RELIGIOUS RIGHTS OF CHILDREN: A GALLERY OF JUDICIAL VISIONS

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INTRODUCTION

What do a child's religious rights "look like"? A review of the Supreme Court's opinions on the subject discloses not a clear or consistent picture, but shifting and various conceptions of children's rights under the religion clauses of the first amendment. This article will examine the reasons for—and the results of—this variety of visions of the shape of a child's religious rights.

In general, the Supreme Court has crafted constitutional rights for children that bear little resemblance to those styled for adults from the same constitutional provisions. While an adult's abortion right may be circumscribed only by health regulations and her own financial resources,[1] the state may impose additional restrictions, such as a requirement of parental consent or judicial approval, on a minor seeking to exercise the identical right.[2] In the field of criminal law, separate justice systems have been established for juvenile and adult offenders.[3] And compulsory education laws uniquely and sharply limit the liberty of minors to an extent unparalleled by any government restriction on adults.[4]

The Court has drawn a set of constitutional rights for children to match its own perceptions of their unique needs.[5] In delineating special constitutional rights for children, the Court has noted, for example, that the "peculiar vulnerability" of children justifies special judicial consideration;[6] because of their dearth of strength and maturity, children are protectively excluded from many traditional forms of power such as legal and commercial action. Similarly, the Court has cited children's "lack of experience, perspective, and judgment" as

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1. *See* Harris v. McRae, 448 U.S. 297 (1980); Roe v. Wade, 410 U.S. 113 (1973).

2. H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979).

3. The dual criminal justice systems are a long-standing tradition in this country. For a summary and discussion of the law and the juvenile justice system, see McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

4. The Court in Pierce v. Society of Sisters, 268 U.S. 510 (1925), left unquestioned the State's power "reasonably to regulate all schools [and] to require that all children of proper age attend some school . . . ." *Id.* at 534.

5. "The Court has long recognized that the status of minors under the law is unique in many respects . . . . 'Children have a very special place in life which law should reflect. Legal theories . . . readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.' " Bellotti v. Baird, 443 U.S. at 633-34 (quoting May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)).

6. *Id.* at 634.

reasons for limiting their "freedom to choose for themselves" in important matters.[7]

The Court's perception of the proper roles of family and state in guiding a child's development also significantly affects the shape of children's constitutional rights.[8] The interplay between the rights of the child and her parents' right to direct her growth has received much attention from the Supreme Court.[9] In the landmark decision of *Pierce v. Society of Sisters*, for example, the Court commented: "[T]hose who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[10] The Court has also endorsed the state, in its role as educator, as a legitimate agent of socialization. "The public school," Justice Frankfurter wrote, "is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."[11]

The characteristics of childhood and the socialization rights of family and state are complex variables that come into play whenever the Court adjudicates questions involving children's constitutional rights—whether the claim is for a right to purchase contraceptives,[12] to prevent censorship on the school library's shelves,[13] or to engage in symbolic protest of the Viet Nam War.[14] The complexity of the problem is more pronounced, however, in the area of religion.

One complicating element in the realm of children's religious rights is the inherent tension between the socialization rights of the state on the one hand, and the Constitution's prohibition on state establishment of religion on the other.[15] To divine where socialization ends and establishment begins requires

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7. *Id.* at 635.

8. Kenneth Henley notes: "The moral and legal liberties of children must be limited by the right of others to socialize them." Henley, *The Authority to Educate*, in HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 255 (O. O'Neill & W. Ruddick eds. 1979).

9. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979); Parham v. J.R., 442 U.S. 583 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972); May v. Anderson, 345 U.S. 528 (1953); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

10. Pierce v. Society of Sisters, 268 U.S. at 535 (1925).

11. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

12. Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (striking down a ban on distribution of contraceptives to persons under 16).

13. Board of Educ. v. Pico, 457 U.S. 853 (1982) (prohibiting school board's content-based removal of books from school library).

14. Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (invalidating school officials' prohibition of pupils wearing black armbands in protest of the Viet Nam policy).

15. Historically, the development of the public school system as a socializing force was anything but divorced from religious influence. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. at 213-17 (Frankfurter, J., concurring) (tracing historical connection between Church and organized education in Western society). While the notion of a broad-based public education system was envisioned by some "before Blackstone's day," one writer noted that the earliest practical applications were "chiefly through charity schools operated by philanthropic agencies, of which in England the Society for Promoting Christian Knowledge was conspicuous." Barry, *The Early Years*, 19 VA. L. REV. 121, 140 (1932).

some notion of what religion is, and what influences a child's acquisition of a religious identity. But religion defies definition; the beliefs, emotions, acts, and practices encompassed by the term are more remarkable for their variety than for their commonalities. Any attempt by the Court or other branch of government to define "religion" or to adopt a fixed view of how one acquires a religious identity would pose serious establishment clause questions.[16] The Supreme Court has warned: "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guaranty against religious establishment."[17] Yet our public education system presumes the legitimacy of inculcating certain values in the nation's children.

Any conception of children's religious rights will be deeply affected by one's understandings concerning the characteristics of childhood, the legitimate socialization rights of the state through public education, and the definition of religious identity. Because each of these matters is highly subjective, blanket resolution of any one of them is ultimately impossible. How children develop, and what distinguishes them from adults, for example, are questions that philosophers, educators, and psychologists have debated for centuries,[18] and about which each individual is likely to have a uniquely personal understanding. The same is true of the concept of family. And beliefs about how one acquires a religious identity are intertwined with the broad and delicate question of what *is* religion.

Rather than confront the awkward task of adopting a judicial position on any of these underlying matters, the Supreme Court often determines issues of children's religious rights without expressly acknowledging the diverse assumptions engaged in by the individual justices. The result has not been a unified, carefully crafted approach to children's religious rights. Because of the multitude of hard, arguable assumptions that must be made—about religion, about childhood and learning, about families, about public education—in order to get within view of the constitutional question, and because the nature of the religion clauses begs the Court not to tread too closely to the heart of the matter, the opinions reveal a gallery of different visions of what might be the shape of children's religious rights.

Part I of this article examines the Supreme Court's opinions in the religion-in-education cases and attempts to uncover some of the many diverse assumptions engaged in by the Court's members. From these underlying as-

16. The Supreme Court wrestled with the difficulty of defining "religious belief" in the conscientious objector cases and finally opted for an expansive interpretation. In Welsh v. United States, 398 U.S. 333 (1970), the Court held that, under United States v. Seeger, 380 U.S. 163 (1965), "if an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience . . . those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons." 398 U.S. at 340.

17. New York v. Cathedral Academy, 434 U.S. 125, 133 (1977).

18. *See* J. VANDER ZANDEN, HUMAN DEVELOPMENT (1978).

sumptions, part II develops four models of judicial conceptions of children's religious rights. In part III, application of these models is illustrated using a hypothetical "moment of silence" statute. In conclusion, the article suggests that the personal nature of the assumptions underlying any conception of a child's religious rights, as well as the inherent tension between the establishment clause and the socializing function of public education, make it unlikely that the Court will ever develop a single picture of what the religion clauses guarantee to children.[19]

I

That issues of children's religious rights are fraught with judicial assumptions and idiosyncrasies is evidenced by the host of concurring and dissenting opinions that attend so many of the decisions rendered on the subject.[20] Members of the Court have at times confessed to the extremely personal nature of such first amendment decisions. Of the difficulties encountered in distinguishing between the secular and sectarian in education, Justice Jackson wrote in 1948 that, "[i]t is idle to pretend that this task is one for which we can find in the Constitution [or in any other legal source] one word to help us . . . . It is a matter on which we can find no law but our prepossessions."[21] More recently, Justice White wrote for the Court: "Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches . . . ."[22]

The "prepossessions" upon which such views are built are seldom so labelled in the justices' writings. But examination of the Supreme Court's opinions in children's religious rights cases reveals a variety of such personal understandings of religion, of learning and education, and of the family relationship.[23] As will be shown in part II, the justices' private assumptions on

19. It is beyond the scope of this article to question seriously the socialization function of public education. For a critical examination of the education system and its method of value inculcation, see Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309 (1980) (addressing the school's imposition of values and the school's relation to the first amendment's guarantee of freedom of expression).

