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Introduction

Intrepretive flexibility is the genius of the United States Constitution. That such a document has survived little modified for almost two hundred years in a nation whose development is hardly envisioned from one generation to the next is certain proof of its framers' wisdom. Its adaptability has been the result not only of the Constitution's brief and general nature, but also of its ambiguous language. Rarely does the Constitution deal in particulars; it almost always speaks in terms of concepts. Its language provides guidelines that should be valid regardless of the social, economic, or even technological environment in which they are applied. Nowhere is this ambiguity more apparent than in the opening clauses of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"....

In the last three decades the Supreme Court has come under increased pressure to resolve a host of conflicts between state power and personal claims of religious freedom. Not the least of these concerns has been the proper relationship of church and state in education. The problem springs from the fact that America has two educational systems. Public and private schools exist side by side. This duality is caused by the fact that Americans are committed to two principles related to the control of schools. The first is that parents retain certain rights and responsibilities in the education of their children. The second maintains that education is of benefit not only to the individual but to the community as well; thus, the state, as a political instrument of society, is expected to participate in education on behalf of the general welfare. That this duality should exist in our society is hardly surprising. The zeal and emotionalism with which all parties have exercised their options, however, have led to constant and

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often bitter conflict over what each faction views as the most desirable balance within an equally disputed "constitutional" limit.

First Amendment interpretation becomes necessary when attempts are made by the state to act in a way which either inhibits or promotes religion. Often, these problems arise in an educational context. While the religion clauses indicate in a general fashion that the business of the state and the church are to remain separate and distinct, they do not indicate with any precision when the required separation is breeched. Typically, this separation is discussed employing the metaphor of a wall.[1] But to know that a wall exists is not to know how high it should be, or even where it is placed.

The Supreme Court, clearly, cannot interpret at will. More specifically, it will not engage in telling parties what would happen to them if they committed a certain act. It is essential to the nature of the Court that parties coming before it must present an "actual case or controversy".[2] Subject to the requirement that the controversy be "concrete", it must also be "ripe", and the parties presenting it must come before the Court with adverse interests. Most of the cases involving the religion clauses, however, do not arise in precisely that context. More often, a taxpayer will object to the state's spending money—some of it his—on what he sees as a constitutionally impermissible objective. That a citizen is a taxpayer and that the program to which he objects is supported by tax dollars is not necessarily enough to assure the required "standing". In 1923, a Massachusetts citizen challenged the recently passed Maternity Act.[3] In dismissing the suit for want of standing, the Court noted that the plaintiff shared with millions of other Americans the fact that she paid taxes, and that her interest was relatively inconsequential, certainly not enough to maintain the suit. However, in 1968, in *Flast v. Cohen*,[4] the Court recanted somewhat and established a test, which, if satisfied, would entitle a taxpayer to bring suit much like that in the earlier Massachusetts case. To have standing, said the Court, a taxpayer must first "establish a logical link between that status [taxpayer] and the type of legislative enactment under attack".[5] Therefore, the program attacked must be one which is promulgated under the taxing and spending clause of Article I, Section 8. Secondly, the Court continued, the taxpayer must establish a connection

[1] Thomas Jefferson's letter to the Danbury Baptists, January 1, 1802, quoted in J. WILSON, CHURCH AND STATE IN AMERICAN HISTORY, 75–76 (1965): "I contemplate with sovereign reverence that act of the whole American People which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof', thus building a wall of separation between church and state."

[2] U.S. CONST. art. III, §2.

[3] Frothingham v. Mellon, 282 U.S. 447 (1923).

[4] 392 U.S. 83 (1968).

[5] *Id.* at 102.

between his status and the "precise nature of the constitutional infringement alleged".[6] So, apparently, a taxpayer must show that the challenged act specifically violates power delegated to Congress in Article I, Section 8, not merely the general powers delegated to that body. This, then, is the way in which the bulk of cases relating to the religion clauses arise. In the absence of a citizen calling a particular program into question, the Court would never discuss the stipulations regarding religion. In the absence of the *Flast* standard, the Court would discuss them far less frequently than it does now.

The first commands of the Bill of Rights are not the revealed word of God. They are the product of the historic experience of the early colonies, a reaction to the immediate situation at the time the country was founded, and a reflecion of the thoughts of leading intellectuals—always a relatively small group—on the nature of religion, the state, and society. Because this act grew from life, it is not remarkable that it is constantly interpreted and reinterpreted by an institution which should not and cannot be divorced from the social forces surrounding it.

While questions involving the original intent behind a constitutional provision must play an important role in governing Court decisions related to it, the Supreme Court, in its treatment of the religion clauses, is provided little comfort from this quarter. "Inconclusive" is the most descriptive term applicable to the findings of major historical studies. Vagueness of original intent or early meaning has heightened the relevance of community composition and needs to the decision-making process. The Court has not been immune to the fundamental change in the pattern of beliefs held by Americans. For example, in 1892, Justice Brewer, after examining state decisions which had declared that the Christian religion was part of the common law of their states, concluded that those decisions, coupled with a host of legally recognized religious practices, lent credence to the position that "this is a Christian nation".[7] As late as 1931, Justice Sutherland was able to remark that "We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God".[8] By 1952, Justice Douglas had expanded the notion somewhat: "We are a religious people whose institutions presuppose a Supreme Being".[9] But in 1962, Douglas felt compelled to quote with disapproval, as contrary to the First Amendment, the very evidence he had given to support his earlier statement.[10] The area is overwhelmingly kinetic. What was once a protestant nation is

[6] *Id.*

[7] Church of the Holy Trinity v. U.S., 143 U.S. 457, 471 (1892).

[8] U.S. v. Macintosh, 283 U.S. 605, 625 (1931).

[9] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[10] Engel v. Vitale, 370 U.S. 421, 437 (1962).

now in the fullest sense pluralistic, and this shift was made its impact felt not only in the thoughts of the Justices, but in the educational field itself.

The Court cannot escape the question of what constitutes appropriate methods of public aid to sectarian educational institutions and is obliged to focus its attention on the religion clauses as they relate to government activity in this setting. Describing the constitutional limitations for state action would be less difficult if the two clauses could be joined to form a single, adaptable principle, and at least one noted scholar has attempted to resolve the problem in just that way.[11] But the Court and most legal commentators insist that they should be read independently and utilized separately. Thus, the Supreme Court has often been called upon to resolve conflicts between the "no establishment" and "free exercise" requirements. Attempts at reconciliation have led in several directions. Some insist that the free exercise guarantee is dominant, and the no establishment restriction must be viewed as a device for furthering the religious freedom therein promised. Others see the first clause as demanding strict separation of church and state while the second clause functions as an objective to be served by it. Finally, efforts are made to give the clauses equal status with resulting formulas of neutrality.[12]

It should be said that while the religion clauses give rise to much theorizing, it is essentially pointless to consider them in the abstract. From the earliest days, the decisions of our courts, especially the Supreme Court, have been recorded and preserved. It is through them, on the one hand, and the actual and current developments in education, as they reflect changing societal values, on the other, that the First Amendment must be discussed. Perhaps the best understanding of our problem will come through an attempt to relate the ways in which legal tradition, educational needs, and political and religious perspectives affect one another. Unlike the regulation of trade or the mechanics of a treaty, freedom of religion is something which is of emotional concern to all. And it is completely clear that not only is there no real consensus on solutions, but also that there is no particular agreement in identifying the problems. At least two basic levels of argument can be discerned in this field. At one level, the assumption is made that private and parochial schools are part of our rich heritage and, as such, should be continued for the sake of our national well-being. Thus, the dispute is not over the question of aid versus no aid, but rather over the form the aid should take. At another level, the integrity of the "no aid" principle is seen as possibly more important than the preservation of nonpublic education itself. For those who start here, constitutional considerations may outweigh any inherent merit attributed to maintaining the private school system.

[11] *See generally,* P. KURLAND, RELIGION AND THE LAW (1962).

[12] Bradfield v. Roberts, 175 U.S. 291 (1899); Quick Bear v. Leupp, 210 U.S. 50 (1908).

With these factors before us, attention may now be turned to the work of the Supreme Court, in which the central questions of the proper relationships of church and state in America are finally resolved. It is our understanding that the greatest role of the Court is not in telling parties where they went wrong, but in establishing principles by which the permissibility of future actions may be judged. The ideal, then, is to create a workable standard through which the clauses can be evenly applied to a series of problems. Whether the Court meets that ideal or is obliged to settle for a more pragmatic case-by-case approach remains to the seen.

The Constitution, Religion, and the Schools: Supreme Court Perspectives

While numerous Supreme Court decisions focus upon church-state issues and contribute in some degree to an understanding of problems related specifically to religion and education, the limitations of space and the scope of this study allow only a review of those which have had a direct impact on the questions of establishment and free exercise in the schools.

Generally speaking, the work of the Court can be divided, on the basis of period and content, into two categories. Cases prior to 1930 deal primarily with personal and corporate rights under the Fifth and Fourteenth Amendments, while those following involve the scope and meaning of the First Amendment.

In the early decades of this century the Court dealt variously with the problems of permissible monetary aids to religion[8] and freedom in education for individuals as guaranteed by the Fourteenth Amendment.[13] This freedom, and the protection of non-public schools was strengthened considerably in *Pierce v. Society of Sisters.*[14] At issue was Section 5295 of the Oregon Compulsory Education Act[15] which stated:

> Any parent, guardian or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years . . . who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor. . . .

The appellees, two corporations operating non-public schools, claimed certain irreparable injury through loss of business and property. The Society also argued on the basis of parental rights in choosing schools.[16]

The Court noted first that no question existed over the power of the state to regulate all schools in behalf of the public welfare. Then it declared the Act of 1922 void because of its unreasonable interference with

[13] Meyer v. Nebraska, 262 U.S. 390 (1923); Farrington v. Tokushige, 273 U.S. 284 (1927).
[14] 268 U.S. 510 (1925).
[15] Judicial Code, §266.
[16] 268 U.S. at 532, 533.

the liberty of parents in raising children.[17] Finally, though it was agreed that as corporations the schools could not claim the liberty which the Fourteenth Amendment guaranteed, they could claim protection for business and property against improper use of power by the state.

Oddly enough, *Pierce* is frequently cited in the construction of the First Amendment,[18] though the opinion, written by Justice McReynolds, says nothing about religious liberty beyond a referral to *Meyer*.

The last case of importance, dealing with the Fourteenth Amendment, was *Cochran v. Louisiana State Board of Education*.[19] Its significance is due to the emergence of the so-called "child benefit theory" of public aid to schools. In 1928 Louisiana passed legislation authorizing use of a portion of the severance tax fund of the state for the purpose of indiscriminantly supplying free textbooks to school children.[20] Certain taxpayers and citizens of the state brought suit to restrain such expenditures, charging, among other things, a violation of Section 8 of Article IV of the Louisiana Constitution, which prohibited the use of public money for the purpose of teaching religion, and Section 4 of Article I which banned aid to religious groups. The case went to the high Court on appeal and Chief Justice Hughes, writing for a unanimous Court, needed but one quotation from the state court's decision to dispose of the challenge of violation:

> One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. *It was for their benefit* and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost whichever they attend. *The schools, however, are not the beneficiaries* of these appropriations. They obtain nothing from them. *The school children and the state are alone the beneficiaries.*[21]
>
> (Emphasis added)

Following a series of cases in which the Supreme Court focused on the applicability of the First Amendment to the states[22] and the restrictions

[17] "The child is not the mere creation of the state; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations." 268 U.S. 510, 535 (1925).

[18] P. KURLAND, RELIGION AND THE LAW, 27 (1962).

[19] 281 U.S. 370 (1930).

[20] Act No. 100 of 1928.

[21] 281 U.S. 370, 374, 375 (1930).

[22] Hamilton v. Regents, 293 U.S. 245 (1934); Schneider v. State, 308 U.S. 147 (1939); Hague v. C.I.O., 307 U.S. 496 (1939); Cantwell v. Connecticut, 310 U.S. 296 (1940).

which the Free Exercise Clause placed upon them,[23] it returned to the question of state aid to non-public schools and the "child benefit theory" in the most far-reaching decision yet announced involving church-state separation, *Everson v. Board of Education of the Township of Ewing*.[24]

Pursuant to a 1941 New Jersey statute,[25] the Ewing Board of Education adopted a resolution authorizing the reimbursement of parents for fares paid to a public carrier for transportation of children to and from school. Some of the children attended Catholic schools, and a taxpayer of the district challenged the validity of the statute under the State and Federal Constitutions. On appeal, the Supreme Court handed down a two-point decision, with four Justices dissenting:

1. The expenditures of tax-raised funds as authorized was for a public purpose and did not violate the Due Process Clause of the Fourteenth Amendment.
2. The statute and resolution did not violate the provisions of the First Amendment prohibiting any "law respecting and establishment of religion".

The Court, with Justice Black writing, held that the fact that a state law, passed to fulfill a public need, coincided with personal desires of certain individuals in no way indicated error in the legislature's appraisal of the need. Legislation intended to help children get an education could not be construed to serve no public purpose and the expenditure in the instant case added to the safety of children on their way to and from school. The fact that some of these children were on their way to a parochial school was incidental to the public purpose being served.[26]

Skipping quickly through the First Amendment's history and process of application to the states, Black came to the crux of his argument in a statement which has been the subject of continuing debate:

> The "establishment of religion" clause... 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 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 nonattendance. 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

[23] Minersville School District v. Gobitis, 310 U.S. 586 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Douglas v. Jeannette, 319 U.S. 157 (1943); Board of Education v. Barnette, 319 U.S. 624 (1943).

[24] 330 U.S. 1 (1947).

[25] N.J. Laws, 1941, c. 191, p. 581.

[26] 330 U.S. 1, 6.

