

LAW & RELIGION

CHAPTER I - ESTABLISHMENT CLAUSE: THE EARLY CASES

Introduction

The United States Constitution, as originally enacted in 1789, contains only one reference to religion. In Article VI, Section 3, the Constitution bars religious tests for federal office: “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” The provision was a rejection of English laws adopted in the 17th and 18th centuries that were designed to prevent anyone other than members of the Church of England from holding government office.

Constitutional references to religion were expanded with the adoption of the Bill of Rights in 1791. The principal constitutional provisions relating to religion are now found in the First Amendment which contains two clauses addressing that subject, the Establishment and Free Exercise Clauses: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Establishment Clause regulates the constitutional boundaries of the relationship between government and religion. The Free Exercise Clause protects freedom of religion. While both clauses originally applied only to the federal government, both now operate as limitations on the powers of state governments as well. The Free Exercise Clause was interpreted by the United States Supreme Court as applicable to the states through incorporation into the Fourteenth Amendment Due Process Clause in 1940 in *Cantwell v. Connecticut* and the Establishment Clause was incorporated in *Everson v. Board of Education* in 1947.

The relationship between the two clauses, as interpreted by the Supreme Court, has been a subject of controversy. While the clauses have been seen as mutually reinforcing a set of common values, at times the two clauses operate at cross purposes. That is because the Establishment Clause has traditionally been interpreted to require the government to be neutral toward religion rather than to favor or disfavor it while the Free Exercise Clause, in certain situations, has been interpreted to require the government to provide special treatment toward religious observers so they are free to practice their religion. Recently, members of the Court have given primacy to the Free Exercise Clause over the Establishment Clause.

The Early Establishment Clause Cases: 1947-1971

The cases in this section are early interpretations of the Establishment Clause by the United States Supreme Court. They span a variety of subjects including government support for religious education and tax exemptions for houses of worship. The opinions describe the views of various

members of the Court as to the history and meaning of the Religion Clauses. The cases also track the evolution of the principal standard used by the Supreme Court for many years to review Establishment Clause challenges. While that 3-part test, called the *Lemon* test, was not fully developed until 1971 in *Lemon v. Kurtzman*, parts of the test were adopted even before that.

1. EVERSON v. BOARD OF EDUCATION OF THE TOWNSHIP OF EWING
330 U.S. 1 (1947)

JUSTICE BLACK delivered the opinion of the Court, joined by CHIEF JUSTICE VINSON and JUSTICES REED, DOUGLAS, and MURPHY.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

The appellant, in his capacity as a district taxpayer, filed suit in a state court challenging the right of the Board to reimburse parents of parochial school students. He contended that the statute and resolution violated both the State and the Federal Constitutions. That court held that the legislature was without power to authorize such payment under the state constitution. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor the resolution passed pursuant to it was in conflict with the State constitution or the provisions of the Federal Constitution in issue.

The New Jersey statute is challenged as a "law respecting an establishment of religion." The First Amendment, as made applicable to the states by the Fourteenth, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression "law respecting an establishment of religion," probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting an "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects

determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshiping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout

Virginia, and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson. That Bill stated:

"That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief"

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. *Reynolds v. United States*, 98 U.S. 145, 164 (1878). Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states. Most of them did soon provide similar constitutional protections for religious liberty. But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups. In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect. Some churches have either sought or accepted state financial support for their schools. Here again the efforts to obtain state aid or acceptance of it have not been limited to any one particular faith. The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause.

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious

organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." *Reynolds v. United States, supra* at 164.

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power. New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such government services as police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It appears that these parochial schools meet New Jersey's

requirements. The State contributes no money to the schools. Its legislation does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

JUSTICE JACKSON, with whom JUSTICE FRANKFURTER joins, dissenting.

The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and whether it is wise, are questions I need not try to answer.

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.

The Court's holding is that this taxpayer has no grievance because the state has decided to make the reimbursement a public purpose and therefore we are bound to regard it as such. I agree that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. There is no answer to the proposition, more fully expounded by Mr. Justice Rutledge, that the effect of the religious freedom Amendment was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every

denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today's decision.

This policy of our Federal Constitution has never been wholly pleasing to most religious groups. They all are quick to invoke its protections; they all are irked when they feel its restraints. This Court has gone a long way to hold that public business of such paramount importance as maintenance of public order, protection of privacy of the home, and taxation may not be pursued by a state in a way that even indirectly will interfere with religious proselyting.

But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Nor should I think that those who have done so well without this aid would want to see this separation between Church and State broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it.

But in any event, the great purposes of the Constitution do not depend on the approval of those they restrain. I cannot read the history of the struggle to separate political from ecclesiastical affairs, well summarized in the opinion of Mr. Justice Rutledge in which I generally concur, without a conviction that the Court today is unconsciously giving the clock's hands a backward turn.

JUSTICE RUTLEDGE, with whom JUSTICES FRANKFURTER, JACKSON and BURTON join, dissenting.

I.

Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. It is the exact summation of its author's views formed during his long struggle for religious freedom. Madison could not have confused "church" and "religion," or "an established church" and "an establishment of religion."

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so

that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

[D]aily religious education commingled with secular is "religion" within the guaranty's comprehensive scope. So are religious training and teaching in whatever form. The word connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details.

"Religion" has the same broad significance in the twin prohibition concerning "an establishment." The Amendment was not duplicitous. "Religion" and "establishment" were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.

II.

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others is to be found irrefutable confirmation of the Amendment's sweeping content. For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general.

[D]uring all this time the fight for religious freedom moved forward in Virginia with growing intensity. Madison led throughout, against Patrick Henry's powerful opposing leadership until Henry was elected governor in November, 1784. The climax came in the legislative struggle of 1784-1785 over the Assessment Bill. This was nothing more nor less than a taxing measure for the support of religion, designed to revive the payment of tithes suspended since 1777. So long as it singled out a particular sect for preference it incurred the active hostility of dissentient groups. It was broadened to include them, with the result that some subsided temporarily in their opposition. As altered, the bill gave to each taxpayer the privilege of designating which church should receive his share of the tax. In default of designation the legislature applied it to pious uses. But what is of the utmost significance here, "in its final form the bill left the taxpayer the option of giving his tax to education."

Madison was unyielding at all times, opposing with all his vigor the general and nondiscriminatory as he had the earlier particular and discriminatory assessments proposed. The modified Assessment Bill passed second reading in December, 1784, and was all but enacted. Madison and his followers, however, maneuvered deferment of final consideration until November, 1785. And before the Assembly reconvened in the fall he issued his historic Memorial and Remonstrance.

This is Madison's complete, though not his only, interpretation of religious liberty. It is a broadside attack upon all forms of "establishment" of religion, both general and particular,

nondiscriminatory or selective. The Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is "an establishment of religion."

The Remonstrance, stirring up a storm of popular protest, killed the Assessment Bill. It collapsed in committee shortly before Christmas, 1785. With this, the way was cleared at last for enactment of Jefferson's Bill for Establishing Religious Freedom. Madison promptly drove it through in January of 1786. This dual victory substantially ended the fight over establishments, settling the issue against them.

The next year Madison became a member of the Constitutional Convention. Its work done, he fought valiantly to secure the ratification of its great product in Virginia as elsewhere. Madison was certain in his own mind that under the Constitution "there is not a shadow of right in the general government to intermeddle with religion." Nevertheless he pledged that he would work for a Bill of Rights, including a specific guaranty of religious freedom, and Virginia, with other states, ratified the Constitution on this assurance.

