Indeed, in the Counter Narrative, teachers were part of the problem, not the solution. *See supra* notes 311–316 and accompanying text. *Epperson* reminds us that common school religion can harm teachers. *Edwards v. Aguillard* made short shrift of the disingenuous argument that the Louisiana Creationism Act fostered academic freedom. 482 U.S. 578, 586 (1987). Thus, the true argument of academic

(c) The Categorical Quality of the Psychological Harm

Justice Frankfurter, following the Counter Narrative, declared that psychological harm was categorical: "These are consequences not amenable to statistics."[634] Other *McCollum* Narrative opinions implicitly adopted the same position.[635] It is not clear, however, to what extent the position was strongly held or thought through. Justice Douglas, concurring in *Schempp*, insisted that the existence of psychological harm depended upon evidentiary fact.[636] Justice Brennan, also concurring in *Schempp*, implicitly conceded the relevance and authority of "experts who have studied the behaviors and attitudes of children."[637] Justice Kennedy, writing for the Court in *Lee*, did the same.[638] Finally, Justice O'Connor, concurring in *Wallace*, straddling the question, stated that "the effect of a moment of silence law is not entirely a question of fact."[639] The foregoing raise a question, however slight, about the commitment of the McCollum Narrative to the categorical character of psychological harm.

(d) A Note on Harassment

In *Santa Fe*, coercion of the crudest, most naked sort was at stake: "One [complainant] family [was] Mormon and the other . . . Catholic. The District Court permitted [the complainants] to litigate anonymously to protect them from intimidation or harassment," which was "[a] decision, the Fifth Circuit Court of Appeals noted, that many District officials

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freedom, in this context, belongs to the teacher who does not wish to have her religious views interfered with, molested, or offended, by common school religion.

[634] Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 202, 228 (1948) (Frankfurter, J., concurring).

[635] *See* Engel v. Vitale, 370 U.S. 421, 431 (1962) (stating that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain"); *Schempp*, 374 U.S. at 221 (quoting *Engel*, *supra*); *Wallace*, 472 U.S. at 60, n.51 (quoting *Engel*, *supra*); *Edwards*, 482 U.S. at 584 (declaring that "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure"); *Lee*, 505 U.S. at 592 (stating that "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed," and that "if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000) (stating that "[t]o assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme'" and further stating that "[w]e stressed in *Lee* the obvious observation that 'adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention'").

[636] *Schempp*, 374 U.S. at 228–29 (Douglas, J., concurring).

[637] *Id.* at 290 (Brennan, J., concurring).

[638] *Lee*, 505 U.S. at 593 (stating that "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers toward conformity, and that the influence is strongest in matters of social convention").

[639] *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring).

apparently neither agreed with nor particularly respected."[640] Indeed, the District Court had to threaten these officials with contempt of court.[641]

A solid legal basis would have allowed the case to be decided on these facts alone.[642] The McCollum Narrative, however, had not developed a coherent stance or claim, categorical or otherwise, regarding psychological harm to parents and families. Thus, the Court was not prepared to address threats and intimidation directed towards families who objected to school-sanctioned, student-led prayers at high school football games. Given the intimidation and harassment by Santa Fe Independent School District officials,[643] violation of the Establishment Clause is self-evident. Unfortunately, the Court failed to see it.

(2.) The Zorach *Narrative*

(a) The Nature of the Psychological Harm

Justices dissenting from the McCollum Narrative tended to dismiss the relevance of psychological harm,[644] as did the justices authoring the Zorach Narrative opinions. Justice Douglas, writing for the Court in *Zorach*, dismissed the question of psychological harm, holding that there was no force or coercion: "A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any."[645]

Similarly in *Mergens*, Justice O'Connor dismissed the possibility of psychological harm, finding a "crucial difference between *government* speech endorsing religion . . . and *private* speech endorsing religion," and

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[640] *Santa Fe*, 530 U.S. at 294, n.1 (internal quotations omitted).

[641] *Id.*

[642] If they manage to obtain the identity of the plaintiffs, then the efforts by local school officials to harass the plaintiffs might well support an action under 42 U.S.C. § 1983. It follows that the relief granted in *Santa Fe* could have rested on the danger of *physical* harm to the plaintiffs caused by the threats and intimidation of the school officials. Therefore, the case need not have been decided on the basis of *psychological* harm. Alternatively, the threat of *physical* harm itself could have constituted a *psychological* harm.

[643] For a general discussion about the harassment of religious minorities at the present time, see RAVITCH, *supra* note 39.

[644] Illinois *ex rel*. McCollum v. Bd. of Educ., 333 U.S. 202, 241 (1948) (Reed, J., dissenting) (stating that "[e]ven assuming that certain children who did not elect to take instruction are embarrassed to remain outside of the classes, one can hardly speak of that embarrassment as a prohibition against the free exercise of religion"); Sch. Dist. v. Schempp, 374 U.S. 203, 316 (1963) (Stewart, J., dissenting) (insisting that

> the duty laid upon government . . . is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate. . . . [I]t is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief);

Lee v. Weisman, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting) (downplaying the significance of psychological harm in the face of a supposed larger interest in "fostering respect for religion generally").

[645] Zorach v. Clauson, 343 U.S. 306, 311 (1952).

concluding that "secondary students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[646] O'Connor also held that "the possibility of *student* peer pressure remains, but there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate. Moreover, petitioners' fear of a mistaken inference of endorsement is largely self-imposed."[647] She concludes: "To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, . . . students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech."[648] Disregarding the eerie echo of *Plessy v. Ferguson*[649] and self-imposition in these remarks,[650] O'Connor never explained how a school can make this non-endorsement "clear." She merely stated that there is a distinction between "lead[ing] or direct[ing]" and "permit[ting]" religious activities in the common schools.[651]

Justice O'Connor further argued that "the broad spectrum of officially recognized student clubs . . . and the fact that . . . students are free to initiate and organize additional student clubs, . . . counteract any possible message of official endorsement of or preference for religion or a particular religious belief."[652] For a variety of reasons, the "freedom" to which O'Connor refers is formalist fiction. Not all religious groups will encourage students belonging to those groups to form student clubs or will be in a position to do so, should they desire to establish them. Most organizations require a critical mass of members in order to survive and function. In many schools, some religious minorities will lack this critical mass.[653]

Beyond demographic inequality, such clubs have radically different theological implications for the religious communities that form them. Evangelical Protestants have few constraints on laypeople conducting worship services.[654] For Roman Catholics, however, the standard worship

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[646] Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

[647] *Id.* at 251.

[648] *Id.* at 251.

[649] 163 U.S. 537.

[650] *Id.* at 551 (declaring that if "the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is not by reason of anything found in the act [mandating racially separate railroad carriage,] but solely because the colored race chooses to put that construction upon it").

[651] *Mergens*, 496 U.S. at 252.

[652] *Id.*

[653] RAVITCH, *supra* note 39, at 145.