> 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 the establishment of religion by law was intended to erect a "wall of separation between church and State".[27]

After defining the clause in such terms, pleasing to the most ardent separationist, Black added:

> 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.[28]

Justice Jackson and Justice Rutledge wrote dissenting opinions and Justices Burton and Frankfurter agreed with one or both of these. Justice Jackson found the Court's opinion inconsistent with the facts in the case, and went on to say that as for the "child benefit theory," to attempt to determine whether aid was primarily to the schools and incidentally to children, or directly to children and only incidentally to schools was of little importance. The constitutional provisions under consideration prohibited aid to religion as such, unspecified as to amount or kind; the avenue by which the aid got to the school was not determinative as to whether it got there. Any device supported by public money which aided children to gain access to sectarian instruction was in direct violation of Justice Black's and the Court's interpretation of the First Amendment. Jackson concluded that:

> 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 prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination. . . .[29]
>
> 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 in its rigidity.[30]

During the five years following *Everson,* another question focusing on the Establishment Clause came to the Court in two cases, *McCollum v. Board of Education*[31] and *Zorach v. Clauson.*[32] The issue, released-time in

[27] *Id.* at 15.
[28] *Id.* at 16.
[29] *Id.* at 24.
[30] *Id.* at 26.
[31] 333 U.S. 203 (1948).
[32] 343 U.S. 306 (1952).

public schools, although new to the Supreme Court, dated back to the 1920s in state courts. The system developed as a reaction to the idea that children were getting a "Godless" education in the public schools. Drawing support from Catholics, Protestants and Jews, the program spread from a single experiment in Gary, Indiana in 1914 to about 2000 public school systems by 1947.[33]

There were minor variations in the programs, but generally pupils were released for one class period each week and given the option of remaining in school or attending religious classes conducted at nearby churches. Parents designated which class, if any, their child was to visit.

The Champaign, Illinois system was operated by an organization of Jewish, Catholic and Protestant representatives who were permitted to offer classes in religious instruction in public schools, during school hours, to pupils whose parents had signed requests cards. Those who did not take the instruction were required to leave their classrooms and pursue their studies in another room. Mrs. Vashti McCollum, a resident and taxpayer of Champaign, whose son was separated from the other members of his class while such instruction was in progress, sought a writ of mandamus to prohibit operation of the system, and on March 8, 1948, the Supreme Court supported her position, with only Justice Reed in dissent.

Speaking for the Court, Mr. Justice Black, after a brief review of the facts, went directly to the heart of the matter:

> The foregoing facts . . . show the use of tax supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . as we interpreted it in *Everson v. Board of Education.*[34]

He cited the definition from *Everson* and then, in answer to the charge that by refusing aid the "free exercise" clause was violated, Black said:

> 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

[33] A brief review of released time is contained in Mr. Justice Frankfurter's opinion in *McCollum,* 333 U.S. 203, 220 (1948).

[34] 333 U.S. 203, 209 (1948).

> Case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.[35]

Of greatest interest in the large view of *McCollum* and its place in First Amendment interpretations is the fact that complete unanimity existed on Black's *Everson* definition. Even Reed, alone in dissent, agreed that governmental entities "cannot 'aid' all or any religions or prefer one 'over another' ". Of course, agreement over a statement provides little comfort because, as Reed's dissent made painfully clear, it must still await application. For Reed the word "aid" meant "purposeful assistance directly to the church itself or some religious group or organization doing religious work"....[36] Thus, what was "purposeful assistance" to the majority in *McCollum* was not "aid" to Reed. Few years were to pass before the Court found itself more seriously fragmented over the same problem.

Zorach v. Clauson grew out of a program in New York City where the public schools were permitted to release students during the school day so that they might leave the school buildings and grounds and go to religious centers for instruction or devotional exercises. Those not released stayed in the classrooms.

The Court, in 1952, found in favor of this plan, with Justice Douglas writing for a six-judge majority. He began by seeming to defend the notion of separation in its strictest sense, with the following interpretation:

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.[37]

Then a process of modification set in, heralded by the oft-quoted statement that "we are a religious people whose institutions presuppose a Supreme Being". The limited scope of the government's control over religion, within the framework of the First Amendment, was expressed by Douglas in these words:

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective

[35] *Id.* at 212.
[36] *Id.* at 248.
[37] 343 U.S. 306, 312 (1952).

> scope of religious influence. The government must be neutral when it comes to competition between sects. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.[38]

Finally, apparently in an effort to demonstrate that the Court had not reversed itself, Douglas concluded:

> In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCollum* case.[39]

The next two cases of significance in this field deal with the role of religious exercises in the public schools. In some aspects, especially financial, they are the least important of all the decisions considered, but in others, notably their potential use as precedents for weightier issues and their impact on the public, they must be ranked with *Everson* and *McCollum*.

On June 25, 1962 the Supreme Court, in *Engel v. Vitale*,[40] rendered a decision which was criticized generally throughout the nation. The question before the Court was the constitutionality of a prayer composed and endorsed by the New York Board of Regents for recitation, on a voluntary basis, in the public schools.[41] Challenge to this practice was brought by the parents of five school children, and the Supreme Court granted certiorari.

Holding that the action of the Board of Regents had violated the Establishment Clause of the First Amendment, the Court said:

> ... We think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country, it is no part of the business of government to compose official prayers for any group of American people to recite as part of a religious program carried on by government.[42]

Interestingly, Black, for the majority, relied heavily upon historical argument, citing several problems which had existed when church and state intermingled, but nowhere did he refer to his now classic definition

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[38] *Id.* at 314.

[39] *Id.* at 315.

[40] 370 U.S. 421 (1962).

[41] The prayer is rather innocuous: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country."

[42] 370 U.S. 421, 425.

in *Everson*. (In a more recent opinion, however, he returned to his *Everson* statement.)

In Justice Douglas' concurring opinion, the fact that the teacher (a paid public servant) was leading the prayer in a public school constituted a financing of a religious exercise by government. Sandwiched between his strict separationist approach and later quotations from Justice Rutledge's dissent in *Everson,* in the same vein, Douglas referred to his *Zorach* opinion only long enough to restate his belief that "we are a religious people". . . .[43] Perhaps in this context it needed restatement!

Finally, Justice Douglas referred to *Everson* as apparently "out of line" with the First Amendment. Its result, helping needy children, was appealing, but funds for busing, and for "lunches, books and tuition, as examples" could be used to "satisfy other needs of children in parochial schools".[44]

In 1963 two cases closely related to *Engel* were decided together by the Supreme Court. The issue in both *Abington School District v. Schempp* and *Murray v. Curlett*[45] was whether the "establishment" clause was violated by a Pennsylvania statute, or a rule of the Board of School Commissioners of Baltimore City adopted pursuant to statutory authority, requiring the reading, without comment, at the opening of each school day of verses from the Bible and the recitation of the Lord's Prayer by the students.

Mr. Justice Clark, for the Court, acknowledged that "religion has been closely identified with our history and government". With that admission behind him, he started out after a definition of "neutrality" which, if adopted by government, would be a wholesome position. Advancing from case to case as they appeared in time, Clark arrived at a "test" in the application of the religion clauses:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercise effect of the enactment as it operated against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free

[43] *Id.* at 442.

[44] *Id.* at 444.

[45] Both cases cited at 374 U.S. 203 (1963).

> Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.[46]

In conclusion Justice Clark maintained that the decision did not, in effect, establish a "religion of secularism" in the schools. The state, he said, may not show hostility toward religion or those who believe. The value of studying the Bible for literary or historic purposes, and comparative religion, or the history of religion, must be recognized and nothing in the opinion was to be understood as touching these matters.

1968 signaled a return by the Court to efforts at resolving challenges to various attempts by states in coming to the aid of financially suffering parochial school systems. In that year, the validity of the New York statute requiring school districts to purchase and loan textbooks to students enrolled in non-public as well as public schools was questioned.[47]

The majority opinion was written by Mr. Justice White in *Board of Education v. Allen*.[48] The question of book loans was seen as similar to the busing problem in *Everson* and Justice White relied almost exclusively on the holding from that case to support the New York law. After quoting Justice Black's famous rendition of the Establishment Clause,[49] White emphasized the *finding* of the 1947 Court that the constitutional prohibition did not prevent New Jersey from spending tax funds to pay bus fares for parochial school children "... as part of a general program under which it pays the fares of pupils attending public and other schools".[50]

Moving on to strengthen his position through the use of precedent, White turned to the *Schempp* "primary purpose" test[51] and in applying it determined that:

> The express purpose... was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.[52]

This was the critical aspect of the majority position.

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[46] 374 U.S. 203, 222, 223 (1963).
[47] New York Education Law 701 (1967 Supp.).
[48] 392 U.S. 236 (1968).
[49] *Id.* at 242.
[50] *Id.*
[51] Quoted above at 546.
[52] 392 U.S. 236, 243, 244 (1968).

Because *Everson* was considered the precedent most closely paralleling the *Allen* case, Justice Black's dissenting opinion cannot be treated lightly. He was not uncertain of his ground as he opened his attack by saying that "the New York law held valid is a flat, flagrant, open violation of the First and Fourteenth Amendments which together forbid Congress or state legislatures to enact any law 'respecting an establishment of religion' ".[53] Instead of documenting ways in which the parochial schools might be utilizing this aid in support of religion, Black was content to rest his argument on deductive reasoning. Since part of the function of these schools is undeniably to maintain the faith, and since books do form the "heart" of any school, it therefore follows that the First Amendment "must preclude a State from using funds levied from all its citizens to purchase books for use by children in schools, which, although 'secular', realistically will in some way inevitably tend to propagate the religious views of the favored sect".[54] That books are so vital to education made distinguishing them from bus rides a simple matter for Justice Black.

Like the *Everson* decision before it, there was, in *Allen* broad agreement across the Court concerning the strictures imposed by Justice Black on acceptable aid. The members divided on the nature of the New York law in question and its impact. One of the central difficulties seemed to be the failure to recognize that the state and the church may be viewing the *same* institution—parochial schools—as fulfilling *different* primary aims.

Two years after the *Allen* decision, the new Burger Court was faced with the thorny question of tax exemptions for churches. The factual setting of *Walz v. Tax Commission of the City of New York*[55] was simple. Like other states, New York has a law which excludes churches from paying the ad valorem property tax which other property owners must pay. As a taxpayer, Mr. Walz filed suit, claiming that with the New York exemption, his own taxes resulted in his being forced to contribute, indirectly, to religious bodies, and therefore the state was in violation of the Establishment Clause.

The Burger Court applied the argument that the course of constitutional neutrality in the area of religion "cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited".[56] This language was not new, for the Court had long ago held in *Zorach* that "The First Amendment . . . does not say that in every and all respects there shall be a separation of church and state".[57] How-

[53] *Id.* at 250.
[54] *Id.* at 252.
[55] 397 U.S. 663 (1970).
[56] *Id.* at 669.
[57] 343 U.S. 306, 312 (1952).

ever, in *Walz* the Court went further and summed up all the loose wording that had preceded it:

> The general principle to be derived from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of these expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise without sponsorship and without interference.[58]

This is certainly the most sweeping statement that the Court has made concerning the Establishment Clause; it is also the first anatomical analysis of it! "Play in the joints" is not expressly clear on its face, and undoubtedly encourages more litigation than the phrase is worth. In all, the Court seemed to say that the question in each case is one of "degree",[59] that is, the extent of entanglement of the state with religion.

The Court decided that the tax exemption did no go far enough in degree to violate the First Amendment.

> The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches.... Separation in this context cannot mean the absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of worship are no more than incidental benefits accorded all persons or institutions within a state's boundaries, along with many other exempt organizations. The appellant has not established even an arguable quantitative correlation between the payment of an ad valorem property tax and the receipt of these municipal benefits.[60]

In a concurring opinion, Justice Brennan summed it up neatly: "we live in a pluralistic society".[61]

It did not take the Supreme Court long after *Walz* to apply the new standard of "entanglement". In June of 1971, the Court decided three cases—two from Rhode Island and one from Pennsylvania—involving state schemes to aid parochial schools.[62] In each of these cases, decided together, the Court found the entanglement occasioned by the legislation in question to be excessive.

The Rhode Island Salary Supplement Act of 1969 provided for a 15% salary supplement to be paid to teachers in non-public schools in which the average per-pupil expenditure on secular education was below the

[58] 397 U.S. at 669.

[59] *Id.* at 673.

[60] *Id.* at 676.

[61] *Id.* at 680.

[62] Lemon v. Kurtzman, No. 89; Earley v. Dicenso, No. 569; Robinson v. Dicenso, No. 570, 403 U.S. 602 (1971).

average in public schools in the state. Teachers receiving such supplements were required to refrain from teaching courses not offered in the public schools, and they were also required to agree not to teach any courses in religion. As a practical matter, in Rhode Island, about 25% of the students in the state attended non-public schools, and of that group, about 95% attended Roman Catholic affiliated schools. At the time of the hearing, about 250 teachers were benefitted by the Act, and they were exclusively Roman Catholic.

The Pennsylvania plan was somewhat different. There, the state Superintendent of Public Instruction was authorized by the 1968 Nonpublic Elementary and Secondary Education Act to "purchase . . . secular educational services" from nonpublic schools, in effect directly reimbursing those schools benefited for teachers' salaries, books, and other educational materials. Once again, there was a legislative insistance that the aid be given only to benefit certain prescribed secular courses. And once again, the chief beneficiaries of the Act were the Roman Catholic schools. The funds for the Pennsylvania program were specifically provided by a tax on horse and harness racing, and was later changed to rely on a portion of the state tax on cigarettes.

The Court approached the problem in an orderly fashion. Looking at the sum of the Court's interpretations over the years, Chief Justice Burger, for the majority, stated that:

> Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive governmental entanglement with religion.' [63]

If there had been any doubt, it was now clear that the *Walz* "entanglement" standard had won its place in history.

As to the first test, the legislative purpose, the Court quickly found that neither statue gave any indication that the intent of the legislature was to promote religion. Indeed, it appeared that both states had taken extreme precautions—precautions that would ultimately contribute heavily to the evidence against the constitutionality of the laws themselves—to avoid promoting religion. Having found this, though, the Court made a quick maneuver and concluded that the "cumulative impact of the entire relationship arising under the statutes in each state involves excessive entanglement between government and religion".[64]

Summarizing its plan of analysis, the Court noted that the line between church and state is certainly not rigid, and added that the *Walz* decision may, indeed, have expanded the area of permissible state involvement

[63] 403 U.S. at 612.

[64] *Id.*

with religion. Nonetheless, not all action was considered permissible. The standard which Burger set up to fix where the line should be drawn is this:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority.[65]

In striking down the legislation at issue, Burger concluded by saying:

> The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether the state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn.[66]

Before moving to the indirect aid questions resolved in June of this year, mention should be made of the 1972 decision in *Wisconsin v. Yoder*.[67] Involved was a typical state law which required all youngsters to attend some school until the age of 16. Amish parents in Wisconsin withdrew their children from school after the 8th grade, claiming that continuation would result in the violation of rights guaranteed by the Free Exercise Clause. They were found guilty in the state courts, and on appeal, the Supreme Court reversed.