Ratification thus accomplished, Madison was sent to the first Congress. There he went at once about performing his pledge to establish freedom for the nation as he had done in Virginia. Within a little more than three years from his legislative victory at home he had proposed and secured the ratification of the First Amendment as the first article of our Bill of Rights.

All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.

As the Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or to support. With Jefferson, Madison believed that to tolerate any fragment of establishment would be to perpetuate restraint upon that freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever. In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even "three pence" contribution was thus to be exacted from any citizen for such a purpose.

In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises.

III.

Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own.

New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. Under the test they framed it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given. That it is a

substantial and a necessary element is shown most plainly by the continuing and increasing demand for the state to assume it. Nor is there pretense that it relates only to the secular instruction given in religious schools or that any attempt is or could be made toward allocating proportional shares as between the secular and the religious instruction. It is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools. And the very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance.

Transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items composing the total burden.

For me, therefore, the feat is impossible to select so indispensable an item from the composite of total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs. Unless this can be maintained, and the Court does not maintain it, the aid thus given is outlawed. Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials.

IV.

But we are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private purpose, namely, the promotion of education, and the majority accept this idea in the conclusion that all we have here is "public welfare legislation."

Of course paying the cost of transportation promotes the general cause of education and the welfare of the individual. So does paying all other items of educational expense. These things are beside the real question. Stripped of its religious phase, the case presents no substantial federal question. The public function argument, by casting the issue in terms of promoting the general cause of education and the welfare of the individual, ignores the religious factor and its essential connection with the transportation, thereby leaving out the only vital element in the case.

Our constitutional policy does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one. This was the very heart of Madison's Remonstrance, as it is of the Amendment itself.

Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. No such finding has been or could be made in this case.

The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the

church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. It is the very thing Jefferson and Madison experienced and sought to guard against. The end of such strife cannot be other than to destroy the cherished liberty.

V.

No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or their parents for them desire a different kind of training others do not demand.

But if those feelings should prevail, there would be an end to our historic constitutional policy and command. No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost. Hardship in fact there is which none can blink. But, for assuring to those who undergo it the greater, the most comprehensive freedom, it is one written by design and firm intent into our basic law.

Of course discrimination in the legal sense does not exist. The child attending the religious school has the same right as any other to attend the public school. But he foregoes exercising it because the same guaranty which assures this freedom forbids the public school or any agency of the state to give or aid him in securing the religious instruction he seeks.

Were he to accept the common school, he would be the first to protest the teaching there of any creed or faith not his own. And it is precisely for the reason that their atmosphere is wholly secular that children are not sent to public schools. But that is a constitutional necessity, because we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.

That policy necessarily entails hardship upon persons who forego the right to educational advantages the state can supply in order to secure others it is precluded from giving. Indeed this may hamper the parent and the child forced by conscience to that choice. But it does not make the state unneutral to withhold what the Constitution forbids it to give. On the contrary it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly.

The problem then cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike. Thus, if the present statute and its application were shown to apply equally to all religious schools of

whatever faith, yet in the light of our tradition it could not stand. For then the adherent of one creed still would pay for the support of another. The person who embraces no creed also would be forced to pay for teaching what he does not believe. Again, it was the furnishing of "contributions of money for the propagation of opinions which he disbelieves" that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted.

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

[The dissents of Justices Jackson and Rutledge also argued that Ewing Township provided for reimbursement only for transportation to public and Catholic schools. Justice Black's majority opinion did not address the question of discrimination among religions: "Although the township resolution authorized reimbursement only for parents of Public and Catholic school pupils, appellant does not allege, nor is there anything in the record which would offer support to an allegation, that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools." 330 U.S. at 4, n.2.]

2. ILLINOIS EX REL. McCOLLUM v. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS
333 U.S. 203 (1948)

JUSTICE BLACK delivered the opinion of the Court.

The appellant, Vashti McCollum, began this action against the Champaign Board of Education in the Circuit Court of Champaign County, Illinois. Appellant's petition alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for secular education. The petitioner charged that this joint public-school religious-group program violated the First and Fourteenth Amendments.

The following facts are shown by the record without dispute. In 1940 interested members of the Jewish, Roman Catholic, and a few of the Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, thirty minutes for the lower grades,

forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi, although for the past several years there have been no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.

The foregoing facts show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*. The majority in the *Everson* case, and the minority agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State. They disagreed as to the facts shown by the record and as to the proper application of the First Amendment's language to those facts.

Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the *Everson* case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions. In addition they ask that we distinguish or overrule our holding in the *Everson* case that the Fourteenth Amendment made the "establishment of religion" clause of the First Amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions.

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

Here not only are the State's tax-supported public school buildings used for the dissemination

of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.

JUSTICE JACKSON, concurring.

I concur in the result reached by the Court, but with these reservations. This Court is directing the Illinois courts generally to sustain plaintiff's complaint without laying down any standards to define the limits of the effect of our decision. While I agree that the religious classes involved here go beyond permissible limits, this Court does not tell the State court where it may stop, nor does it set up any standards by which the State court may determine that question for itself.

The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine applicable alike to all school boards of the nation is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation.

It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. If with no surer legal guidance we are to take up and decide every variation of this controversy, we are likely to make the legal "wall of separation between church and state" as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.

JUSTICE REED, dissenting.

I find it difficult to extract from the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional. Is it the use of school buildings for religious instruction; the release of pupils by the schools for religious instruction during school hours; the so-called assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; or the action of the principals in arranging an opportunity for the classes and the appearance of the Council's instructors?

From the tenor of the opinions I conclude that their teachings are that any use of a pupil's school time, whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban. From the holding and the language of the opinions, I can only deduce that religious instruction of public school children during school hours is prohibited. The history of American education is against such an interpretation of the First Amendment.

The phrase "an establishment of religion" may have been intended by Congress to be aimed only at a state church. Passing years, however, have brought about acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was

equivalent to an establishment of religion.

This Court summarized the amendment's accepted reach into the religious field, as I understand its scope, in *Everson v. Board of Education*. I agree, as there stated, that none of our governmental entities can "set up a church." I agree that they cannot "aid" all or any religions or prefer one "over another." But "aid" must be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions. "Prefer" must give an advantage to one "over another." I agree that pupils cannot "be released in part from their legal duty" of school attendance upon condition that they attend religious classes. But as Illinois has held that it is within the discretion of the School Board to permit absence from school for religious instruction no legal duty of school attendance is violated. If the sentence in the Court's opinion, concerning the pupils' release from legal duty, is intended to mean that the Constitution forbids a school to excuse a pupil from secular control during school hours to attend voluntarily a class in religious education, whether in or out of school buildings, I disagree. Of course, no tax can be levied to support organizations intended "to teach or practice religion." I agree too that the state cannot influence one toward religion against his will or punish him for his beliefs. Champaign's religious education course does none of these things.

It seems clear to me that the "aid" referred to by the Court in the *Everson* case could not have been those incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society. This explains the well-known fact that all churches receive "aid" from government in the form of freedom from taxation. The *Everson* decision itself justified the transportation of children to church schools by New Jersey for safety reasons.

I cannot agree with the Court's conclusion that when pupils compelled by law to go to school for secular education are released from school so as to attend the religious classes, churches are unconstitutionally aided. The prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state. This Court cannot be too cautious in upsetting practices embedded in our society by many years of experience. Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people.

