GOVERNMENT AID
TO
CHURCH SCHOOLS

Decision
of
Supreme Court of the United States
Together with Dissenting Opinions
and Comments

The Sunday School Board of the Southern Baptist Convention
Nashville, Tennessee
1947

FOREWORD

The Joint Conference Committee on Public Relations for the Baptists of the United States has for one of its cherished aims the preservation of religious liberty in America and the extension of it to all countries of the world. In our own country, where separation of church and state has been so explicitly disavowed by the Constitution, there is great need for constant vigilence on the part of those who believe in the democratic provisions and implications of the American system, lest those who believe in a state church and a hierarchical theory should undermine, or annul, or even change our system to suit the latter's doctrines and programs.

The decision of the United States Court on February 10, 1947, in the New Jersey parochial school case precipitated a crisis in this continuing struggle of the advocates of full religious liberty against the encroachments of the zealous proponents of union of church and state. We rejoice that the old-world system was rejected by the founding fathers in the institutions of America. The Joint Conference on Public Relations feels that it is rendering a public service to publish both the opinion of the five justices who upheld the New Jersey law and the opinion of the four justices who dissented, in order that the public can thereby see the issue in its real setting. It believes also that such publicity will result in a clarification of that issue and will be of much importance in the formation of a true public opinion, when fully awakened.

In this connection the Joint Conference Committee would express profound appreciation for the able services of the Honorable E. Hilton Jackson who prepared the brief for the Baptists acting as *Amicus Curiae,* and for his brilliant presentation, along with other counsel, of our view of the case before the Supreme Court of the United States, an invaluable service which he rendered without cost to the committee.[1]

Warmest thanks are also due to the Baptist Sunday School Board, Nashville, Tennessee, Dr. T. L. Holcomb, executive secretary, for printing this publication without cost to the Committee.

It is felt that the hour has struck for the people as a whole to awake to a situation fraught with the meaning of destiny. Surely Baptists, with their historic testimony as a heritage, have a duty in this hour.

J. M. DAWSON, *Executive Secretary*

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[1]NOTE: Mr. Jackson, our attorney, has advised that a petition for rehearing is being prepared and will be seasonably filed.

DECISION DEPLORED

At the winter meeting of the Joint Conference Committee on Public Relations, Baptists of the United States, with the largest attendance in its history present, representative Baptists from over the nation adopted a paper signed by Dr. Louie D. Newton, president of the Southern Baptist Convention, Dr. Stanley I. Stuber, director of Public Relations for the Northern Baptist Convention, and Dr. J. M. Dawson, executive secretary of the Joint Conference on Public Relations.

The text of the paper follows:

"The five-to-four decision of the Supreme Court which upheld a New Jersey School Board providing funds for the bus fare of Catholic pupils attending parochial schools is viewed with great seriousness by the Joint Conference Committee on Public Relations of the Baptists of the United States, meeting in session today, February 11, 1947, in Washington, D. C. We feel that the majority opinion must be acknowledged as turning back the hands of the clock as far as religious liberty and the separation of church and state are concerned in these United States.

"We deplore this opinion and are convinced that it will divide the people of the nation at a time when unity is greatly needed. In view of the religious heritage of America, which Associate Justice Black so eloquently reviewed, the decision is all the more to be deplored.

"As Baptists of the United States we are resolved that the struggle for religious liberty, in terms of the separation of church and state, must be continued. Having lost a battle, we have not lost the war. We feel that the decision will, in many ways, help to clarify the whole church-state issue if reviewed in light of the Constitution and our religious heritage. This will be particularly true when similar bills are brought before the Supreme Court. We have the conviction that the cause of religious freedom is an invincible one, and we stand unalterably opposed to the use of public funds for the support of private and church schools now, and at any time in the future."

THE PRESS AND THE DECISION

The unfavorable reaction on the part of great newspapers of the nation is reflected in the following editorial which appeared in the *Washington Post,* February 13, 1947.

CHURCH AND STATE

Only a narrow gap divides the five Supreme Court justices who upheld the use of public funds for transportation of students to church schools from the four who took the opposite view. But that narrow gap runs to immense depth. For the principle at issue is one of the most fundamental in the American concept of government—the separation of church and state.

Speaking for the majority, Justice Black gave almost as much lip-service to the principles of religious freedom laid down by Jefferson and Madison as did the dissenters. He argued for a broad interpretation of the constitutional prohibition against enactment of any law "respecting an establishment of religion." He even quoted approvingly a court decision to the effect that neither the States nor the Federal Government "can pass laws which aid one religion, aid all religions, or prefer one religion over another. 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." Indeed, he emphatically proclaimed the intention of Jefferson in his "Virginia Bill for Religious Liberty" and of the founding fathers in the first amendment to erect "a wall of separation between church and state."

Justice Black and his four colleagues also freely admitted that this "wall of separation" applies to the States through the fourteenth amendment. Yet they upheld New Jersey in paying for the transportation of students to Catholic schools on the ground that such payments promote the public welfare. Policemen are hired to guard children going to church schools, he said, and firemen to protect their property. Why should not tax funds also be used to help parents get their children to church schools as well as to other schools?

That superficial argument begins to fall apart as soon as one examines the facts that were before the court. The funds in question could not be used to pay for the transportation of children to all schools in the township, but only to public schools and Catholic schools. Surely, if public funds are to be used for this purpose, they must be distributed to all religious groups without discrimination. But the fundamental error lies in the court's assumption that the intrinsic merit of a private activity, such as financing transportation to church schools, may transform it into a public welfare function.

School children's bus fare is one of many items in our national bill of education. If citizens can be taxed to pay this expense, they can be taxed to pay the salaries of church school teachers and the cost of buildings for religious educational purposes. When and if this happens, the dominant group in any community will be in a position to

dip into the public purse to propagate its own faith and the separation of church and State, as we have known it in the past, will be nothing but a myth. The majority opinion carries strong suggestions that the court would not go that far. But the court has destroyed the only basis on which a rational distinction can be made. Its resort to expediency in this instance will deprive it of an anchor to tie to when the larger issues are raised.