20. In their last term alone, the members of the Supreme Court produced seventeen opinions in response to the three religion-in-education cases before them. Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (six opinions); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985) (five opinions); and Aguilar v. Felton, 105 S. Ct. 3232 (1985) (six opinions).

21. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. at 237-38 (Jackson, J., concurring).

22. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

23. The purpose of part I of this article is not to attribute conclusively any of these personal understandings distilled from Supreme Court opinions to particular justices. A judicial opinion would be an unfair source to scrutinize for such a purpose. Moreover, it is the nature of subjects such as religion, family, and learning that one seldom articulates her underlying assumptions or strives to make them consistent; an individual may harbor several different alternative notions on a single issue and may combine notions on different issues in alternative ways.

these matters can be important determinants of any judicial conception of children's religious rights.

A. Assumptions about the Acquisition of Religious Identity

In order to conceptualize the special religious rights of the child, one must make some assumptions about how a person acquires a religious identity. The range of beliefs regarding this process is expansive, and members of the Court have understandably indulged in a number of views on the subject.

It is sometimes posited that religious identity derives from one's family and heritage. Religious belief and affiliation pass to a child through participation in the religious life of her parents and siblings—through experiencing the holidays, rituals, and lifestyle associated with the religion of her family. This family notion of religious identity was clearly evident in the majority opinion in *Wisconsin v. Yoder*.[24] In *Yoder*, the Court exempted children of Wisconsin's Old Order Amish community from the last two years of the state's compulsory education requirements. In reaching its decision, the Court considered the three hundred-year heritage of the faith, and the importance of community and lifestyle to its perpetuation. Chief Justice Burger wrote:

> The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent *and the child*.[25]

Here the Court assumes that the child's religious identity has already been determined: it is the faith of her parents and community. The majority engaged in this assumption over the strong dissent of Justice Douglas who protested that the children were not parties to the suit and that *their* religion had not yet been ascertained.[26]

A second view is that religious identity is acquired through religious training and indoctrination. The basic tenets, values, and practices of one's faith are directly imposed upon the child through lessons expressly about religion. This view does not regard those actions, lessons, and facts from which one could draw an inference about religion as "religious influences." The indoctrination envisioned may take place in the context of the home, but customarily calls for the religious authority to provide doctrinal instruction as

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Nor, obviously, does part I intend to portray the entire range of human thought on these subjects. Part I is meant to show that various personal understandings of these subjects appear in the Court's opinions and that views on these subjects are a necessary ingredient of any judicial appraisal of a case involving children's religious rights.

24. 406 U.S. 205 (1972).

25. *Id.* at 218 (emphasis added).

26. *Id.* at 241 (Douglas, J., dissenting in part).

well. Sunday schools, weekday catechism classes, and sectarian schooling are commonplace examples of such religious indoctrination. The Supreme Court in 1925, for example, struck down an Oregon statute preventing parents from sending their children to private religious schools as state interference with "the right of parents to choose schools where their children will receive appropriate mental and religious training . . . ."[27]

The indoctrination view was implicit in the rationale of *Zorach v. Clauson*.[28] In *Zorach*, the Court found that a program whereby public school students were released for part of the school day to attend off-campus religious lessons did not aid or promote religion in violation of the establishment clause. The only relevant difference between the program upheld in *Zorach* and the one struck down by the Court four years earlier in *Illinois ex rel. McCollum v. Board of Education*[29] was that the *McCollum* program had permitted the religious instructors to use public school classrooms for their lessons. According to the majority in *Zorach*, however, the school's involvement with religion was sufficiently attenuated where the religion classes were held off-campus. Only when there is a danger that children will understand such instruction to be sponsored by the school, as in *McCollum*, is there an establishment clause problem. By highlighting the distinction between on- and off-campus instruction, the *Zorach* majority implicitly deems insignificant the more subtle, symbolic messages that might be inferred from the school's accommodation of religious interests,[30] and thus presupposes that it is formal religious instruction that is critical to the child's religious development.

A third notion regarding the acquisition of religious identity deems the individual a more active participant in the process of becoming a religious being. Cumulative interaction with the whole spectrum of environmental influences—the more subtle, symbolic messages as well as direct instruction—leads the child to choose a religious faith. This view, unlike the indoctrination view, regards the child as capable of making connections between, and drawing religious inferences from, her diverse exposure to messages never intended to be religious. This choice view appeared most recently in *Grand Rapids School District v. Ball*[31] where the Court struck down a state-sponsored program providing secular instruction in private schools. The Court cited the pos-

27. Pierce v. Society of Sisters, 268 U.S. at 532.

28. 343 U.S. 306 (1952).

29. 333 U.S. 203 (1948).

30. The question of the more subtle coercive effects of the *Zorach* program had not been properly raised in the proceedings below, and the Court observed that "a wholly different case" would have been presented had it been *shown* that the program amounted to religious coercion. 343 U.S. at 311. Each of the three dissenters objected strenuously to the majority's unwillingness to address the coercive potential of the released-time program. *Id.* at 315-20 (Black, J., dissenting); *id.* at 320-23 (Frankfurter, J., dissenting); *id.* at 323-25 (Jackson, J., dissenting). Justice Black, for example, concluded: "State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of 'co-operation,' to steal into the sacred area of religious choice." *Id.* at 320 (Black, J., dissenting).

31. 105 S. Ct. 3216, 3223 (1985).

sibility of "a crucial symbolic link between government and religion" as a fundamental problem with the program.[32] Those who feel that religious acquisition is a matter of choice consider the more indirect, and sometimes unconscious, cues as possible sources of religious development; the family's religion and formal religious instruction are only two elements of one's religious foundation.

The choice view has been an important factor in a number of Supreme Court decisions. Justice Jackson once reflected upon the scope of subjects in which religious meaning could be found—science, art, history, literature—and concluded that, "for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples."[33] Members of the Court have also recognized the potential religious influence on a child of "secular" instruction by a religious teacher or school.[34] "No matter what the curriculum offers," wrote Justice Douglas, "the question is, what is *taught*?"[35]

A fourth view is that the source of religious identity is inspiration—that religion springs from within the individual heart. According to this view, evangelical attempts by others can at most set the stage for such inspiration. The inspiration view is not often explicitly subscribed to or addressed by the Supreme Court. However, it is not unusual for an opinion to make oblique allusion to the extremely personal nature of religion by asserting, for example, that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[36]

B. Assumptions about Learning and Development Theories

In adjudicating issues of children's constitutional rights, the Supreme Court often expresses a protective concern for the malleability inherent in childhood, the child's capacity for change through learning.[37] Educational theorists have proposed an array of theories to explain the processes that account for the mental and intellectual changes occurring between cradle and

32. *Id.*

33. Illinois *ex rel.* McCollum v. Board of Educ. 333 U.S. at 236 (Jackson, J., concurring).

34. This view is often expressed in cases reviewing state financial aid to private sectarian schools, and is evidenced by judicial references to the pervasiveness of religious influences in sectarian schools. *See, e.g.*, Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3220 (1985); Aguilar v. Felton, 105 S. Ct. 3232, 3235 (1985); Meek v. Pittenger, 421 U.S. 349, 366 (1975); Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472 (1973); Tilton v. Richardson, 403 U.S. 672, 694 (1971) (Douglas, J., dissenting); Lemon v. Kurtzman, 403 U.S. 602 (1971); Everson v. Board of Educ., 330 U.S. 1, 24 (1946) (Jackson, J., dissenting).

35. Lemon v. Kurtzman, 403 U.S. at 635 (Douglas, J., concurring).

36. Engel v. Vitale, 370 U.S. 421, 432 (1962) (citing J. MADISON, *Memorial and Remonstrance against Religious Assessments*, in II WRITINGS OF MADISON 187).

37. *See, e.g.*, Grand Rapids School District v. Ball, 105 S. Ct. at 3226; Bellotti v. Baird, 443 U.S. at 634; Wisconsin v. Yoder, 406 U.S. at 237 (Stewart, J., concurring); *id.* at 240 (Douglas, J., dissenting in part); May v. Anderson, 345 U.S. at 535 (Frankfurter, J., concurring).

college.[38] The justices' opinions frequently reveal a layperson's adoption of one or more of the many theories about how children learn and develop. Such judicial assumptions about learning can have a significant impact in the area of children's religious rights, as it is often posited that one's religious identity is, at least in part, learned.