3. ZORACH v. CLAUSON 343 U.S. 306 (1952)

JUSTICE DOUGLAS delivered the opinion of the Court.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have

not reported for religious instruction.¹

This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike *McCullum v. Board of Education*. In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment.

Appellants, who are taxpayers and residents of New York City and whose children attend its public schools, challenge the present law, contending it is in essence not different from the one involved in the *McCullum* case. Their argument reduces itself to this: the weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the cooperation of the schools this "released time" program, like the one in the *McCullum* case, would be futile and ineffective. The New York Court of Appeals sustained the law against this claim of unconstitutionality. The case is here on appeal.

There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard

¹ The New York City released time program is embodied in the following provisions:

(a) N. Y. Education Law, § 3210, subdiv. 1 (b), which provides that "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

(b) Regulations of the Commissioner of Education of the State of New York, Art. 17, § 154 (1 N. Y. Official Code Comp. 683), which provide for absence during school hours for religious observance and education outside the school grounds, where conducted by or under the control of a duly constituted religious body. Students must obtain written requests from their parents or guardians to be excused for such training, and must register for the training and have a copy of their registration filed with the public school authorities. Weekly reports of their attendance at such religious schools must be filed with their principal or teacher. Only one hour a week is to be allowed for such training, at the end of a class session, and where more than one religious school is conducted, the hour of release shall be the same for all religious schools.

(c) Regulations of the Board of Education of the City of New York, which provide similar rules supplementing the State Commissioner's regulations, with the following significant amplifications: No announcement of any kind will be made in the public schools relative to the program. The religious organizations and parents will assume full responsibility for attendance at the religious schools and will explain any failures to attend on the weekly attendance reports. Students who are released will be dismissed from school in the usual way. There shall be no comment by any principal or teacher on attendance or nonattendance of any pupil upon religious instruction.

and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.² Hence we put aside that claim of coercion.

Moreover, apart from that claim of coercion, we do not see how New York by this type of "released time" program has made a law respecting an establishment of religion within the meaning of the First Amendment. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other -- hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths -- these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious

² Appellants contend that they should have been allowed to prove that the system is in fact administered in a coercive manner. The New York Court of Appeals declined to grant a trial on this issue, noting that appellants had not properly raised their claim in the manner required by state practice. This independent state ground for decision precludes appellants from raising the issue of maladministration in this proceeding.

The only allegation in the complaint that bears on the issue is that the operation of the program "has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction." But this charge does not even implicate the school authorities. Since the allegation did not implicate the school authorities in the use of coercion, there is no basis for holding that the New York Court of Appeals under the guise of local practice defeated a federal right.

program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as spiritual needs deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

In the *McCullum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCullum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

JUSTICE BLACK, dissenting.

Illinois ex rel. McCollum v. Board of Education held invalid an Illinois system under which school children were freed from some hours of required school work on condition that they attend special religious classes held in the school buildings. I see no significant difference between the invalid Illinois system and that of New York here sustained. Except for the use of the school buildings in Illinois, there is no difference between the systems which I consider even worthy of mention. In the New York program, as in that of Illinois, the school authorities release some of the children on the condition that they attend the religious classes, get reports on whether they attend, and hold the other children in the school building until the religious hour is over. As we attempted to make categorically clear, the *McCullum* decision would have been the same if the religious classes had not been held in the school buildings. We said:

"Here *not only* are the State's tax-supported public school buildings used for the

dissemination of religious doctrines. The State *also* affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. *This* is not separation of Church and State."

McColum thus held that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do.

Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery. That this is the purpose, design and consequence of the New York program cannot be denied. The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids. In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all. New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State.

The Court's validation of the New York system rests in part on its statement that Americans are "a religious people whose institutions presuppose a Supreme Being." This was at least as true when the First Amendment was adopted; and it was just as true when eight Justices invalidated the released time system in *McColum*. It was precisely because Eighteenth Century Americans were a religious people divided into many fighting sects that we were given the constitutional mandate to keep Church and State completely separate. Colonial history had already shown that, here as elsewhere zealous sectarians entrusted with governmental power to further their causes would sometimes torture, maim and kill those they branded "heretics," "atheists" or "agnostics." The First Amendment was therefore to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters whom they could not convert to their faith. Now as then, it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all nonbelievers can be maintained. It is this neutrality the Court abandons today when it treats New York's coercive system as a program which *merely* "encourages religious instruction or cooperates with religious authorities." The abandonment is all the more dangerous to liberty because of the Court's legal exaltation of the orthodox and its derogation of unbelievers.

Under our system of religious freedom, the spiritual mind of man has been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy hand of government. Before today, our judicial opinions have refrained from drawing invidious distinctions between those who believe in no religion and those who do believe. The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law. 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.

JUSTICE FRANKFURTER, dissenting.

By way of emphasizing my agreement with MR. JUSTICE JACKSON'S dissent, I add a few words. The Court tells us that in the maintenance of its public schools, "[The State government] can close its doors or suspend its operations" so that its citizens may be free for religious devotions or instruction. If that were the issue, it would not rise to the dignity of a constitutional controversy. The essence of this case is that the school system did not "close its doors" and did not "suspend its operations." There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes. If every one is free to make what use he will of time wholly unconnected from schooling required by law then of course there is no conflict with the Fourteenth Amendment.

The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released-time program are compelled to attend. The school system is very much in operation during this kind of released time. If its doors are closed, they are closed upon those students who do not attend the religious instruction, in order to keep them within the school. That is the very thing which raises the constitutional issue. Failure to discuss this issue does not take it out of the case.

Again, the Court relies upon the absence from the record of evidence of coercion. "If in fact coercion were used," according to the Court, "to persuade or force students to take the religious instruction, a wholly different case would be presented." Thus, "coercion" in the abstract is acknowledged to be fatal. But the Court disregards the fact that as the case comes to us, there could be no proof of coercion, for the appellants were not allowed to make proof of it. Appellants alleged that "The operation of the released time program has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction." This allegation was denied by appellees. Thus were drawn issues of fact. Appellants sought an opportunity to adduce evidence in support of these allegations at an appropriate trial. The courts below denied that opportunity on the ground that such proof was irrelevant to the issue of constitutionality.

When constitutional issues turn on facts, it is a strange procedure not to permit the facts to be established. When such is the case, there are weighty considerations for us to require the State court to make its determination only after a thorough canvass of all the circumstances. If we are to decide this case on the present record, however, a strict adherence to the usage of courts in ruling on the sufficiency of pleadings would require us to take as admitted the facts pleaded in the appellants' complaint, including the fact of coercion. I cannot see how a finding that coercion was absent can be made here, when appellants were prevented from making a timely showing of coercion because the courts below thought it irrelevant.

The result in the *McCullum* case was based on principles that received unanimous acceptance by this Court, barring only a single vote. I agree with MR. JUSTICE BLACK that those principles are disregarded in reaching the result in this case. Happily they are not disavowed by the Court. From this I draw the hope that in future variations of the problem which are bound to come here, these principles may again be honored in the observance.

The deeply divisive controversy aroused by the attempts to secure public school pupils for

sectarian instruction would promptly end if the advocates of such instruction were content to have the school "close its doors or suspend its operations" instead of seeking to use the public schools as the instrument for securing attendance at denominational classes. The unwillingness of the promoters of this movement to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes -- an attitude that hardly reflects the faith of the greatest religious spirits.

JUSTICE JACKSON, dissenting.