Chief Justice Burger, for the Court, reviewed the essential Amish beliefs and found that religion and style of life were inseparable. He admitted that, in some situations, the state has the power to make "reasonable regulations" and that here, as elsewhere, a balancing test is in order. Burger claimed that for the Wisconsin act to be acceptable, it must either not deny the free exercise of religion, or demonstrate a state interest so large as to justify overruling it. The state argued that the law applied equally to everyone, that education prepared its citizens for society, and helped them gain self-reliance. The Court found simply that the Amish are indeed "self-reliant" and that for them, at least, education in the common sense does not serve these principles.

Justice Douglas, dissenting in part, raised the intriguing question of whether, through this decision, the parents' religious beliefs might be imposed upon the children.

[65] *Id* at 615.

[66] *Id.* at 625.

[67] 92 S. Ct. 1526 (1972).

The importance of this case, for our consideration, is that by showing leniency vis-a-vis rights under the Free Exercise Clause, the Court, in its search for a balanced state position (neutrality) is further justified in striking a more stringent position in matters relating to attempts to provide aid to non-public schools.

On June 25, 1973, the Court decided three cases, *Committee for Public Education and Religious Liberty v. Nyquist,*[68] *Levitt v. Committee for Public Education and Religious Liberty,*[69] and *Sloan v. Lemon.*[70] The cases, two from New York and one from Pennsylvania, represented the first time since *Lemon v. Kurtzman*[71] that the Court had dealt with the problem of indirect aid to non-public schools. Of the three cases, *Committee v. Nyquist* is clearly the most important. The New York law considered there[72] had three distinct sections. First, the law provided that the state would supply direct money grants for the maintenance and repair of non-public school buildings in order to protect the health and safety of the children attending. Second, the law provided that parents of children who attended non-public schools and who fell below certain family income levels would be eligible to receive direct tuition reimbursements. Finally, the law provided that for parents whose income level was too high to qualify for the direct reimbursement program, there would be a system of tax credits, allowing these parents to deduct a certain percentage of the money that they had spent on non-public education.

The Court considered each of the three provisions separately. The question of direct money maintenance grants was taken up first. Justice Powell, writing for the Court, set out a relevant statistic: 85% of the non-public schools that would benefit under the New York plan are church related. With this factor in mind, Powell posed the same test that Burger had used in *Lemon v. Kurtzman:* Does the legislation have a legitimate secular purpose? Does the legislation either advance or inhibit religion? Does the legislation avoid excessive entanglements? For the majority of the Court, it was unnecessary to go beyond the second question. After having recited the Court's fears that money dispersed directly to the church related schools might be used, easily, to repair a building that had a primarily religious function, Powell rather abruptly terminated his consideration of this first fact of the New York law by stating:

> What we have said demonstrates that New York's maintainance and repair

[68] 93 S. Ct. 2955 (1973).

[69] 93 S. Ct. 2814 (1973).

[70] 93 S. Ct. 2982 (1973).

[71] 93 S. Ct. 1463 (1973).

[72] The first section of the legislation was called the "Health and Safety Grants for Nonpublic School Children". The remainder of the package was called the "Elementary and Secondary Education Opportunity Program".

provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian schools. We have no occasion, therefore, to consider the further question whether those provisions as presently written would also fail to survive scrutiny under the administrative entanglement aspect of the three-part test because assuring the secular use of all funds requires too intrusive and continuing a relationship between Church and State.[73]

The next section of the law that Powell considered was the tuition reimbursement program. Taking as a "given" that this plan would be unconstitutional if the money were to go directly to the schools, Powell wondered if it was of any great constitutional significance that the money went to the parents instead. He concluded that it was not. Powell also distinguished the instant case from the *Everson* or *Allen* situations, in which the Court had sanctioned the repayment of bus fares and the direct loan of textbooks. Buses and books, he argued, are by their nature limited in scope. Although those cases may resemble this one in the method of payment, they differ greatly in the total effect of the legislation. The tuition grants are subject to no restrictions, and the "effect of the aid is unmistakably to provide desired financial support for nonpublic sectarian institutions".[74] The tuition reimbursement program, therefore, failed the "effect" test.

Finally, Powell considered the tax credits, and had little difficulty finding that they, too, violated the Establishment Clause. He wrote that "in light of the practical similarity between New York's tax and tuition reimbursement programs, we hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools".[75]

Levitt v. Committee and *Sloan v. Lemon* were, in effect, decided pursuant to the Court's holding in *Nyquist*. *Levitt* concerned a New York law which reimbursed private schools for the costs of testing and record keeping. *Sloan* was a Pennsylvania tuition reimbursement plan. In each case, the Court held that the program in question did not differ sufficiently from the programs in *Nyquist* to require a different result. Both, therefore, were declared unconstitutional as violative of the Establishment Clause.

None of the three decisions was unanimous. Burger and Rehnquist dissented in *Levitt* and *Sloan* and in all except the maintenance payments section of *Nyquist*. Justice White dissented across the board.

In summarizing the work of the Supreme Court to date, three points should be made. First, the Court has not only taken a case-by-case approach

[73] S. Ct. 2955, 2969 (1973).
[74] 93 S. Ct. at 2971.
[75] 93 S. Ct. at 2976.

to the question of religion in the schools, but it has developed a more muddled position over the years in regard to setting a standard for measuring the amount and kind of permissible aid to religion. If one reads the principles derived by Justice Black from the establishment stricture, set forth in *Everson,* alongside those suggested by Chief Justice Burger in *Walz* and *Lemon,* it is apparent that some backsliding has taken place. The Court seems determined to allow greater freedom of association between government and religion and in this sense it is responding to increased complexities and costs in education. That it does so by sacrificing clarity becomes evident when one notes that in *Nyquist* Justice Powell states and applies the test set forth by the Chief Justice in *Lemon,* but the Chief Justice himself dissents in *Nyquist.* Unfortunately, as the barrier between church and state becomes more vague, the decisions are less useful as predictive devices for the lower courts and legislatures.

Second, a much more solid and consistent pattern has emerged through the cases dealing with religion in public institutions. Setting aside the *Zorach* ruling, and tracing the Court's attitude from 1948, in *McCollum,* through the prayer and Bible cases, to *Epperson,* it is clear that the Supreme Court will tolerate no religious orientation on the part of the state or its agents. It is easier to strengthen the Establishment Clause vis-a-vis public facilities, of course, because there is no question as to their economic viability. This is obviously not the case with religious enterprises.

Third, the Court's attitude toward practices by religious believers in public schools has almost dictated the necessity for a shifting of position in regard to parochial schools. In the process of zealously guarding the Establishment Clause through its strict application in public school cases, the Court has not been able to permit the state a role of neutrality between those who believe and those who do not. In fact, the state has been forced into a position of hostility toward organized religion in its schools. In order to redress the balance, then, the Court has been under an obligation to ease the burdens placed upon church-sponsored schools.

In addition to the fact that the First Amendment language is abstract and thus subject to a range of reasonable interpretations, the difficulty in creating a manageable theory of church-state relations is compounded by the existence of two mandates encompassed by the religion clauses which are not, in all instances, mutually compatible. Add to this the necessary recognition that "law should reflect policy and not policy law" in a changing society, and there exist the ingredients of an insurmountable problem. Nevertheless, positions are drawn, political pressures continue, and increasingly complex questions are in need of answers. The challenge to provide guidelines by which government can operate in fairness under the constitutional demands has been accepted by many who show responsible concern. From the vast literature on the subject it is possible to identify

every shade of opinion from support of extreme separation to espousal of something more than accommodation or cooperation.

Opinions, whether expressed by individuals or interest groups, are not useful beyond the limited scope of their subject matter and they do not constitute general theories applicable to an entire range of questions. Because of the need for predictability in law, and because of their lasting importance, attention to the more general concepts of First Amendment interpretation is warranted and will be undertaken in the following pages.

Into the Theoretical Thicket

In dealing with what the Court says, we are faced with a relatively simple task; the Court sets out its opinion, and we need only sift through it and select the important language. In dealing with what the Court means, however, we are faced with a somewhat more complex dilemma. That the Court made a particular statement is really beyond dispute—the written word is, after all, the written word. What the Court meant by that statement, though, involves a less objective analysis.

It is doubtful that all the cases discussed lead to any one coherent principle or, to be sure, any consensus on the meaning of the language used. What may be clearer is that there are several competing theories in use both by the Court and by advocates of vested interests. The advocates, as well as the Court itself, point to three possible constructions of the First Amendment as it applies to the question of public aid to nonpublic religious schools. States may, in one view, make no accommodation to a religious school as such. This is the strict separation position. Another view is that the state must remain neutral in its dealings with religious schools. The third and polar position is that the state should cooperate with nonpublic religious schools.

Each of these positions has its ardent adherents, and each is at least basically supportable by the language of the Court. To lend order to the ensuing discussion, it is useful to focus on the thoughts of the primary commentators for each point of view. There is no better choice for a representative of the separationist thought than Leo Pfeffer, General Counsel to the American Jewish Congress, member of the New York and United States Supreme Court bars, and outspoken advocate of total separation. The most prominent spokesman on the side of cooperation is Congressman Robert Drinan, former Dean of the Boston College School of Law. Philip B. Kurland, Professor of Law, University of Chicago Law School, Wilber G. Katz, Professor of Law, University of Wisconsin Law School, and Paul G. Kauper, Professor of Law, University of Michigan Law School, each brings valuable insight into the area of neutrality.

As in any question of constitutional interpretation, it is valuable to

examine the roots of the constitutional provision in question—here, the First Amendment religion clauses—and attempt to determine the intent of the framers. Having done that, the next step is to look at the evolutionary nature of the particular problem, and see how the language has been construed and modified. In this connection, it is also relevant to examine the philosophical, as well as the historical basis which seems to be guiding the Court. Finally, it is most important to consider the nature of the problem as it exists presently. It is at that point that any commentator must come to grips with the ramifications of his theory.

The Theory of Separation

Consistent with the basic approach just outlined, adherents of the separation position have recognized the necessity of attributing an ideological commitment for separation to the framers of the First Amendment as well as to later interpreters of the document. In this view, the basis for the commitment to separation is seen as stemming from two basic principles: limited government having only those powers assigned to it by the people, and the social contract theory by which governments are formed merely to do for man what he cannot do for himself.[76] An important correlation of the latter principle is the notion of inherent rights existing in the people, and "first of these inherent rights and above all others are rights of conscience, rights concerning man's relationship to God".[77]

It is possible to rely particularly on a few documents to support this position. One unusually popular item is James Madison's "Memorial and Remonstance". In it, Madison sets forth fifteen arguments against government support of religion, which the separationists argue are as valid today as they were in 1786. Pfeffer notes that in his opinion—always synonomous with the separationist position—they "[b]asically fall into two classes: those predicated on the concept of voluntariness in matters of conscience, and those predicated on the concept that relgion is outside the jurisdiction of political government—the two aspects of what five years later was to become the opening words of the bill of rights".[78]

Theorists also play the game of quoting their favorite version of a draft of the constitutional provision in question. Separationists are especially fond of Charles Pinkney's proposal to the Constitutional Convention that "The legislature of the United States shall pass no law on the subject of

[76] L. Pfeffer, *Freedom and Separation: America's Contribution to Civilization,* 2 J. OF CHURCH AND STATE, 107, 108 (1960).

[77] *Id.* at 108.

[78] Statement of Leo Pfeffer in *Hearings on Federal Aid to Schools Before the General Subcommittee on Education of the House Committee on Education and Labor,* 87th Cong., 1st Sess., at 969 (1961).

religion".[79] Equally popular is the Samuel Livermore wording: "Congress shall make no laws touching religion, or infringing on the rights of conscience".[80] Still another claim for separation is the defeat of the so-called "little Blaine amendments". The separationists' argument is simply stated:

> The defeat of the amendment (referring to the original Blaine amendment in Congress) was based at least in part, on the belief that the provisions of the state constitutions were adequate. The extent to which the principle of separation had become part of the American constitutional system, state as well as Federal is indicated 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'.[81]

One final quotation that is used to support the position is the statement made by President Grant in an address to the Grand Army of Tennessee in 1875:

> Encourage free schools and resolve that no $1 appropriated for their support shall be appropriated for the support of any sectarian schools. Resolve that neither the State nor the Nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contribution. Keep the church and the state forever separated.[82]

This statement, however, is distinguishable from the former ones; they were definitive, and this one is merely old.

It is through this kind of argument, however, that the supporters of any constitutional position, in this case the religious separationists, begin to justify that position. It is persuasive, but it has definite limitations. As will be seen, one can produce an historical document to demonstrate almost anything.

The next step in the process is to examine the various evolutions worked

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[79] 1 STOKES, CHURCH AND STATE IN THE UNITED STATES 351 (1950).

[80] I. ANNALS OF CONGRESS 731 (1789).

[81] L. PFEFFER, CHURCH, STATE AND FREEDOM (Rev. Ed. 1967) 131. The "Blaine Amendment" refers to a resolution for a federal constitutional amendment offered by Senator James G. Blaine in 1876. It read: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any lands devoted thereto, shall ever be under the control of any religious sect or denomination nor shall any money so raised or lands so devoted be divided between religious sects or denominations". 4 CONG. REC. 5580 (1876). The proposal passed in the House without difficulty but fell short of the necessary two-thirds vote in the Senate.

[82] Quoted in L. Pfeffer, *Hearings On Federal Aid to Schools, supra* note 78, at 970.

on the document by the Court. Clearly, not all view this evolution in the same fashion. Using *Pierce v. Society of Sisters*[83] as a starting point, the separationist views the case as being as important for what it did not say as for what it did. The issue in *Pierce,* of course, was whether the state could constitutionally monopolize the furnishing of the *secular* education. Basically, the view of the separationist is that while *Pierce* did not involve a religious school per se, even if it did, it does not necessarily follow that the government must aid those schools which are constitutionally protected. To the position that the only way to give real meaning to the religious liberty guaranteed is through aid, Pfeffer responds with this analogy:

> In the late 1930's and the early 1940's, the Supreme Court ruled in a number of cases involving the Jehovah's Witnesses that the constitutional guarantee of religious liberty forbids a State from prohibiting the Jehovah's Witnesses from distributing their literature even though this literature bitterly attacks the Catholic Church. And these State laws were declared unconstitutional. I submit... that nobody would contend that if the Jehovah's Witnesses lacked the finances to distribute this literature they would have a claim under principle of religious liberty on the Federal Government to print the religious literature, or, to make the analogy more apt, to give them more money so that they can print the religious literature on their own private presses.[84]

There is, however, one glaring difficulty with this analogy; the distribution of religious literature is not compulsory; education is. The point, on the other hand, may be well made: permission for the nonpublic school to exist in no way obligates the state to support that existance.