Justice Black's argument favoring this relatively small encroachment upon a constitutional principle reminds us of the young woman who tried to excuse her transgression of the moral law by saying that her illegitimate child was only a small one. It is the principle that is vital, as Justice Rutledge made clear in his powerful dissent, and not the amount of the assistance given. Taxes are wholly public. The religious function is wholly private. The two cannot be intermingled, in our opinion, without grave damage to both. We should think that every religious group interested in maintaining freedom in its relationship to the Deity would understand and appreciate this fact. For, as Justice Jackson wrote in his separate dissent: "If the State may aid these religious schools, it may therefore regulate them." In this sense, the court appears to have struck a blow at religious freedom as well as the separation of church and state, for the two are inextricably woven together.

One of the foremost columnists of the country, Arthur Krock of the *New York Times*, offered the following comment:

WASHINGTON, Feb. 10—The vigor with which four justices of the Supreme Court today dissented from the legal reasoning, historical interpretation and final conclusion of the other five in the New Jersey case concerning publicly paid transportation of children to Catholic parochial schools suggests that, like the portal-to-portal issue, this is only the beginning of a grave judicial controversy.

This implication arises from the fact that, while the majority conceded that the New Jersey statute specifically providing transportation at public expense to children in non-public schools "approaches the verge" of a State's constitutional power, the minority contended that, under the majority's validation of the law, States may go much further. "If the State may aid these religious schools," commented Justice Jackson in his separate dissent, "it may therefore regulate them." And, speaking for the whole minority, Justice Rutledge said:

> 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." If that is true and the (First) Amendment's force can be thus destroyed, what has been said becomes all the more pertinent. For then there could be no possible objection to more extensive support of religious education by New Jersey.
>
> If the fact alone be determinative that religious schools are engaged in education, thus promoting the general and individual welfare, together with the Legislature's decision that the payment of public moneys for their aid makes their work a public function, then I can see no possible basis, except one of dubious legislative policy, for the State's refusal to make full appropriation for support of private, religious schools, just as is done for public instruction. There could not be, on that (the majority's) basis, valid constitutional objection. . . .

This is more than an inference that a State could make such an attempt and rely on today's majority decision to uphold it in so doing. In that event, whatever encroachment on Jefferson's and Madison's First Amendment, forbidding an "establishment" of religion, was made by today's decision, there would be nothing left of the amendment at all. . . .

Justice Jackson, noting that his first inclination was to join the majority, said he had reluctantly decided otherwise. He made these points: "To render aid to its (Catholic) church schools is indistinguishable to me from rendering the same aid to the Church itself," and that violates the First Amendment. The test by which "the beneficiaries of this expenditure are selected" is "essentially religious," another plain violation. The effect of the amendment—"immeasurably compromised by today's decision"—"was to take every form of propagation of religion out of the realm of things . . . supported in whole or in part at the taxpayers' expense."

The Chief Justice and Justice Reed joined the generally inseparable trio of Justices Black, Murphy and Douglas to reject this reasoning.

The *Evening Star*, Washington, D. C., after a brilliant review of the decision offered the following editorial opinion:

MORE THAN FARES INVOLVED

Supreme Court Justice Rutledge was hardly exaggerating the situation when, in dissenting from the majority decision in the New Jersey parochial school controversy, he commented that "this is not just a little case over bus fares." It may have been scarcely more than that to the township of Ewing, N. J., when its school board decided to pay the bus fares of pupils attending Catholic as well as public schools of the county, but the courts have lifted the case from obscurity. It has revived issues that go back to the days of Madison, Jefferson and other architects of the constitutional wall between church and state. . . . It is the kind of issue that tends not only to divide high tribunals but men and women generally. As Justice Jackson ruefully remarked, it is an issue that can stir up the very sort of "bitter religious controversy" which our forefathers sought to end

through separating church from state. And the unfortunate fact is that the decision opens the way for other claims against the State, not only in New Jersey but elsewhere, that inevitably will lead to further legal disputes, ill-feeling between religious groups and further action by the Supreme Court.

* * * *

On file in the office of the Joint Conference Committee on Public Relations for the Baptists of the United States may be seen a vast number of editorial expressions from publications throughout the country which tend to confirm the judgment of the reputable journals quoted here.

THE DECISION ANALYZED

The decision of the Supreme Court in the New Jersey case expressly holds that public tax funds may be used for the transportation of students to parochial Catholic schools.

1. The opinion compels the Court for the first time to define "the establishment of religion" as set forth in the First Amendment.

2. The opinion is unfortunate in that four of the nine Justices of the Court vigorously dissent from the majority opinion.

3. The opinion is attacked with vigor and devastation by the dissenting opinions.

4. The underlying constitutional principles are alike adopted by the majority and minority opinions.

5. The majority opinion if strictly construed would seem to call for its later repudiation by the Court or for the enactment of a new constitutional amendment.

The majority opinion by Mr. Justice Black states the case as follows:

> 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.

The minority opinion accepts the correctness of the principle just stated, but reaches the conclusion that the establishment of religion as used in the First Amendment compels the Court to declare the New Jersey statute a breach of this amendment and therefore null and void. The basic reasoning of Mr. Justice Black is stated as follows:

"Moreover, state-paid policeman, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. 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 general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."

The weakness of this line of reasoning is pointed out by Mr. Justice Jackson in his dissent:

"It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid 'Is this man or building identified with the Catholic Church?' But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld."

Mr. Justice Rutledge also calls attention to the fallacy of this reasoning:

"Nor is the case comparable to one of furnishing fire or police protection, or access to public highways. These things are matters of common right, part of the general need for safety. Certainly the fire department must not stand idly by while the church burns. Nor is this reason why the state should pay the expense of transportation or other items of the cost of religious education."