This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages: first, that the State compel each student to yield a large part of his time for public secular education; and, second, that some of it be "released" to him on condition that he devote it to sectarian religious purposes.

No one suggests that the Constitution would permit the State directly to require this "released" time to be spent "under the control of a religious body." This program accomplishes that forbidden result by indirection. If public education were taking so much time as to injure the students' welfare by encroaching upon their religious opportunity, simply shortening everyone's school day would facilitate voluntary attendance at Church classes. But that suggestion is rejected upon the ground that if they are made free many students will not go to Church. Hence, they must be deprived of freedom for this period, with Church attendance put to them as one of the two permissible ways of using it.

The greater effectiveness of this system over voluntary attendance after school hours is due to the truant officer who, if the youngster fails to go to the Church school, dogs him back to the public schoolroom. Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. It is as unconstitutional, in my view, when exerted by indirection as when exercised forthrightly.

As one whose children have been sent to privately supported Church schools, I may challenge the Court's suggestion that opposition to this plan can only be antireligious, atheistic, or agnostic. My evangelistic brethren confuse an objection to compulsion with an objection to religion.

The day that this country ceases to be free for irreligion it will cease to be free for religion -- except for the sect that can win political power. The same epithetical jurisprudence used by the Court today to beat down those who oppose pressuring children into some religion can devise as good epithets tomorrow against those who object to pressuring them into a favored religion. And, after all, if we concede to the State power and wisdom to single out "duly constituted religious" bodies as exclusive alternatives for compulsory secular instruction, it would be logical to also uphold the power and wisdom to choose the true faith among those "duly constituted." We start down a rough road when we begin to mix compulsory public education with compulsory godliness.

A number of Justices just short of a majority of the majority that promulgates today's

passionate dialectics joined in answering them in *McCollum*. The distinction attempted between that case and this is trivial, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity. A reading of the Court's opinion in that case along with its opinion in this case will show such difference of overtones and undertones as to make clear that the *McCollum* case has passed like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.

**4. BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 v. ALLEN,
COMMISSIONER OF EDUCATION OF NEW YORK**
392 U.S. 236 (1968)

JUSTICE WHITE delivered the opinion of the Court.

A law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools are included. This case presents the question whether this statute is a "law respecting an establishment of religion, or prohibiting the free exercise thereof," and so in conflict with the First and Fourteenth Amendments, because it authorizes the loan of textbooks to students attending parochial schools. We hold that the law is not in violation of the Constitution.

Until 1965, § 701 of the Education Law of the State of New York authorized public school boards to designate textbooks for use in the public schools, to purchase such books with public funds, and to rent or sell the books to public school students. In 1965 the Legislature amended § 701. Beginning with the 1966-1967 school year, local school boards were required to purchase textbooks and lend them without charge "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law." The books now loaned are "textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education," and which "a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends."

Appellant Board of Education of Central School District No. 1 in Rensselaer and Columbia Counties, brought suit in the New York courts against appellee James Allen. The complaint alleged that § 701 violated the Federal Constitution; that if appellants, in reliance on their interpretation of the Constitution, failed to lend books to parochial school students appellee Allen would remove appellants from office; and that to prevent this, appellants were complying with the law. The trial court held the law unconstitutional under the First and Fourteenth Amendments. On appeal, the New York Court of Appeals held that § 701 was not in violation of the Federal Constitution. The Court of Appeals said that the law's purpose was to benefit all schoolchildren, regardless of the type of school they attended, and that only textbooks approved by public school authorities could be loaned. It therefore considered § 701 "completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends."

Everson v. Board of Education, 330 U.S. 1 (1947), is the case decided by this Court that is most nearly in point for today's problem. *Everson* and later cases have shown that the line between state neutrality to religion and state support of religion is not easy to locate. "The problem, like many problems in constitutional law, is one of degree." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Based on *Everson*, *Zorach*, and other cases, *Abington School District v. Schempp*, 374 U.S. 203 (1963), fashioned a test subscribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits:

"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. To withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education*. . . ."

This test is not easy to apply, but the citation of *Everson* by the *Schempp* Court to support its general standard made clear how the *Schempp* rule would be applied to the facts of *Everson*. The statute upheld in *Everson* would be considered a law having "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." We reach the same result with respect to the New York law. The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.¹ Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.

It should be noted that the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their students. There is some evidence that at least some of the schools did not.

Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of § 701 does not

¹ While the record in this case contained no information about how the books are transferred from the Boards of Education to individual students, both parties suggested that New York permits private schools to submit to boards of education summaries of the requests for textbooks filed by individual students, and also permits private schools to store on their premises the textbooks being loaned by the Board of Education to the students. For purposes of this case we consider the New York statute to permit these procedures. So construing the statute, we find it in conformity with the Constitution, for the books are furnished for the use of individual students and at their request.

authorize the loan of religious books, and the State claims no right to distribute religious literature. Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval. In judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.

The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However this Court has long recognized that religious schools pursue two goals, religious instruction and secular education.

We cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. This case comes to us after summary judgment entered on the pleadings. Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books. We are unable to hold, based on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction or that § 701 is a law respecting the establishment of religion within the meaning of the First Amendment.

Appellants also contend that § 701 offends the Free Exercise Clause. However, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion," *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963), and appellants have not contended that the law coerces them as individuals in the practice of their religion.

JUSTICE HARLAN, concurring.

Although I join the opinion and judgment of the Court, I wish to emphasize certain of the principles which I believe to be central to the determination of this case.

The attitude of government toward religion must, as this Court has frequently observed, be one of neutrality. Neutrality is, however, a coat of many colors. It requires that "government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief." *Abington School District v. Schempp*. Realization of these objectives entails "no simple and clear measure" by which this or any case may readily be decided, but these objectives do suggest the principles which I believe to be applicable in the present circumstances. I would hold that where the governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly in the realm of the sectarian as to give rise to divisive influences and inhibitions of freedom," it is not forbidden by the religious clauses of the First Amendment. In my opinion, § 701 of the Education Law of New York does not employ religion as its standard for action or inaction, and is not

otherwise inconsistent with these principles.

MR. JUSTICE BLACK, dissenting.

I believe the New York law held valid is a flagrant violation of the First and Fourteenth Amendments. The *Everson* and *McCollum* cases plainly interpret the First and Fourteenth Amendments as protecting the taxpayers of a State from being compelled to pay taxes to their government to support private religious organizations the taxpayers oppose. To authorize a State to tax its residents for such church purposes is to put the State squarely in the religious activities of certain religious groups that happen to be strong enough politically to write their own religious preferences and prejudices into the laws. It was to escape laws precisely like this that a large part of the Nation's early immigrants fled to this country. It was also to escape such laws that the First Amendment was written barring passage of any law "respecting an establishment of religion."

I know of no prior opinion of this Court upon which the majority here can rightfully rely to support its holding this New York law constitutional. In saying this, I am not unmindful of the fact that the New York Court of Appeals purported to follow *Everson v. Board of Education* in which this Court, in an opinion written by me, upheld a New Jersey law authorizing reimbursement to parents for the transportation of children attending sectarian schools. That law did not attempt to deny the benefit of its general terms to children of any faith going to any legally authorized school. Thus, it was treated in the same way as a general law paying the streetcar fare *of all school children*, or a law providing midday lunches for all children or all school children, or a law to provide police protection for children going to and from school, or general laws to provide police and fire protection for buildings, including, of course, churches and church school buildings as well as others.