[654] *See generally* JAMES F. WHITE, PROTESTANT WORSHIP: TRADITIONS IN TRANSITION 171–208 (1989) (discussing the patterns of worship and the important role of the laity in worship in the Frontier tradition, "the most prevalent worship tradition in American Protestantism" and in the Pentecostal tradition).

service is the Mass, which must be celebrated by a bishop or a priest.[655] Thus, given the Equal Access Act's powerful incentive for public schools to restrict the participation of adult outsiders,[656] evangelical Protestants have, as a practical matter, a clear advantage over Roman Catholics regarding traditional forms of worship conducted in the statutory "forum." Evangelical Protestants can have their traditional worship services operating within the constraints of the Act, but Roman Catholics cannot. Thus, the "access" is anything but "equal," because the Act discriminates against religions in which liturgy and liturgical action are central. It is unrealistic to suppose that both groups could engage equally in "non-worship religious speech," ignoring the discriminatory aspects of the Act relative to liturgy.[657] If this supposition would suffice, and it should not, then *Good News Club* is clearly incorrect.[658] But apart from *Good News Club*, discrimination against liturgical worship offends the core values of religious freedom and religious conscience. It is a source of psychological harm to those students and their parents for whom liturgy is important. It cannot be an accident that evangelical Protestant high school students have organized most of the Equal Access religious clubs.[659]

Justice Marshall sought to answer the question that Justice O'Connor ignored. He wrote "to emphasize the steps Westside must take to avoid appearing to endorse the Christian club's goals."[660] He concluded:

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[655] CATECHISM, *supra* note 378, at § 1327 (stating that "[i]n brief, the Eucharist is the sum and summary of our faith"); *id.* at § 1348 (declaring that "the bishop or priest acting *in the person of Christ the head* (*in persona Christi capitis*) presides over the assembly, speaks after the readings, receives the offerings, and says the Eucharistic Prayer").

[656] 20 U.S.C. § 4071(c) (2000) provides, in relevant part that "[s]chools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that . . . nonschool persons may not direct, conduct, control, or regularly attend activities of student groups." *See generally* Student Coalition for Peace v. Lower Merion Sch. Dist., 776 F.2d 431, 442 (3d Cir. 1985) (holding that "student groups wishing to invite nonstudents onto school property are protected by the Act if the school's limited open forum encompasses nonstudent participation in student events, as long as those nonstudents do not 'direct, conduct, control, or regularly attend' such activities"); David S. Tatel & Elliot M. Mincberg, *The Equal Access Act Four Years Later: The Confusion Remains*, 51 ED. LAW REP. 11, 16 (1989) (stating that "[a] school district can . . . limit nonstudent participation in religious . . . meetings by limiting nonstudent participation in other noncurriculum related meetings").

[657] Such a supposition assumes that "non-worship religious speech" has the same relative value in the various religious and belief systems to which Americans belong. This cannot be the case, especially for those religions in which liturgy plays the central role. Thus, the discrimination against liturgy remains.

[658] The holding in *Good News Club v. Milford Central School* rests on the conflating of various forms of religious speech: worship, proselytizing and commentary. Justice Stevens, dissenting, correctly insisted on differentiating between these forms. 533 U.S. 98, 130–34 (2001) (Stevens, J., dissenting). Justice Stevens would hold it proper to permit "the first type of religious speech while excluding the second and third types." *Id.* at 2114. The distinction rests on a functional judgment about psychological harm. Only by distinguishing between the forms of religious speech can the defects in the Equal Access Act be, to some extent, avoided. On the other hand, by conflating them, as Justice Thomas does, the bias against liturgical religions becomes legitimated.

[659] Fitschen, *supra* note 589, at 436 (arguing that tens of thousands of Bible clubs have been formed in the wake of *Board of Education v. Mergens*, 496 U.S. 226 (1990)).

[660] *Mergens*, 496 U.S. at 263 (Marshall, J., concurring).

> [The school could] entirely discontinue encouraging student participation in clubs and clarify that the clubs are not instrumentally related to the school's overall mission. Or, if the school sought to continue its general endorsement of those student clubs that did not engage in controversial speech, it could do so if it also affirmatively disclaimed any endorsement of the Christian club.[661]

Justice Marshall's concern about the need to affirmatively disclaim any endorsement of the student religious club is closely related to his view of psychological harm. He applied the reasoning of the canon in the *McCollum* cases, refusing to dismiss or downplay psychological harm:

> When the government, through mandatory attendance laws, brings students together in a highly controlled environment every day for the better part of their waking hours and regulates virtually every aspect of their existence during that time, we should not be so quick to dismiss the problem of peer pressure as if the school environment had nothing to do with creating and fostering it. The State has structured an environment in which students holding mainstream views may be able to coerce adherents of minority religions to attend club meetings or to adhere to club beliefs. Thus, the State cannot disclaim its responsibility for those resulting pressures.[662]

Justice Marshall was entirely correct. Consistent with the canon of the *McCollum* cases, however, he ignored the psychological harm done to the *parents* of common school students. He also failed to consider the history and tradition of overreaching by the Protestant Empire through the instrumentality of common school religion. Despite these flaws, Marshall's opinion represents the best effort to square the two lines of cases. For him, the key is the duty of the common schools, at least in some settings, to affirmatively disassociate themselves from the clubs, while at the same time permitting the clubs to operate on school property. Such a duty represents a clear break with the tradition of common school religion.[663] Marshall may not have adequately explained, however, how a school can discharge that duty. Given the reality of the Protestant Empire, the matter required far more attention to detail and specificity. The duty that Marshall finds rests, in effect, on an anti-Protestant Empire premise.[664]

Good News Club, per Justice Thomas, follows the lead of *Zorach* and *Mergens* by downplaying the meaning or significance of psychological harm, finding the claim of such harm "unpersuasive,"[665] by relying on the formalist argument that the school is not "sponsor[ing]" or "endorsing" the activities of the Good News Club.[666] Thomas speculates about such harm:

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[661] *Id.* at 270.

[662] *Id.* at 269.

[663] It is not clear, however, that even this duty, as described by Justice Marshall, meets the requirements of religious freedom and liberty. *See infra* note 723 and accompanying text.

[664] For an attempt to provide some detail and specificity, see Steven H. Aden, *Who Speaks for the State?: Religious Speakers on Government Platforms and the Role of Disclaiming Endorsement*, 9 WM. & MARY BILL RTS. J. 419, 430–31 (2001).

[665] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 113–14 (2001).

[666] *Id.* at 113–20.

> [E]ven if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.[667]

Thomas concludes that "[w]e cannot operate . . . under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity."[668] Justice Scalia, concurring, dismisses the question of psychological harm: "so-called 'peer pressure,' if it can even been [sic] considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected."[669] Justice Breyer, concurring, insists that the question of psychological harm is still open.[670] Perforce, he was not prepared to dismiss it out of hand.

(b) The Victims of the Psychological Harm

Those dismissing the question of psychological harm spent little or no time considering who the victims of this harm might be. Justice Marshall, concurring in *Mergens*, clearly recognizes that students might be victims,[671] and, consistent with the weakness in the McCollum Narrative, fails to recognize that parents and others might also be victims of "equal access."[672]

In one of the greater ironies in the history of common school religion, however, Justice Thomas, writing for the Court in *Good News Club*, addresses the question of psychological harm to parents, finding that none exists: "the parents of elementary school children would [not] be confused about whether the school was endorsing religion."[673] Thomas ignores the dynamics of the pressure that children can exert on their parents because of

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[667] *Id.* at 118.

[668] *Id.* at 119.

[669] *Id.* 121 (Scalia, J., concurring).

[670] *Id.* at 127–30 (Breyer, J., concurring).

