

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Individual Rights/Religion/Establishment

McCullum v. Board Of Education, 333 U.S. 203 (1948)

Vashti McCollum, a parent of a ten-year-old student in the Champaign, Illinois, public school system, objected to the release time policy approved by the board of education. This program permitted religious school teachers to teach classes in the public schools for thirty minutes each week. Parents could choose whether to allow their children to attend those classes or remain in a traditional secular classroom (where very little work was apparently done). These release time programs by the late 1940s had become very popular in many urban school districts in the United States. McCollum asked a local court to declare that allowing religious teachers to teach class in public schools violated the Establishment Clause of the First Amendment as incorporated by the due process clause of the Fourteenth Amendment. The local trial court rejected her claim. After the state supreme court affirmed this rejection, McCollum appealed to the Supreme Court of the United States.

The justices by an 8–1 vote declared the Illinois program unconstitutional, but they could not agree on a common opinion. One reason for this difference may have been personal. Justices Black, Frankfurter, and Jackson had particularly tense relationships at this time and often insisted on writing separately. Do those personal relationships explain the apparent lack of agreement among the majority? What features of the release time program do each of the justices writing majority opinions identify as crucial to the decision? In the major establishment clause cases of the 1940s (Everson v. Board of Education of Ewing Tp. [1947], McCollum, Zorach v. Clauson [1952]), Justice Frankfurter voted to declare the laws in question unconstitutional. Frankfurter typically voted to sustain state and local laws, insisting that elected officials in democracies were primarily responsible for balancing individual rights and the public welfare. Why did he seem to make an exception for these establishment clause cases?

The American Civil Liberties Union, the Synagogue Council of America, and the American Unitarian Association filed amicus briefs (or in the case of the Unitarians, were not granted leave to do so) in McCollum. No religious group intervened on behalf of the board. This, we should emphasize, better reflects the nature of religious interest group organizing than the lack of religious interest in release time programs. Throughout most of the New Deal/Great Society Era, public interest organizations that favored a sharp separation of church and state were far more involved in litigation than their rivals. The American Unitarian Association's request to file an amicus brief contained a particularly interesting assertion.

[T]he absolute separation of church and state [is] one of the cardinal principles of Unitarianism. The state rests ultimately upon the use of force, but from the Unitarian point of view the essence of religion is that it rests upon completely voluntary acceptance of ethical and spiritual beliefs and obligations. From the point of view of the Unitarian faith the only proper function of the state in connection with the church is to guarantee complete freedom in the realm of religion to individuals and to churches, by the use of force if necessary. Beyond this strictly limited function, which is basic in the American system, any action by the state constitutes an abridgement of the rights of the church.

Is this assertion consistent with the Establishment Clause? Consider the following problem. Different religions have different attitudes toward the state. As a result, every interpretation of the Establishment Clause will be more consistent with the doctrines of some religions than others.

JUSTICE BLACK delivered the opinion of the Court.

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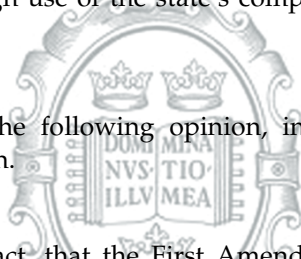
... The operation of the state's compulsory education system ... assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth). . . .

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

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

...

JUSTICE FRANKFURTER delivered the following opinion, in which JUSTICE JACKSON, JUSTICE RUTLEDGE and JUSTICE BURTON join.



...

... [A]greement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between Church and State,' does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase. We cannot illuminatingly apply the 'wall-of-separation' metaphor until we have considered the relevant history of religious education in America, the place of the 'released time' movement in that history, and its precise manifestation in the case before us.

... The evolution of colonial education, largely in the service of religion, into the public school system of today is the story of changing conceptions regarding the American democratic society, of the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people. The modern public school derived from a philosophy of freedom reflected in the First Amendment. . . . As the momentum for popular education increased and in turn evoked strong claims for State support of religious education, contests not unlike that which in Virginia had produced Madison's Remonstrance appeared in various form in other States. New York and Massachusetts provide famous chapters in the history that established disassociation of religious teaching from State-maintained schools. . . . The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people. . . .

...

[T]he establishment of this principle of separation in the field of education was not due to any decline in the religious beliefs of the people. Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. . . . The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where

conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

...

The extent to which this principle was deemed a presupposition of our Constitutional system is strikingly illustrated by the fact that every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system "free from sectarian control."

...

Of course, "released time" as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some "released time" classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular "released time" program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court. The substantial differences among arrangements lumped together as "released time" emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does 'released time' operate in Champaign? Public school teachers distribute to their pupils cards supplied by church groups, so that the parents may indicate whether they desire religious instruction for their children. For those desiring it, religious classes are conducted in the regular classrooms of the public schools by teachers of religion paid by the churches and appointed by them, but, as the State court found, "subject to the approval and supervision of the Superintendent." The courses do not profess to give secular instruction in subjects concerning religion. Their candid purpose is sectarian teaching. While a child can go to any of the religious classes offered, a particular sect wishing a teacher for its devotees requires the permission of the school superintendent "who in turn will determine whether or not it is practical for said group to teach in said school system." If no provision is made for religious instruction in the particular faith of a child, or if for other reasons the child is not enrolled in any of the offered classes, he is often left to his own devices. Reports of attendance in the religious classes are submitted by the religious instructor to the school authorities, and the child who fails to attend is presumably deemed a truant.

Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. . . .

...

Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. . . . It is the

Court's duty to enforce this principle in its full integrity. We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." . . . If nowhere else, in the relation between Church and State, "good fences make good neighbors."

