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

Petitioners,

—vs.— No. 119

JOHN N. CURLETT, et al.,

Respondents.

Washington, D. C.
February 27, 1963.

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

BEFORE:

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

APPEARANCES:

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

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

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

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

PROCEEDINGS

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

Mr. Kerpelman?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Mr. Kerpelman?

MR. KERPELMAN: Yes, Your Honor?

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

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

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

MR. KERPELMAN: Yes, sir?

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

MR. KERPELMAN: —how they determined that?

THE COURT: Yes.

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

THE COURT: [Inaudible][1]

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

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

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

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

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

MR. KERPELMAN: No, Your Honor.

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

THE COURT: [Inaudible]

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

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

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

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

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

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

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

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

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

THE COURT: This case is here on a demurrer?

MR. KERPELMAN: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

MR. KERPELMAN: Yes, Your Honor.

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

MR. KERPELMAN: Right.

THE COURT: You're free to walk away—

MR. KERPELMAN: Yes, Your Honor.

THE COURT: —and not participate in any way.

MR. KERPELMAN: Yes, Your Honor.

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

And I might say this, Mr. Justice—

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

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

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

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

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

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

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

MR. KERPELMAN: But under the establishment—

THE COURT: Very literally.

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

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

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

THE COURT: That's precisely my point.

THE COURT: But is that correct?

MR. KERPELMAN: Well, it seems to me—

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

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

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

MR. KERPELMAN: No, Your Honor.

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

MR. KERPELMAN: Yes, Your Honor.

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

MR. KERPELMAN: Yes, Your Honor.

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

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

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

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

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

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

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

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

MR. KERPELMAN: Yes—

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

MR. KERPELMAN: Well—

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

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

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

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

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

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

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

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

THE COURT: [Inaudible]

MR. KERPELMAN: Clearly, clearly.

THE COURT: [Inaudible]

MR. KERPELMAN: Yes, Your Honor; yes.

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

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

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

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

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

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

I would like to get to a point which the—

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

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

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

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

MR. KERPELMAN: Sorry—

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

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

[Laughter]

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

MR. KERPELMAN: Yes, Your Honor.

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

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

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

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

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

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

THE COURT: [Inaudible]

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

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

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

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

THE COURT: Are you familiar with the Northwest Ordinance?

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

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

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

THE COURT: Secular.

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

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

MR. KERPELMAN: Yes, Your Honor.

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

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

THE COURT: You're expressing a personal opinion—

MR. KERPELMAN: An entirely personal opinion.

THE COURT: —that is constitutionally irrelevant.

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

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

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

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

THE COURT: Well—

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

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

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

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

MR. KERPELMAN: Well—

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

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

THE COURT: I understand that.

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

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

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

THE COURT: It got here on a demurrer—

MR. KERPELMAN: Yes, sir.

THE COURT: —on your pleading and a demurrer—

MR. KERPELMAN: Yes, sir—

THE COURT: —and there's no—

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

THE COURT: In the exercise of their religious beliefs?

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

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

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

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

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

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

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

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

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

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