[671] Bd. of Educ. v. Mergens, 496 U.S. 226, 269 (1990) (Marshall, J., concurring).

[672] The Justices dissenting from the Zorach Narrative did so within the contours of the McCollum Narrative. Therefore, they added nothing to the need for a family-centered analysis of psychological harm. Consistent with that Narrative, they emphasized harm to students, ignoring the question of harm to parents and to families. Zorach v. Clauson, 343 U.S. 306, 318 (1952) (Black, J., dissenting) (referring to "pupils"); *Id.* at 323 (Frankfurter, J., dissenting) (referring to "children"); *Mergens*, 496 U.S. at 275 (Stevens, J., dissenting) (referring to "high school students"); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 132 (2001) (Stevens, J., dissenting) (referring to "young children"); *Id.* at 143 n.4 (Souter, J., dissenting) (noting the critical fact that "parents are required to give permission for their children to attend" the Club's worship services, but insisting that "the proper focus of concern in assessing effects includes the elementary school pupils who are invited to meetings, . . . who see peers heading into classrooms for religious instruction as other classes end, and who are addressed by the 'challenge' and 'invitation'").

[673] *Good News Club*, 533 U.S. at 115.

their desire to conform to the behavior of their fellow students. The Counter Narrative, by contrast, fully appreciates this situation.[674]

(c) The Categorical Quality of Psychological Harm

In *Zorach*, Justice Douglas insists that the question of psychological harm depends upon evidentiary fact.[675] Justice Stewart, dissenting in *Schempp*, flatly rejects the categorical nature of claims regarding psychological harm.[676] In *Good News Club*, Justice Thomas, for the Court, also rejects categorical claims of psychological harm,[677] but makes categorical claims about the *absence* of such harm.[678] Justice Thomas plainly demonstrates the limitations of categorical claims. They necessarily rest on policy judgments. If those judgments change, then the claims do also. The larger point is that Thomas clearly overturns a judgment that animated the Counter Narrative.[679] Justice Breyer, concurring in *Good News Club*, concludes that the question of psychological harm requires evidentiary fact, not categorical claim or assertion.[680]

ii. Status-Based Harm

The Counter Narrative declares status-based harm to be the denial or absence of equality understood as the absence of (1) preference and (2) discrimination on the basis of religious belief.[681] The McCollum Narrative defines Establishment Clause violations in part as problems of inequality.[682]

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[674] *See supra* notes 413–414 and accompanying text.

[675] *Zorach*, 343 U.S. at 311.

[676] Sch. Dist. v. Schempp, 374 U.S. 203, 319 (1963) (Stewart, J., dissenting).

[677] *Good News Club*, 533 U.S. 117 n.7.

[678] *Id.* at 114–15 (making a categorical claim about the absence of harm to parents); *Id.* at 2106 (making a categorical claim about what children would or would not perceive, stating that "we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum").

[679] Those dissenting from the Zorach Narrative added little to the competing McCollum Narrative. Justice Frankfurter relied on the procedural posture of Zorach to conclude that, as a matter of pleading, the claims regarding psychological harm had to be accepted by the Court. *Zorach*, 343 U.S. at 321–22 (Frankfurter, J., dissenting). Frankfurter, however, did state that "[t]he unwillingness of the promoters of [the released time program] to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes." *Id.* at 323 (Frankfurter, J., dissenting). Justice Souter, dissenting in *Good News Club*, adhered to the Counter Narrative, stating that "[t]he fact that there may be no evidence in the record that individual students were confused during the time the Good News Club met on school premises . . . is immaterial." 533 U.S. at 143 n.4 (Souter, J., dissenting).

[680] *Good News Club*, 533 U.S. at 127–30 (Breyer, J., concurring).

[681] *See supra* note 422 and accompanying text.

[682] *See, e.g.*, *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring) (commenting on the concrete, fact-based problem of preference in McCollum, noting that "not . . . all the practicing sects in Champaign are willing or able to provide religious instruction"); *Schempp*, 374 U.S. at 229 (Douglas, J., concurring) (noting that "the Establishment Clause . . . forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by

The McCollum Narrative also adopts the position that the religious exercises or displays in question violate a prohibition against government aid, tax-based or otherwise, to religious groups,[683] that the violation is a categorical violation of the Establishment Clause,[684] and that the harm derives from the absence of any secular purpose behind the laws and practices under scrutiny.[685]

The linkage between psychological harm and status-based harm is not as strong in the McCollum Narrative as it is in the Counter Narrative.[686] The absence of a powerful rhetoric linking the two forms of harm may bear on the fact that the *Zorach* cases use the textual forms that undergird status-based harm to trump the logic of the McCollum Narrative. In *Zorach*, the

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relying on its members alone"); *Schempp*, 374 U.S. at 282 (Brennan, J., concurring) (finding an unconstitutional preference in the face of the fact that regulations permitted the reading of various versions of the Bible, stating that "majority sects are preferred in approximate proportion to their representation in the community and in the student body, while the smaller sects suffer commensurate discrimination" because "[s]o long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided"); *Wallace*, 472 U.S. at 60 (stating that "[t]he addition of 'or voluntary prayer' [to the text of the statute] indicates that the State intended to characterize prayer as a favored practice"); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (stating that "the legislature passed the [Creationism] Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator").

[683] Regarding unconstitutional tax-based aid, see, for example, *McCollum*, 333 U.S. at 210 (declaring that the Champaign released time program "is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith); Engel v. Vitale, 370 U.S. 421, 441 (1962) (Douglas, J., concurring) (arguing that "no matter how briefly the prayer is said, . . . the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution"); *Schempp*, 373 U.S. at 230 (Douglas, J., concurring) (maintaining that "[i]t is not the amount of public funds expended; as this case illustrates, it is the use to which public funds are put that is controlling").

Regarding non tax-based unconstitutional aid, see, for example, Stone v. Graham, 449 U.S. 39, 42 (1980) (stating that "[i]t does not matter that posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits").

[684] *Engel*, 370 U.S. at 424 (stating that "[w]e think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 292 (2000) (declaring that "the Constitution . . . requires that we keep in mind 'the myriad, subtle ways in which Establishment Clause values can be eroded,'" one such way being "the mere passage by the [School] District of a policy that has the purpose and perception of government establishment of religion").

[685] *See, e.g.*, *Stone*, 449 U.S. at 41 (declaring that "Kentucky's statute requiring the posting of the Ten Commandments in public school rooms had no secular legislative purpose"); *Wallace*, 472 U.S. at 67 (O'Connor, J., concurring) (stating that "the purpose and likely effect of this subsequent enactment [of the moment of silence law] is to endorse and sponsor voluntary prayer in the public schools"); *Edwards*, 482 U.S. at 589 (stating that "the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creationism'"); *Santa Fe*, 530 U.S. at 307–09 (arguing that "the expressed purposes of the policy [permitting students, by an election process, to have a student deliver an "invocation"] encourage the selection of a religious message" and that "[i]t is reasonable to infer that the specific purpose of the policy was to preserve a popular state-sponsored religious practice") (internal quotations omitted).

[686] There are a few opinions in which the link exists. *See McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring); *Schempp*, 374 U.S. at 281–84 (Brennan, J., concurring); *Santa Fe*, 530 U.S. at 313–14.