Of all the Supreme Court cases, however, *Everson*[85] is undoubtedly the most troublesome. Separationists claim that the lack of public outcry over *Everson* was largely due to the fact that it was not generally understood. *McCollum,* they feel, was needed to clarify it. In any event, they agree with the principles of the Court, but not in the application of those principles. Pfeffer has drawn a critical distinction between the concept of "welfare benefits" which are directed to school children, and "educational benefits" which are directed to the school itself. The former are constitutional, the latter are not. This distinction, he feels, is also shared by the Court. The principle, then, is agreed upon. The application of the principle in 1947 was faulty. The dissenters in *Everson,* the argument goes, saw the purpose of the busing law as, essentially, to aid the *schools;* by providing them with buses, it relieved the school of that burden. The majority, though, saw the purpose of the law as promoting the safety of the *children* in crossing the streets and the like. It is fairly clear that this is a legitimate objective of

[83] 268 U.S. 510 (1925).

[84] L. Pfeffer, *Hearings on Federal Aid to Schools, supra* note 78, at 965.

[85] Everson v. Board of Education, 330 U.S. 1 (1947).

government. Although Pfeffer, once again, embraces Black's restrictive definition of those acts allowed by the state under the Establishment Clause, he sees the decision itself as resting upon two "fictions". First, although not expressly, Justice Black adopted the *Cochran* "child benefit" theory. He did this by construing the statute in question to mean that children should be allowed to ride in buses "rather than run the risk of traffic and other hazards incident to walking or 'hitch-hiking' ".[86] Black was aware of the aid being furnished the schools in this instance, too, noting that:

> 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 the children's bus fare out of their own pockets when transportation to public school would have been paid for by the state....

Nevertheless, no concession beyond this was made to the idea of "educational benefits", and Black returned immediately to a defense of the "welfare" concept:

> But 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 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.[87]

The fiction, then, lies in "equating bus transportation and police or fire protection".[88] Pfeffer reasons that when police are provided it is to protect children from traffic; when fire protection is offered, it is to preserve society's economic assets, "whether in the form of church buildings or burlesque theatres". Bus transportation is granted for the purpose of *getting children to school.* The difference is highlighted in this analogy:

> If the purpose of supplying bus transportation is to protect children from traffic accidents, the State can constitutionally supply free transportation not merely to church schools, but to churches as well, just as it can constitutionally supply traffic and police protection on the streets leading to churches.[89]

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[86] *Id.* at 7.

[87] *Id.* at 17.

[88] L. Pfeffer, *Religion, Education, and the Constitution,* 8 LAWYERS GUILD REV. 387, 395 (1948).

[89] *Id.* at 398.

Again, as in the former analogy of the distribution of religious literature, the one activity is compulsory, the other is not.

Black apparently recognized this weakness as well, for he went on to state that transportation can be offered to children attending church schools because "(t)hese are accredited schools" and meet "the secular educational requirements which the state has power to impose".[90] He says that legislation is constitutionally valid which is "intended to facilitate the opportunity of children to get a secular education".[91] There is apparently a limit, though, to even the Black line of thought. That limit is at least at the loan of books, for in *Allen* he commented emphatically, "the New York law . . . is a flat, flagrant, open violation of the First and Fourteenth Amendments which together forbid Congress or state legislatures to enact any law 'respecting an establishment of religion' ".[92] The separationist response to the shift in tactic in *Everson,* however, is to suggest that Black virtually abandoned the "child benefit" theory in choosing to stress the secular aspects of church schools. Herein lies the second fiction:

> (It) lies in assuming that the education received by Catholic children in parochial schools is secular education. . . . The encyclical of Pius XI (1930) "On the Christian Education of youth" states that the 'only school approved by the Church is one where . . . the Catholic religion permeates the entire atmosphere' and where 'all teaching and the whole organization of the school and its teachers, syllabus and text-books in every branch is regulated by the Christian spirit!' [93]

In summary, then, this view is that whenever a conflict exists between the prohibition of the First Amendment and the welfare of children, "the latter interest is superior".[94] Needless to say, whenever the "superior interest" can be maintained without encroaching on the Amendment's guarantees, it is unconstitutional to rely on means that cause an encroachment. This formulation, then, becomes an absolute. Thus, if it is possible to avoid infringing upon the Establishment Clause, anything short of such action should not pass. In the *Everson* situation, there would be a clear alternative:

> Even if bus transportation is considered a safety device, it is *possible* for the state to assure the safety of children attending parochial schools without impairing the First Amendment guaranty of the separation of church and state. The state need only prescribe as a condition for the maintenance of private schools that where necessary the school shall provide for the transportation of the attending children. This is exactly what the state

[90] 330 U.S. 1, 18.

[91] *Id.* at 7.

[92] Board of Education v. Allen, 392 U.S. 236, 250 (1968).

[93] *Id.* at note 88.

[94] L. PFEFFER, CHURCH, STATE, AND FREEDOM, *supra* note 81, at 476.

> does when it requires private schools to comply with state fire, safety, and health regulations for the buildings.[95] (Emphasis added.)

This, then, is the core of the separationist position. It is the extension of the separationist view of the *Pierce* decision. Nonpublic schools are entitled to exist and flourish, but every educational benefit bestowed upon them must be at their own expense, with no reliance upon government—notwithstanding the fact of accreditation. The separationist, then, must emphasize the difference between what is to be considered an educational aid and a welfare benefit. In this view, busing, and books as well, are primarily for the purpose of education. Other types of aid, such as free medical and dental services and hot lunches, are not constitutionally prohibited because a child needs them and benefits from them regardless of whether he goes to a public school, a private school, or none at all.

As to the decision in *McCollum,* the separationists have not had much to say, presumably because it comes so close to an endorsement of the doctrine which they advocate. Even this seeming victory, however, was to bode ill for the doctrinaire. The cause of the discomfort was Justice Frankfurter's concurring opinion, in which he commented that the Court's decision could not encompass all plans loosely labeled "released time" because they differed "in aspects that might well be constitutionally crucial".[96] But Pfeffer, for one, was ready to meet the imminent danger before it materialized by refusing to allow specifics to stand in the way of principle. He argued that it was not the particulars of any program which might cause it to run afoul of the First Amendment—and here he was on fairly safe ground since the Court had not mentioned any in arriving at its conclusions—but its *raison d'etre.*

> The State required all children not attending parochial or private schools to attend public schools for a specified number of hours weekly. It enters into an agreement with willing parents and children to relieve the latter in part from that obligation if they will use the released time to participate in religious instruction. This is aid to religion, the third party beneficiary of the agreement, is far more valuable than permitting the use of public school premises for religious instruction or even than direct subsidy for religious education. The State cannot, consistently with its obligation under the First Amendment, utilize its public school machinery as a recruiting agency for religious instruction.[97]

By 1952, however, the Supreme Court had permitted principle to be overrun by particulars.

The only particular of any importance which distinguished *Zorach* from

[95] *Id.* at 477.

[96] L. Pfeffer, *Religion, Education and the Constitution, supra* note 88, at 397, 398.

[97] *Id.* at 399.

McCollum is that, unlike the Champaign plan, the New York system under review required classes in religious instruction to be held *outside* of public school property. This, no doubt coupled with the mounting tide of criticism during the intervening years, was sufficient to persuade six justices of the newer program's constitutionality. The apparent inconsistency of *Zorach* in the line of cases surrounding it is minimized by the shear bulk of cases holding for a more strictly separationist line. *Engel,*[98] *McGowan,*[99] and *Torasco*[100] simply render the decision minor at this juncture. That the decision may represent a position to which the Court does not consistently adhere to is only of modest comfort to the separationists who were distraught over the Court's apparent abandonment of principle.

As is his bent, Pfeffer found a fiction. This time, it was that the released time program involved:

> no more than that the public school 'closes its doors or suspends operations as to those who want to repair to their religious sanctuary for worship or instruction'. In reality, released time does not mean releasing time for religious instruction; it means releasing children for religious instruction and *not releasing those who do not wish to partake in religious instruction.* The dismissed-time system under which *all* children are released indicates quite clearly that they depend on the nonrelease of the other children as the factor inducing enrollment for released time religious instruction.[101]

If one accepts the separationists' standards, the complaint is an important one. By not "releasing" students, in the full sense of the word, the state was to some degree supporting religion. Although Justice Douglas did not agree,[102] Pfeffer, in his brief on behalf of the appellants suggested that the program violated the Free Exercise Clause as well. His contention was that the compulsory attendance laws of the school operated to coerce students into participation in the program which did not, in every instance, offer instruction in the faith of their choice.[103] It is significant to note that the response to this argument by those who support the most possible cooperation between church and state on this issue marks one of the major shifts in their approach to the First Amendment generally.

It is difficult to imagine that even the most ardent separationist could improve on Justice Black's opinion in *Engel.* Perhaps the only accommodation would be to seek a clearer definition of the relationship of this decision

[98] Engel v. Vitale, 370 U.S. 421 (1962).

[99] McGowan v. Maryland, 366 U.S. 420 (1961).

[100] Torasco v. Watkins, 367 U.S. 488 (1961).

[101] L. PFEFFER, CHURCH, STATE AND FREEDOM, *supra* note 81, at 373.

[102] On the matter of expanding the question to include consideration of both religious clauses, Justice Douglas said: "It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case". 343 U.S. 306, 311.

[103] L. Pfeffer, *Released Time and Religious Liberty: A Reply,* 53 MICH. L. REV., 91, 96, 97 (1954).

and the "*Everson-McCollum* doctrine". But even this omission is easily explained.[104] Leaping to the defense of Black and the Court, the separationists attacked critics who charged that the Supreme Court was "officially stating its disbelief in God Almighty", or of "tampering with America's Soul". As Pfeffer sees it—and it is difficult to see where he is wrong—school prayers, or Bible readings, could serve only two purposes: to inculcate religion or to achieve the secular ends of bringing order to the classroom and instilling a sense of respect for the teacher and the work at hand. The first purpose presents no novel problem, unless the entire approach of the Court since 1947 is to be upset. To those urging the second, Pfeffer, at least, responds:

> To hold that government may employ religion as a means to effect secular ends that are properly within government competence would make the First Amendment meaningless. Practically every defense of religious instruction in public schools is expressly predicated on the not unreasonable assertion that religious education leads to morality and good citizenship. If religion could be used to achieve the obviously secular goal of morality and good citizenship, it would follow not only that religion could constitutionally be taught in the public schools, but also that tax-raised funds could be used to finance religion and religious education.[105]

Predictably, Pfeffer has a fiction to explain what is going on here.[106] The "fictions" held by advocates of school prayers are that the practice has persisted for 150 years, that there is just one Bible and prayers are offered to the same God, that if a student can be excused from Bible reading and prayer recitation, there is no valid objection to the practice, that today only atheists and secularists oppose the "Becker Amendment" which would permit prayers to be said, and that the Supreme Court has prohibited even the mention of God or religion in the schools and thus only an amendment can restore God to public life. The "fact" with which he would replace the first fiction is that for 150 years there have been continuing efforts to eliminate the practice in the schools. Secondly, the unity of religions cannot be stressed because "no controversy in human history has caused more persecution, oppression, and bloodshed than the question of what is the true word of God and which is the correct way to worship Him". Third, granting permission to be excused from class does not really put the practice on a voluntary footing because children simply do not think or behave

[104] Pfeffer undoubtedly expected or at least hoped to find specific reference to Justice Black's definition of the Establishment Clause in *Everson,* but he explained its absence as due to "the implicit assumption that the meanings of the no establishment clause is now so well settled and known that even a decent respect for stare decisis did not require citation of judicial authorities". Pfeffer, *Court, Constitution and Prayer,* 16 RUTGERS L. REV., 735, 743–44 (1962).

[105] *Id.* at 746.

[106] L. Pfeffer, *Testimony, Hearings On School Prayers Before The House Committee On The Judiciary,* 88th Cong., 2nd Sess., at 928–938 (1964).

that way. They will not want to risk taking advantage of the opportunity to be dismissed. Next, labeling those who cannot support the Becker Amendment as atheists is foolish. Among the organizations opposing the amendment are the National Council of Churches, the Protestant Episcopal Church in the United States, the Lutheran Church of America, and the editorial boards of such Catholic periodicals as the *Catholic Telegraph, America,* and *Catholic World.* Finally, the Court itself answered the problem of over-secularization of schools in *Engel* and *Schempp.* The latter was more to the point:

> It is insisted that unless these religious exercises are permitted a 'religion of secularism' is established in the schools. We agree of course that the state may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe'. We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of the civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or religion, when presented objectively as part of a secular program of education, may not be effected consistent with the first amendment.[107]

Naturally, what is said of *Schempp* can be repeated for *Engel:* at least it represented virtually the end of the rainbow. What they reveal is an apparent commitment on the part of the Court to remain as rigid as possible with regard to separation of church and state.

Two of the most recent decisions, *Allen* and *Walz,* can only present heartaches for the separationists, although the arguments made in response to them are nothing novel. In response to the finding constitutional the loan of textbooks, the separationist argues that the result fails for the same logic that caused the results in *Everson* to fail: the benefit is educational; instead, the benefit should be directly to the child. In response to *Walz,* the separationist argues that, as Justice Douglas points out, the failure to tax the Church is tantamount to offering it financial aid, and is a blatent violation of the Establishment Clause.

What is clear, then, is that those advocating separation have read both history and the words of the Court to conform to their preconceived notion of the proper result. That this is a legitimate technique is beyond dispute. To watch others with a different result in mind do the same thing is truly fascinating.

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[107] *Id.* at 937–38. Notice that this passage attempts to answer not only those who fear a complete prohibition of all things relating to religion, but also those who see another "religion" being created by the schools and defended against the encroachment of all others.

The Case for Cooperation

Those who advocate the theory of cooperation between the Church and the state with regard to education undertake roughly the same kind of analysis as the separationist. That they reach the opposite conclusion points up both the genius of the Constitution and the vested zeal with which it is occasionally viewed.

Unlike the separationists, this group tends to avoid the search for documentary evidence and concentrates on a particular perspective of the relevant facts. History is rooted, the argument goes, in examples of cooperation between church and state. There were a number of "tangible alliances" between state and church designed to support and promote religion:

> Tax exemption for churches and similar institutions, draft immunity for divinity students and clergymen, government salaries for chaplains and tax support for church-related social welfare agencies have their roots to a large extent in the truly extraordinary respect and esteem accorded by American institutions to the person of the minister of religion.[108]

Additional examples of the same thing are chaplaincies in Congress; chaplaincies in the armed forces; presidential Thanksgiving proclamations; compulsory chapel attendance at West Point and Annapolis; and the presence of "In God We Trust" on our coins. Although these arguments have been somewhat successfully rebutted by the separationists, they take on a new seriousness in light of Chief Justice Burger's decision in *Walz*. Not only was the tax exemption for churches upheld and expressly ruled constitutional, but Burger made the point that the mere fact of age is a consideration in determining permissible state action.