As my Brother DOUGLAS so forcefully shows, in an argument with which I fully agree, upholding a State's power to pay bus or streetcar fares for school children cannot provide support for the validity of a state law using tax-raised funds to buy school books for a religious school. The First Amendment's bar to establishment of religion must preclude a State from using funds levied from all of its citizens to purchase books for use by sectarian schools, which, although "secular," realistically will in some way inevitably tend to propagate the religious views of the favored sect. Books are the most essential tool of education since they contain the resources of knowledge which the educational process is designed to exploit. In this sense it is not difficult to distinguish books, which are the heart of any school, from bus fares, which provide a convenient and helpful general public transportation service. With respect to the former, state financial support actively and directly assists the teaching and propagation of sectarian religious viewpoints in clear conflict with the First Amendment's establishment bar; with respect to the latter, the State merely provides a general and nondiscriminatory transportation service in no way related to substantive religious beliefs.

This New York law, it may be said by some, makes but a small inroad and does not amount to complete state establishment of religion. But that is no excuse for upholding it. It requires no prophet to foresee that on the argument used to support this law others could be upheld providing for government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the

sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools. Arguments made in favor of this New York law point squarely in this direction, namely, that the fact that government has not heretofore aided religious schools with tax-raised funds amounts to a discrimination against those schools and against religion.

I still subscribe to the belief that tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny. The prohibition against establishment of religion was written on the assumption that state aid to religion generates discord, disharmony, hatred, and strife among our people. And I still believe that the only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable. The Court's affirmance here bodes nothing but evil to religious peace in this country.

JUSTICE DOUGLAS, dissenting.

The statute empowers each parochial school to determine for itself which textbooks will be eligible for loans to its students. This initial and crucial selection is undoubtedly made by the parochial school's principal or instructors, who are, in the case of Roman Catholic schools, normally priests or nuns.

The next step under the Act is an "individual request" for an eligible textbook, but the State Education Department has ruled that a pupil may make his request to the local public board of education through a "private school official." And forms for textbook requisitions to be filled out by the head of the private school are provided.

The role of the local public school board is to decide whether to veto the selection made by the parochial school. This is done by determining first whether the text has been or should be "approved" for use in public schools and second whether the text is "secular," "non-religious," or "non-sectarian."¹ The local boards apparently have broad discretion in exercising this veto power.²

¹ The legislature, in its "statement of policy" to the Act, speaks of aiding instruction in "non-sectarian subjects," and gives as examples "science, mathematics, [and] foreign languages."

² For example the regulations of the Board of Education of the City of New York respecting approval of textbooks for public schools contain no limitations directly relevant to the question of sectarianism. The material is to "promote the objectives of the educational program," "treat the subject competently and accurately," "have a wholesome tone that is consonant with right conduct and civic values," "be in harmony with American democratic ideals and moral values," "be free of any reflection on the dignity and status of any group, race, or religion, whether expressed or implied, by statement or omission," and "be free of objectionable features of over-dramatization, violence, or crime." Guiding Principles for Schools in the Selection and Use of "Non-Listed" Instructional Materials (1952).

Thus the statutory system provides that the parochial school will ask for the books that it wants. Can there be the slightest doubt that the parochial school will select the book or books that best promote its sectarian creed? If the board of education supinely submits by approving and supplying the sectarian or sectarian-oriented textbooks, the struggle to keep church and state separate has been lost. If the board resists, then the battle line between church and state will have been drawn and the contest will be on to keep the school board independent or to put it under church domination and control.

Whatever may be said of *Everson*, there is nothing ideological about a bus. There is nothing ideological about a school lunch, or a public nurse, or a scholarship. The constitutionality of such public aid to students in parochial schools turns on considerations not present in this case. The textbook goes to the very heart of education in a parochial school. It is the chief instrumentality for propagating a particular religious faith. How can we possibly approve such state aid to a religion? A parochial school textbook may contain many, many more seeds of creed and dogma than a prayer.

Judge Van Voorhis said that the difficulty with the textbook loan program "is that there is no reliable standard by which secular and religious textbooks can be distinguished from each other." The New York Legislature felt that science was a non-sectarian subject. Does this mean that any general science textbook intended for use in grades 7-12 may be provided by the State to parochial school students? May John M. Scott's *Adventures in Science* (1963) be supplied under the textbook loan program? This book teaches embryology in the following manner:

"The body of a human being grows in the same way, but it is much more remarkable than that of any animal, for the embryo has a human soul infused into the body by God. Human parents are partners with God in creation. Through their cooperation with God souls are born for heaven."

Comparative economics would seem to be a nonsectarian subject. Will New York, then, provide Arthur J. Hughes' general history text, *Man in Time* (1964), to parochial school students? It treats that topic in this manner:

"Capitalism is an economic system based on man's right to private property and on his freedom to use that property in producing goods which will earn him a just profit on his investment. Man's right to private property stems from the Natural Law implanted in him by God."

Even where the treatment given to a particular topic in a school textbook is not blatantly sectarian, it will necessarily have certain shadings that will lead a parochial school to prefer one text over another.

The Crusades, for example, may be taught as a Christian undertaking to "save the Holy Land" from the Moslem Turks who "became a threat to Christianity and its holy places," or as essentially a series of wars born out of political and materialistic motives.

It will be often difficult, as Mr. Justice Jackson said, to say "where the secular ends and the sectarian begins in education." But certain it is that once the so-called "secular" textbook is the prize to be won by that religious faith which selects the book, the battle will be on for those positions of control. Judge Van Voorhis expressed the fear that in the end the state might

dominate the church. Others fear that one sectarian group, gaining control of the state agencies which approve the "secular" textbooks, will use their control to disseminate ideas most congenial to their faith.

In general textbooks are approved by "boards of education, trustees or such body or officer as perform the functions of such boards." New York Education Law § 701, subd. 1. These school boards are generally elected. And superintendents who advise on textbook selection are appointed by the board of education. The initiative to requisition books is with the parochial school. Powerful religious-political pressures will therefore be on the state agencies to provide the books that are desired.

These are the battlegrounds where control of textbook distribution will be won or lost. Now that "secular" textbooks will pour into religious schools, we can rest assured that a contest will be on to provide those books for religious schools which the dominant religious group concludes best reflect the philosophy of the particular church. The stakes are now extremely high to obtain approval of what is "proper." For the "proper" books will radiate the "correct" religious view.

Even if I am wrong in that basic premise, we still should not affirm the judgment below. Judge Van Voorhis, dissenting in the New York Court of Appeals, thought that the result of tying parochial school textbooks to public funds would be to put nonsectarian books into religious schools, which in the long view would tend towards state domination of the church. That would, indeed, be the result if the school boards did not succumb to "sectarian" pressure or control. So, however the case be viewed -- whether sectarian groups win control of school boards or do not gain such control -- the principle of separation of church and state, inherent in the Establishment Clause, is violated by what we today approve.

JUSTICE FORTAS, dissenting.

Despite the transparent camouflage that the books are furnished to students, the reality is that they are selected and their use is prescribed by the sectarian authorities. The State cannot choose the book to be used. It is true that the public school boards must "approve" the book selected by the sectarian authorities; but this has no real significance. The purpose of these provisions is to hold out promise that the books will be "secular;" but the fact remains that the books are chosen by the sectarian schools.

It is misleading to say, as the majority opinion does, that the New York "law merely makes available to all children the benefits of a general program to lend school books free of charge." This is not a "general" program. It is a specific program to use state funds to buy books prescribed by sectarian schools. It could be called a "general" program only if the school books made available to all children were precisely the same -- the books selected for and used in the public schools.