Further analysis by Mr. Justice Rutledge raises the question:

"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. Today as then the furnishing of 'contributions of money for the propagation of opinions which he disbelieves' is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end."

The Court in upholding the New Jersey statute ignores the fact that parochial schools in fact represent a worldwide policy of the Roman Catholic Church, and Justice Jackson quotes from the rubric "Catholic Schools and the Canon Law of the church."

"Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place.

"Catholic children shall not attend non-Catholic, indifferent, schools that are mixed, that is to say, schools open to Catholics and non-Catholics alike. The bishop of the diocese only has the right, in harmony with the instructions of the Holy See, to decide under what circumstances, and with what safeguards to prevent loss of faith, it may be tolerated that Catholic children go to such schools. (Canon 1374)."

The foregoing observations compelled the Justice to remark that "Catholic education is the rock on which the whole structure rests, and to render tax aid to its church school is indistinguishable for me to render the same aid to the church itself," and further that "if a state may aid these religious schools it may therefore regulate them."

It is true that this decision apparently upholds similar legislation in sixteen states, and at the same time invites other states to enact similar laws. It must also be stated that the Catholic Church is not the only offender in this regard. Notorious cases exist where Protestant denominations are both demanding and receiving aid from tax money violative of the Constitution.

From a purely practical approach, it is apparent that, if the state may use public funds to pay the bus fare of children to parochial schools, it may logically pay other expenses of such schools. It is easy to see that such a doctrine might ultimately destroy the public school system, and would cause widespread demands for a division of school funds between public schools and religious schools. This becomes more evident when it is recalled that there are in the United States 258 different religious denominations. Imagine, if you can, the scramble and confusion that would result if

each of them had the legal right to dip into the public school funds in order to maintain their separate schools. The public school system as we have known it, would be greatly impaired, if not completely destroyed. What an irreparable tragedy it would be to allow state enactments masquerading in the garments of police power or the general welfare clause to gradually whittle away our great constitutional safeguards. The statute in question is the thin edge of the wedge which, when driven all the way in, will split American democracy wide open.

The spirit which would make the state by its aid sponsor for any form of religion or worship whether Protestant or Catholic, strikes a deadly blow to the integrity of our democracy.

E. HILTON JACKSON,

Law Offices, Jackson and Jackson, Washington, D. C.

OPINION OF THE SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1946.

Arch R. Everson, Appellant, *v.* Board of Education of the Township of Ewing, et al.	Appeal from the Court of Errors and Appeals of the State of New Jersey.

[February 10, 1947.]

Mr. Justice Black delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools.[1] 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.

[1] "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." New Jersey Laws, 1941, c. 191, p. 581; N. J. Rev. Stat. 18: 14–8.

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 the resolution passed pursuant to it 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. 132 N. J. L. 98. 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. 133 N. J. L. 350. The case is here on appeal under 28 U. S. C. § 344 (a).

Since there has been no attack on the statute on the ground that a part of its language excludes children attending private schools operated for profit from enjoying State payment for their transportation, we need not consider this exclusionary language; it has no relevancy to any constitutional question here presented.[2] Furthermore, if the exclusion clause had been properly challenged, we do not know whether New Jersey's highest court would con-

[2] Appellant does not challenge the New Jersey statute or the resolution on the ground that either violates the equal protection clause of the Fourteenth Amendment by excluding payment for the transportation of any pupil who attends a "private school run for profit." 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 the slightest 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. It will be appropriate to consider the exclusion of students of private schools operated for profit when and if it is proved to have occurred, is made the basis of a suit by one in a position to challenge it. and New Jersey's highest court has ruled adversely to the challenger. Striking down a state law is not a matter of such light moment that it should be done by a federal court *ex mero motu* on a postulate neither charged nor proved, but which rests on nothing but a possibility. *Cf. Liverpool N. Y. & P. Steamship Co.* v. *Comm'rs. of Emigration*, 113 U. S. 33, 39.

strue its statutes as precluding payment of the school transportation of any group of pupils, even those of a private school run for profit.[3] Consequently, we put to one side the question as to the validity of the statute against the claim that it does not authorize payment for the transportation generally of school children in New Jersey.

The only contention here is that the State statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent, overlap. *First.* They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged, violates the due process clause of the Fourteenth Amendment. *Second.* The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

First. The due process argument that the State law taxes some people to help others carry out their private

[3] It might hold the excepting clause to be invalid, and sustain the statute with that clause excised. Section 1:10 N. J. Rev. Stat. provides with regard to any statute that if "any provision thereof shall be declared unconstitutional . . . in whole or in part, by a court of competent jurisdiction, such article shall, to the extent it is not unconstitutional, . . . be enforced . . . ." The opinion of the Court of Errors and Appeals in this very case suggests that state law now authorizes transportation of *all* pupils. Its opinion stated: "Since we hold that the legislature may appropriate general state funds or authorize the use of local funds for the transportation of pupils to *any* school, we conclude that such authorization of the use of local funds is likewise authorized by *Pamph. L.* 1941, *Ch.* 191, and *R. S.* 18:7–78." 133 N. J. L. 350, 354. (Italics supplied.)

purposes is framed in two phases. The first phase is that a state cannot tax A to reimburse B for the cost of transporting his children to church schools. This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any non-public school, whether operated by a church, or any other non-government individual or group. But, the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.

It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. *Loan Association* v. *Topeka,* 20 Wall. 655; *Parkersburg* v. *Brown,* 106 U. S. 487; *Thompson* v. *Consolidated Gas Utilities Corp.,* 300 U. S. 55. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green* v. *Frazier,* 253 U. S. 233, 240. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment did not strip the states of their power to meet problems previously left

for individual solution. *Davidson* v. *New Orleans,* 96 U. S. 97, 103–104; *Barbier* v. *Connolly,* 113 U. S. 27, 31–32; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 157–158.