One view of the learning process depicts the newborn child as an empty canvas, whose color and definition will depend solely on what the external world unilaterally imposes upon her.[39] Learning is the imposition of knowledge and values; the child is defined as the sum of her lessons and experiences. This wholly passive view of the learning process is often what prompts public censorship of school curricula.[40] In the context of religious rights cases, the Court has sometimes suggested that all religious influences should be expunged from the schools. For example, in striking down a state statute under which "auxiliary services" were provided to private school children, Justice Stewart wrote for the Court: "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."[41]

A second perspective on learning maintains a similarly passive view of the child in the learning process, but envisions the newborn not as an empty canvas, but as having certain predispositions. These predispositions might be genetic traits, or characteristics acquired through family interaction at the very earliest stages of life. The forces shaping the child are all still external in the predisposition view of learning; the strength and character of the external influences that act upon the child as she grows will determine whether her predispositions will be quashed or developed.

Justice Douglas embraced a predisposition view in his concurrence in *Lemon v. Kurtzman*.[42] Referring to the disadvantages of the public school system, he commented: "The main [disadvantage] is that a state system may attempt to mold all students alike according to the views of the dominant group and to discourage the emergence of individual idiosyncrasies."[43] While sug-

38. The two major groups of theorists today are the associationists and the field theorists. The former group perceives the child as a passive learner and focuses on the environment as the major behavioral influence. The field theorists, largely represented by the cognitivist subgroup, perceive the child as an active participant in her own development and concentrate on the effect of interaction between the child and the environment. For a general discussion, see Hill, *Learning Theories*, in ENCYCLOPEDIA OF EDUCATION 470-76 (1972).

39. Rousseau described this view of the learning process in EMILE: "We are born weak, we need strength; helpless, we need aid; foolish, we need reason. All that we lack at birth, all that we need when we come to man's estate, is the gift of education." J. ROUSSEAU, EMILE 6 (B. Foxley trans. Everyman ed.).

40. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. at 856-57 (school board characterized certain books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy" and removed them from school library as "improper fare for school students").

41. Meek v. Pittenger, 421 U.S. at 370-71.

42. 403 U.S. 602 (1971).

43. *Id.* at 630 (Douglas, J., concurring).

gesting that children have distinct predispositions from which idiosyncrasies may emerge, Douglas expressed a concern that uniform schooling may overwhelm such predispositions before they can be developed.

A third understanding of the learning process perceives the child as an active participant in her own development. Here the child is also seen as arriving on the scene with certain predispositions. However, instead of simply being acted upon, the developing child maintains a dynamic relationship with her environment; the interaction between the two continually shapes both the child and the environment. Because the child of this third view actively interprets her environment, learning can occur from more subtle juxtapositions and examples than would be considered possible under either the empty canvas or predisposition assumption. For example, the state's institution of an optional religious instruction period in the middle of the public school day can have the effect of "confusing, not to say fusing, what the Constitution sought to keep strictly apart," even for those students who opt not to attend religious classes;[44] the child may interpret the state's action as government endorsement of religious activity.

The developmental understanding of learning was expressed in *West Virginia State Board of Education v. Barnette*,[45] where the Court held a compulsory flag salute in the public schools unconstitutional. Addressing proper and improper ways to teach loyalty, Justice Jackson wrote for the Court:

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.[46]

If the Court's understanding of the learning process had been the first one described—the child as an empty canvas, compelling a flag salute could have been justified as "teaching" students loyalty. Instead, the Court rested on a view that the child is a necessarily "voluntary and spontaneous" participant in the learning process.

A fourth understanding of the learning process perceives children as creatures of mature conscience and thus deemphasizes the distinction between adults and children. The children of this maturity view are small adults, minus some experience, and the goal of childhood is to reap enough knowledge and experience to permit the adult to emerge. Here the primary function of education is simply to add to the individual's stock of knowledge.

The Court's complaint, for example, that a state statute restricting foreign language instruction in public schools interferes with "the opportunity of

44. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. at 231 (Frankfurter, J., concurring).

45. 319 U.S. 624 (1943).

46. *Id.* at 641-42.

pupils to acquire knowledge"[47] reflects the maturity view. The same view appears to underlie Justice Frankfurter's dissent in *Barnette*. Frankfurter likened the relationship between child and school to every other relationship between individual and state, characterized the concern raised by a compelled flag salute as merely that "it may offend the conscience of some children," and concluded that it did not impinge on the first amendment rights of students.[48] Such a dissent rejects the notion that a child's conscience has a special vulnerability that may require different standards of governmental behavior in the education context than in contexts involving adults.

C. *Assumptions about the Family*

A third factor influencing determinations of children's religious rights is the way in which the family relationship is understood. Pushing at the edge of any decision affecting a child is her parents' interest in influencing her growth. The nature of the relationship between a child's interests and those of her parents is a highly personal, sensitive, and arguable subject. Although the issue is not often directly addressed by the Court, opinions of the justices reveal a variety of views on the subject.

One view of the relationship between a child's and parents' interests is an image of separation and possible conflict; the child's interests are independent of the family's. Although the interests of parent and child will often coincide, the holder of this view looks closely to discern whether the interests or rights of the child are being obscured or trampled by those of the family.

Several opinions reflect this separation notion of the family relationship. In *Prince v. Massachusetts*,[49] the Court rejected a free exercise claim that religious leafletting by children under family supervision should be exempt from child labor laws. Recognizing the independent interests of the child, the Court wrote: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[50] Similarly, Chief Justice Burger complained that a decision striking down state provision of "auxiliary services" to private schools "penalizes *children* . . . not because of any act of theirs but because of their parents' choice of religious exercise."[51] The notion that the interests of child and family are separate was also central to Justice Douglas's

47. Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

48. West Va. State Bd. of Educ. v. Barnette, 319 U.S. at 661 (Frankfurter, J., dissenting).

49. 321 U.S. 158 (1944).

50. *Id.* at 170.

51. Meek v. Pittenger, 421 U.S. at 386 (Burger, C.J., concurring in part and dissenting in part). Chief Justice Burger expressed much the same objection ten years later when the Court struck down a New York City program which used federal funds to pay salaries of public employees who were providing special teaching services to eligible low-income students in parochial schools: "Many of these children now will not receive the special training they need, simply because their parents desire that they attend religiously-affiliated schools." Aguilar v. Felton, 105 S. Ct. at 3242 (Burger, C.J., dissenting).

dissent in *Yoder*: "Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views."[52]

A second understanding of the relation between a child's interests and her family's is one of natural accommodation. Under this view, although the interests of child and parent may differ, the existence of the family relationship brings about a natural accommodation of each to the other. The result of this accommodation is a set of interests superior to the separate interests of either the parents or child. An adherent of this view might recognize that some strife within the family may arise in reaching an accord, but would believe that—absent family dysfunction—intrafamily resolution would be preferable to any judicially imposed balancing of separate interests.

The notion of intrafamily accommodation is evident in the reasons given by the *Pierce* Court for striking down an Oregon statute forbidding sectarian education: "[T]he enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, [and] the right of the child to influence the parent's choice of a school . . . ."[53] In a recent reference to the *Pierce* holding, the Court expressed the same view: "[W]e have long recognized that *parents and children* have the right to choose between public schools and available sectarian alternatives."[54] The Court's decision in *Bellotti v. Baird*[55] similarly reflects a view of intrafamily accommodation of interests. In upholding a statute requiring parental notification of a minor's abortion, the *Bellotti* Court found a *state interest* in the child-parent dynamic: "There is, however, an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision. Also, as we have observed above, parents naturally take an interest in the welfare of their children . . . ."[56]

A third way of understanding the family relationship is to assume that the interests of parent and child are identical. This view usually leaves the child's interests to be articulated by the parent; should the child express a contrary desire, it is simply because she is not aware of her own best interests. One operating under this view of the family relationship would rarely find it necessary to consider the child's opinion of her own interests in order to determine the child's true interests.