Although those urging cooperation seem to pass over the fact that at the time of the First Amendment's ratification many states had and continued to support established churches, they have chosen to focus on precisely one document which was earlier used in the argument of the separationists—the little Blaine amendments. Father Drinan suggests that the various state anti-aid amendments:

> supply one of the strongest proofs of the Protestant expectations in the last century that the government which they had created was a state basically friendly to Protestantism and all its institutions. In agreeing to the secularization of education, Protestant sects did not perceive that they were in effect surrendering to Caesar some of the things which belonged to God. Or, if they did so perceive, then they felt that Caesar was on the side of God.[109]

[108] R. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 7 (1963).

[109] *Id.* at 41.

To strengthen the position that Nineteenth Century America was indeed a Protestant country, Drinan reviews the reading material offered the public schools during the period and concludes that:

> It seems fair to say that until around 1900 the public school in America taught little that was really inconsistent with Protestant Christianity and that, in fact, many of the lessons from McGuffy's readers and other texts reiterated to some extent the lessons of many Protestant primers.[110]

The expectation in the call for separation in the earlier years, then, was not a genuine separation at all, but rather a kindly Protestant bias. The nation was "safe" for separation.

One final point must be mentioned before moving to the evolutionary phase. Fundamental to the cooperative argument is the attention given the development of *education* in America. There is a critical distinction between the ideal of public education and its development in practice. Sympathy is expressed for the for the former: "Two of the greatest ideas underlying American democracy were born in the mid-nineteenth century: the pledge of the state to give a *free* education to every child in an atmosphere not affected by a sectarian orientation".[111] Unfortunately, the developmental aspects created grave difficulties. Fulfillment of the ideal was easy at the time it emerged, it is argued, because we were a pan-Protestant nation. Today, however, we are clearly a religiously pluralistic society, and as a result of this change, the nondenominational pan-Protestant environment of the public school "has been largely displaced by a secularistic orientation".[112]

Turning to the various interpretations of the Constitution by the Court and the various interpretations of the Court by the commentators—and proceeding, for clarity, in the same order followed in the separationist argument—it is evident that different conclusions are reached. In this view, *Pierce* is seen as the crucial first step in a logical progression leading to the recent Catholic bid for aid to nonpublic schools.

Drinan, for one, agrees that the holding in *Pierce* did not rest upon freedom of religion—to conclude otherwise is simply not possible. However, he gives considerable attention to dicta. Of the holding itself, he notes:

> The Supreme Court was bound to decide the case on the narrow issues before the Oregon tribunal. Hence its technical ruling was that the Oregon law unreasonably *invaded the school's right to their property.*
>
> The question of religious liberty in the constitutional sense did not arise. . . .

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[110] *Id.* at 42. There is little doubt as to the accuracy of Drinan's findings. *See generally,* R. BILLINGTON, THE PROTESTANT CRUSADE: 1800–1860, (1938).

[111] THE WALL BETWEEN CHURCH AND STATE 70 (D. OAKES ed. 1963).

[112] *Id.*

> Nor was "liberty" in the Fourteenth Amendment sense involved. The two plaintiffs in the *Pierce* case were corporations; as corporations they could not constitutionally claim the "life" or "liberty" protected by the Fourteenth Amendment. *They could only claim* that the Oregon law deprived them of "property" without due process of law.[113] (Emphasis added.)

What should logically be the conclusion regarding *Pierce,* however, is, in the view of advocates of cooperation, only the starting point. The stress is placed on the Court's dicta on the subject of parental rights and obligations.[114] After mentioning two or three other decisions touching the same area, Drinan focuses on *Prince v. Massachusetts*[115] which dealt with a situation in which children were selling articles on the streets in behalf of the Jehovah's Witnesses in violation of a state proscription. The plaintiff relied upon the doctrine of parental rights, and the Court responded that "[i]t is traditional with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder".[116] *Pierce* was then cited in conjunction with these words. Because of this citation, Drinan concludes that *Pierce* "clearly spells out and vindicates in American law, as Pius XI reminded us in 1931 in his encyclical on education, the traditional natural law and Catholic position that the right and duty to educate resides primarily in the parents and is by them delegated to the state".[117] Where this is all leading, of course, is to the premier question about the first released time case: why can't parents authorize classes in religion for their children? If one follows the logic this far, the answer is obvious. But one is led to ask another question: would the *Pierce-Prince* doctrine apply to the *Pierce* situation itself, in which, by a vote of 115,000 to 103,000 parents in Oregon opted to make public schooling mandatory?

Having already witnessed the seeming contradiction between the reasoning and the result in *Everson,* it should come as no shock that the cooperation forces have examined it at length as well. The examination, of course, begins with the famous Black statement that governments cannot pass laws which "... aid all religions", and Drinan asks whether Black meant to rule out financial aid for the church-related school entirely. If this is answered in the affirmative, it may perhaps be surmised that the parochial school "is not really a school at all, but a glorified catechism class", or if a more liberal interpretation is given, "that any state aid which even incidentally renders the practice of religion more convenient is consti-

[113] R. Drinan, *Parental Rights and American Law,* 172 THE CATHOLIC WORLD 22 (1950).

[114] 268 U.S. 510, 535.

[115] 321 U.S. 158 (1944).

[116] R. Drinan, *Parental Rights and American Law, supra* note 113, at 23.

[117] *Id.*

tutionally forbidded".[118] Next, taking Justice Black's expression that "no tax . . . 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", it is claimed that if this means—as Pfeffer would have it—that the parochial schools as schools are barred from state aid, then two presumptions must necessarily follow: "1. The sectarian school is established merely to conduct religious activities, and 2. the sectarian school is simply and exclusively one of the church's 'institutions to teach or practice religion.' " [119] The implication of reading these utterances in that light is obvious: either Black did not mean what he said, or, assuming parochial schools do fulfill a secular function, they are by right entitled to aid. In other words, it is an attempt to eliminate the possibility that a church-related school can fulfill secular requirements *and,* at the same time, be refused aid as an educational institution.

If one accepts the premise, the conclusion is inescapable: neither Black nor the Court can be taken at face value—that is, they did not intend to rule out all aid for the secular aspects of parochial schools—because the decision itself permits such aid.[120]

After reviewing *Everson* and related lower court cases, Drinan finds that it is not very useful as a foundation for the argument for federal aid to parochial schools. In the child welfare theory employed, however, he sees solid support for the Catholic cause. He quotes Mr. Pfeffer in this regard:

> When the *Everson* decision is coupled with the *Cochran* decision, they lead logically to the conclusion that a state may, notwithstanding the First Amendment, finance practically every aspect of parochial education, with the exception of such comparatively minor items as the proportionate salaries of teachers while they teach the catechism [121]

Herein lies a fundamental distinction between the schools represented by Drinan and Pfeffer. For Pfeffer, *Everson* must *not* be linked with *Cochran* because too much aid can pass to the nonpublic schools under the guise of public welfare legislation. Instead, *Everson* must be viewed as broadening the meaning of the "Establishment Clause" and related to later cases, particularly *McCollum.* On the other hand, Drinan bends every effort to read *Everson* not as a basis for later decisions, but rather as the sequel to *Pierce* and *Cochran,* for the very reason Pfeffer avoids such attachment:

Everson relied to some extent on the *Cochran* ruling, a unanimous deci-

[118] R. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY, *supra* note 108, at 132.

[119] *Id.* at 122–123.

[120] *Id.* at 133.

[121] L. PFEFFER, CHURCH STATE AND FREEDOM, *supra* note 81 at 476, quoted in R. DRINAN, *The Constitutionality of Public Aid to Parochial Schools,* in THE WALL BETWEEN CHURCH AND STATE, *supra* note 111 at 60.

sion in 1931 of the United States Supreme Court upholding the validity of a Louisiana statute which permitted the loaning of secular textbooks to children in nonpublic schools. The *Cochran-Everson* line of reasoning could, if logically pursued, lead to the conclusion that the state could constitutionally furnish all the secular educational needs of school children in private church-related schools.[122]

While *Everson* is consoling to both sides, *McCollum* is more easily categorized. In fact, no decision in the long line of church-state cases infuriated the advocates of aid to parochial schools more than *McCollum*.

Glibly disregarding the fact that the Court in *Pierce* upset the wishes of a majority of parents voting in Oregon on an educational policy, the basic assault on the *McCollum* case is an attempt to establish the idea that almost all the parental pressure in the Champaign situation was on the side of released time, and thus Terry McCollum should not have had the right to dissent. Of course, it is recognized that in both cases what is at stake is not majority rule but the constitutionality of certain actions, and yet the emphasis placed on elements surrounding *McCollum* is so great that it can only be assumed relevant. For example, it can be argued that the trial testimony establishes these "significant" facts. The McCollum boy was a known problem child. He was the only non-participant in the released time program during his fifth grade year. While the other children were attending religious classes, Terry was sent not to another fifth grade section but to the music room so he would be alone and not create a disturbance. There was "overwhelming" evidence that non-participants were never embarrassed by failure to attend the special classes.[123] Given the grounds upon which the case was decided, these facts are not at all significant, and it would seem that the only way they might be is if the Court rested its decision upon a concept of child-suffering, or child-deprivation. This is precisely where Drinan, at least, goes astray in his reading of *McCollum*. He sees the Court attempting to protect individuals from being coerced into religious education, and he says, in effect, that the children not enrolled are suffering no ill effects. The decision, then, is viewed as action taken to prevent the state from causing certain harmful effects. It is in his eyes a negative freedom. This he labels a "novel liberty". The real problem is a failure to make the shift from the Free Exercise Clause to the Establishment Clause. The use of the term "liberty" is revealing. There may be, in fact, an effort by Drinan to place *McCollum* in the line of "free exercise" cases and, being unable to do so, he views the case as a huge misstep:

The new right or "liberty" which is the word in the Fourteenth Amend-

[122] R. Drinan, *Should the State Aid Private Schools?* 37 CONN. B. J., 368 (1963).

[123] R. Drinan, *The Novel "Liberty" Created by the McCollum Decision,* 39 GEO. L. J., 216, 218, 219 (1951).

> ment used to transfer the new right to the states, is deemed to be one of the fundamental rights guaranteed by the Bill of Rights and intended by the framers of the Fourteenth Amendment to be transferred to the states. The new "liberty", however, is different from any "liberty" hitherto created by the Supreme Court. *It is unlike any of the extensions of religious liberty recently granted to the Jehovah's Witnesses.* In the cases involving the Witnesses the right claimed and vindicated was a *positive thing* even if in some cases it seemed insubstantial and flimsy. *It was nonetheless a right to hold and act upon one's religious beliefs,* however, eccentric. The right created for Mrs. McCollum, however, and for others similarly disposed, is the sheer *negative right to be able to protest against the religious activities of others even if those activities do not violate one's own freedom to worship as one chooses.* The new "liberty", therefore, is a power to restrict the religious activities of others if such activities are in any way protected or advanced by state action.[124] (Emphasis added.)

The major grievance, then, is that the Court is curtailing the *real* right of liberty of parents who seek religious guidance for the children. If one attaches prime importance to the Free Exercise Clause and views the Establishment Clause as being only "instrumental to religious freedom, a mere technique by means of which the state is to observe that impartiality necessary to guarantee religious liberty",[125] as Drinan does, the interpretation is substantially correct.

The Court in fact did not base its ruling on the protection of a "negative" right. It sought only to prevent positive action by the state in support of religion. There is a difference. What mattered to the Court was not Terry McCollum's "right" to avoid religious education and be comfortable in doing it, but rather the right of the state to promote religion, which it considered unconstitutional in this form.

The conflict between what the Court did and what Father Drinan would have it do is based in turn on a conflict over interpretation of the religion clauses. As indicated, Drinan reads the clauses, elevating one over the other. The proper end they serve is twofold: the promotion of religious liberty—the right of all to construct and express their religious convictions as they see fit; and the guarantee (through the Establishment Clause) that the government will remain impartial among the various creeds. The Court views the clauses separately and gives them equal rank. Thus in *McCollum* the question was not one concerning the right of free exercise of religion—as it would necessarily be in Drinan's scheme—but only whether the government was acting in such a way as to promote any or all religions, thereby violating the Establishment Clause. In essence, Drinan has a far more restricted view of the non-establishment mandate. It means

[124] *Id.* at 222.

[125] *Id.* at 222, 223.

only that if the state chooses to promote religious belief, it must do so impartially. The Court, in *Everson* and *McCollum,* broadens the mandate so that it becomes a prohibition of state promotion *per se.*

Dean Drinan's arguments, however, cannot be dismissed so easily. Involved in the Court's interpretation of the Establishment Clause is a thorny dilemma: if the effect of the ruling is to place non-belief on a plane with belief, and if the state is prohibited from positively aiding religion, then logically it is also prohibited from promoting anti-religion. Drinan puts it succinctly:

> Quite obviously the state is placed in a novel and very artificial position. It must walk the tightrope of giving comfort neither to the friends of religion nor its foes. In this latter obligation is the nub of the matter. The state by the *McCollum* decision must refrain from giving financial or moral assistance not only to the teaching of religion, but also to the teaching of anti-religion.[126]

On the surface, it would appear that, although the burdens of the Court might be increased, it would be no more difficult to ascertain the promotion of one than the other. Even supposing the successful differentiation between "religiouslessness" and anti-religion, the fundamental obstacle remains:

> It seems almost unnecessary to say that if a believer did bring suit to enjoin state assistance—intentional or otherwise—to the forces of irreligion the courts would be incapable of granting relief. The suggestion of a regulation that one speaking or writing or in any way acting for the state must be scrupulously careful not to utter anything which favors or disfavors religion seems to fall squarely within the prohibition of the "previous restraint" outlawed in *Near v. Minnesota*. . . .
>
> The very function asked of the Court, moreover, seems to be impossible of fulfillment. To determine when the expression of one's disbelief becomes that type of irreligion form which the state must dissociate itself demands that the Court become a board of religious censors.[127]

It may be, then, that the dilemma is created not by the Court but by Father Drinan. He is asking the Court to be far more rigorous in its attack upon "irreligion" than upon religion. To be specific, since the Court has in effect obligated the state to be neutral in respect to both belief and non-belief, it must be assumed that the Court will itself use the same indices of "promotion" in both directions. Thus, if students were released from regular classes to attend instruction in anti-religion, under *McCollum* the program could be ruled unconstitutional; if a statement opposing religion were drafted by the state to be recited in class, under *Engel* it could be de-

[126] *Id.* at 223.
[127] *Id.* at 224.

cleared invalid. Obviously the Court's strictures against the promotion of belief cannot be taken too literally or totally. The teacher as an agent of the state, speaking out on occasion against religion or in favor of it, would not fall under the *Everson-McCollum* restrictions not only because of the other First Amendment protections, but also because remarks of this nature would not be construed as having the support of the state.