It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370; Holmes, J., in *Interstate Ry.* v. *Massachusetts,* 207 U. S. 79, 87. See opinion of Cooley, J., in *Stuart* v. *School District No. 1 of Kalamazoo,* 30 Mich. 69 (1878). The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitch-hiking." See *Barbier* v. *Connolly, supra* at 31. See also cases collected 63 A. L. R. 413; 118 A. L. R. 806. Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael* v. *Southern Coal & Coke Co.,* 301 U. S. 495, 518. Subsidies and loans to individuals such as farmers and home owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history.

Insofar as the second phase of the due process argument may differ from the first, it is by suggesting that taxation for transportation of children to church schools constitutes support of a religion by the State. But if the law is invalid for this reason, it is because it violates the First Amendment's prohibition against the establishment of religion by law. This is the exact question raised by appellant's second contention, to consideration of which we now turn.

Second. The New Jersey statute is challenged as a "law respecting the establishment of religion." The First Amendment, as made applicable to the states by the Fourteenth, *Murdock* v. *Pennsylvania,* 319 U. S. 105, 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 the 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 the "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again,[4] 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,

[4] See *Reynolds* v. *United States,* 98 U. S. 145, 162; *cf. Knowlton* v. *Moore,* 178 U. S. 41, 89, 106.

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.[5]

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.[6] An exercise of

[5] See *e. g.* Macauley, History of England (1849) I, cc. 2, 4; The Cambridge Modern History (1908) V, cc. V, IX, XI; Beard, Rise of American Civilization (1937) I, 60; Cobb, Religious Liberty in America (1902) c. II; Sweet, The Story of Religion in America (1939) c. II; Sweet, Religion in Colonial America (1942) 320–322.

[6] See *e. g.* the charter of the colony of Carolina which gave the grantees the right of "patronage and avowdsons of all the churches and chapels . . . together with licence and power to build and found churches, chapels and oratories . . . and to cause them to be dedicated and consecreated, according to the ecclesiastical laws of our kingdom of England." Poore, Constitutions (1878) II, 1390, 1391. That of Maryland gave to the grantee Lord Baltimore "the Patronages and Avowdsons of all Churches which . . . shall happen to be built, together with Licence and Faculty of erecting and founding Churches, Chapels, and Places of Worship . . . and of causing the same to be dedicated and consecrated according to the Ecclesiastical Laws of our

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 worshipping God only as their own consciences dictated.[7] And all of these dissenters were compelled to pay tithes and taxes [8] 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.[9]

Kingdom of *England*, with all, and singular such, and as ample Rights, Jurisdictions, Privileges, . . . as any Bishop . . . in our Kingdom of *England* ever . . . hath had. . . ." McDonald, Documentary Source Book of American History (1934) 31, 33. The Commission of New Hampshire of 1680, Poore, *supra*, II, 1277, stated: "And above all things We do by these presents will, require and comand our said Councill to take all possible care for ye discountenancing of vice and encouraging of virtue and good living; and that by such examples ye infidle may be invited and desire to partake of ye Christian Religion, and for ye greater ease and satisfaction of ye sd loving subjects in matters of religion, We do hereby require and comand yt liberty of conscience shall be allowed unto all protestants; yt such especially as shall be conformable to ye rites of ye Church of Engd shall be particularly countenanced and encouraged." See also *Pawlett* v. *Clark*, 9 Cranch 292.

[7] See *e. g.* Semple, Baptists in Virginia (1894); Sweet, Religion in Colonial America, *supra* at 131–152, 322–339.

[8] Almost every colony exacted some kind of tax for church support. See *e. g.* Cobb, op. cit. *supra*, *note* 5, 110 (Virginia); 131 (North Carolina); 169 (Massachusetts); 270 (Connecticut); 304, 310, 339 (New York); 386 (Maryland); 295 (New Hampshire).

[9] Madison wrote to a friend in 1774: "That diabolical, hell-conceived principle of persecution rages among some. . . . This vexes me the worst of anything whatever. There are at this time in the adjacent

The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation.[10] 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 a great stimulus and 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.[11] 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

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country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all." I Writings of James Madison (1900) 18, 21.

[10] Virginia's resistance to taxation for church support was crystallized in the famous "Parson's Case" argued by Patrick Henry in 1763. For an account see Cobb, *op. cit.*, *supra*, note 5, 108–111.

[11] II Writings of James Madison, 183.

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,[12] 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.[13] The preamble to that Bill stated among other things that

> "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the

[12] In a recently discovered collection of Madison's papers, Madison recollected that his Remonstrance "met with the approbation of the Baptists, the Presbyterians, the Quakers, and the few Roman Catholics, universally; of the Methodists in part; and even of not a few of the Sect formerly established by law." Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments*, in Fleet, *Madison's "Detached Memorandum,"* 3 William and Mary Q. (1946) 534, 551, 555.

[13] For accounts of background and evolution of the Virginia Bill for Religious Liberty see *e. g.* James, The Struggle for Religious Liberty in Virginia (1900); Thom, The Struggle for Religious Freedom in Virginia; the Baptists (1900); Cobb, *op. cit., supra,* note 5, 74–115; Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments, op. cit., supra,* note 12, 554, 556.

> particular pastor, whose morals he would make his pattern. . . ."

And the statute itself enacted

> "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. . . ."[14]

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, supra* at 164; *Watson* v. *Jones,* 13 Wall. 679; *Davis* v. *Beason,* 133 U. S. 333, 342. Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states.[15] Most of them did soon provide similar constitutional protections for religious liberty.[16] 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.[17] In recent years, so far as the provision against the establishment of a religion is concerned,

[14] 12 Hening, Statutes of Virginia (1823) 84; Commager, Documents of American History (1944) 125.

[15] *Permoli* v. *New Orleans,* 3 How. 589. *Cf. Barron* v. *Baltimore,* 7 Pet. 243.