This notion of an identity of interests is more often implicit than explicit in the Court's opinions. In *Zorach*, for example, the Court adverted to no free exercise problem with the state's released-time program, even though the state was effectively imposing the parents' decision on the child regardless of the child's desire.[57] In *Committee for Public Education and Religious Liberty*

52. Wisconsin v. Yoder, 406 U.S. at 242 (Douglas, J., dissenting in part).
53. Pierce v. Society of Sisters, 268 U.S. at 532.
54. Grand Rapids School Dist. v. Ball, 105 S. Ct. at 3230.
55. 443 U.S. 622 (1979).
56. *Id.* at 648.
57. Zorach v. Clauson, 343 U.S. 306 (1952).

v. Nyquist,[58] the Court was able to carry on a discussion of the scope of the parents' "right to have their children educated in a religious environment" without referring once to the child's rights or interests in such an education.[59] Similarly, the majority opinion in *Yoder* did not even consider the possibility that the interests of the Amish children might not be served by granting the partial exemption from compulsory education requirements sought for them by their parents.[60]

D. Objectives of Public Education

Implicit in our educational system is a conviction that certain societal values justify burdening young citizens' liberty with years of compulsory school attendance. Because of the pressure exerted on the contours of children's rights by this socialization power of the state, the justices' views about the legitimate scope of this socialization power will influence their conception of students' rights under the religion clauses. The Supreme Court's opinions have asserted the legitimacy of several objectives of public education.

The inculcation of communitarian values has been frequently posited as a legitimate objective of public education. In fulfilling this objective, schools may focus on instilling community and national pride, and a sense of social obligation.[61] Opinions in Supreme Court decisions involving children's religious rights often presume the legitimacy of this objective. This is evident from the frequently expressed concern that religion in the schools would instill an unwanted divisiveness.[62] Justice Frankfurter wrote for four justices in *McCollum*: "Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."[63] Similarly, the Court in *Barnette* did not question the desirability of inspiring "patriotism and love of country" in public school children; it simply disapproved of a compulsory flag salute as the method chosen to "inspire."[64]

Another objective of public education often endorsed by the Court is enhancement of individual development. This objective is consistent with the oft-noted national interest in intellectual diversity,[65] and with the fear that a

58. 413 U.S. 756 (1973).

59. *Id.* at 788.

60. Wisconsin v. Yoder, 406 U.S. 205 (1972).

61. One commentator has observed: "No educational task is more critical than cultivating youth's idealism and concern for the general welfare by providing experiences to permit their fullest flowering." J. WESTMAN, CHILD ADVOCACY: NEW PROFESSIONAL ROLES FOR HELPING FAMILIES 202 (1979).

62. *See, e.g.*, Grand Rapids School Dist. v. Ball, 105 S. Ct. at 3222-23; Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. at 795; Engel v. Vitale, 370 U.S. at 431; Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. at 217 (Frankfurter, J., concurring).

63. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. at 216-17.

64. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

65. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring) (religious organizations are granted tax exemptions "because they uniquely contribute to the pluralism of American society by their religious activities . . . .").

"pall of orthodoxy" will be cast over the nation's classrooms.[66] Justice O'Connor recently referred to this fear of enforced orthodoxy: "This Court's decisions have recognized a distinction when government sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs."[67] The Court also recognized the objective of intellectual diversity in *Nyquist*, saying: "And we do not doubt—indeed, we fully recognize—the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools."[68]

A third objective of public education is to prepare students for their eventual social roles as productive, self-sufficient citizens. This objective has been at the forefront of educational thought at various times in American history.[69] In 1923, Justice McReynolds wrote for the Court that, "it is the natural duty of the parent to give his children education *suitable to their station in life.*"[70] In 1925, he again spoke for his brethren in deeming it the "high duty" of parents to "prepare [their children] for additional obligations."[71] Although referring to the duties of parents, the Court on both occasions expected these duties of preparation to be fulfilled by sending the children to school.[72] Half a century later, in *Wisconsin v. Yoder*, the Court again focused on the preparatory goal of education: "[T]he value of all education must be assessed in terms of its capacity to prepare the child for life."[73]

Each of the above objectives of public education may be adjudged legitimate or illegitimate independently of the others. The Court does not seem to have perceived any tensions or inconsistencies among them as legitimate socialization goals of the state. Indeed, most educators would probably consider all three to be among the most important goals of education.[74] The significant variable affecting questions of children's religious rights is not *which* of these goals is deemed legitimate, but how much *weight* the goals carry when measured against a child's rights under the religion clauses.

The values of community, intellectual diversity, and self-sufficiency are all firmly entrenched in America's history, and the advancement of such values in the schools is not surprising. There is, however, something deeply troubling about government instilling in the young a preordained set of values that, almost by definition, promotes the existing regime. The Court in *Pierce*

66. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); *see also* Epperson v. Arkansas, 393 U.S. 97 (1968).

67. Wallace v. Jaffree, 105 S. Ct. at 2503 (O'Connor, J., concurring).

68. *Id.* at 773.

69. *See generally* J. WESTMAN, *supra* note 61, at 197-204.

70. Meyer v. Nebraska, 262 U.S. at 400 (emphasis added).

71. Pierce v. Society of Sisters, 268 U.S. at 535.

72. In *Meyer*, the question revolved around the teaching of foreign languages in the schools. 262 U.S. 390. The *Pierce* Court was examining the suitability of private schools as an alternative to public schools. 268 U.S. 510.

73. Wisconsin v. Yoder, 406 U.S. at 222.

74. J. WESTMAN, *supra* note 61, at 203.

hinted at its concern over the scope of the socialization power of the state: "The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children. . . . The child is not the mere creature of the State."[75] While this concern may lurk in the recesses of the judicial mind, the Court has never directly confronted the problems inherent in state control over as powerful a socializing force as the schools.[76] The issue is perhaps nowhere more clearly implicated than in the religion-in-education context, where the government's actions are measured against the first amendment's proscription of state intrusion on the individual conscience.

II

Under the establishment clause, government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another;"[77] under the free exercise clause, government may not interfere with an individual's free exercise of her religion, except "to prevent grave and immediate danger to interests which the State may lawfully protect."[78] The Supreme Court has never reached unanimous agreement upon the practical application of the religion clauses, particularly in cases involving children.[79]

The discussion in part I revealed the variety of assumptions expressed by the Court's membership on the difficult topics of how one acquires a religious identity, how children learn and develop, how families interact, and the legitimate scope of the state's socialization power in public education. Although these are topics on which no single view can be correct, they are matters which necessarily inform and affect any judicial conception of children's rights under the religion clauses.

This section of the article will develop four models of children's religious rights; each model will represent a different judicial conception of what the establishment and free exercise clauses guarantee to children, and each will be shown to grow naturally out of differing combinations of assumptions considered in part I.

A. Model One: Religious Rights of Adults and Children are Identical

A justice drawn in a particular case to a Model One conception of children's religious rights would advocate identical application of the religion clauses to adults and children. This model is most consistent with the view of learning that takes children to be mature creatures of conscience; under the

75. Pierce v. Society of Sisters, 268 U.S. at 535.

76. *See* Arons & Lawrence, *supra* note 19.

77. Everson v. Board of Educ., 330 U.S. at 15.

78. West Va. State Bd. of Educ. v. Barnette, 319 U.S. at 639.

79. Justice Rehnquist has commented: "Differences of opinion are undoubtedly to be expected when the Court turns to the task of interpreting the meaning of the Religion Clauses of the First Amendment." Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. at 805 (Rehnquist, J., dissenting in part).

maturity view, the personal values of children are not especially malleable and education merely increases the sum of an individual's factual knowledge. If moral development is as self-orchestrated in the child as in the adult, the potential for governmental coercion is no greater in the school system than in contexts primarily involving adults. Model One presumes that the individual child, like the adult, will be able to sift intelligently through the messages transmitted by the state and reject those which she finds hostile to her own values.