This case is not within the principle of *Everson*. Apart from the differences between textbooks and bus rides, the present statute does not call for extending to children attending sectarian schools the same service extended to children in public schools. This statute calls for furnishing special, separate, and particular books, specially, separately, and particularly chosen by religious sects for use in their sectarian schools. This is the feature that makes it impossible, in

my view, to reach any conclusion other than that this statute is an unconstitutional use of public funds to support an establishment of religion.

This is the feature of the present statute that makes it totally inaccurate to suggest, as the majority does, that furnishing these specially selected books for use in sectarian schools is like "public provision of police and fire protection." These are furnished to all alike. They are not selected on the basis of specification by a religious sect. And patrons of any one sect do not receive services different from those accorded members of other religions or agnostics or even atheists.

5. WALZ v. TAX COMMISSION OF THE CITY OF NEW YORK
397 U.S. 664 (1970)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

Appellant sought to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations for properties used solely for religious worship. The exemption from state taxes is authorized by Art. 16, § 1, of the New York Constitution, which provides:

"Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."¹

Appellant's contention was that the grant of an exemption to church property indirectly requires the appellant to make a contribution to religious bodies and thereby violates the First Amendment.

I.

The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. The general principle deducible from all that has been said by the Court is this: that we will not tolerate either

¹ Art. 16, § 1, of the New York State Constitution is implemented by § 420, subd. 1, of the New York Real Property Tax Law which states in pertinent part:

"Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts -- one that seeks to mark boundaries to avoid excessive entanglement.

In *Everson* the Court declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history. Surely, bus transportation and police protection to pupils who receive religious instruction "aid" that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith. But if as in *Everson* buses can be provided to carry and policemen to protect church school pupils, we fail to see how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the Religion Clauses.

With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion.

II.

The legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York has determined that certain entities that exist in a harmonious relationship to the community, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life.

Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private

profit institutions.

We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others. Churches vary substantially in the scope of such services. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result -- the effect -- is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.

Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case.

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion. The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.

All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches -- over 75 years -- religious organizations have been expressly exempt from the tax. Such treatment is an "aid" to churches no more and no less in principle than the real estate tax exemption granted by States. Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

It is significant that Congress, from its earliest days, has viewed the Religion Clauses as

authorizing statutory real estate tax exemption to religious bodies. In 1802 the 7th Congress enacted a taxing statute for the County of Alexandria, adopting the 1800 Virginia statutory pattern which provided tax exemptions for churches. As early as 1813 the 12th Congress refunded import duties paid by religious societies on the importation of religious articles. During this period the City Council of Washington, D. C., acting under congressional authority, enacted a series of real and personal property assessments that uniformly exempted church property.

It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, is not something to be lightly cast aside.

Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion. Thus, it is hardly useful to suggest that tax exemption is but the "foot in the door" or the "nose of the camel in the tent" leading to an established church. If tax exemption can be seen as this first step toward "establishment" of religion, the second step has been long in coming. Any move that realistically "establishes" a church or tends to do so can be dealt with "while this Court sits."

JUSTICE BRENNAN, concurring.

The existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations, is not conclusive of its constitutionality. But such practice is of considerable import in the interpretation of abstract constitutional language. The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. The exemptions have continued to the present day. They are in force in all 50 States. No judicial decision has ever held that they violate the Establishment Clause.

Government has two basic secular purposes for granting real property tax exemptions to religious organizations. First, these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community.

Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society. To this end, New York extends its exemptions not only to religious and social service organizations but also to scientific, literary, bar, library, patriotic, and historical groups, and generally to institutions "organized exclusively for the moral or mental improvement of men and women." The very breadth of this scheme negates any suggestion that the State intends to single out religious organizations for special preference. The exemptions merely facilitate the existence of a broad range of private, nonprofit

organizations, among them religious groups, by leaving each free to come into existence, then to flourish or wither, without being burdened by real property taxes.

Although governmental purposes for granting religious exemptions may be wholly secular, exemptions can nonetheless violate the Establishment Clause if they result in extensive state involvement with religion. Accordingly, those who urge the exemptions' unconstitutionality argue that exemptions are the equivalent of governmental subsidy of churches. Tax exemptions and general subsidies, however, are different. An exemption assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. Tax exemptions constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy.

Even though exemptions produce only passive state involvement with religion, nonetheless some argue that their termination would be desirable as a means of reducing the level of church-state contact. But it cannot realistically be said that termination of religious tax exemptions would quantitatively lessen the extent of state involvement with religion. The termination of exemptions would give rise, as the Court says, to the necessity for "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." Whether Government grants or withholds the exemptions, it is going to be involved with religion.

Against the background of the history, purpose, and operation of religious tax exemptions, I must conclude that the exemptions do not "serve the essentially religious activities of religious institutions." Their principal effect is to carry out secular purposes. Nor do I find that the exemptions "employ the organs of government for essentially religious purposes." Finally, I do not think that the exemptions "use essentially religious means to serve governmental ends." Viewed in this light, there is no nonreligious substitute for religion as an element in our societal mosaic.

JUSTICE HARLAN, concurring.

Neutrality and voluntarism stand as barriers against the most egregious and hence divisive kinds of state involvement in religious matters. This legislation neither encourages nor discourages participation in religious life and thus satisfies the voluntarism requirement of the First Amendment.

The statute also satisfies the requirement of neutrality. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter. The statute has defined a class of nontaxable entities whose common denominator is their nonprofit pursuit of activities devoted to cultural and moral improvement and the doing of "good works" by performing certain social services in the community that might otherwise have to be assumed by government. The statute would appear not to omit any organization that could be reasonably thought to contribute to that goal.

To the extent that religious institutions sponsor the secular activities that this legislation is designed to promote, it is consistent with neutrality to grant them an exemption just as other

organizations devoting resources to these projects receive exemptions. I think, moreover, in the context of a statute so broad as the one before us, churches may properly receive an exemption even though they do not themselves sponsor the secular-type activities mentioned in the statute. As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups.

Whether the present exemption entails that degree of involvement with government that presents a threat of fragmentation along religious lines involves, for me, a more subtle question than deciding simply whether neutrality has been violated. In the instant case noninvolvement is further assured by the neutrality and breadth of the exemption. In the context of an exemption so sweeping its administration need not entangle government in difficult classifications of what is or is not religious, for any organization -- although not religious in a customary sense -- would qualify under the pervasive rubric of a group dedicated to moral and cultural improvement.

Exemptions do not differ from subsidies as an economic matter. Aside from the longstanding tradition behind exemptions there are other differences, however. Subsidies, unlike exemptions, must be passed on periodically and thus invite more political controversy than exemptions. Moreover, subsidies or direct aid, as a general rule, are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree.

Whether direct aid or subsidies entail that degree of involvement that is prohibited by the Constitution is a question that must be reserved for a later case upon a record that fully develops all the pertinent considerations. It may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement -- on a neutral basis -- than the Federal Government.

I recognize that for those who seek inflexible solutions this tripartite analysis provides little comfort. It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trail ahead. I, for one, however, do not believe that a "slippery slope" is necessarily without a constitutional toehold. The prospect of difficult questions of judgment in constitutional law should not be the basis for prohibiting legislative action that is constitutionally permissible.

JUSTICE DOUGLAS, dissenting.