Court drew a distinction between establishment and accommodation,[687] setting the stage for a formalist approach to the question of religion in the common schools, an approach that largely bracketed psychological harm.[688] In *Mergens*, the Court insisted that "[b]ecause the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to 'endorse or disapprove of religion.'"[689] Additionally, in *Good News Club*, the Court concluded that the effort to exclude the Club amounted to impermissible "viewpoint discrimination."[690] The Court in *Good News Club* directly confronted the equality principle as found in both the Counter Narrative and the McCollum Narrative. It saw the issue presented by this case as "nothing more than [the Club's desire] to be treated neutrally and given access to speak about the same topics as are other groups."[691]

The linkage between the two forms of harm, abandoned in the Zorach Narrative, surfaced in some of the dissenting opinions. Justice Black found status-based constitutional harm: "Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids."[692] He also found a generalized nonspecific psychological harm,[693] but did not connect the two. Justice Stevens sought to confine himself to the question of statutory interpretation in *Mergens*.[694] He conceded, however, that "[t]he [relevant] statutory definition . . . should depend on the constitutional concern that motivated"[695] the Court's decision in *Widmar v. Vincent*.[696] This concern, as Stevens saw it, applied not to student groups in general, but to student groups advancing a religious agenda.[697] More specifically, "[t]he forum established by the state university [in *Widmar*] accommodated participating groups that were 'noncurriculum related' not only because they did not mirror the school's classroom instruction, but also because they advocated controversial positions that a state university's obligation of neutrality prevented it from endorsing."[698] The status-based harm of "discrimination" does not exist in the abstract, but rather exists in close relation to psychological harm. Thus, for Justice Stevens, a broad free speech anti-discrimination principle was inappropriate without a consideration of context, and psychological harm arising from considerations unique to religion formed an element of that context. Therefore, Stevens linked the two forms of harm, and urged a narrower free

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[687] Zorach v. Clauson, 343 U.S. 306, 313–15 (1952).

[688] *See supra* notes 490–492 and accompanying text.

[689] Bd. of Educ. v. Mergens, 496 U.S. 226, 249 (1990) (quoting *Wallace*, 472 U.S. at 56 (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984))).

[690] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 110–12 (2001).

[691] *Id.* at 114.

[692] *Zorach*, 343 U.S. at 318 (Black, J., dissenting).

[693] *Id.* at 316.

[694] *Mergens*, 496 U.S. at 273 (Stevens, J., dissenting).

[695] *Id.* at 277.

[696] Widmar v. Vincent, 454 U.S. 263 (1981).

[697] *Mergens*, 496 U.S. at 271–72 (Stevens, J., dissenting).

[698] *Id.* at 273–74 (Stevens, J., dissenting).

speech anti-discrimination principle because of countervailing religious liberty issues.

Justice Stevens, dissenting in *Good News Club*, constructed a taxonomy of forms of religious speech.[699] Consistent with his view in *Mergens* that a free speech anti-discrimination principle should be narrowly drawn, Stevens argued that the principle of equality operated differently with respect to the three forms of religious speech. For Stevens, considerations of the psychological harm unique to religious proselytizing lay at the heart of the difference between equality or antidiscrimination rules that should pertain.[700] Justice Souter, also dissenting in *Good News Club*, agreed with Stevens that a religious speech taxonomy exists consisting of at least two forms: "discussion of a subject from a particular, Christian point of view," and "an evangelical service of worship calling children to commit themselves in an act of Christian conversion."[701] Like Stevens, Souter saw the relevance of psychological harm associated with religious proselytizing in assessing the constitutional significance of the free speech forms.[702]

V. RECAPITULATION AND CONCLUSION: FOUR NARRATIVES AND THE SEARCH FOR COMMON GROUND

This article has examined four narratives. The Pro Narrative and the Counter Narrative, both constructed by the state courts prior to the United States Supreme Court's adoption of the Revised Tentative Principle, cannot easily coexist. The weak Counter Narrative, elaborated by *Freeman* and *Herold*, paves the way for reconciliation of the two Narratives. These cases suggest an approach that accepts the general premise of the Pro Narrative, but deviates from it in circumstances in which overreaching by the Protestant Empire is simply too great. Thus, in *Freeman*, Bible reading in the public schools may pass muster as long as the teachers do not become overzealous in proselytizing their evangelical faith.[703] In other words, the words of the Bible itself should do the work of the Protestant Empire. In *Herold*, the court distinguished between the rights of Roman Catholics and those of Jews. It found no overreaching by the Protestant Empire concerning Roman Catholics, but did so regarding Jews. The practical consequences of *Herold* are that the vast majority of school districts in Louisiana could continue to impose common school religion because few, if any, Jews resided in those districts. Thus, few if any Jewish plaintiffs in those districts would sue in court to ban Bible reading, prayer or Service Exercises.[704] How *Herold* would have treated the complaints of atheists, freethinkers, or adherents of non-Bible religions remains unclear. *Doremus*

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[699] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 130 (2001) (Stevens, J., dissenting).
[700] *Id.* at 131–32 (Stevens, J., dissenting).
[701] *Id.* at 138 (Souter, J., dissenting).
[702] *Id.* at 136–45.
[703] *See supra* note 313 and accompanying text.
[704] *See supra* notes 314–315 and accompanying text.

suggests that their interests might have been ignored.[705] The Illinois Supreme Court backtracked from *Ring*, upholding both on-site and off-site released time programs. Even *Minor*, its powerful dictum notwithstanding, may be read to accommodate common school religion, should the majority in a school district opt to provide for its exercise in the public schools.[706]

The Counter Narrative, however, largely settled on a strong form. *Minor*'s dictum is a powerful wellspring for the Counter Narrative, without regard to the formalist distinction between holding and dicta.[707] The strong Counter Narrative became the normative expression of resistance to the works of the Protestant Empire. The Pro and the Counter Narratives, therefore, mirrored the dynamic tension between persistence and resistance, between those who favored the psychological war of attrition waged by the Protestant Empire using the instrumental assistance of the common schools (and thus of common school religion) and those who sought to end this war. This tension has marked the contours of one of our culture wars, which continue to rage at the present time.

When the United States Supreme Court, for practical reasons largely involving national security, decided to rein in the Protestant Empire,[708] the Court embraced the "separationism" idea that animates the Counter Narrative, of which *McCollum* is a straightforward example. The Court also sought to limit the reach of this idea in *Zorach*, although the scope of the limitation was not clear at the time *Zorach* was decided. Indeed, given *Engel*, *Schempp*, *Stone*, *Jaffree*, and *Edwards*, one might reasonably conclude that *Zorach* was an odd decision with little meaning or significance. A better reading of *Zorach*, however, suggests that it functions, in relation to the then developing McCollum Narrative, in much the same way that *Freeman*, *Herold*, *Ring* (limited by the released time cases), and *Minor* function in relation to the Counter Narrative. Just as *Freeman* and *Herold* permitted common school religion to continue, albeit under somewhat different circumstances than those present in the cases themselves, *Zorach* permitted a nexus of common schools and religion to continue, as long as the relationship had a "physical distance" not present in *McCollum*. Thus, indirect instrumental assistance became a matter of location.

With this understanding of *Zorach*, *Mergens* and *Good News Club* appear to merely elaborate on *Zorach*'s function by permitting a nexus of common schools and religion to continue, as long as the relationship can be concealed by "free speech." In other words, "physical distance" and "free speech" function as means whereby "other institutions" can continue to do the work of the Protestant Empire in the common schools. The Revised Tentative Principle may be maintained as a matter of form. "Physical

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[705] *See supra* notes 270–272 and accompanying text.