JUSTICE JACKSON, concurring.

. . .
A Federal Court may interfere with local school authorities only when they invade either a personal liberty or a property right protected by the Federal Constitution. Ordinarily this will come about in either of two ways:

First. When a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement. We may then set him free or enjoin his prosecution. . . . But here, complainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground.

Second. Where a complaint is deprived of property by being taxed for unconstitutional purposes, such as directly or indirectly to support a religious establishment. . . .

In this case, however, any cost of this plan to the taxpayers is incalculable and negligible. . . .

If, however, jurisdiction is found to exist, it is important that we circumscribe our decision with some care. . . . The prayer for relief is that a writ issue against the Board of Education "ordering it to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools . . . and in all public school houses and buildings in said district when occupied by public schools." The plaintiff, as she has every right to be, is an avowed atheist. What she has asked of the courts is that they not only end the "released time" plan but also ban every form of teaching which suggests or recognizes that there is a God. . . . This Court is directing the Illinois courts generally to sustain plaintiff's complaint without exception of any of these grounds of complaint, without discriminating between them and without laying down any standards to define the limits of the effect of our decision.

. . .
While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remain to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

. . . While I agree that the religious classes involved here go beyond permissible limits, I also think the complaint demands more than plaintiff is entitled to have granted. So far as I can see this Court does not tell the State court where it may stop, nor does it set up any standards by which the State court may determine that question for itself.

... It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions. If with no surer legal guidance we are to take up and decide every variation of this controversy, raised by persons not subject to penalty or tax but who are dissatisfied with the way schools are dealing with the problem, we are likely to have much business of the sort. And, more importantly, we are likely to make the legal "wall of separation between church and state" as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.

JUSTICE REED, dissenting.

...
The phrase "an establishment of religion" may have been intended by Congress to be aimed only at a state church. When the First Amendment was pending in Congress in substantially its present form, "Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." Passing years, however, have brought about acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion. A reading of the general statements of eminent statesmen of former days ... will show that circumstances such as those in this case were far from the minds of the authors. ... Mr. Jefferson, as one of the founders of the University of Virginia, a school which from its establishment in 1819 has been wholly governed, managed and controlled by the State of Virginia, was faced with the same problem that is before this Court today: The question of the constitutional limitation upon religious education in public schools. ... [T]he Regulations of the University of October 4, 1824, [based on Jefferson's recommendations], provided that:

Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour. ...

... Throughout the Remonstrance, Mr. Madison speaks of the "establishment" sought to be effected by the act. It is clear from its historical setting and its language that the Remonstrance was a protest against an effort by Virginia to support Christian sects by taxation. Issues similar to those raised by the instant case were not discussed. Thus, Mr. Madison's approval of Mr. Jefferson's report as Rector gives, in my opinion, a clearer indication of his views on the constitutionality of religious education in public schools than his general statements on a different subject.

... I agree as there stated that none of our governmental entities can "set up a church." I agree that they cannot "aid" all or any religions or prefer one "over another." But "aid" must be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions. "Prefer" must give an advantage to one "over another." ... Of course, no tax can be levied to support organizations intended "to teach or practice religion." I agree too that the state cannot influence one toward religion against his will or punish him for his beliefs. Champaign's religious education course does none of these things.

It seems clear to me that the "aid" referred to by the Court in the Everson case could not have been those incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society. ... [A]ll churches receive 'aid' from government in the form of freedom from taxation. The Everson decision itself justified the transportation of children to church schools by New Jersey for safety reasons. ... Likewise the National School Lunch Act aids all school children

attending tax exempt schools. In *Bradfield v. Roberts* (1899), . . . this Court held proper the payment of money by the Federal Government to build an addition to a hospital, chartered by individuals who were members of a Roman Catholic sisterhood, and operated under the auspices of the Roman Catholic Church. . . . While obviously in these instances the respective churches, in a certain sense, were aided, this Court has never held that such 'aid' was in violation of the First or Fourteenth Amendments.

. . . The practices of the federal government offer many examples of this kind of "aid" by the state to religion. The Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for the proceedings. The armed forces have commissioned chaplains from early days. . . . Under the Servicemen's Readjustment Act of 1944, eligible veterans may receive training at government expense for the ministry in denominational schools. The schools of the District of Columbia have opening exercises which "include a reading from the Bible without note or comment, and the Lord's prayer."

. . . With the general statements in the opinions concerning the constitutional requirement that the nation and the states, by virtue of the First and Fourteenth Amendments, may "make no law respecting an establishment of religion," I am in agreement. But, in the light of the meaning given to those words by the precedents, customs, and practices which I have detailed above, I cannot agree with the Court's conclusion that when pupils compelled by law to go to school for secular education are released from school so as to attend the religious classes, churches are unconstitutionally aided. Whatever may be the wisdom of the arrangement as to the use of the school buildings made with The Champaign Council of Religious Education, it is clear to me that past practice shows such cooperation between the schools and a non-ecclesiastical body is not forbidden by the First Amendment. When actual church services have always been permitted on government property, the mere use of the school buildings by a non-sectarian group for religious education ought not to be condemned as an establishment of religion. . . . The prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together any more than the other provisions of the First Amendment—free speech, free press—are absolutes. . . . This Court cannot be too cautious in upsetting practices embedded in our society by many years of experience. A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population. A definite violation of legislative limits must be established. The Constitution should not be stretched to forbid national customs in the way courts act to reach arrangements to avoid federal taxation. Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance where, for me, the history of past practices is determinative of the meaning of a constitutional clause not a decorous introduction to the study of its text. The judgment should be affirmed.