There is a line between what a State may do in encouraging "religious" activities, and what a State may not do by using its resources to promote "religious" activities, or bestowing benefits because of them. Yet that line may not always be clear. Closing public schools on Sunday is in the former category; subsidizing churches, in my view, is in the latter. Indeed I would suppose that in common understanding one of the best ways to "establish" one or more religions is to subsidize them, which a tax exemption does. The State may not do that any more than it may prefer "those who believe in no religion over those who do believe."

Churches perform some functions that a State would constitutionally be empowered to

perform. I refer to nonsectarian social welfare operations such as the care of orphaned children and the destitute and people who are sick. A tax exemption to agencies performing those functions would be as constitutionally proper as the grant of direct subsidies to them. Under the First Amendment a State may not, however, provide worship if private groups fail to do so.

That is a major difference between churches on the one hand and the rest of the nonprofit organizations on the other. Government could provide or finance operas, hospitals, historical societies, and all the rest because they represent social welfare programs within the reach of the police power. In contrast, government may not provide or finance worship because of the Establishment Clause any more than it may single out "atheistic" or "agnostic" centers or groups and create or finance them.

Direct financial aid to churches or tax exemptions to the church *qua* church is not, in my view, even arguably permitted. That seems to me to be the requirement of the Establishment Clause. The present involvement of government in religion may seem *de minimis*. But it is, I fear, a long step down the Establishment path.

6. LEMON v. KURTZMAN
403 U.S. 602 (1971)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

I.

The Rhode Island Statute

The Rhode Island Salary Supplement Act rests on the legislative finding that the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The Act authorizes state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary. As supplemented, however, a nonpublic school teacher's salary cannot exceed the maximum paid to teachers in the State's public schools, and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a nonpublic school at which the average per-pupil expenditure on secular education is less than the

average in the State's public schools. Appellant State Commissioner of Education also requires eligible schools to submit financial data. If this information indicates a per-pupil expenditure in excess of the statutory limitation, the records of the school must be examined to assess how much of the expenditure is attributable to secular education and how much to religious activity.¹

The Act also requires that teachers eligible for salary supplements must teach only those subjects that are offered in the State's public schools. They must use "only teaching materials which are used in the public schools." Finally, any teacher applying for a salary supplement must first agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act.

A three-judge federal court found that Rhode Island's nonpublic elementary schools accommodated approximately 25% of the State's pupils. About 95% of these pupils attended schools affiliated with the Roman Catholic church. To date some 250 teachers have applied for benefits under the Act. All of them are employed by Roman Catholic schools.

The court held a hearing at which evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was "an integral part of the religious mission of the Catholic Church."

The District Court concluded that the Act violated the Establishment Clause, holding that it fostered "excessive entanglement" between government and religion. We affirm.

The Pennsylvania Statute

Pennsylvania has adopted a program that has some but not all of the features of the Rhode Island program. The Pennsylvania Nonpublic Elementary and Secondary Education Act was passed in response to a crisis that the Legislature found existed in the State's nonpublic schools due to rapidly rising costs. The statute affirmatively reflects the legislative conclusion that the State's educational goals could appropriately be fulfilled by government support of "those purely secular educational objectives achieved through nonpublic education"

The statute authorizes appellee state Superintendent of Public Instruction to "purchase" specified "secular educational services" from nonpublic schools. Under the "contracts" authorized by the statute, the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials. A school seeking reimbursement must maintain prescribed accounting procedures that identify the "separate" cost of the "secular educational service." These accounts are subject to state audit. The Act is financed by a portion of the state tax on cigarettes.

¹The District Court found only one instance in which this breakdown between religious and secular expenses was necessary. The school was not affiliated with the Catholic church. The court found it unlikely that such determinations would be necessary with Catholic schools because their reliance on nuns kept their costs substantially below those of public schools.

There are several significant restrictions on state aid. Reimbursement is limited to courses "in the curricula of the public schools." It is further limited "solely" to courses in the following "secular" subjects: mathematics, modern foreign languages, physical science, and physical education. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction. Finally, the statute prohibits reimbursement for any course that contains "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

The Act went into effect on July 1, 1968. It appears that some \$ 5 million has been expended annually under the Act. The State has now entered into contracts with some 1,181 nonpublic elementary and secondary schools with a student population of some 535,215 pupils -- more than 20% of the total number of students in the State. More than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Roman Catholic church.

Appellants brought this action to challenge the constitutionality of the Pennsylvania statute.

II.

In *Everson*, 330 U.S. 1 (1947), this Court upheld a state statute that reimbursed the parents of parochial school children for bus transportation expenses. There MR. JUSTICE BLACK suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses. Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is at best opaque. Its authors did not simply prohibit the establishment of a state church or a state religion. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz*, *supra* at 674.

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. As in *Allen*, we find nothing

here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.

In *Allen* the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were instrumental in the teaching of religion. The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion.

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

III.

In *Walz v. Tax Commission*, the Court upheld state tax exemptions for real property owned by religious organizations and used for religious worship. That holding, however, tended to confine the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship. The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Here we find that both statutes foster an impermissible degree of entanglement.

(a) *Rhode Island program*

The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Act.

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities to ensure that state aid supports only secular education.

The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.

In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control poses to the separation of the religious from the purely secular aspects of pre-college education.

In our view the record shows these dangers are present to a substantial degree. The Rhode Island Roman Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative, the Diocesan Superintendent of Schools. With only two exceptions, school principals are nuns appointed either by the Superintendent or the Mother Provincial of the order whose members staff the school. By 1969 lay teachers constituted more than a third of all teachers in the parochial elementary schools, and their number is growing.

They are first interviewed by the superintendent's office and then by the school principal. The contracts are signed by the parish priest. Religious authority necessarily pervades the school system.

The schools are governed by the standards set forth in a "Handbook of School Regulations," which has the force of synodal law in the diocese. It emphasizes the role and importance of the teacher in parochial schools. The Handbook also states that: "Religious formation is not confined to formal courses; nor is it restricted to a single subject area." Finally, the Handbook advises teachers to stimulate interest in religious vocations and missionary work.

Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential if not actual hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation.

We need not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion -- indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not teach any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures

on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. We cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

(b) *Pennsylvania program*

The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system very similar to the one in Rhode Island. According to the allegations, the church-related schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those cases the state aid was provided to the student and his parents. In *Walz v. Tax Commission*, the Court warned of the dangers of direct payments to religious organizations: "Obviously a direct money subsidy would be a relationship pregnant with involvement and could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards"

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

IV.

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. Partisans of parochial schools, understandably

concerned with rising costs, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the free exercise of religious belief.

Here we are confronted with very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified in these two programs by the need for continuing annual appropriations and the likelihood of larger demands as costs and populations grow.

V.

In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Nor do we ignore their economic plight. Taxpayers have been spared vast sums by the maintenance of these educational institutions by religious organizations.

The merit and benefits of these schools, however, are not the issue before us. The sole

question is whether state aid to these schools can be squared with the Religion Clauses. The judgment of the Rhode Island District Court is affirmed. The judgment of the Pennsylvania District Court is reversed, and the case is remanded for further proceedings..

JUSTICE DOUGLAS, whom JUSTICE BLACK joins, concurring.

Early in the 19th century the Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible. The contests between Protestants and Catholics, often erupting into violence, are a twice-told tale. Parochial schools grew, but not Catholic schools alone. Other dissenting sects established their own schools. But the major force in shaping the pattern of education in this country was the conflict between Protestants and Catholics. The Catholics logically argued that a public school was sectarian when it taught the King James version of the Bible. They therefore wanted it removed from the public schools; and in time they tried to get public funds for their own parochial schools.