[706] *See supra* note 316 and accompanying text.

[707] *See* Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 709–30 (1999) advancing an analysis of "judicial dicta" [as opposed to obiter dicta] as "defeasibly... binding").

[708] *See* Newsom, *supra* note 1, at 259–63.

distance" and "free speech" become the formalist tests for distinguishing between direct instrumental facilitation of the work of the Protestant Empire by "the officials, administrators and teachers in the common schools" and the indirect facilitation by those officials, administrators, and teachers of "other institutions" doing the work of the Protestant Empire in the common schools. The state court judges who constructed the Counter Narrative would be appalled by this result. The Supreme Court's Narratives simply do not meet the standard that these judges, though few in number, laid down.

One may separate the Justices according to their positions on the meaning of the Revised Tentative Principle. One position treats the Principle as a major advance in the cause of religious freedom and conscience, resting in part on Lord Bryce's religion principle, as reinforced by his political principle. This position embraces at least the broad themes of the Counter Narrative and rejects the opinion that the Zorach Narrative constitutes a reasonable and proper limitation on the reach of the Revised Tentative Principle. Justices Stevens, Souter, and Ginsburg hold this view. Justice Breyer's puzzling concurrence in *Good News Club* makes it difficult to fully assess his views on the Principle. His rejection of the categorical claim of psychological harm in *Good News Club* might explain his concurrence in that case; however, he also concurred in *Santa Fe*—an opinion implicitly recognizing and accepting the categorical claim of psychological harm.[709] A second position embraces both the McCollum and Zorach Narratives. Religious freedom and conscience matter, but the rights of the majoritarian religions are also important. The task at hand is to balance the two by relying on "physical distance" and "free speech." Justices Kennedy and O'Connor hold this position, which echoes the weak Counter Narrative. A third position rejects, or is at least skeptical of, the McCollum and Counter Narratives and, therefore, embraces the Zorach Narrative, and perhaps the Pro Narrative as well.[710] Chief Justice Rehnquist and Justices Scalia and Thomas hold this position.[711]

Two of these positions take a consistent stand regarding psychological harm. The first holds that psychological harm done to religious minorities by direct or indirect instrumental facilitation constitutes a violation of the Establishment Clause. The third adheres to the opposite view. The second

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[709] *See supra* note 635 and accompanying text.

[710] *See* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 507–10 (1994) (arguing that Scalia's legal coercion doctrine undermines *Engel* and *Schempp*). *See also* Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 166 (2000) (arguing that "the current focus on nondiscrimination [with reference to "equal access"] in assessing claims seems to be eliminating the unique protections of the Establishment Clause beyond those embodied in the Equal Protection Clause").

[711] The fact that Justices Scalia and Thomas are Roman Catholics does not prevent them from being avatars of the Protestant Empire. They reflect a triumphalist American Roman Catholicism that assumes that the anti-Roman Catholicism of the Protestant Empire has dissipated or that Roman Catholics have the social, cultural, economic and political clout to overcome it. They misapprehend the situation. *See* Newsom, *supra* note 1, at 188 n.3. They have allowed a right-wing, reactionary ideology to shape their judgments about church-state issues and other matters.

position holds that sometimes psychological harm matters and sometimes it does not, depending on the presence or absence of "physical space" or "free speech" considerations.

It is likely that the McCollum and Zorach Narratives will continue to shape the Court's decision-making for some time to come. Those holding the first and second positions will uphold the McCollum Narrative, and those holding the second and third positions will uphold the Zorach Narrative. Comparing this state of affairs with the situation involving the Pro and Counter Narratives, the country has made some progress because the Pro Narrative was the normative or majority narrative in the pre-Incorporation régime. The progress, however, is not as great as it could, or should, have been. It is time to ask why.

The McCollum Narrative never embraced the boldness of the Counter Narrative largely because the raison d'être of the Revised Tentative Principle was pragmatic and not principled. Furthermore, as Justice Brennan's patronizing attitude toward state courts demonstrates,[712] the Court felt little need to think long and hard about them.[713] Thus, the Court overlooked or ignored the good work done by the builders of the Counter Narrative on the question of psychological harm. As a consequence, the Court deprived itself of the chance to fully understand and appreciate the fundamental dynamics at play. The stubborn truth is that those who resisted common school religion appealed to family values. The Court has long recognized the right of parents to control the religious formation of their children.[714] It is sad and strange, therefore, that the Court never discussed that right in the cases generating the McCollum and Zorach Narratives, except for one brief reference by Justice Brennan in *Edwards*.[715]

It might be naïve to suppose that a better narrative on the psychological harm done to families might have dissuaded the builders of the Zorach Narrative. It probably would not have done so. A better family values narrative at the heart of the McCollum Narrative, however, might have given those builders greater pause or forced them to articulate a better defense of the Zorach Narrative. There is virtue in requiring the law to offer the best explanation possible for its decisions.[716] The failure to construct sound ideologies and myths can lead a nation astray.[717]

Measured by this standard, the weaknesses of the Zorach Narrative are pronounced. *Zorach* never satisfactorily explains why "physical distance,"

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[712] *See supra* note 494 and accompanying text.

[713] Ironically, it was Justice Brennan who paid the most attention to the Counter Narrative.

[714] *See supra* note 305 and accompanying text.

[715] Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

[716] *See* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Louis H. Pollak, *Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62, 64 (1963). *But see* Thomas M. Mengler, *Public Relations in the Supreme Court: Justice Tom Clark's Opinion in the School Prayer Case*, 6 CONST. COMMENT. 331, 347 (1989) (arguing that the public reaction to *Schempp* was milder than the reaction to *Engel*, not because Justice Clark wrote an opinion addressed to the public, but because "the people were ready for the second school prayer case [and] [t]he shock had worn off").

[717] *See* Newsom, *supra* note 221, at 149.

the situs of religious instruction, should matter.[718] Furthermore, Justice Jackson tripped up the *Zorach* majority by correctly noting that the program operated to place the students not participating in the released time program in "jail." A "family values" analysis would easily demonstrate that the situs is irrelevant. The pressures that operate on children and, through them, their parents, do not depend on situs. Instead, they depend on the fact that the public schools are involved and that classmates were empowered by the setting and the context to exert pressure on other children. Furthermore, most parents would seek to avoid seeing their children in "jail" or some other form of detention because of their religious beliefs. So much for *Zorach*.

Mergens fares no better for the same reasons. Many of the grave flaws in the Court's argument regarding "equal access" have already been noted.[719] From the perspective of a "family values" analysis, the context or the setting undermines any claim that the State has not made life worse for religious minorities. It is that context, in which the public school looms large, which empowers other school children to pressure those children who would resist joining the religious clubs and, indirectly, on their parents.

Undeniably, the Equal Access Act largely reflects the effort of proponents of religion in the common schools to subvert *Engel* and *Schempp*.[720] Nothing in the Act counters the belief that "equal access" and "Free Speech" are merely a Trojan Horse to enable majoritarian religions to impose themselves on religious minorities. If the minions of the Protestant Empire cannot directly use public school officials to advance their agenda, they can use "free speech" to inveigle the common schools into making students available to their blandishments.[721] If psychological harm is understood as a social and family based dynamic, then the distinction that Justice O'Connor makes in *Mergens* between endorsement and accommodation defies common sense. The Protestant Empire has manipulated the common schools throughout much of the nation's history. Thus, it is irrational to suppose that the distinction that Justice O'Connor draws between "leading and directing" and "permitting"[722] religious

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[718] *See supra* notes 708–709 and accompanying text.