[16] For a collection of state constitutional provisions on freedom of religion see Gavel, Public Funds for Church and Private Schools (1937) 148–149. See also 2 Cooley, Constitutional Limitations (1927) 960–985.

[17] Test provisions forbade office holders to "deny . . . the truth of the Protestant religion," *e. g.* Constitution of North Carolina (1776) § XXXII, II Poore, *supra,* 1413. Maryland permitted taxation for support of the Christian religion and limited civil office to Christians until 1818, *id.,* I, 819, 820, 832.

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.[18] 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.[19] 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.[20]

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 prior to the application of the First Amendment to the states by the Fourteenth.[21] The broad meaning given the Amendment by these earlier cases has been accepted by 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.[22] There is every rea-

[18] See Note 50 Yale L. J. (1941) 917; see also cases collected 14 L. R. A. 418; 5 A. L. R. 879; 141 A. L. R. 1148.

[19] See cases collected 14 L. R. A. 418; 5 A. L. R. 879; 141 A. L. R. 1148.

[20] *Ibid.* See also Cooley, *op. cit., supra,* note 16.

[21] *Terrett* v. *Taylor,* 9 Cranch 43; *Watson* v. *Jones,* 13 Wall 679; *Davis* v. *Beason,* 133 U. S. 333; *Cf. Reynolds* v. *U. S., supra,* 162; *Reuben Quick Bear* v. *Leupp,* 210 U. S. 50.

[22] *Cantwell* v. *Conn.,* 310 U. S. 296; *Jamison* v. *Texas,* 318 U. S. 413; *Largent* v. *Texas,* 318 U. S. 418; *Murdock* v. *Pennsylvania, supra;*

son to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina,[23] quoted with approval by this Court in *Watson* v. *Jones,* 13 Wall. 679, 730: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority."

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.

West Virginia State Board of Education v. *Barnette,* 319 U. S. 624; *Follett* v. *McCormick,* 321 U. S. 573; *Marsh* v. *Alabama,* 327 U. S. 501. *Cf. Bradfield* v. *Roberts,* 175 U. S. 291.

[23] *Harmon* v. *Dreher,* 2 Speer's Equity Reports (S. C., 1843), 87, 120.

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. See *Interstate Ry.* v. *Massachusetts,* Holmes, J., *supra* at 85, 88. 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 childrens' bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools,[24] 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 very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. 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 general government services as ordinary 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

[24] New Jersey long ago permitted public utilities to charge school children reduced rates. See *Public S. R. Co.* v. *Public Utility Comm'rs.* 81 N. J. L. 363 (1911); see also *Interstate Ry.* v. *Mass., supra.* The District of Columbia Code requires that the new charter of the District public transportation company provide a three cent fare "for school children . . . going to and from public, parochial or like schools . . ." 47 Stat. 752, 759.

school if the school meets the secular educational requirements which the state has power to impose. See *Pierce* v. *Society of Sisters,* 268 U. S. 510. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, 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.

Affirmed.

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I. DISSENTING OPINION— SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1946.

Arch R. Everson, Appellant, *v.* Board of Education of the Township of Ewing, et al.	Appeal from the Court of Errors and Appeals of the State of New Jersey.

[February 10, 1947.]

Mr. Justice Jackson, dissenting.

I find myself, contrary to first impressions, unable to join in this decision. I have a sympathy, though it is not ideological, with Catholic citizens who are compelled by law to pay taxes for public schools, and also feel constrained by conscience and discipline to support other schools for their own children. Such relief to them as this case involves is not in itself a serious burden to taxpayers and I had assumed it to be as little serious in principle. Study of this case convinces me otherwise. 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. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'er consent,'—consented."

I.

The Court sustains this legislation by assuming two deviations from the facts of this particular case; first, it assumes a state of facts the record does not support, and secondly, it refuses to consider facts which are inescapable on the record.

The Court concludes that this "legislation, as applied, 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," and it draws a comparison between "state provisions intended to guarantee free transportation" for school children with services such as police and fire protection, and implies that we are here dealing with "laws authorizing new types of public services . . ." This hypothesis permeates the opinion. The facts will not bear that construction.

The Township of Ewing is not furnishing transportation to the children in any form; it is not operating school busses itself or contracting for their operation; and it is not performing any public service of any kind with this taxpayer's money. All school children are left to ride as ordinary paying passengers on the regular busses operated by the public transportation system. What the Township does, and what the taxpayer complains of, is at stated intervals to reimburse parents for the fares paid, provided the children attend either public schools or Catholic Church schools. This expenditure of tax funds has no possible effect on the child's safety or expedition in transit. As passengers on the public busses they travel as fast and no faster, and are as safe and no safer, since their parents are reimbursed as before.

In addition to thus assuming a type of service that does not exist, the Court also insists that we must close our eyes to a discrimination which does exist. The resolution which authorizes disbursement of this taxpayer's money limits reimbursement to those who attend public schools and Catholic schools. That is the way the Act is applied to this taxpayer.

The New Jersey Act in question makes the character of the school, not the needs of the children determine the eligibility of parents to reimbursement. The Act

permits payment for transportation to parochial schools or public schools but prohibits it to private schools operated in whole or in part for profit. Children often are sent to private schools because their parents feel that they require more individual instruction than public schools can provide, or because they are backward or defective and need special attention. If all children of the state were objects of impartial solicitude, no reason is obvious for denying transportation reimbursement to students of this class, for these often are as needy and as worthy as those who go to public or parochial schools. Refusal to reimburse those who attend such schools is understandable only in the light of a purpose to aid the schools, because the state might well abstain from aiding a profit-making private enterprise. Thus, under the Act and resolution brought to us by this case children are classified according to the schools they attend and are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths.