The story of conflict and dissension is long and well known. The result was a state of so-called equilibrium where religious instruction was eliminated from public schools and the use of public funds to support religious schools was banned. But the hydraulic pressures created by political forces and by economic stress were great and they began to change the situation. Laws were passed that dispensed public funds to sustain religious schools. And it was forcefully argued that a linguist or mathematician or physicist trained in religious schools was just as competent as one trained in secular schools. So we have gradually edged into a situation where public funds are supplied each year to sectarian schools.

But we have never faced, until recently, the problem of policing sectarian schools. Under these laws there will be vast governmental suppression, surveillance, or meddling in church affairs. In the present cases we deal with the totality of instruction destined to be sectarian, at least in part, if the religious character of the school is to be maintained. A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching.

[The Pennsylvania] statute prescribes that courses in mathematics, modern foreign languages, physical science, and physical education "shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." The subtleties involved in applying this standard are obvious. It places the State astride a sectarian school and gives it power to dictate what is or is not secular, what is or is not religious. I can think of no more disrupting influence apt to promote rancor and ill-will between church and state than this kind of surveillance and control.

Those who man these schools are good people, dedicated people. But they are dedicated to ideas that the Framers of our Constitution placed beyond the reach of government. If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would

breed only rancor and dissension.

JUSTICE BRENNAN, concurring.

Public education was, of course, virtually nonexistent when the Constitution was adopted. Education in the Colonies was overwhelmingly a private enterprise, usually carried on as a denominational activity by the dominant Protestant sects. In point of fact, government generally looked to the church to provide education, and often contributed support through donations of land and money.

Nor was there substantial change in the years immediately following ratification of the Constitution and the Bill of Rights. Schools continued to be local and, in the main, denominational institutions. But the Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing urbanization soon led to widespread demands for secular public education. At the same time strong opposition developed to use of the States' taxing powers to support private sectarian schools. In fact, after 1840, no efforts of sectarian schools to obtain a share of public school funds succeeded. Between 1840 and 1875, 19 States added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools, and by 1900, 16 more States had added similar provisions. In fact, no State admitted to the Union after 1858, except West Virginia, omitted such provision from its first constitution. Today fewer than a half-dozen States omit such provisions from their constitutions.

Thus for more than a century, the consensus has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions. If this history is not itself compelling, other forms of governmental involvement that each of the statutes requires tip the scales in my view against validity. These are involvements that threaten "dangers as much to church as to state." "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."

The Rhode Island statute requires Roman Catholic teachers to surrender their right to teach religion courses and to promise not to "inject" religious teaching into their secular courses. This has led at least one teacher to stop praying with his classes, a concrete testimonial to the self-censorship that inevitably accompanies state regulation of delicate First Amendment freedoms. Both the Rhode Island and Pennsylvania statutes prescribe extensive standardization of the content of secular courses, and of the teaching materials and textbooks to be used in teaching the courses. And the regulations to implement those requirements necessarily require policing of instruction in the schools. The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental "secularization of a creed."

Policing the content of courses, the specific textbooks used, and indeed the words of teachers is far different from the legitimate policing carried on under state compulsory attendance laws or laws regulating minimum levels of educational achievement. Government's legitimate interest in ensuring the acquisition of certain knowledge does not carry with it power to prescribe what shall

not be taught, or what methods of instruction shall be used, or what opinions the teacher may offer.

I expressed the view in *Walz* that "general subsidies of religious activities would, of course, constitute impermissible state involvement with religion:"

"Tax exemptions and general subsidies are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, 'in the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches,' while 'in the case of an exemption, the state merely refrains from diverting to its own uses income generated by the churches through voluntary contributions.'"

Pennsylvania [and] Rhode Island argue strenuously that the government monies in all these cases are not "general subsidies of religious activities" because they are paid specifically and solely for the secular education that the sectarian institutions provide.

The universality of state constitutional provisions forbidding such grants, as well as the weight of judicial authority disapproving such aid as a violation of separation of church and state, reflects a time-tested judgment that such grants constitute impermissible aid to religion. The argument, consistently rejected in the past, has been that government grants to sectarian schools ought not be viewed as impermissible subsidies "because [the schools] relieve the State of a burden, which it would otherwise bear . . . by performing for it its duty of educating children."

Nonetheless, it is argued once again in these cases that sectarian schools perform two separable functions. First, they provide secular education, and second, they teach the tenets of a particular sect. Since the State has determined that the secular education provided in sectarian schools serves the legitimate state interest in the education of its citizens, it is contended that state aid solely to the secular education function does not involve the State in aid to religion.

Our opinion in *Allen* recognized that sectarian schools provide both a secular and a sectarian education. But I do not read *Allen* as supporting the proposition that public subsidy of a sectarian institution's secular training is permissible state involvement. When the same secular educational process occurs in both public and sectarian schools, *Allen* held that the State could provide secular textbooks for use in that process to students in both public and sectarian schools. Since the textbooks involved in *Allen* would, at least in theory, be limited to secular education, no aid to sectarian instruction was involved.

More important, since the textbooks in *Allen* had been previously provided by the parents, and not the schools, no aid to the institution was involved. Rather, as in the case of the bus transportation in *Everson*, the general program of providing all children in the State with free secular textbooks assisted all parents in schooling their children.

Allen, in my view, simply sustained a statute in which the State was "neutral in its relations with groups of religious believers and non-believers." The only context in which the Court in *Allen* employed the distinction between secular and religious in a parochial school was to reach

its conclusion that the textbooks that the State was providing could and would be secular. The present cases, however, involve direct subsidies of tax monies to the schools themselves and we cannot blink the fact that the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.

The common ingredient of the three prongs of the test set forth at the outset of this opinion is whether the statutes involve government in the "essentially religious activities" of religious institutions. My analysis of the operation, purposes, and effects of these statutes leads me inescapably to the conclusion that they do impermissibly involve the States with the "essentially religious activities" of sectarian educational institutions. More specifically, for the reasons stated, I think each government uses "essentially religious means to serve governmental ends, where secular means would suffice." This Nation long ago committed itself to primary reliance upon publicly supported public education to serve its important goals in secular education. Our religious diversity gave strong impetus to that commitment.

I conclude that, in using sectarian institutions to further goals in secular education, the statutes do violence to the principle that "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice." I, therefore, agree that the state statutes providing public funds to sectarian schools are unconstitutional.

JUSTICE WHITE, concurring in part, dissenting in part.

Our prior cases have recognized the dual role of parochial schools in American society: they perform both religious and secular functions. That religion may indirectly benefit from governmental aid to the secular activities of churches does not convert that aid into an impermissible establishment of religion. It is enough for me that the States are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. I would sustain the Rhode Island program. I would also reject the facial challenge to the Pennsylvania statute.

The Court strikes down the Rhode Island statute on its face. Accepting the District Court's observation that education is an integral part of the religious mission of the Catholic church -- an observation that should neither surprise nor alarm anyone -- the majority then interposes findings and conclusions that nuns, clerics, and Catholic laymen unavoidably pose a grave risk in that they might not be able to put aside their religion in the secular classroom. Although stopping short of considering them untrustworthy, the Court concludes that for them the difficulties of avoiding teaching religion along with secular subjects would pose intolerable risks and would entail an unacceptable enforcement regime.

The Court creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught and enforces it, it is then entangled in the "no entanglement" aspect of Establishment Clause jurisprudence.