[719] *See supra* notes 646–663 and accompanying text.

[720] *See* ALLEY, *supra* note 48, at 202–06; LYNDA BECK FENWICK, SHOULD THE CHILDREN PRAY?: A HISTORICAL, JUDICIAL, AND POLITICAL EXAMINATION OF PUBLIC SCHOOL PRAYER 169–71 (1989); Butler, *supra* note 60, at 926 (stating that "[b]y applying free speech concepts to religious speech and asserting that religion should not be treated differently, the Court has brought religion to the door of the school house"); Wood, *supra* note 82, at 366 (noting that "[i]n the words of Jerry Falwell, 'We knew we couldn't win on school prayer [in Congress], but 'equal access' gets us what we wanted all along'") (citation omitted).

[721] *See* Ruti Teitel, *When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174, 178 (1986) (commenting upon the aggressiveness of evangelical students in "creating their own organizations"); Wood, *supra* note 82, at 367 (stating that "there is the strong likelihood that the more aggressive and militant missionary and ideological groups will be among the first to enter the public schools under the protection of the Equal Access Act").

[722] Bd. of Educ. v. Mergens, 496 U.S. 226, 252 (1990).

activities in the common schools will be clear to the average American public school student, her parents, or anyone else. O'Connor's fundamental error lies in her failure to analyze the dynamics of suasion, attrition, and restraint as they impact not only students, but also their parents and even the broader community. Such an analysis provides the only way to truly understand the works of the Protestant Empire, and to understand that the common school provides the setting or context in or out of which the dynamic can come into play. Conceding that minorities will suffer psychological harm by reason of being minorities, the question remains whether it is permissible for the state to worsen their situation. The Equal Access Act does precisely that, in exactly the same way that released time programs, of either the *McCollum* or the *Zorach* type, do. Students belonging to minority religious groups will be importuned by gung-ho religious majoritarians, because they are students, to participate in the majoritarians' religious activities, without regard for what the religious minority students or their parents think about them or how these activities might undermine their parents' religious beliefs. O'Connor never addressed the question of how parents might react to these "equal access" religious programs. Her ultimate failure was her refusal to take seriously our history of majoritarian overreaching in the common schools and the relation between that overreaching and the families of students holding minority religious views.

Justice Marshall sought to make the question in *Mergens* turn in part on the presence or absence of "ideological" clubs.[723] The history of common school religion counsels against any easy assumption that the common school is merely "accommodating" religious clubs, without regard to the presence or absence of other "ideological" clubs. The stubborn fact remains that "ideological" clubs have not been the source of the tension between religious groups. It will not suffice, however, to permit "ideological" clubs to bash religion, while at the same time denying equal access to religious clubs, if only to answer the attacks leveled by the "ideological" clubs. Here, the only sensible principle of equal access emerges, and the test is ultimately one of religion, not of ideology, and of viewpoint, not of content. In other words, Justice Marshall's brave efforts notwithstanding, the proper test focuses on religious liberty and freedom, not on "free speech." Justice Marshall also argued that schools had a duty to affirmatively disclaim any endorsement of "equal access" religious groups. The idea has considerable merit, but given the present reality of the Protestant Empire it lacks practicality. So much for *Mergens*.

In *Good News Club*, Justice Souter, dissenting, pays attention to the details, which Justice Thomas, for the Court, neglects to do. Justice Souter observed that the risk of the appearance of school endorsement of the Club is enhanced by the

> timing and format of Good News's gatherings. . . . The club is open solely to elementary students, . . . only four outside groups have been identified

[723] *Id.* at 266.

> as meeting in the school, and Good News is, seemingly, the only one whose instruction follows immediately on the conclusion of the official school day.[724]

Indeed, "Good News's religious meeting follows regular school activities so closely that the Good News instructor must wait to begin until 'the room is clear,' and 'people are out of the room.'"[725] Souter continues: "the temporal and physical continuity of Good News's meetings with the regular school routine seems to be the whole point of using the school. When meetings were held in a community church, 8 or 10 children attended; after the school became the site, the number went up three-fold."[726] Souter concludes: "there is a good case that Good News's exercises blur the line between public classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not."[727]

Even Justice Souter, however, failed to analyze the problem from a family perspective. Attendance probably soared because some parents, at the importuning of their children in the context or setting of the common school, gave in and signed the necessary forms to permit their children to participate in the Club's Service Exercises. Even if attendance increased because parents agreed with the religion of the Good News Club and found its starting time convenient, the categorical fact of psychological harm remains.

It may be that this horrid little case will have little impact in the real world. All that the Milford Central School must do is deny access to any organization until at least two hours after the end of the school day. The odds are good that the Club would then decide to hold its worship services elsewhere. Whatever might be said about "physical distance" and "free speech," for many of school children, family values are reinforced when they come home from school. The context or setting in which student peer pressure might operate is radically altered by allowing the children to go home first. Staying after school for an extra hour is different from going home and then returning to school, or any other site, one or two hours later. At some point, being in the minority carries with it a cost.[728] If children go home first, it is more difficult, if not impossible, to see how the common schools provide a context in which the cost of being a religious minority increases. Many children have plenty to do when they get home. Peer pressure never abates, but other factors allow one to say fairly that if a child still seeks parental permission to return to school for a Good News Club worship service, then that is life. Perhaps the law can do nothing in this circumstance to ease the pressure that the child has brought to bear on her family. So much for *Good News Club*.

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[724] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 144 (2001) (Souter, J., dissenting).
[725] *Id.*
[726] *Id.*
[727] *Id.* at 144–45.
[728] *See supra* notes 39–44 and accompanying text.

Finally, the Zorach Narrative may reflect a cynical judgment about the pragmatic rationale for the Revised Tentative Principle. Whatever one makes of *Zorach*, standing by itself, the relevant question concerns *Zorach*, read with *Mergens* and *Good News Club*. The Cold War is over. The Evil Empire, but not the American Protestant Empire, has been laid low. Our culture wars have a sharply defined geographical dimension.[729] An analysis of the last few presidential election cycles demonstrates the point. The last one confirmed the very real existence of two quite different Americas. The top seven major metropolitan areas—New York, Los Angeles, Chicago, San Francisco, Philadelphia, Detroit, and Washington—generated huge majorities for Al Gore, the Democratic candidate for President, and the next sixteen also supported Gore, although not to the same extent. On the other hand, the rest of the nation, including "some of the fast-growing metropolitan fringes," supported George W. Bush, the Republican candidate for President.[730] Religion and race divide the two Americas. White Protestants voted overwhelmingly for Bush and white Roman Catholics narrowly favored Bush. On the other hand, non-white and non-Christian groups strongly supported Gore.[731] The conclusion follows that Gore country, or urban metropolitan America, has a greater religious diversity than Bush country has, a pattern that has existed for a very long time.[732]

The Court may have decided that national security no longer requires Americans to master the scientific method, religious scruples notwithstanding. In any event, if we need more scientists, we can import them or train them in Gore country. In light of the Supreme Court's misguided decision in *Bush v. Gore*,[733] it may decide to strengthen the hand of Bush country. The Protestant Empire continues to work most prominently in the South and the non-coastal West, but its presence is also felt in the rest of the country. The only difference is that the Protestant Empire runs into more resistance in Gore country than it does in Bush country. Bush country is the heart of the Protestant Empire.[734] Five centuries of history have taught it not to concede. The American people, even those harmed by the works of the Protestant Empire, continue to invoke it and to cause it to be Really Present.[735]

The curious mix of pragmatism and cynicism that underlies the Court's approach to common school religion amounts to a grand compromise: take

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[729] Evidence of the geographical dimension of these wars goes back more than one hundred years. *See supra* notes 348–351 and accompanying text. *See also* ALLEY, *supra* note 38, at 226.