Of course, this case is not one of a Baptist or a Jew or an Episcopalian or a pupil of a private school complaining of discrimination. It is one of a taxpayer urging that he is being taxed for an unconstitutional purpose. I think he is entitled to have us consider the Act just as it is written. The statement by the New Jersey court that it holds the Legislature may authorize use of local funds "for the transportation of pupils to any school." 133 N. J. L. 350, 354, in view of the other constitutional views expressed, is not a holding that this Act authorizes transportation of *all* pupils to *all* schools. As applied to this taxpayer by the action he complains of, certainly the Act does not authorize reimbursement to those who choose any alternative to the public school except Catholic Church schools.

If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?

II.

Whether the taxpayer constitutionally can be made to contribute aid to parents of students because of their attendance at parochial schools depends upon the nature of those schools and their relation to the Church. The Constitution says nothing of education. It lays no obligation on the states to provide schools and does not undertake to regulate state systems of education if they see fit to maintain them. But they cannot, through school policy any more than through other means, invade rights secured to citizens by the Constitution of the United States. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const., Amend. I; *Cantwell* v. *Connecticut,* 310 U. S. 296.

The function of the Church school is a subject on which this record is meager. It shows only that the schools are under superintendence of a priest and that "religion is taught as part of the curriculum." But we know that such schools are parochial only in name—they, in fact, represent a world-wide and age-old policy of the Roman Catholic Church. Under the rubric "Catholic Schools," the Canon Law of the Church by which all Catholics are bound, provides:

> "1215. Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place. . . . (Canon 1372.)"

> "1216. In every elementary school the children must, according to their age, be instructed in Christian doctrine.
>
> "The young people who attend the higher schools are to receive a deeper religious knowledge, and the bishops shall appoint priests qualified for such work by their learning and piety. (Canon 1373.)"
>
> "1217. Catholic children shall not attend non-Catholic, indifferent, schools that are mixed, that is to say, schools open to Catholics and non-Catholics alike. The bishop of the diocese only has the right, in harmony with the instructions of the Holy See, to decide under what circumstances, and with what safeguards to prevent loss of faith, it may be tolerated that Catholic children go to such schools. (Canon 1374.)"
>
> "1224. The religious teaching of youth in any schools is subject to the authority and inspection of the Church.
>
> "The local Ordinaries have the right and duty to watch that nothing is taught contrary to faith or good morals, in any of the schools of their territory.
>
> "They, moreover, have the right to approve the books of Christian doctrine and the teachers of religion, and to demand, for the sake of safeguarding religion and morals, the removal of teachers and books. (Canon 1381.)" (Woywod, Rev. Stanislaus. The New Canon Law, under imprimatur of Most Rev. Francis J. Spellman, Archbishop of New York and others, 1940.)

It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination

in the faith and order of the Church by the word and example of persons consecrated to the task.

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.[1] 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 if possible 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. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. 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.

III.

It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school. The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohi-

[1] See Cubberley, Public Education in the United States (1934) ch. VI; Knight, Education in the United States (1941) ch. VIII.

bition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.

The Court, however, compares this to other subsidies and loans to individuals and says, "Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 518." Of course, the state may pay out tax-raised funds to relieve pauperism, but it may not under our Constitution do so to induce or reward piety. It may spend funds to secure old age against want, but it may not spend funds to secure religion against skepticism. It may compensate individuals for loss of employment, but it cannot compensate them for adherence to a creed.

It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid "Is this man or building identified with the Catholic Church." But before these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. To consider the converse of the Court's reasoning will best

disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this Act if applied to police and fire service. Could we sustain an Act that said the police shall protect pupils on the way to or from public schools and Catholic schools but not while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us and I should think it pretty plain that such a scheme would not be valid.

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. It may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. 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 to our Constitution 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, if not an unreasonable way, to hold that public business of such paramount importance as maintenance of public order, protection of the privacy of the home, and taxation may not be pursued by a state in a way that even indirectly will interfere with religious proselyting. See dissent in *Douglas* v. *Jeannette,* 319 U. S. 157, 166; *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Martin* v. *Struthers,* 319 U. S. 141; *Jones* v. *Opelika,* 316 U. S. 584, reversed on rehearing, 319 U. S. 103.

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. 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. Indeed this Court has declared that "It is hardly lack of due process for the Government to regulate that which it subsidizes." *Wickard* v. *Filburn*, 317 U. S. 111, 131.

But in any event, the great purposes of the Constitution do not depend on the approval or convenience 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.

MR. JUSTICE FRANKFURTER joins in this opinion.

II. DISSENTING OPINION— SUPREME COURT OF THE UNITED STATES

No. 52.—OCTOBER TERM, 1946.

Arch R. Everson, Appellant, *v.* Board of Education of the Township of Ewing, et al. } Appeal from the Court of Errors and Appeals of the State of New Jersey.

[February 10, 1947.]

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE BURTON agree, dissenting.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U. S. Const., Am. Art. I.

* * *

"Well aware that Almighty God hath created the mind free; . . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . .

"*We, the General Assembly, do enact,* 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. . . ." [1]

I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision. Neither so high nor so impregnable today as yesterday is the wall raised between church and state by

[1] "A Bill for Establishing Religious Freedom," enacted by the General Assembly of Virginia, January 19, 1786. See 1 Randall, The Life of Thomas Jefferson (1858) 219–220; XII Hening's Statutes of Virginia (1823) 84.

Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth.[2] New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. That a third, and a fourth, and still others will be attempted, we may be sure. For just as *Cochran* v. *Board of Education*, 281 U. S. 370, has opened the way by oblique ruling [3] for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision.

This case forces us to determine squarely for the first time [4] what was "an establishment of religion" in the First Amendment's conception; and by that measure to decide whether New Jersey's action violates its command. The facts may be stated shortly, to give setting and color to the constitutional problem.

By statute New Jersey has authorized local boards of education to provide for the transportation of children "to and from school other than a public school" except one operated for profit wholly or in part, over established public school routes, or by other means when the child lives "remote from any school." [5] The school board of

[2] *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Prince* v. *Massachusetts*, 321 U. S. 158; *Thomas* v. *Collins*, 323 U. S. 516, 530. See note 48.