Moreover, given the doctrine which emerges from the *Everson-McCollum* rulings and the corresponding Drinan interpretation of that doctrine as granting permission (liberty) to non-believers to prevent state promotion of positive belief, it is understandable why those interested in church-state cooperation stress parental rights under the Free Exercise Clause. It is one thing to agree that public funds should not be used to promote religion. It is quite another to say that those funds should be used to promote irreligion—that is, to *foster* secularism or, in effect, to *promote the religion of irreligion.* It may be too great a jump to make, but the essence behind the parental rights argument is that by deleting all favorable advances toward religion, public education incorporates a *bias against* religion. If this is the situation, and if it can be demonstrated, and if the Court insists that the state remain neutral between religion and anti-religion, then why should not the rights of those in favor of positive belief be recognized?

Although the cooperation people had much to say about *Everson* and *McCollum,* they were somewhat more reserved concerning *Zorach* and *Engel.* The reaction to *Zorach,* though, was not a vigorous defense. By 1952 it was obvious that there would be no serious undermining of the basic separationist position adopted in the late 1940's, although by the early 1970's accommodation has certainly expanded. By excluding reconsideration of the Court's central tenets, only one hope remains, a demonstration of state support for the religion of secularism in the public schools, followed by a justification for aid to parochial schools based on parental rights and the Free Exercise Clause. Ironically, this strategy calls for continued adherence by the Court to the strictest reading of the Establishment Clause. Any slight movement toward a more balanced view, perhaps even that expressed in *Zorach,* means a weakening of the grounds upon which the claims of cooperation were to be made.

As to *Engel,* Drinan has made his position somewhat clear in a newspaper article expressing concern over the proposed Becker Amendment expressly allowing prayers and Bible readings in the public schools. Although not in favor of any constitutional change in this regard, Drinan suggested that Catholics in particular are in a position to appreciate parental uneasiness about silence concerning religion in the public school.[128] However, at a later point, he mentioned that the Catholic Church had

[128] Drinan, *Hands Off Constitution,* Boston Sunday Globe, June 14, 1964, *Quoted in Hearings On School Prayers, supra* note 106, at 2560.

taken no official position on the proposals to restore religious practices to the schools.[129]

Because of the hope that perhaps a "religion of secularism" can be shown, thus strengthening the claim for nonpublic school aid, the real objection to *Engel* is not that "if pushed to the limit of its logic, it would direct that *all* values 'sponsored' by the public school (which is the alter ego of the state) *must* be secular", but rather the assumptions behind Black's reasoning. There is no satisfaction to be found in Black's claim that government is "encroaching" on religion and is constitutionally barred from doing so. Instead, the "real 'governmental encroachment' on religion is the assumption by the government that education belongs to it and that the churches may not 'encroach' upon this governmental monopoly".[130] It would seem that the direction of "encroachment" depends upon which of the religion clauses is to be emphasized. Black is relying upon the Establishment Clause and saying that government is *not permitted to help religion.* Unable to sever their attachment to the Free Exercise Clause, the cooperationists interpret Black as saying that government is to be secular; this includes education, and religion is not permitted to help education. There is a difference.

It is a curious thing that two obviously intelligent schools of thought and two clearly articulate spokesmen for those schools have viewed the same Constitution, the same history, the same Court decisions with the identical language, and produce such divergent points of view. One can only assume that these are men with a cause; their reasoning is selective, their interpretations motivated not only by their understanding of the laws, but by their societal preferences.

Whenever there are two extreme positions, however, there will be a middle ground.

Legal commentators who view the non-establishment command of the First Amendment as placing the government in a position of neutrality in respect to believers and non-believers find agreement on terminology alone. The content of "neutrality" theories, taken together, offers little comfort to those in search of practical guidelines for legislation or judicial decision. Viewed separately, only one could be construed as suggesting a manageable "test" applicable to religion cases.

Professor Philip B. Kurland[131] has rather modestly set forth a principle which is intended to be neither a summation of the Court's activities nor an all-inclusive doctrine. The concept, he says, "is meant to provide a starting point for solutions to problems brought before the Court, not a

[129] R. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY, *supra* note 108, at 109.

[130] *Id.* at 110.

[131] Professor of Law, University of Chicago Law School.

mechanical answer to them".[132] Simply stated, the thesis is that the two religion clauses combine to form a single constitutional mandate forbidding laws which favor religion and those which are hostile to it.

> The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.[133]

In *Religion And The Law* Professor Kurland is quite content to review the major Supreme Court cases touching the church-state question. No attempt is made to impose his "principle" upon problems of a hypothetical nature. Armed with his new doctrine, Kurland sets out to find authority for it and does so in not a few instances. The first case considered, *Reynolds* v. *United States,*[134] falls neatly in line with the holding that a law appropriate to governmental authority may be maintained against persons whose religious scruples dictate opposition to it. Clearly if the Waite Court had upheld the right of the Mormon to practice polygamy as commanded by his religious convictions, in violation of a federal statute, a "classification of religion . . . to confer a benefit" would have resulted. Other cases lending credence to the Kurland principle included *Cochran, Everson,* (if one agrees that the regulation allowing free transportation encompassed all schools and not, as the record shows, only Trenton and Pennington High Schools and Catholic Schools[135]) the *Sunday Closing* cases and others. Naturally, some decisions are irreconcilable. Most notable among these is *Zorach.* If the Court had conscientiously applied the "religion-blind" test, the New York released-time program would not have survived. Only by broadening the statute to mean the release of students for other forms of instruction as well as religious could it be saved.

Kurland has continued to apply his standard to more recent cases and his finding is not encouraging. For example, *Engle v. Vitale* was found to be "compatible" with the thesis in result, but not in its language or method.[136] Th Court, he noted, demonstrated "no readiness to reread the freedom and separation clauses other than as distinct commands of the Constitution".[137] Commenting on the Clark "test" in *Schempp,*[138] Kurland viewed the portion relating to the Establishment Clause as being al-

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[132] P. KURLAND, RELIGION AND THE LAW, 18, 19 (1962).

[133] *Id.* at 18, 112.

[134] 98 U.S. 145 (1879).

[135] 330 U.S. 1, 30 (1947).

[136] P. Kurland, *The Regent Prayer Case: "Full of Sound and Fury, Signifying . . .",* (1962) SUPREME COURT REVIEW, 32.

[137] *Id.* at 33.

[138] *Id.* at 47.

most the same in purpose that *Religion And The Law* found in both clauses taken together.[139] Unhappily, Clark's determination that the Free Exercise Clause serves the same function in a different way merely confused the situation.

> Apparently only the establishment clause precludes the "advancement of religion". But both clauses, according to Mr. Justice Clark, prohibit inhibition of religious activity: The free-exercise clause prohibits it by precluding the use of coercion; the establishment clause, by restricting some undefined non-coercive methods.[140]

Finally, the holding in *Sherbert* is totally out of line with the stated principle since an exception to South Carolina's unemployment compensation laws was granted solely for reasons of religious freedom.

Again, it is important to note that Professor Kurland, despite his own review of Court holdings, is proposing a guide for future action, not a summary statement of past experiences. As a guide or "starting point" his principle is open to attack for lack of direction. One may seriously question the intended realm of applicability. If religion is not to be used as a basis for legislative action or inaction in only a limited field of governmental activity, the bounds are not identified. At the same time, a principle with such restricted use could hardly be deemed a principle at all. Conversely, if Kurland's modesty is not genuine and his intention is to provide an all-encompassing test, it leads to remarkable results unlikely to be welcomed in any quarter. Mr. Pfeffer has demonstrated that application of the thesis would mean, for example, the repeal of draft exemptions for conscientious objectors, ministers and divinity students, the withdrawal of chaplains from the armed forces, the end of school absences for holy days, and a host of other restrictions on judicial or legislative discretion.[141]

The problems besetting the Kurland doctrine are engendered not by the particulars suggested but by the doctrine per se. That is, any attempt to erect a principle capable of being acted upon will necessarily restrict discretion or be restricted itself. It is ironic that Pfeffer should point the accusing finger—the hallmark of *his* own theory is not flexibility!

If the Kurland thesis is characterized by inflexibility, the final two theories examined can be said to reflect a desire to avoid such characterization.

Professor Wilber G. Katz[142] applies two terms interchangeably to describe his view of the religion clauses: "religious liberty" and "strict neutrality". The latter is more appropriate if the former connotes freedom for

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[139] P. Kurland, *The School Prayer Cases*, in THE WALL BETWEEN CHURCH AND STATE, *supra* note 111, at 161.

[140] *Id.*

[141] L. Pfeffer, *Religion-Blind Government*, 15 STAN. L. REV., 389, 400–406 (1963).

[142] Professor of Law, University of Wisconsin Law School.

positive belief. His thesis has remained virtually unchanged for fourteen years.[143] It is basically a reaction to the strict separation principle and it takes the form of placing the Establishment Clause in a supporting role to the free exercise command. It means that separation is not a concept to be followed at the *expense* of religious liberty. Rather, separation is designed to *promote* it. Although this concern over the use of the term "separation" appears to be of minor importance, especially when Katz suggests that it still "rules out government aid to religion, however impartial",[144] it is nevertheless critical since it makes protection of religious freedom the master guide for judgment. Separation must *serve* free exercise, never the reverse. In Katz' words: "The Constitution does not shrink religious liberty to the liberty which is compatible with strict separation".[145]

With most others who do not elect an extreme position, Katz, though not afraid of historical examination, finds in the evidence nothing very conclusive.

> One conviction emerges from a study of the various attempts at "proof" [of particular interpretations]. This is the melancholy conviction that the heat generated by questions concerning religion has made fairness in the handling of historical evidence almost impossible.[146]

In what must be regarded as understatement we are reminded that "what the historical 'studies' show primarily is that in this field of law, as in religion itself, controversy becomes so charged with emotion that objectivity is difficult to maintain".[147]

The focus of the problem should not be placed on historical intent or interpretation but on current governmental activity. As state services and control expand, increased contact with spheres of interest to religion occurs. Because of this, maintenance of a strict separation doctrine would gradually erode religious freedom. If this freedom is to be protected, logically, the separation idea itself must be eroded.

> As government activity is extended, instances multiply where . . . action which might appear as government aid [to religion] is only the result of an effort to maintain full neutrality.[148]

Having established religious freedom as the guiding principle replacing

[143] Katz first expressed his thesis in 1953 in *Freedom of Religion and State Neutrality,* 20 U. CHI. L. REV., 426 (1953). Since that time it has appeared in *The Case for Religious Liberty,* in RELIGION IN AMERICA, (1958); *The Freedom to Believe,* 192 ATLANTIC MONTHLY 66 (Sept., 1953); *Religion and Law in America,* in RELIGIOUS PERSPECTIVES IN AMERICAN CULTURE (1961).

[144] W. Katz, *Religion and the Law* in RELIGIOUS PERSPECTIVES IN AMERICAN CULTURE, *supra* note 143, at 54.

[145] *Id.* [hereinafter cited as RELIGIOUS PERSPECTIVES]

[146] W. Katz, *Freedom of Religion and State Neutrality, supra* note 143, at 434.

[147] W. Katz, *Religion and the Law, supra* note 143, at 56–57.

[148] *Id.* at 60.

separation, Katz is faced with the obligation of giving content to his principle. Addressing himself to the question of whether freedom to doubt and to believe are equally protected, Katz offers a position which is both in keeping with the times and pragmatic, from a legal perspective:

> Certainly the American tradition of religious freedom includes freedom to doubt and to deny, and the development of that tradition is toward neutrality between belief and unbelief.... A contrary view would require the state to adopt an official definition of religion, a task which involves obvious risks of discrimination against marginal groups.[149]

In response to the charge that placing "unbelief" on a full parity with freedom to believe forces government to be hostile toward religion, Professor Katz argues that this fear reflects a failure to distinguish separation and strict neutrality. "If the state is to be neutral, it cannot be insulated from contact with religion. Many types of government provision for religion are necessary under the strict neutrality principle in order to avoid unintended restraints upon religious freedom." [150]

Application of the neutrality principle to the school question is no easy task, and maintaining neutrality in the public schools is almost impossible, according to Professor Katz. As related to the public schools, the problem is stated as "keeping the schools secular (*i.e.* ruling out any attempt to inculcate religious belief) and yet avoiding inculcation of secularism (*i.e.* a philosophy of life which leaves no place for religion)".[151] There is good reason to be pessimistic about effectuating neutrality in schools and this is candidly admitted.

Because of Katz' pessimism he encourages experimentation in techniques of introducing religion into public schools. Programs allowing for religious instruction serve to promote the principle of religious liberty. The major stumbling block to be overcome or avoided in released time experiments is the element of coercion. Referring to the finding of the Court in *McCollum,* Katz insists the case was rightly decided *if* the fact of having religious instruction in the schools created pressure for the pupils to attend. The same standard must be applied in all such instances. The *Zorach* holding, Katz believes, is consonant with full religious liberty. Again, he is anxious not only to enhance free exercise, but to avoid the charge of secularism: "The authorization of released time need not be defended as an aid to religion: it may be defended as a protection of religious freedom—as *an effort to prevent the public school system from silently teaching the unimportance of religion*".[152] (Emphasis added.)

[149] W. Katz, *The Case for Religious Liberty*, in RELIGION IN AMERICA, *supra*, note 143, at 102.
[150] W. Katz, *Religion and the Law, supra* note 143, at 60.
[151] W. Katz, *Freedom of Religion and State Neutrality, supra* note 143, at 438.
[152] W. Katz, *The Freedom to Believe, supra* note 143, at 67.

It is important to note here that Katz' theory of neutrality, while tied to the affirmative promotion of religious liberty, is not restricted to the promotion of *religion* alone. As has been indicated, belief and unbelief are equally guaranteed and Katz is careful to avoid identification of the term "neutrality" with the connotation of state cooperation or accommodation solely with positive religious forces. This is the distinguishing feature of "strict neutrality".