[730] *See* Barone, *supra* note 581, at 1712–13.

[731] *Id.* at 1714. *See also Exit Polls: Results*, *at* http://www.cnn.com/ELECTION/2000/epolls/US/P000.html (last visited Nov. 5, 2001). Barone does not identify race as a critical variable, although the data certainly bear out the relevance of race. For example, white Protestants favored Bush 63% to 34%. *Id.* African-American Protestants, on the other hand, favored Gore 96% to 4%, and Hispanic Protestants favored Gore 67% to 33%. Barone, *supra* note 581, at 1714.

[732] *See supra* note 350 and accompanying text.

[733] 531 U.S. 98 (2000).

[734] *See supra* note 731 and accompanying text.

[735] Newsom, *supra* note 1, at 263–66.

something away from the forces of the Protestant Empire, but not too much. The tension between the McCollum and Zorach Narratives mirrors the effort to strike a balance between the imperative of minimizing psychological and status-based harm to religious minorities and the practical and historical reality of the Protestant Empire that seeks to impose such harm.

The compromise has failed to satisfy many Americans. Defiance of the Revised Tentative Principle continues in many parts of the country. Many school districts refuse to comply with the requirements of *Engel* and *Schempp*.[736] The minions of the Protestant Empire continue to harass members of religious minorities who have the temerity to complain about common school religion.[737] Indeed, one commentator believes that this situation is worsening.[738] One can point to the *Santa Fe* debacle in which the plaintiffs were forced to hide their identities from local evangelical Protestants, including school officials.[739] In addition, for more than forty years, members of Congress sought to overturn *Engel* and *Schempp*.[740] Their efforts, including the Equal Access Act, have been moderately successful.[741]

The question remains whether this persistence has any merit. The Revised Tentative Principle deprives the avatars of the Protestant Empire of the direct instrumental assistance of common school officials, administrators, and teachers. By so doing, it weakens the influence and control of the Protestant Empire in the common schools.[742] Thus, the forces of the Protestant Empire have lost something.[743]

Many defenders of the old order have exaggerated or mischaracterized the loss. Professor Butler claims that *McCollum* caused "religion [to be] expelled from the school house."[744] Chief Justice Rehnquist has claimed, in somewhat less extravagant prose, that the Court majority in *Santa Fe* showed "hostility to all things religious in public life."[745] Both the professor and the justice are wrong. The Court did not expel or demonstrate hostility to religion, but it did alter, to some degree, a complex dynamic of attrition and suasion with legal coercion in the background. It

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[736] FRASER, *supra* note 49, at 201. *See also* Ellis Katz, *Patterns of Compliance with the* Schempp *Decision*, 14 J. PUB. L. 396 (1965); RAVITCH, *supra* note 39, at 146; Michael W. La Morte & Fred N. Dorminy, *Compliance with the* Schempp *Decision: A Decade Later*, 3 J.L. & EDUC. 399 (1974).

[737] ALLEY, *supra* note 38, *passim*; RAVITCH, *supra* note 39, at 3–18.

[738] ALLEY, *supra* note 38, at 229.

[739] *See supra* notes 640–643 and accompanying text.

[740] FENWICK, *supra* note 720, at 142–71; ALLEY, *supra* note 48, at 107–219; KEYNES & MILLER, *supra* note 603, at 187–205.

[741] *See supra* notes 720–722 and accompanying text.

[742] As the Zorach Narrative makes clear, however, the Revised Tentative Principle does not eliminate Protestant Empire influence and control. That Narrative still makes available to the Empire the *indirect* instrumental assistance of those officials, teachers and administrators.

[743] Those, including myself, who object to the Zorach Narrative, believe that the Protestant Empire has not lost enough.

[744] Butler, *supra* note 60, at 845.

[745] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (Rehnquist, C.J., dissenting).

expelled majoritarian religion, pan-Protestant common school religion, insofar as that religion depended upon *direct* instrumental assistance. In so doing, the Court showed hostility to the pretensions of majoritarian religion.

Despite the above exaggerations and mischaracterizations, there were some real losses to the Protestant Empire. Fraser notes that many evangelical Protestants have had a difficult time accepting the loss of "their" common schools.[746] Professors Fraser and Glenn see a helpful distinction between those Protestants who view themselves as embattled minorities and those who view themselves as rightful arbiters of society.[747] The desire of the second group to overturn the loss of "their" schools is meritless. Their claim amounts to nothing more than Protestant Empire prerogative. On the contrary, the wishes of the first group present greater difficulties. Here the paradox of strategic and institutional secularism surfaces.

By restraining common school religion, the Court did not enshrine secular humanism or any other religion in the stead of common school religion. While secularism, properly understood, "is a confinement of the values endorsed by the state—and hence by the public school—to those having to do with this world, or those not having to do with God,"[748] it appeals not only "to those who hold no religion," but also "to those whose religion is not much concerned with a corporate expression in the social order, and to those who suppose that their own particular religion will be overlooked when the others are being accommodated by the state."[749] Secularism represents, therefore, as much a strategic stance of many with God-centered religious beliefs as it does a humanistic belief system. The clear implication is that many strategic separationists, such as myself, strongly believe that children need religious instruction, but that it should take place elsewhere than the common schools. Properly understood, the Counter Narrative and the McCollum Narrative reflect a strategic secularism,[750] but not a moral, philosophical, or theological secularism. One finds here no advocacy for secular humanism or atheism, but a distaste for majoritarian religion subjugating religious minorities, particularly in the common schools.

Strategic separationism and strategic secularism constitute nothing more than a judgment about the institutional competence of the common schools to teach religion. They are not a judgment about the value or utility of teaching religion, but merely about who should teach it and where it

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[746] FRASER, *supra* note 49, at 46–47, 239–40.

[747] *Id.* 235–39. Glenn characterizes these two elements as "fundamentalists" and "evangelicals," respectively. GLENN, *supra* note 54, at 280. Glenn treats the plaintiffs in *Mozert v. Hawkins*, 827 F.2d 1058 (6th Cir. 1987), *cert. den*. 484 U.S. 1066 (1988), as "fundamentalists," and the plaintiffs in the Alabama case, *Smith v. Board*, 827 F.2d 686 (11th Cir. 1987), as "evangelicals." GLENN, *supra* note 54, at 280–83. The distinction and the examples are extremely helpful.

[748] Rodes, *supra* note 443, at 117.