[3] The briefs did not raise the First Amendment issue. The only one presented was whether the state's action involved a public or an exclusively private function under the due process clause of the Fourteenth Amendment. See Part IV *infra*. On the facts, the cost of transportation here is inseparable from both religious and secular teaching at the religious school. In the *Cochran* case the state furnished secular textbooks only. But see text *infra* at note 40 *et seq.*, and Part IV.

[4] Cf. note 3 and text Part IV; see also note 35.

[5] The statute reads: "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part." Laws of New Jersey (1941) c. 191.

Ewing Township has provided by resolution for "the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier. . . ." [6]

Named parents have paid the cost of public conveyance of their children from their homes in Ewing to three public high schools and four parochial schools outside the district.[7] Semiannually the Board has reimbursed the parents from public school funds raised by general taxation. Religion is taught as part of the curriculum in each of the four private schools, as appears affirmatively by the testimony of the superintendent of parochial schools in the Diocese of Trenton.

The Court of Errors and Appeals of New Jersey, reversing the Supreme Court's decision, 132 N. J. L. 98, has held

[6] The full text of the resolution is given in note 59 *infra*.

[7] The public schools attended were the Trenton Senior High School, the Trenton Junior High School and the Pennington High School. Ewing Township itself provides no public high schools, affording only elementary public schools which stop with the eighth grade. The Ewing school board pays for both transportation and tuitions of pupils attending the public high schools. The only private schools, all Catholic, covered in application of the resolution are St. Mary's Cathedral High School, Trenton Catholic Boys High School, and two elementary parochial schools, St. Hedwig's Parochial School and St. Francis School. The Ewing board pays only for transportation to these schools, not for tuitions. So far as the record discloses the board does not pay for or provide transportation to any other elementary school, public or private. See notes 58, 59 and text *infra*.

the Ewing board's action not in contravention of the state constitution or statutes or of the Federal Constitution 133 N. J. L. 350. We have to consider only whether this ruling accords with the prohibition of the First Amendment implied in the due process clause of the Fourteenth.

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 compact and exact summation of its author's views formed during his long struggle for religious freedom. In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was "a Model of technical precision, and perspicuous brevity." [8] 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. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.

[8] IX Writings of James Madison (ed. by Hunt, 1904) 288; Padover, Jefferson (1942) 74. Madison's characterization related to Jefferson's entire revision of the Virginia Code, of which the Bill for Establishing Religious Freedom was part. See note 15.

"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.

No one would claim today that the Amendment is constricted, in "prohibiting the free exercise" of religion, to securing the free exercise of some formal or creedal observance, of one sect or of many. It secures all forms of religious expression, creedal, sectarian or nonsectarian wherever and however taking place, except conduct which trenches upon the like freedoms of others or clearly and presently endangers the community's good order and security. For the protective purposes of this phase of the basic freedom street preaching, oral or by distribution of literature, has been given "the same high estate under the First Amendment as . . . worship in the churches and preaching from the pulpits." [10] And on this basis parents have been held entitled to send their children to private, re-

[9] See *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333; *Mormon Church* v. *United States*, 136 U. S. 1; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Prince* v. *Massachusetts*, 321 U. S. 158; also *Cleveland* v. *United States*, Nos. 12–19, October Term, 1946.

Possibly the first official declaration of the "clear and present danger" doctrine was Jefferson's declaration in the Virginia Statute for Establishing Religious Freedom: "That it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." 1 Randall, The Life of Thomas Jefferson (1858) 220; Padover, Jefferson (1942) 81. For Madison's view to the same effect, see note 28 *infra*.

[10] *Murdock* v. *Pennsylvania*, 319 U. S. 105, 109; *Martin* v. *Struthers*, 319 U. S. 141; *Jamison* v. *Texas*, 318 U. S. 413; *Marsh* v. *Alabama*, 326 U. S. 501; *Tucker* v. *Texas*, 326 U. S. 517.

ligious schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510. Accordingly, daily 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,[11] of which the Amend-

[11] Conflicts in other states, and earlier in the colonies, contributed much to generation of the Amendment, but none so directly as that in Virginia or with such formative influence on the Amendment's content and wording. See Cobb, Religious Liberty in America (1902); Sweet, The Story of Religion in America (1939). The Charter of Rhode Island of 1663, II Poore, Constitutions (1878) 1595, was the first colonial charter to provide for religious freedom.

The climactic period of the Virginia struggle covers the decade 1776–1787, from adoption of the Declaration of Rights to enactment of the Statute for Religious Freedom. For short accounts see Padover, Jefferson (1942) c. V; Brant, James Madison, The Virginia Revolutionist (1941) cc. XII, XV; James, The Struggle for Religious Liberty in Virginia (1900) cc. X, XI; Eckenrode, Separation of Church and State in Virginia (1910). These works and Randall, see note 1, will be cited in this opinion by the names of their authors. Citations to "Jefferson" refer to The Works of Thomas Jefferson (ed. by Ford, 1904–1905); to "Madison," to The Writings of James Madison (ed. by Hunt, 1901–1910).

ment was the direct culmination.[12] 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 and in the issues which engendered them 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. Remonstrance, Par. 15, Appendix hereto. Madison was coauthor with George Mason of the religious clause in Virginia's great Declaration of Rights of 1776. He is credited with changing it from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual.[13] He sought also to have the Declaration expressly condemn the existing Virginia establishment.[14] But the forces supporting it were then too strong.

Accordingly Madison yielded on this phase but not for long. At once he resumed the fight, continuing it before succeeding legislative sessions. As a member of the General Assembly in 1779 he threw his full weight behind

[12] Brant, cc. XII, XV; James, cc. X, XI; Eckenrode.

[13] See Brant, c. XII, particularly at 243. Cf. Madison's Remonstrance, Appendix to this opinion. Jefferson of course held the same view. See note 15.