The idea of "strictness" is best exemplified in the discussion of released-time programs. After emphasizing the difference between viewing *Zorach* as positive aid for religion and as an effort to avoid pure secularism, Katz claims that "it is no legal quibble to make this distinction between government aid and provisions designed to keep government activities from restraining the free exercise of religion".[153] The effort to maintain a balance between believers and non-believers explains the primary concern over the element of coercion in these cases:

> Can a released time program operate without more or less subtle coercions? . . . Perhaps this factual difference (between *McCollum* and *Zorach*) has some significance on the issue of pressure to participate; but apart from this factor, the cases seem indistinguishable. The *Zorach* opinion reflects sympathy for efforts to prevent the secular public school system from impliedly teaching the unimportance of religion or its irrelevance to weekday concerns. This consideration seems an adequate justification unless the program operates in such a way that pupils feel a pressure to participate. It must be added that the evidence of pressure offered in the *Zorach* case was substantial and disturbing.[154]

The crucial test of coercion is in the granting of complete student freedom during the time allocated for religious study. "If it could be shown that released time programs succeed where dismissed time programs fail, the element of affirmative aid in the released time arrangement would seem to have been established." [155] In a word, if religious instruction classes are as successful when students are simply released from school as when those not attending classes are required to remain in school, the latter type of program would stand the constitutional test and be justified as an attempt to offset any implication of the unimportance of religion.

The matter of prayers in public schools presents no problem under the "strict neutrality" doctrine. Since belief and unbelief must be promoted equally, government is required to be impartial toward both.

> When Government schools include regular religious devotions in their programs, the school authorities are not impartial. They discriminate not

[153] *Id.*

[154] W. Katz, *The Case for Religious Liberty*, in RELIGION in AMERICA, *supra* note 143, at 107.

[155] W. Katz, *Freedom of Religion and State Neutrality*, *supra* note 143, at 439.

> only against those who have no religious belief but also against those whose beliefs are incompatible with the particular devotions in question.[156]

There is a temptation to read the Katz version of neutrality as meaning either indifference toward or non-recognition of religion by the state. This would approximate the Kurland idea of preventing government from using religion as a classification in legislation. Such is not the case. In a sense almost the reverse is true. Katz desires a balance between religion and non-religion but he also wants to subsume these under the term "religious liberty" and give them a positive position. Obviously this cannot be done. Nevertheless, affirmative belief in religion can be promoted and should be, as long as it does not work against unbelief. This means that the state should render "no help unless no help would be harm [to religion]".[157] This is considerably different from saying, as Kurland does, that religion should not be taken into account. For this reason Katz attacks that thesis as being too rigid. Taking just one example for comparsion, Professor Katz says:

> Neutrality toward religion does not require public authorities to be blind to the facts of religious differences. It does not forbid rules excusing adherents of particular faiths from school attendance on designated religious holidays. This is a point at which the principle suggested by Professor Philip Kurland is too rigid. He has suggested that any regulation which uses religion as a basis of classification is contrary to the First Amendment. I trust that he would agree that an exception is appropriate in this case. Attendance excuses, like the (tax) exemptions... are permissible, not in order to promote religion but to protect its free exercise and thus maintain neutrality.[158]

To summarize, "strict neutrality" when applied to the public school situation means government may not inculcate religious belief through its school programs, nor may it demonstrate complete indifference to religious needs. There is good reason to be pessimistic about government's ability to meet these demands.

The requirement of state impartiality between belief and non-belief would seem to indicate problems of a similar nature in the realm of aid to parochial schools, but here Katz refuses to be victimized by the strictures of his own theory. Remembering that the no-establishment command of the First Amendment is intended to serve the promotion of liberty and that liberty is not to "shrink" in the cause of separation, Katz constructs a

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[156] W. Katz, *Hearings On Proposed Amendments To The Constitution Relating To School Prayers, Bible Readings, Etc. Before the House Comm. on the Judiciary,* 88th Cong., 2nd Sess., at 814 (1964).

[157] *Id.* at 818.

[158] W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 47 (1964).

corresponding thesis that, since parents have the right to choose non-public education (*Pierce*), "presumably this choice should be free from discriminatory burdens".[159] The best example of this formula in practice is the federal enactment governing educational costs for congressional and Supreme Court pages. Specifically, provision "c" in Section 88a of Title 2 of the United States Code reads:

> ... said page or pages may elect to attend a private or parochial school of their own choice: Provided, however, that such private or parochial school shall be reimbursed by the Senate and House of Representatives only in the same amount as would be paid if the page or pages were attending a public school under the provisions of subsections (a) and (b) of this section.[160]

By contrast, the grave error of restricting freedom by elevating the separation principle is committed by Justice Rutledge dissenting in *Everson.*

> Like St. Paul's freedom, religious liberty with a great price must be bought. And for those who exercise it most fully, by insisting upon religious education for their children mixed with secular, by the terms of our Constitution the price is greater than for others.[161]

Professor Katz claims, rightly, that Justice Rutledge found this price tag in the phrase "no law respecting an establishment of religion", which he "construed as requiring a complete and permanent separation of religious activity and civil authority".[162] The flavor of the majority opinion as well as the holding in *Everson* support the strict neutrality idea. Two portions of Justice Black's opinion merit particular attention:

> [The First] Amendment requires the state to be 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.[163]

> ... We must be careful, in protecting the citizens of New Jersey from 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.[164]

"These passages", Katz says, "... and the opinion as a whole ... support the principle of full-neutrality, a principle requiring the government to

[159] W. Katz, *Religion and the Law, supra* note 145, at 63.

[160] Quoted in W. Katz, personal letter to Senator Wayne Morse, *reproduced in Hearings On S. 370 Before The Subcomm. On Education Of The Senate Comm. On Labor And Public Welfare,* 89th Cong., 1st Sess., at 173 (1965).

[161] 330 U.S. 1, 50 (1947).

[162] W. Katz, *Religion and the Law, supra* note 144, at 64.

[163] 330 U.S. 1, 18 (1947).

[164] *Id.* at 16.

be neutral not only between sects but also between believers and nonbelievers".[165]

To say as Katz does that government should not discriminate against religion says nothing until factual bounds are drawn for the term "discriminate". The defender of strict neutrality admits to some early confusion. Prior to 1953 Professor Katz assumed that tax support for parochial schools was clearly unconstitutional. "It seemed to me that direct payment for educational costs was something more than action to avoid discrimination against religion." [166] Since that time his position has been that "if one assumes that the religious schools meet the state's standards for education in secular subjects, it is not aid to religion to apply tax funds toward the cost of such education in public and private schools without discrimination".[167] He argues further that, like the dissenters in *Everson,* he can see no difference between minor payments for federal welfare or child benefit and payments for education. Thus none of the nondiscriminatory uses of public funds are forbidden by the First Amendment.[168]

Katz warns against making a leap from his position that aid is constitutional to one which claims that private schools *must* receive benefits under the Free Exercise Clause. Private schools may never be singled out for special aid, but they can be included in a general program. The legislatures have the discretion over whether to include them or not.[169] Nevertheless the burden of proof in the aid question, following the Katz principle, is on the state for not granting aid on a nondiscriminatory basis, rather than the private schools desiring to benefit by it.

> While the government should not promote religion, it not only may, but should, try to avoid restraining or burdening religious choices. And if groups wish to have parish schools, there seems to be a presumption in favor of so molding government fiscal policies as not to handicap that choice. For me, therefore, the question is whether there are strong enough grounds for disapproving such schools to justify imposing the handicap. The *Harvard Law Review* comment on the *Everson* case was right in saying that the question is "brutally simple." For these editors the question is: Shall we encourage parochial schools? I might prefer to put it: Shall we continue to discourage parochial schools?[170]

The real question, however, is not whether parochial schools are to be encouraged or discouraged, but rather, in a more fundamental constitutional sense, whether the separation command of the Establishment Clause is to serve its own ends or those of religious freedom.

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[165] W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS, *supra* note 158, at 13.

[166] W. Katz, *Freedom of Religion and State Neutrality, supra* note 143, at 440.

[167] *Id.*

[168] *Id.*

[169] W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS, *supra* note 158, at 74.

[170] *Id.* at 77. The comment referred to is found at 60 HARV. L. REV. 800 (1947).

The difference between the "strict neutrality" principle of Katz and the idea of "accommodation" or "cooperative separatism" set forth by Professor Paul G. Kauper[171] is slight but meaningful. It is a difference in the degree to which the free exercise standard is seen as requiring the state to promote *positive* religious belief. Katz, it will be recalled, placed major emphasis on an equal balance between the interests of believers and nonbelievers. Occasionally these interests conflict and he is inclined to give the benefit of the doubt to the former. Kauper, on the other hand, feels government should be more obligated than "inclined" to support religious groups. Stated another way, the Katz view that in some cases government must aid religion is predicated on the assumption that neutrality must be maintained and in these instances aid is *necessary* to redress the balance. Kauper is more concerned with the "furtherance of religious freedom" per se than preserving a balance between conflicting forces.

Professor Kauper is another whose position requires no particular one-sided historical analysis. In fact, it serves his own "accommodation" thesis to dismiss restraint in interpretation flowing from historic "proofs" or original intent behind the First Amendment.

> The search for original meaning and historical purpose underlying this language has yielded inconclusive results, and it would not be profitable to explore the matter in detail. In the end the Supreme Court is free to give this language the meaning it chooses.[172]

He is willing to rely on historical experience only enough to demonstrate that "with separation of Church and State, the State and the churches can live in a state of friendly cooperation. We may describe this situation as 'cooperative separatism' ".[173]

> But if we turn to the substance of things, it is readily apparent that in the American tradition of Church-State relations and consistent, therefore, with the historic American understanding of separation of Church and State, government has recognized the importance and relevancy of religion in American life and has accommodated its policies to this situation. The acknowledgement in many of our state constitutions of dependence upon God, the references to a Deity in our national anthem, the annual Thanksgiving proclamations, the opening of sessions of Congress by prayer, the commissioning of chaplains for the armed forces and the recognition of the place of chaplains in providing a spiritual ministry for those in hospitals and prisons, the authorization of marriages by ministers, priests and rabbis —all signify the awareness by government of the place of religion in American thought and life.[174]

[171] Professor of Law, University of Michigan Law School.

[173] P. KAUPER, RELIGION AND THE CONSTITUTION 47 (1964).

[173] P. Kauper, *Separation of Church and State—A Constitutional View*, THE CATHOLIC LAWYER 33 (1963).

[174] *Id.* at 34.

Like Professor Katz before him, Kauper is far more concerned with current church-state relations. And he too finds an ever-increasing sphere of common interest due to the coming of the welfare state and its expanded realm of activity.

> It is useful to note in this connection that a notable aspect of the secularization of American Life is the gradual taking over by the state of many functions at one time performed by the churches. We do recognize that it is appropriately a religious function to engage in activities other than having church services on Sunday. It is appropriately a church function to operate hospitals, to operate schools and colleges, and to take care of the needy and helpless. Yet we know also that in these areas the state has been moving in more and more, and that with the progressive acceptance of the conception of the welfare state or the social service state, we are looking to government to perform functions which at one time were performed wholly or primarily by the churches. The fact that the state is now performing these functions in no way impairs the validity of the churches' performance of these same functions.
>
> The question then arises whether, because of concurrence of interests and objectives, the state may to some extent support these functions when carried on by the church.[175]

This "concurrence of interest" idea is crucial to Kauper because it is this overlapping of purpose and function which supports the whole concept of accommodation or cooperation by the state.

This functional overlap explains the shade of differences between Kauper and Katz. Katz would have the state balance the interests of believers and non-believers, using state aid to do so where necessary. Kauper would elevate the interest of believers when it corresponds to the interest of government. For Katz, government aid or participation is justified only as a *technique of avoiding discrimination.* For Kauper it is more than merely a weight to be thrown on the scales, it is a positive *acknowledgement of purpose.*

One example should suffice to indicate this distinction. Aid to parochial schools is allowed for by Professor Katz' theory principally because it would avoid discrimination against those who would inculcate religious beliefs in their children through the educational process. Kauper would support certain forms of aid for different reasons.

Two considerations are emphasized by Professor Kauper in his discussion of federal or state tax funds being granted to private schools. First, education laws make it a duty for parents to send their children to schools which meet requisite standards. Because of these standards which refer to curriculum content, health and safety requirements, minimum number

[175] P. Kauper, *Church and State: Cooperative Separatism,* 60 MICH. L. REV. 1, 28 (1961).

of school days, qualification for teachers and the like, "it is evident that private schools by meeting these requirements are already integrated in a substantial way into the total educational system within a state".[176]

The second important consideration is that private schools, serving the same function as state schools, do not exist through tolerance of the state. Kauper cites *Pierce* in substantiating the claim that churches have a constitutional right to establish schools just as parents have the same right to make use of them.[177]

Next, reviewing *Everson,* Kauper finds that the Court made a distinction between aid to education, which would be unconstitutional, and social welfare legislation which does not violate the Establishment Clause provision. With insight and humor Kauper remarks that, "It is apparent that the solution to some of these problems depends on placing the right label on the legislative program". . . .[178] The Court, in this interpretation, leaves unanswered the fundamental question: "At what point can it be said that financial assistance to parochial schools can be identified with religious instruction as to make it an unconstitutional establishment? There can be no precise answer to this".[179] In spite of this condemnation the commentator does see in *Everson,* and *Cochran,* the distinction made between the secular and religious aspects of the situation. This is most important to Kauper's theory, since the "overlapping functions" of church and state must be made clear if it is to be applied.

> If the relevant cases—those dealing with bus transportation and textbooks—furnish any answer at all, it is that the state can afford some support for parochial schools in so far as they discharge the *same secular functions* as the public schools even though they have the plus element of religion. In other words the *concurrence of function* principle is applicable here. The parochial schools do serve a recognized public purpose so far as the state's total interest in the educational process is concerned.
>
> By emphasizing the secular aspects of parochial school education, substantial financial assistance can be given without running into the obstacle that it amounts to an establishment of religion. If any distinguishing limitation is to be observed, it is that overall subsidies to parochial schools, which include support for operating expenses, are invalid because they further the teaching of religion, whereas assistance for specific purposes not directly and immediately identified with religious instruction is valid and proper.[180] (Emphasis added.)

Kauper concludes his argument that public funds can be granted to

[176] *Id.* at 34.
[177] *Id.*
[178] *Id.* at 35.
[179] *Id.* at 36.
[180] *Id.*

private schools by stressing the importance of unholding parental rights, but more importantly, the concurrent function idea:

> In any event, it is clear that the government may give some support to parochial school education, either by way of so-called fringe benefits or by subsidizing particular phases of this education identifiable as secular in character. *A principal reason to justify these expenditures is that parochial schools do serve a secular as well as religious purpose.* To put the matter another way, *the church and state are engaged in concurrent functions.*[181] (Emphasis added.)