[749] *Id.*

[750] *See supra* Part III.C.2.; Part IV.B.3.

should be taught. Long ago, the Counter Narrative asserted the correct proposition when it concluded that institutions other than the common schools are, for a variety of policy reasons, the proper venue for such teaching.[751] The single most powerful justification for this proposition is the risk and danger of psychological harm to public school students and their families who belong to religious minorities.

On the other hand, the single most powerful argument against strategic separationism is that institutions other than the common schools may not be equal to the task of superintending the religious formation of children. The Counter and the McCollum Narratives unfortunately underestimated or ignored this factor. This raises the question of how to strengthen those other institutions, to help families understand that religious and moral formation of their children is a moral good, and to help families assume their responsibilities regarding that formation. The dilemma becomes how to preserve the common schools as the place where the nation's children have the shared experiences necessary to forge a common national identity and, at the same time, to wean families away from a dependence upon the schools for religious formation.

The Protestant Empire and its arrogant pretensions impede a sensible approach to the problem. The remembrance *du temps perdu* causes many Protestants to insist that the common schools play a role in the religious formation of their children,[752] blinding them to a range of creative solutions that minimize, if not eliminate, the risk of psychological and status-based harm to religious minorities. If the secularism of the common schools is, or should be, merely strategic or structural, then it is possible to imagine a situation in which the explicit mission of the common schools is to leave some large moral, ethical, and religious questions open or unanswered, with the clear understanding that other institutions, including the family, will provide the answers.[753]

Given our national history, this is a risky proposition requiring a much care and caution. Justice Marshall may have recognized this risk in his concurring opinion in *Mergens*, in which he elaborated on the duty of the

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[751] *See supra* notes 340–346 and accompanying text.

[752] *See, e.g.*, Butler, *supra* note 60, at 923–24; Fitschen, *supra* note 589, at 446-447.

[753] Professor Underwood argues for a limited expansion of the equal access idea for elementary schools. He would prohibit participation by churches or other outside religious groups, but would allow parents to supervise and control "equal access" activities there. Underwood, *supra* note 499, at 542–43. While this solution is marginally less objectionable than the one allowed by *Good News Club*, Professor Underwood begs the question of how and where parents should participate in answering the large open questions. He assumes that the common school is the appropriate venue. The reality of psychological harm should give Underwood more pause. Instead, he argues that religious minorities faced with "domination by a small array of religious or secular organizations . . . [should] be more energetic in supporting their own groups rather than to seek a governmental orchestration of the composition of the [equal access] forum." *Id.* at 546. Underwood overlooks the fact that some religious groups do not approve of "equal access" activities or lack the critical mass, the wherewithal, or both, to take advantage of Underwood's equal access forum. Underwood seems oblivious to the fact that not all religions wish to use the common schools to proselytize. Such groups—and their members—should not suffer disadvantage for this reason. This is why "equal access" is unhelpful in working through problems of common school religion.

common schools to affirmatively disclaim endorsement of student-led equal access religious clubs. The immediate problem with Marshall's creative, yet troubling, solution lies in his failure to indicate the ways that schools could discharge that duty in a country in which the Protestant Empire is still really present. Similarly, the problems in determining which large questions are to be left open, how they are to be left open, and whether families and other institutions will be in place to answer the open questions, are daunting, particularly because of the tendency of majoritarian religions to try to overwhelm religious minorities.[754]

Fraser argues that "[t]he way to a better future is through an inclusive and engaging education in which schools encourage all of their citizens—students, teachers, and administrators—to listen respectfully, where power is shared, where all voices are heard and given their due rights."[755] Fraser, reflecting the weakness found in the McCollum Narrative, ignores or overlooks parents and family. If, however, one corrects Fraser in this regard and adds parents and family to his solution, its value is revealed. Through such power-sharing dialogue, Americans may begin to identify the institutions and structures that will answer the open questions suggested herein, and to find a common ground with those who wish to see the common schools provide common or shared experiences for American children. It is difficult to imagine how one locates a common ground with those who are determined to restore the power that the Protestant Empire held prior to the adoption of the Revised Tentative Principle and who might seek to subvert the dialogue to their own partisan objectives. Power-sharing dialogue cannot merely serve as a formalist fig leaf for majoritarian excesses.

As our culture wars continue, majoritarians will probably behave as they always have. It may be possible, however, to fashion new solutions that will enable ever larger numbers of Americans to celebrate and witness both religion, including belief systems that function as religion, and religious freedom. Perhaps the state, acting through the direct instrumentality of its common school officials, administrators, and teachers, will be able to create an environment in which Fraser's power-sharing dialogue may take place.

At the very least, the common schools can begin to suggest and identify the open questions. Everyone must recognize the invariable pressures of majoritarianism to subvert this dialogue and the reasonable unwillingness that some religious minorities might have to participate in such a dialogue. It is in this context, however, that Justice Marshall's insight might bear fruit: affirmative disclaimer of common school religion, of instrumental assistance, direct or indirect, to the Protestant Empire or any other religious nationalism. Power-sharing dialogue involving the wider community has little in common with equal access student-initiated religious clubs. In this difference, possibilities for finding common ground

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[754] *See supra* note 38 and accompanying text.
[755] FRASER, *supra* note 49, at 240.

exist. In this difference, possibilities for modifying the public or civic behavior of some religious majoritiarians and some religious dissenters also exist. By engaging each other in power-sharing dialogue, something exceedingly rare in our national history and experience might be created.[756]

The true meaning of the Zorach Narrative now becomes clear: it gives the minions of the Protestant Empire the hope that they can recover "their" schools by manipulating and taking advantage of the indirect instrumental assistance of the officials, administrators, and teachers of the common schools. It gives them the hope that the McCollum Narrative might be overturned and that the Tentative Principle, including direct instrumental assistance, might be restored. But, worst of all, it discourages the power-sharing dialogue called for herein. The tragedy of this situation lies in the fact that through such dialogue, the reality of status-based psychological harm visited upon religious minorities becomes manifest to the good faith participants. Additionally, the pompous, bigoted, and insensitive stance of the avatars of the Protestant Empire becomes equally manifest.

The categorical claims in the Counter Narrative regarding psychological harm are a kind of legal marker or place-holder. They await the time when the American people come to understand the truth that religious freedom depends upon minimizing the infliction of psychological harm on religious minorities, and that the state should never make the situation of religious minorities worse than it otherwise might be. Unfortunately, the Court continues to align itself with the forces of the Protestant Empire, for whom religious minorities are mere targets for the centuries-old strategy of suasion and attrition against the backdrop of coercion. By "balancing" the McCollum and the Zorach Narratives, the Court shows that it lacks the vision of the Counter Narrative and keeps the Pro Narrative alive. Thus, it embarrasses not only itself, but also all of the rest of us. The Court demonstrates that its commitment to religion and religious freedom is weak, ultimately aligning itself with the Protestant Empire, instead of the People.[757] The Revised Tentative Principle has at least two possible readings. One is rooted in the narrow strategic "management" justification of the Principle, while the other is rooted in a broader commitment to the values of both religion and religious freedom. The Court has chosen the first reading, proving that interest-convergence,[758] rather than any real or sustained commitment to progressive reform, all too often continues to explain the work of the Court.

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[756] For an example of such dialogue, see Brereton, *supra* note 84.

[757] I have explored the relation between the People and the elites, and the role of myth and ideology in the shaping of that relation. *See* Newsom, *supra* note 221, *passim*.

[758] *See supra* note 159 and accompanying text.