Model One is also the logical corollary of the view that religion is acquired by inspiration. If one believes that religious identity is acquired in this way, then one would see no need to treat establishment or free exercise questions differently when they involve children. As long as religious identity is not subject to external manipulation or influence, the child needs no more protection from religious interference than does the adult.[80]

Model One has cropped up in several judicial opinions, most often in dissent. Justice Murphy's dissatisfaction with the majority's result in *Prince v. Massachusetts*[81] was founded on a Model One outlook:

> Religious training and activity, whether performed by *adult or child*, are protected by the Fourteenth Amendment . . . . The vital freedom of religion, which is "of the very essence of a scheme of ordered liberty," cannot be erased by slender references to the state's power to restrict the more secular activities of children.[82]

Murphy's dissent rests on a belief that the state action at issue infringed on the child's free exercise of current, fully-developed religious beliefs.[83] The model is also suggested by Justice Frankfurter's dissent in *Barnette*, where he rejected any notion that young children need special protection from the full force of the state's coercive power: "The Constitution does not give us greater veto power . . . when dealing with grade school regulations than with college regulations that offend conscience . . . ."[84] His view that a compulsory flag salute would at most be a mere offense against the "conscience" of some children[85]

80. Note that Model One opinions may differ on their interpretation of the level of protection guaranteed by the religion clauses; Model One says only that there is no compelling reason for varying the level of protection as between children and adults. Under Model One the thorny issues related to public education are evaluated no differently than analogous issues in areas where the state regulates adult behavior.

81. 321 U.S. 158 (1944).

82. *Id.* at 172-74 (Murphy, J., dissenting) (emphasis added). Justice Murphy also notes that the state has greater control over the *activities* of children than those of adults. *Id.* at 173. While this control will perhaps affect the scope of rights in some instances, it does not change his underlying conception of the sameness of children's and adult's religious rights. Thus, a Model One conception of children's religious rights may be compatible with a rather broad view of the state's socialization rights in the public education context.

83. *Id.* at 171 (characterizing child labor law ban on religious leafletting by children as an impermissible attempt "to prohibit a child from exercising her constitutional right to practice her religion on the public streets").

84. West Va. State Bd. of Educ. v. Barnette, 319 U.S. at 648 (Frankfurter, J., dissenting).

85. *Id.* at 661.

also reveals a conception of children as beings with a developed moral sense.

Justice Stewart's dissent in *Engel v. Vitale*[86] contains yet another example of a Model One conception of children's religious rights. After enumerating several instances of religious invocations countenanced by government, Stewart expressed disbelief that the majority could distinguish between these examples and school prayer: "[I]s the Court suggesting that the Constitution permits judges and Congressmen and Presidents to join in prayer, but prohibits school children from doing so?"[87] Justice Rehnquist made a similar comment in his recent dissent in *Grand Rapids School District v. Ball*: "[O]ne wonders how the teaching of 'Math Topics,' 'Spanish,' and 'Gymnastics,' which is struck down today, creates a greater 'symbolic link' [between government and religion] than the municipal creche upheld in *Lynch v. Donnelly* . . . or the legislative chaplain upheld in *Marsh v. Chambers* . . . ."[88]

B. Model Two: A Child Has the Right to Have Her Religious Development Directed by Her Family

According to this second model, children's religious rights are quite distinct from those of adults. Model Two conceives of a child's religious rights as the right to have her religious experience and growth directed by her family. It ignores the question of whether and when a child has a separate religious identity to freely exercise, and simply relegates the youth to her parent's religious control. Under Model Two, the establishment clause does not prevent the state from facilitating the advancement of the parents' religion in a child's life.

Model Two draws upon a notion that the family is an adequate protectorate of the child's interests. It is therefore consistent with an understanding of the family relationship which assumes either that a child's interests are identical to what her parents judge them to be, or that the family relationship works a natural accommodation of the interests of parent and child when they conflict. A danger is detected when parental control over children's upbringing is inadequate. Model Two is inconsistent with the view of the family that appreciates the possibility of truly separate interests of parents and child, as such potential conflict could render the parents a less trustworthy guardian of the child's religious alternatives than the state.

In delegating certain safeguarding powers to the family unit, Model Two presumes that parents will act as a check on the government's socializing influence upon the child. Special protection is therefore afforded to the *parents'* liberty "to direct the upbringing and education of children under their control,"[89] with emphasis, for example, on the "parent's right to have his child

86. 370 U.S. 421 (1962).

87. *Id.* at 450 n.9 (Stewart, J., dissenting).

88. Grand Rapids School Dist. v. Ball, 105 S. Ct. at 3232 (Rehnquist, J., dissenting) (citations omitted).

89. Pierce v. Society of Sisters, 268 U.S. at 534-35.

educated in a sectarian school."[90] By spotlighting the right of parents to make choices about their children's religious education, Model Two deemphasizes the question of the extent to which the state may legitimately seek to inculcate selected values through public education.

Although this second model of children's religious rights is particularly compatible with the theory that religious identity derives from one's family and heritage, it is not inconsistent with the belief that religious identity is acquired through indoctrination or as a matter of choice. Model Two simply deems the family the best regulator of the child's religious influences. Similarly, Model Two is consistent with any view of the learning process that incorporates some notion of the malleability of moral development during childhood.[91]

The majority opinion in *Yoder* is perhaps the classic formulation of this conception of children's religious rights:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. . . . This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. . . . [T]he Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.[92]

A similar sort of dissolving of the children's rights into those of their parents occurred in *Zorach*, where the Court never questioned the parents' right to determine whether a child receives religious instruction during the school's released-time program.[93] And, in striking down the on-campus released-time program in *McCollum*, Justice Frankfurter explained that the program forced some children into the unacceptable position of being inculcated with a "feeling of separatism" or "hav[ing] religious instruction in *a faith which is not that of their parents.*"[94]

Snatches of the family model of children's religious rights also turn up in opinions as off-handed references linking religion to family or home: "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."[95]

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90. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. at 788.

91. Model Two is incompatible with the maturity view of the learning process because Model Two presupposes that there is *something* in the child malleable enough to require the family's protection. Model Two is similarly incompatible with the inspiration view of religious acquisition because under that view, external influence plays only a minor role in one's religious development.

92. Wisconsin v. Yoder, 406 U.S. at 232-33 (citations omitted).

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

94. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. at 227 (Frankfurter, J., concurring) (emphasis added).

95. Abington School Dist. v. Schempp, 374 U.S. 203, 226 (1963).

C. *Models Three and Four: The Child Has The Right To Preserve Her Religious Options*

The third and fourth models stand upon a common pedestal of commitment to preserving the child's religious options, but differ in their method of accomplishing this objective. Model Three's approach is to eliminate most religious influences from the child's world until she has matured enough to cope with them objectively. Model Four takes the opposite approach, and concentrates on presenting the child with as broad a spectrum of religious information as possible so as to make the future choice an informed one. However, both models seek to ensure that the eventual exercise of adult religious rights will be meaningful. An important premise of Models Three and Four is that a child's environment and experiences significantly influence her mental, moral, and religious development. Such influence may occur dynamically, through productive interaction between the child and her world, or statically, through the cumulative impact of external forces on the child.[96]

The language of the Court's opinion in *Prince* is very suggestive of a preservation notion of children's religious rights. "It is the interest of youth itself, and of the whole community," wrote the Court, "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[97] In protecting this interest in the welfare of youth, "the state has a wide range of power for limiting parental freedom and authority . . . [and] this includes, to some extent, matters of conscience and religious conviction."[98] Parents are not free, for example, to "make martyrs of their children *before they have reached the age of full and legal discretion when they can make that choice for themselves.*"[99] Thus, the Court gives weight to an interest in the child's future freedoms at the expense of the current free exercise claims of both parent and child.

1. *Model Three: Suspending Religious Influence Until the Age of Full Discretion*

Model Three's approach to preserving a child's religious alternatives is to exclude anything with religious meaning from the child's environment until she is capable of maturely appraising such influences. It presumes that anything with religious meaning influences the child's development of a religious identity and is therefore impermissible. Model Three's conception of children's religious rights is revealed by judicial efforts to eliminate anything that is "religious" from the classroom and any other place where the state directly touches the child. A Model Three conception was articulated recently by the

96. This premise is inconsistent with both the family and inspiration views of the acquisition of religious identity, as these views take religious identity to be somewhat of a "given." Models Three and Four assume that a child will have space to entertain religious alternatives as she reaches adulthood.

97. Prince v. Massachusetts, 321 U.S. at 165.

98. *Id.* at 167.

99. *Id.* at 170 (emphasis added).