"Madison looked upon . . . religious freedom, to judge from the concentrated attention he gave it, as the fundamental freedom." Brant, 243; and see Remonstrance, Par. 1, 4, 15, Appendix.

[14] See Brant, 245–246. Madison quoted liberally from the Declaration in his Remonstrance and the use made of the quotations indicates that he considered the Declaration to have outlawed the prevailing establishment in principle, if not technically.

Jefferson's historic Bill for Establishing Religious Freedom. That bill was a prime phase of Jefferson's broad program of democratic reform undertaken on his return from the Continental Congress in 1776 and submitted for the General Assembly's consideration in 1779 as his proposed revised Virginia code.[15] With Jefferson's departure for Europe in 1784, Madison became the Bill's prime sponsor.[16] Enactment failed in successive legislatures from its introduction in June, 1779, until its adoption in January, 1786. But during all this time the fight for religious freedom moved forward in Virginia on various fronts 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. See Supplemental Appendix hereto. This was nothing more nor less than a taxing measure for the support of religion, designed to revive the

[15] Jefferson was chairman of the revising committee and chief draftsman. Corevisers were Wythe, Pendleton, Mason and Lee. The first enacted portion of the revision, which became known as Jefferson's Code, was the statute barring entailments. Primogeniture soon followed. Much longer the author was to wait for enactment of the Bill for Religious Freedom; and not until after his death was the corollary bill to be accepted in principle which he considered most important of all, namely, to provide for common education at public expense. See V Jefferson, 153. However, he linked this with disestablishment as corollary prime parts in a system of basic freedoms. I Jefferson, 78.

Jefferson, and Madison by his sponsorship, sought to give the Bill for Establishing Religious Freedom as nearly constitutional status as they could at the time. Acknowledging that one legislature could not "restrain the acts of succeeding Assemblies and that therefore to declare this act to be irrevocable would be of no effect in law," the Bill's concluding provision as enacted nevertheless asserted: "Yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operations, such act will be an infringement of natural right." 1 Randall, 220.

[16] See I Jefferson, 70–71; XII Jefferson, 447; Padover, 80.

payment of tithes suspended since 1777. So long as it singled out a particular sect for preference it incurred the active and general hostility of dissentient groups. It was broadened to include them, with the result that some subsided temporarily in their opposition.[17] 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.[18] 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." [19]

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 As-

[17] Madison regarded this action as desertion. See his letter to Monroe of April 12, 1785; II Madison, 129, 131–132; James, cc. X, XI. But see Eckenrode, 91, suggesting it was surrender to the inevitable.

The bill provided: "That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid. . . ." See also notes 19, 43 *infra*.

A copy of the Assessment Bill is to be found among the Washington manuscripts in the Library of Congress. Papers of George Washington, Vol. 231. Because of its crucial role in the Virginia struggle and bearing upon the First Amendment's meaning, the text of the Bill is set forth in the Supplemental Appendix to this opinion.

[18] Eckenrode, 99, 100.

[19] *Id.*, 100; II Madison, 113. The bill directed the sheriff to pay "all funds which . . . may not be appropriated by the person paying the same . . . into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever." Supplemental Appendix.

sembly reconvened in the fall he issued his historic Memorial and Remonstrance.[20]

This is Madison's complete, though not his only, interpretation of religious liberty.[21] It is a broadside attack upon all forms of "establishment" of religion, both general and particular, nondiscriminatory or selective. Reflecting not only the many legislative conflicts over the Assessment Bill and the Bill for Establishing Religious Freedom but also, for example, the struggles for religious incorporations and the continued maintenance of the glebes, 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." Because it behooves us in the dimming distance of time not to lose sight of what he and his coworkers had in mind when, by a single sweeping stroke of the pen, they forbade an establishment of religion and secured its free exercise, the text of the Remonstrance is appended at the end of this opinion for its wider current reference, together with a copy of the bill against which it was directed.

The Remonstrance, stirring up a storm of popular protest, killed the Assessment Bill.[22] It collapsed in committee shortly before Christmas, 1785. With this, the way was cleared at last for enactment of Jefferson's Bill

[20] See generally Eckenrode, c. V; Brant, James, and other authorities cited in note 11 above.

[21] II Madison, 183; and the Appendix to this opinion. Eckenrode, 100 ff. See also Fleet, Madison's "Detached Memoranda" (1946) III William & Mary Q. (3d Series) 534, 554–562.

[22] The major causes assigned for its defeat include the elevation of Patrick Henry to the governorship in November of 1784; the blunder of the proponents in allowing the Bill for Incorporations to come to the floor and incur defeat before the Assessment Bill was acted on; Madison's astute leadership, taking advantage of every "break" to convert his initial minority into a majority, including the deferment of action on the third reading to the fall; the Remonstrance, bringing a flood of protesting petitions; and the general poverty of the time. See Eckenrode, c. V, for an excellent short, detailed account.

for Establishing Religious Freedom. Madison promptly drove it through in January of 1786, seven years from the time it was first introduced. This dual victory substantially ended the fight over establishments, settling the issue against them. See note 33.

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, and nowhere else more effectively.[23] 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" [24] and that "this subject is, for the honor of America, perfectly free and unshackled. The Government has no jurisdiction over it. . . ." [25] 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.[26]

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 submission and ratification of the First Amendment as the first article of our Bill of Rights.[27]

[23] See James, Brant, *op. cit. supra* note 11.

[24] V Madison, 176. Cf. notes 33, 37.

[25] V Madison, 132.

[26] Brant, 250. The assurance made first to his constituents was responsible for Madison's becoming a member of the Virginia Convention which ratified the Constitution. See James, 154–158.

[27] The amendment with respect to religious liberties read, as Madison introduced it: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Congress 434. In the process of debate this was modified to its present form. See especially 1 Annals of Congress 729–731, 765; also note 34.

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