There is of course a recognition by Kauper that his theory of accommodation is directed primarily toward advancing religious liberty. He cautions that enhancement of this liberty must not be allowed to .

> swallow up the establishment limitation. The accommodation theory is limited by the involvement principle. Government may to some extent involve itself in religious matters. The problem relates to the degree and extent of such involvement.[182]

This means that the Court is faced with a balancing test when the two religion clauses collide.

Kauper is not encouraged by his search for a manageable principle but his evaluation of the problem might echo the sentiments of all those who make similar attempts:

> The truth is that the Court, in attempting to give meaning to the religion clauses and to resolve the dilemma posed when the establishment and free exercise guarantees collide, is faced with an extraordinarily difficult problem, and the challenge to judgment cannot be obscured by resort to mechanical tests.[183]

Conclusion

If anything is clear from all of the above, it is that there is no agreement on the appropriate relationship of education, the church, and the state. It is submitted that the lack of agreement on the Supreme Court is in itself a commentary on the "nature of the beast". It is contended there that the elements of the problem preclude the possibility of composing a formula, or test, which is at the same time internally consistent, well-principled, and feasible in its application. A review of the theories presented above lends credence to this view.

The principle of "strict separation", set forth by Leo Pfeffer, has as its

[181] *Id.* at 38.

[182] P. Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation,* in RELIGION AND THE PUBLIC ORDER at 28 (1964).

[183] *Id.* at 39.

most enchanting aspect, simplicity. This is the most endearing quality of any form of absolute. It assumes that religious liberty is best served when church and state are not intermingled. Accordingly, prime attention is given to the Establishment Clause of the First Amendment. The application of the theory within the sphere of education is easily determined. It dictates that the state must do nothing which promotes religion either in public or private schools. In public education the state is prohibited from taking any action construed as being beneficial to positive beliefs. The *McCollum* decision best exemplified the ideal. Federal and state aid to parochial schools, in whatever guise, is simply banned. Whereas most commentators, and the Court itself, acknowledge grave concern over delicate problems in this area, the "separationists" are not troubled. Doubts about placing burdens on the free exercise of religion by withholding aid to parochial schools vanish with the premise that strict adherence to the no-establishment command ultimately confers a blessing upon that freedom.

The "separation" concept, unfortunately, suffers mightily in the hands of reality. This is nowhere better demonstrated than in the *Everson* case where a five-man majority felt compelled to juggle labels of state activities in order to square reason with principle. Here, the Court understood that even if religion somehow stood to gain from the principle, education certainly did not. In this instance the Court found it easier to distinguish between children and education than between education and religion. *Everson* represents the insurmountable problem confronting the Court when it elevates the no-aid principle to a status which logically precludes the realization of one of the nation's highest priorities—excellence in education.

The reality of educational needs serves as only one check on the application of the no-aid doctrine. The other formibable restriction is the free exercise guarantee. Pfeffer admits, for example, that where separation results in hostility toward religion, the state must make amends. Thus the provisions for armed forces chaplains are seen as constitutionally permissible. The point at which the necessities of religious freedom curtail the operation of the separation doctrine is difficult to determine but the process becomes less painful as the importance of the doctrine is increased. Leo Pfeffer seeks to make the task as simple as possible by raising an absolute standard. "Absolutes", he says, "have their rightful place, especially in a charter of freedoms. They set forth a goal to be striven for, though never fully achieved".[184]

Pfeffer's theory brings clarity and simplicity to an area of constitutional law which does not permit it. In the words of Soliciter General Erwin N. Griswold, "The absolutist approach involves . . . a failure to exercise the

[184] L. Pfeffer, *The Case for Separation*, in RELIGION in AMERICA 91 (1958).

responsibilities—and indeed the pains—of judging." [185] The necessity to "judge" matters involving the religion clauses cannot be denied.

The concept of state "cooperation" presented by Father Drinan placed emphasis on the Free Exercise Clause and directed attention to the role of religion in state educational institutions. Recognizing that the no-establishment command of the Constitution stands in the way of affirmative aid to parochial schools under circumstances in which the state is not acting in a biased way against positive beliefs, Drinan is obligated to show that the Court has forced such a bias through its interpretation of that command. His demands for financial support are valid only if it is agreed that, through various "establishment" restrictions placed on the public schools, the state is implicitly or explicitly compelled to adopt a hostile attitude toward religion. For the Catholic, this hostility is seen as a violation of religious freedom which can only be rectified through an affirmative state response to parochial education.

Drinan's claims (that is, his arguments resulting from the situation he portrays) are sound and strike a sympathetic chord. The difficulty lies in the attempt to maintain his portrayal of reality against the background of the "cooperation" theory. In a sense, the goal sought by the doctrine depends upon its rejection by the Court. It requires cooperation and noncooperation simultaneously. Financial aid to religiously oriented schools is justifiable only if the Court drives respect for religion out of the public schools! To put it another way, the doctrine relies upon the Court's acceptance of a double standard for the Establishment Clause. On the one hand, the interpretation of the clause must be very broad when applied to questions of religion in the public schools in order to ensure hostility. On the other hand, for purposes of allowing aid to parochial schools, the same clause must be virtually overlooked.

Father Drinan is asking for both a denial and promotion of religion and his theory must be faulted for being internally inconsistent.

Examining the conflicting positions held by Representative Drinan and Mr. Pfeffer, one is struck by the fact that in discussing the same problems and Court decisions, they are not addressing one another. That they are so far apart in their understanding of the role of church and state in education can be traced in part to the many relatively minor differences in historical emphasis and the importance of various aspects of Court cases. More importantly, they do not view the relationship of the religion clauses in the same fashion. Finally, they differ widely over the repercussions which increased aid or lack of it may have on society generally. Beyond all these factors lies a much more fundamental problem: *They are seeking*

[185] This criticism of an absolute approach is applied by Griswold to the separation principle in the church-state area, as well as to others, including free speech problems. *See generally,* E. N. Griswold, *Absolute is in the Dark,* 8 UTAH L. REV. 167 (1963).

to apply two different constitutional clauses to the same questions. Father Drinan adopts the Free Exercise Clause as his starting point and would have us believe that the Establishment Clause is a technical complement to the other. Leo Pfeffer depends upon the "no establishment" command to guarantee free exercise of religion as well as protection from established religions.

Since the battle for and against aid is being waged with two different weapons, it is not difficult to see why there are also different foes. For Drinan, defender of freedom for religion, the enemy is the secular common school. For Pfeffer, whose sword and shield is the Establishment Clause, the culprit is religious orientation in parochial schools.

To a large extent, championing of the Free Exercise Clause by Father Drinan, and Catholics generally, was caused by the broad interpretation of the other religion clause by the Court in the 1940's. Drinan candidly admitted that Justice Black's rendition of the Establishment Clause necessitated a rethinking of the Catholic argument by opening up the following questions:

> 1. Can religionists claim that the secularized public school violated the establishment clause because it prefers irreligion over religion?
> 2. Can religionists claim further that the state, by assisting only the secularized school, subscribes to and promotes an orthodoxy which is imposed on all students to whom, by law, the state has given a pledge of a free education unaffected by an officially established indoctrination?[186]

The starting point for mounting an assault on the "secularization" of the common schools is the concept of parental rights. By underscoring the Court's dictum in *Pierce,* and more recently, *Prince v. Massachusetts,*[187] Drinan was able to arrive at the fundamental truth that the public school is not the agency of the state for its own ends but rather the creation of the state for the benefit of parents, to assist them in discharging their primary duty of educating their own children.[188] With this thesis as an underpinning, the argument is shifted away from the question of establishment, and sectarian schools, and on to the public schools and the question of violation of religious freedom. The contention is made that:

> "the fulness of the 'free exercise' of religion clause in the First Amendment should protect religious parents and children from the hazards to their faith in the secular school and should guarantee to them an opportunity

[186] R. Drinan, *Constitutionality of Public Aid to Parochial Schools,* in THE WALL BETWEEN CHURCH AND STATE *supra* note 111, at 68.

[187] The Court said, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder". 321 U.S. 158, 166 (1944).

[188] R. Drinan, *The Novel 'Liberty' Created by the McCollum Decision, supra* note 122, at 225–26.

> to have schools in which their religious faith is not impeded or restricted".[189]

Father Drinan places the religious freedom contention squarely before his readers:

> "If we honestly face the fact, therefore, that the 'secular' school must by law discriminate (the word is not too strong) against all 'sectarian' considerations then does it not follow that non-believers receive in a secular school an education which confirms their beliefs whereas believers are subjected to an atmosphere which challenges if not contradicts their basic convictions?[190]

The nub of the problem is convincing the public and Court of this danger.

Leo Pfeffer is not convinced. He sees the entire charge levied against the public school as predicated upon a fallacy—that education "is a matter which concerns only the parent of the child and that he alone is benefited by the fact that his child is educated".[191] This is labelled a fallacy because:

> ... it ignores the basic premise of America's educational system: that it is the whole community which is benefited when children are educated and that the whole community is concerned not only with the fact of children's education but also with the type of education the children shall receive.
>
> It is for these reasons that education in the United States is compulsory, and that a parent is not permitted to decide that he wants no education for his child. For the same reasons, public education is universal and free, and its cost is borne by the entire community, even those who have no children at all or whose children attend non-public schools. And yet it is for the same reasons that control of the public school is in the hands not of the parents alone but of the entire community.[192]

Finally, Pfeffer dismisses the religious liberty argument by simply reversing it. The real violation of freedom stems not from the lack of belief permitted in public schools, but from the danger of having to support the propagation of faith. Because the public school opens its doors to all while the Church-related schools do not, any charge of discrimination must be directed at the latter.[193]

Pfeffer's view of the public school, its function, control and benefits, coupled with his concern over "permeation" of religion in parochial schools, leaves him no alternative but to embrace the Establishment Clause and direct his attack upon private institutions.

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[189] R. Drinan, *Should the State Aid Private Schools? supra* note 121 at 369.

[190] R. Drinan, *Should the State Aid Private Schools?* 27 VITAL SPEECHES 399 (1961).

[191] L. Pfeffer, *Analysis of Federal Aid to Parochial Schools*, 3 J. OF CHURCH AND STATE 144 (1961).

[192] *Id.* at 145, 146.

[193] *Id.* at 143, 144.

In sum, it should be said that with the more recent rulings in *Allen, Walz, Lemon,* and *Nyquist,* it may be possible for the "cooperationists" to shift back to an emphasis on what the Establishment Clause will permit, rather than what the Free Exercise Clause commands. In any event, an attempt to ascertain the "correct" relationship between "parental rights" and "community benefit" as they pertain to control of education is fraught with danger. Perhaps the most that can be said safely is that an overemphasis upon either is bound to result in defense of an extreme position on the role of the state in nonpublic education.

Turning to the so-called "neutrality" doctrines, the first, suggested by Professor Kurland, that religion should not be used as a classification in legislation, is most easily dismissed. Like the separation idea, it is too doctrinaire, too rigid. By suggesting that the two religion clauses be read together, Kurland is denying to the Court and legislatures much-needed flexibility.

What Kurland offers is virtually all principle and no practicality. When church-state questions are removed from the purely theoretical realm and become tied to immediate problems, several factors invariably vie for attention. At the same time Kurland asks the state to overlook religion as a classification, deep concern may be expressed over the need to enhance public morality, relieve financial burdens of expanding church activities in society, or strengthen academic programs—including those in nonpublic school systems. If these demands are to be met successfully, it is safe to predict that it will happen only through a loosening of the bonds which restrict affirmative state action. Admittedly, application of the Kurland thesis would permit, or even make mandatory, legislative efforts in behalf of religion under circumstances in which religious aspects could be viewed as part of a larger category of activities. To exclude religion would be to discriminate against it. But what about those situations in which discrimination would exist unless special benefits were conferred upon religion to redress the balance? Again, the example of chaplains for military personnel brings this problem into focus.

Conversely, by exempting religion from classification in legislation, it is conceivable that at times the state would be aiding it to such an extent that the no-establishment restriction would be rendered meaningless. As a principle, what Kurland's idea gains in consistency, it loses in feasibility. If, as has been suggested, the challenge of the problem requires flexible standards to permit adequate solutions, the "strict neutrality" and "accommodation" concepts of Wilbur Katz and Paul Kauper respectively represent the best hope. Both are set forth as guides for decision-making which maximize legislative discretion and the Court's role of balancing societal interests and the frequently conflicting commands of the First Amendment's religion clauses. To the extent that they recognize and en-

courage such discretion by these two divisions of government, they are in harmony with current needs. In contrast to the theories reviewed above, however, the ideas set forth by Katz and Kauper suffer from over-permissiveness. It may be flattery to label them "principles" or "doctrines" at all.

With its most recent decisions, the Court has, by its language, at least, more closely endorsed the view of those opting for cooperation than of neutrality, or separation. The question now seems to be how much will be allowed under the Establishment Clause. The Court is refusing to ask whether, in the absence of the particular policies before it, the state would be discriminating against those affirming religious beliefs. It is not weighing the competing interests of believers and non-believers in attempting to balance their rights, and that is the essence of neutrality.

The question is no longer whether the state may involve itself with religion, as Justice Black may have once sensed it, but, now, only to what degree may its "entanglement" extend. And to recognize that there is "entanglement" as a starting point, is to make, by 1970, an assumption that the Court did not make in 1947.

Having made this shift, it is unclear how harsh the Court will be about devices of aid. Now, it seems, it will clearly not allow direct financial aid, but as financial conditions of nonpublic schools worsen, the Court may respond with tolerance.

On the basis of what has gone before, one cannot be enthusiastic about the possibility of deriving a theory of the First Amendment clauses which is principled, internally consistent and, most important, befitting the multiple priorities of today's complex society. Good constitutional law does not abandon principle for the sake of practicality, nor does it permit the reverse. The search, then, for a viable principle should continue. The danger lies in the temptation to forget the forces which surround the Supreme Court. No doctrine which fails to weigh this nation's religious heritage, the counter claims of believers and non-believers, and the persistent dedication to academic excellence, is likely to be favorably received by that body. These are the factors which might have led Justice Oliver Wendell Holmes to repeat his remark:

> The very considerations which judges most rarely mention, and always with apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.[194]

[194] O. W. HOLMES, JR., THE COMMON LAW 35 (1881).