Ball majority: "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."[100]

Excluding all religious elements from the classroom requires the policing of a line between the religious and the secular in school curricula. The notion that everything having a religious meaning may be discovered and excised from lesson plans rests most comfortably next to those assumptions about the acquisition of religious identity and about the learning process in which the child plays a passive role in her own development; these include the view that religion is acquired by indoctrination, and either the empty canvas or the predisposition view of the learning process. When one assumes that the child, as a passive participant, receives only those religious signals transmitted to her by her teacher *as* religious signals, then the teacher is capable of identifying and excluding religious signals altogether. But if one believes instead that the child is an active participant in her own development, capable of interpreting independently the signals she receives from her environment, then Model Three's line between influences religious and secular would seem somewhat fanciful.

Placing faith in such a boundary line does have the "advantage" of sidestepping some of the potential first amendment problems inherent in any situation where the state is as involved with a socializing function as in the public education context. By claiming it can divide all possible elements in the classroom into two categories—"religious" (prohibited) and "everything else" (permitted)—the state legitimates broad inculcation of "everything else," including any or all of the socialization objectives of education discussed above, even though the effect may be to promote a standard set of values among its most impressionable citizens. Such standardization would seem to run counter to the first amendment's promise of freedom of thought, religion, and expression.[101]

A Model Three conception of children's religious rights is sometimes found in opinions in the form of broad statements about the meaning of the establishment clause: "Under our system the choice has been made that government is to be *entirely excluded* from the area of religious instruction and churches excluded from the affairs of government."[102] Model Three's confidence that religious influences can be detected is sometimes revealed in opinions discussing the propriety of government aid to sectarian institutions.[103] For example, in approving a program providing building grants to private sectarian colleges, Chief Justice Burger observed: "There is no evidence that religion seeps into the use of any of these facilities. Indeed, the parties stipulated

100. Grand Rapids School Dist. v. Ball, 105 S. Ct. at 3226.

101. *See* Arons & Lawrence, *supra* note 19.

102. Lemon v. Kurtzman, 403 U.S. at 625 (emphasis added).

103. *See* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985); Aguilar v. Felton, 105 S. Ct. 3232 (1985); Meek v. Pittenger, 421 U.S. 349 (1975); Levitt v. Committee for Pub. Educ. and Religious Liberty, 413 U.S. 472 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

. . . that courses at these institutions are taught according to the academic requirements of the subject matter . . . ."[104]

Justice Brennan's concurrence in *Schempp*[105] focused on distinguishing between the impermissible and the permissible in the public schools. Agreeing with the Court that daily Bible readings constitute an establishment clause violation, Brennan goes on to enumerate several "forms of involvement of government with religion" that, per his vision, lack the degree of religious meaning necessary to function as religious establishment.[106] Included in the list are items such as "Non-Devotional Use of the Bible in the Public Schools," and "Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning."[107] Brennan's concurrence hints at the possible complexity of a Model Three establishment clause inquiry; items and practices which, though traditionally associated with religion, have acquired a secular meaning or use may not be *per se* impermissible under a Model Three conception.

Model Three's right to be free of potentially coercive religious influences applies of necessity more stringently against the state and public schools than against parents or other private influences. But the model also seeks to protect the child from those private decisions that are perceived as closing off options.[108] The notion that a child may need protection against the religious decisions of her parents implies a view of the family relationship that children's rights and interests may be separate from those of their parents.

2. *Model Four: Preserving Religious Options Through Diversity of Exposure*

The fourth model of children's religious rights endeavors to preserve religious alternatives through diversity of exposure and objectivity of presentation. Where Model Three attempts to insulate the child from anything with religious meaning until she has reached a certain level of maturity, Model Four encourages the child's exposure to and exploration of religious alternatives. The child's right under this model is the right to acquire the knowledge necessary for her active development of a religious identity from among actual alternatives.

Model Four is most congenial to the developmental view of the learning process, which sees the child's development as the product of her interaction with and interpretation of her environment. The model presumes that the

104. Tilton v. Richardson, 403 U.S. at 681.

105. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

106. *Id.* at 300-03 (Brennan, J., concurring).

107. *Id.*

108. For examples of private decisions perceived as narrowing a child's religious options, see, e.g., Wisconsin v. Yoder, 406 U.S. 205, 245-46 (1972) (Douglas, J., dissenting in part) (depriving a child of two years of formal education may stunt and deform his entire life); Prince v. Massachusetts, 321 U.S. 150 (1964) (religious leafletting exemption from child labor laws not granted as this would allow parents to make martyrs of their children); *cf.* Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964) (Court ordered blood transfusion to save life of pregnant mother and child over mother's protest that the procedure violated her religion).

child will, to some extent, shape her education; it would therefore be futile to try to exclude everything from the classroom that might take on a religious hue when viewed through the unique perception of some student. Furthermore, such total exclusion of influences even remotely religious creates a distorted vision of the world, inhibiting the child's development in areas necessary to making informed and voluntary decisions as an adult. For very similar reasons, Model Four's emphasis on a full and objective presentation of religious alternatives also makes it most compatible with an assumption that the acquisition of religious identity is a matter of individual choice.

Model Four may also be associated with a narrow understanding of the socialization rights of the state, or a concern about potential overreaching by the state, in the public education context. The model recognizes a conflict between a heavy-handed approach to such socialization and the establishment clause's prohibition of a national creed; its response is essentially to proscribe the schools from preferring the values of any particular religion or otherwise pressuring the child.

Although Model Four seeks to eliminate religious pressures from the classroom, it does not presume that everything with a potential religious connotation or meaning constitutes religious pressure. Thus, unlike Model Three, Model Four's establishment clause inquiry does not focus merely on distinguishing between religious and secular influences, but on questions more subtle in nature: Was the religious material presented in an objective fashion? Is there express or implicit pressure on students to participate in a religious activity or exercise? The age level of the students, the purpose of the discussion and the scope of the presentation are all elements that can play into a court's decision as to whether the state has in some way cheated the child out of her full share of future freedom—either by depriving her of the full range of information, or by giving her subtle or not-so-subtle cues as to which religious values are to be preferred.

The Supreme Court has often seized upon a Model Four conception of a child's religious rights. The *Barnette* Court recognized that a child's intellectual independence is essential to her enjoyment of meaningful religious freedoms as a mature citizen: "That [states] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[109] Justice Jackson, concurring in *McCollum*, rejected a Model Three conception in favor of Model Four:

> While we may and should end such formal and explicit instruction . . . and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselytizing in the schools, I think it remains to be demonstrated whether it is possible, even if

109. West Va. State Bd. of Educ. v. Barnette, 319 U.S. at 637.

> desirable, . . . completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. . . . One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.[110]

Exposing students to the "currents of religious thought" in an objective fashion is clearly an enormous task, but the Court has frequently endorsed its execution.[111] The *Epperson* Court, for example, disapproved of an educational curriculum that hinted at religious preference by conspicuously omitting Darwin's scientific theory of the origin of man.[112]

Justice Douglas's dissent in *Yoder* is another emphatic expression of a Model Four conception of the value of diverse exposure and the importance of leaving a child's future open:

> If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . . It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.[113]

III

Although Supreme Court justices have founded opinions on each of the four models sketched in part II at one time or another, the models clearly do not cover the spectrum of possible judicial conceptions of children's religious rights. Nor is it pretended that any particular justice's conception of children's religious rights neatly fits one of the models presented. Each model can be embellished, qualified, or merged with another to alter slightly the "shape" of the right it apprehends. The models do, however, help to illuminate the ways

110. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. at 235-36 (Jackson, J., concurring).

111. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 42 (1980) (per curiam) ("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 religions, or the like."); Epperson v. Arkansas, 393 U.S. at 106 ("[S]tudy of religion and of the Bible from a literary and historic viewpoint, presented objectively . . . need not collide with the First Amendment's prohibition . . . ."); Abington School Dist. v. Schempp, 374 U.S. at 225 ("Nothing we have said here indicates that [the study of comparative religion], when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.").

112. Epperson v. Arkansas, 393 U.S. 97 (1968).

113. Wisconsin v. Yoder, 406 U.S. at 245-46 (Douglas, J., dissenting in part).

in which the many plausible assumptions regarding the acquisition of religious identity, the processes of learning and development, the family relationship, and the objectives of public education, can affect one's conception of children's religious rights. That the outcome of an adjudication, as well as the reasoning offered in its support, can be significantly influenced by the particular model embraced in the decision will be demonstrated in this section by applying the four models developed in part II to a hypothetical moment of silence statute.

In recent years, proponents of prayer in the public schools have experimented with various mechanisms for getting around the *Schempp* and *Engel* decisions, which held school prayer unconstitutional.[114] Some have advocated a school prayer amendment to the Constitution;[115] others have proposed legislation withdrawing school prayer cases from federal court jurisdiction.[116] A more popular approach is embodied in the moment of silence statutes currently in effect in many states.[117] The legislative histories of these statutes generally belie the existence of any *bona fide* secular purpose,[118] although one is often recited in the enactment itself.

The Supreme Court addressed the constitutionality of one such moment of silence statute in its 1984-85 Term. In *Wallace v. Jaffree*,[119] the Court considered an Alabama statute that provided for a daily period of silence "for meditation or voluntary prayer" in all public school classes and was enacted expressly for the purpose of "return[ing] voluntary prayer to [the] public schools."[120] The Court's decision to strike down the statute focused narrowly on the sponsoring legislator's admission of a religious purpose, and on the statute's recital of "prayer" as an encouraged use of the silent moment.[121] Thus, the *Wallace* decision leaves open the question of the constitutionality of

114. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

115. *See, e.g.*, S.J. Res. 73, 98th Cong., 1st Sess. (1983); H.R.J. Res. 288, 98th Cong., 1st Sess. (1983); H.R.J. 133, 98th Cong., 1st Sess. (1983); H.R.J. Res. 312, 96th Cong., 1st Sess. (1979).

116. *See, e.g.*, S. 785, 98th Cong., 1st Sess. (1983); S. 784, 98th Cong., 1st Sess. (1983); S. 481, 97th Cong., 1st Sess. (1981); S. 438, 96th Cong., 1st Sess. (1979).

117. *See* Wallace v. Jaffree, 105 S. Ct. at 2498 n.1 (O'Connor, J., concurring) (collecting statutes of twenty-five states).

118. For example, New Jersey adopted a moment of silence statute, 18A N.J. STAT. ANN. § 36-4 (West Supp. 1983), by overriding the governor's veto on December 18, 1982. At least 17 similar bills dealing with prayer and/or meditation in the schools had been introduced in the preceding twelve years in the New Jersey legislature. In the debates over the statute, New Jersey Senate President Carmen Orechis said in support of the bill that it would mean "bringing prayer back into the schools through the front door. . . . Most of our youngsters . . . don't cause problems for society in general, but I think if we had more prayer, more religion, a lot of the problems that are brought to us by our youngsters would be eliminated and avoided." *Senate Ok's Quiet Minute for Schools*, Philadelphia Inquirer, Oct. 19, 1982, at A3, col. 2. The statute was held unconstitutional in 1983. May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983). *See also* Wallace v. Jaffree, 105 S. Ct. at 2490-92 (legislative intent of Alabama statute was to endorse school prayer).

119. 105 S. Ct. 2479 (1985).

120. *Id.* at 2481-83.

121. *Id.* at 2490-93.

a more typical moment of silence statute: one purportedly motivated by a secular purpose and not including the word "prayer" in its text.

The four models of children's religious rights will be applied to a hypothetical statute that requires all students, faculty, and principals of public schools throughout the state to observe a one minute period of silence at the beginning of each school day. No religious message or prayer is to be read aloud; no discussion of the moment or its purpose is to take place in the classroom. Teachers are required to enforce the silence, which is to be used for "quiet and private contemplation or introspection."[122] Legislative history reveals that the statute came after a long line of "school prayer" bill proposals, but was the first to be enacted by the state legislature.

A Model One court would not give great weight to potential problems stemming from the child's excessive malleability, or "peculiar vulnerability".[123] Its analysis would instead compare the statute to other instances of government requiring certain perfunctory acts of adults, and consider whether the requirement impinged on the individual freedom. For a Model One court, a mere offense to a "child's conscience"[124] is not a sufficient cause for striking down a law with a rational basis.

After comparing the statute to others imposing "similar" requirements on adults, the Court might very well decide that the moment of silence passes constitutional muster. The moment might be seen as analogous to countless other religious conventions observed by government and public officials, including daily invocations to God in the Supreme Court, prayers in Congress, the third stanza of the national anthem, and the pledge of allegiance. In fact, a Model One court might find that the statute's requirement of silence leaves substantially more room for individual choice than do these other practices that have not been held unconstitutional.[125] As Chief Justice Burger reasoned in his *Wallace v. Jaffree* dissent:

> Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes—as Congress does by providing chaplains and chapels. It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray.[126]

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122. The quoted language is from the controversial and short-lived New Jersey moment of silence law. *See supra* note 118.

123. Bellotti v. Baird, 443 U.S. at 634.

124. West Va. State Bd. of Educ. v. Barnette, 319 U.S. at 661 (Frankfurter, J., dissenting).

125. *See* Marsh v. Chambers, 103 S. Ct. 3330 (1983) (approving practice of opening state legislative sessions with prayers and discussing analogous federal practice in Congress and the Supreme Court); *see also* Wallace v. Jaffree, 105 S. Ct. at 2501 n.5 (O'Connor, J., concurring) (discussing constitutionality of religious references in pledge of allegience and third stanza of national anthem); Engel v. Vitale, 370 U.S. at 440 (Douglas, J., concurring) (same).

126. Wallace v. Jaffree, 105 S. Ct. at 2507-08 (Burger, C.J., dissenting).

Model One outcomes will ultimately depend much more on a court's general reading of the religion clauses[127] than on either analysis of the potentially coercive effect of public schools on young, undeveloped minds, or concern over the effect of channeling children into conformity of contemplation on the quality of future adult religious freedoms.

A Model Two court would be more skeptical about the constitutionality of the moment of silence statute. In evaluating whether the child's right to have her religious experience directed by her family is diminished by the moment of silence, it would focus on the amount of parental control over the student's use of the moment and on whether the silence could be used to every family's advantage, whatever their religious predilections.

The parental control over a minute of the child's school day is fairly attenuated, especially in comparison to the influence or subtle pressure that the actions of her teacher and peers may have on the student during the silent period.[128] Furthermore, the state's provision of an opportunity for students to engage in daily public worship may be characterized as government endorsement of such activities, and attacked by parents claiming a right to bring up their children in a secular atmosphere, or in a religious background opposed to public worship.[129] Because of Model Two's special protection of the parents' right to direct their child's religious development, these attacks are more likely to overcome the state's claims of neutrality or secularity than they would be before a Model One court.

The Model Three conception of children's religious rights attempts to protect the child from all religious influence or pressure from the state by excluding every religious element from the state-child relationship. Therefore, the fate of the moment of silence would turn on whether it is deemed "reli-

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127. The separate opinions of Justices Douglas and Stewart in Engel v. Vitale, 370 U.S. 421 (1962), vividly illustrate this point. Each of the Justices compares the school prayer at issue in the case to the many other instances of public, official prayer—in Congress, in the Supreme Court, the oaths given at trial, etc.—and draws no distinction between adults and children in the public prayer context. *Id.* at 439-40 (Douglas, J. concurring); *id.* at 446-450 (Stewart, J., dissenting). Justice Douglas concludes in his concurrence that all the enumerated prayers are unconstitutional, *id.* at 444; Justice Stewart's dissent, however, indicates that he finds them all equally acceptable under the Constitution. *Id.* at 450.

128. This argument was apparently accepted by the Court in *Yoder*, 406 U.S. 205, where it noted:

> So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily homelife.

Id. at 217.

129. Both these claims were presented by the plaintiffs in Abington School Dist. v. Schempp, 374 U.S. 203 (1963). The named plaintiffs in that case were Unitarians, who claimed that the religious activities taking place in the schools were contrary to their own faith and family beliefs. *Id.* at 208. The other plaintiffs joined in the appeal were professed atheists; they felt that any religious activity in the schools violated the establishment clause principle of separation of Church and State by preferring belief to non-belief. *Id.* at 212.

gious" by a Model Three court. In light of the law's legislative history, parental claims of establishment might be favorably received, especially if supported with evidence that the statute's implementation was effectively reinstituting school prayer. Alternatively, a Model Three court might interpret the statute as facially secular and uphold it. The inherent latitude in defining "religious" renders adjudication under Model Three highly discretionary in all but the most extreme cases.[130]

Justice O'Connor's separate opinion in *Wallace* exemplifies a Model Three approach to the moment of silence issue. In search of the proper line between religious and nonreligious activity, O'Connor distinguished a moment of silence from state-sponsored vocal prayer or Bible reading: "First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise."[131] However, O'Connor went on to explain that establishment clause problems do arise if prayer is an *encouraged* use of the moment of silence: "But when the State also encourages the student to pray during a moment of silence, it converts an otherwise inoffensive moment of silence into an effort by the majority to use the machinery of the State to encourage the minority to participate in a religious exercise."[132] Because of children's "impressionable"[133] nature, it is particularly important to guard against a religious use of the statute by the state: "At the very least, Presidential proclamations [of prayer] are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination."[134]

A Model Four court's inquiry would focus on whether the moment of silence law has the effect of narrowing school children's future religious alternatives either by encouraging one form of "worship" over another, or by failing to expose the children to the entire range of worship and non-worship "methods."

The silent moment statute accommodates those religions which advocate silent, public prayer or meditation; it does not accommodate religions which prohibit or do not require such a practice. By requiring all to engage in a silence that allows some to fulfill religious obligations at school, the state is transmitting a subtle message to the open, young mind: these religions are worthwhile, and therefore desirable.[135] No attempt has been made to present

130. Stone v. Graham, 449 U.S. 39 (1980) (per curiam) presents an example of one of these extreme cases. In striking down a Kentucky statute which required posting of the Ten Commandments in each public classroom in the state, the Court did not hesitate to conclude: "The pre-eminent purpose for posting the Ten Commandments on schoolrooms' walls is plainly religious in nature." *Id.* at 41. Even in such an apparently obvious case, however, Justice Rehnquist dissented from the Court's decision.

131. Wallace v. Jaffree, 105 S. Ct. at 2498-99 (O'Connor, J., concurring).

132. *Id.* at 2499 n.2.

133. *Id.* at 2503.

134. *Id.*

135. This is analogous to the message transmitted in Epperson v. Arkansas, 393 U.S. 97

a balanced array of activities or experiences during the morning minute; every morning, every child must participate in a minute of public silence.

The fact that discussion of the moment of silence is not permitted does not ameliorate the establishment problems with the statute; under Model Four, it actually exacerbates them. Model Four's aim of ensuring that the developing individual is presented with objective information about the spectrum of religious thought and practice is substantially impeded by the no-discussion mandate. A Model Four court would probably strike down the hypothetical moment of silence statute.

CONCLUSION

The difficulty of clarifying the judicial vision of children's religious rights is not surprising. Many of the distinctions between the four models described in part II grow out of differences in the assumptions or beliefs upon which they are based. The range of beliefs relevant to adjudicating children's religious rights is expansive; it includes beliefs about the acquisition of religious identity, the processes of learning and development, the relationship between the interests of parent and child, and the legitimate extent of the school's role as a socializing agent. There exists an entire field of plausible assumptions on each of these controversial subjects. To conclusively embrace any particular model of children's religious rights is to reject certain assumptions from the field as implausible, and to reaffirm those assumptions that support the model chosen. Such final resolution of the mysteries of childhood and of religion does not come easily to most individuals; understandably, it has not come at all to the Supreme Court.[136]

Questions of learning and development, for example, have been the subject of centuries of thought, theory, and research; no single explanation of the mental and emotional processes by which a child becomes an adult has yet been accepted by educators and psychologists.[137] For the Supreme Court to adopt expressly a position on the issue of the relative influences of "nature and nurture"[138]—heredity and environment—on the child's growth, would be analogous to its giving *stare decisis* effect to its position on the creation/evolution debate at the turn of this century.

(1968), to a state that prohibited teaching the evolution theory of the origin of man but permitted other theories. The Supreme Court struck down the statute, noting that a state's selection of dogma is unconstitutional.

136. For references to the difficulty of deciding religion clause cases, see, e.g., Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. at 662; Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. at 805 (Rehnquist, J., dissenting).

137. One basic educational text, for example, describes six different "associationist" theories and three "field" theories in its "overview of some of the major theories of learning." A. ORNSTEIN, AN INTRODUCTION TO THE FOUNDATIONS OF EDUCATION 338-61 (1977).

138. Vander Zanden asserts that the nature-nurture controversy dates back to the classical Greek era, "when philosophers asked the question in this form: Are ideas innate in human beings, or do humans acquire ideas through the experience of their senses?" J. VANDER ZANDEN, HUMAN DEVELOPMENT 93 (1978).

Similar problems would arise if the Court attempted to chisel in stone a particular picture of the family relationship. Traditional notions of a close and loving family relationship do not account for the boundless variety of ways in which families actually interact. Although the Court frequently attempts to promote the notion of the family unit,[139] the failure of some family units[140] necessitates the difficult determination of when the state should instead intervene to save the members from the dangers of the family itself.[141] There can be no general rule as to whether the relationship between parents' and children's interests is one of separation, accommodation, or identity.

The question of how one becomes a religious being is also problematic. One's understanding of the acquisition of religious identity—as a matter of heritage, of indoctrination, of choice, or of inspiration—may greatly impact her conception of exactly what is protected by the religion clauses. For the Court or legislature to presume a method of religious acquisition would present no less an infringement of the establishment clause than would government definition of "religion".[142] The infinite variety of values to which an individual may devote inspirational energy and faith precludes the Court from taking a firm position either on what religion is or how one seizes upon a religious identity.

Given the diversity of thought and unanswerable quality of these questions of learning, family, and religion, it is wholly understandable that the Court has not successfully developed a cohesive conception of the child's religious rights. There is, however, one further reason to suppose that the judicial vision of these rights will remain unsettled. For the Supreme Court to develop a single, clearly defined conception of children's religious rights, it would have to address directly the inherent conceptual friction between the expansive socialization power of the public schools and the first amendment's respect for individual freedom of thought, expression and belief.

Throughout the development of the public education system in this country, the Supreme Court, Congress, and the American majority have supported the power and right of the public schools to serve a socialization function. The focus of the socialization function is to inculcate students with the values accepted as part of the national principle—values which are essentially majoritarian.[143] "A general State education," wrote John Stuart Mill,

139. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979); Parham v. J.R., 442 U.S. 584 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972).

140. The most common example of family dysfunction is that of child abuse. *See generally* R. KEMPE & C. KEMPE, CHILD ABUSE (1978).

141. Standards for state intervention in the family relationship are suggested in J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979).

142. The Court has recognized the expansive variety of beliefs that can be characterized as religious. *See* New York v. Cathedral Academy, 434 U.S. at 132-133; Welsh v. United States, 398 U.S. at 340; United States v. Seeger, 380 U.S. 163 (1965).

143. "In practice, the choice of values to be transmitted lies not with the child or the child's family, but with the political majority or interest group in charge of the school system." Arons & Lawrence, *supra* note 19, at 316.

> is a mere contrivance for moulding people to be exactly likely one another: and as the mould in which it casts them is that which pleases the predominant power in the government, . . . in proportion as it is efficient and successful, it establishes a despotism over the mind.[144]

Whether the schools' despotism is benevolent or tyrannical, the American education system is widely regarded as an appropriate instrument for the inculcation of majoritarian values and the creation of "good citizens."

Any particular set of values is likely to be more consistent with the moral core of some religions than that of others. The values promoted by the public school system represent essentially those of the dominant Judaeo-Christian culture in this country. "We are a religious people," the Court has stated, "whose institutions presuppose a Supreme Being."[145] When the state undertakes to systematically impose a chosen set of values on the minds of its youth, the first amendment's prohibition of state establishment of religion is clearly implicated. A clear Supreme Court vision of the shape of children's religious rights would demand that the Court articulate its justification for upholding the socialization process against the contours of the child's rights. The principles underlying proscription of a national creed and the Constitution's promise to protect the individual's freedom of conscience,[146] raise troubling constitutional questions when juxtaposed with the vast socialization power of the schools: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[147]

144. Mill, *On Liberty*, in UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM 239-40 (M. Warnok ed. 1962)

145. Zorach v. Clauson, 343 U.S. at 313.

146. Government may not invade "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." West Va. State Bd. of Educ. v. Barnette, 319 U.S. at 642.

147. *Id.*