CHURCH-STATE CONSTITUTIONAL ISSUES

MAKING SENSE OF THE ESTABLISHMENT CLAUSE

DONALD L. DRAKEMAN

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PREFACE

> "On your knees, America!"
>
> No, too forceful, concluded the President's writer. How about, "In God We Trust" has been a watchword for Americans since our forefathers . . . ?
>
> Wrong again, Timothy Burnham thought: Too wordy, too mealy-mouthed, too avuncular. . . . If the President wants the citizens to pray, he should tell them to pray.[1]

Unfortunately, novelist Peter Benchley quickly involves Burnham in international intrigue, thus preventing us from finding out how the thoughtful speechwriter would have penned the presidential proclamation declaring a National Day of Prayer. We must instead go to the *Federal Register*, which duly records all such presidential statements, although we should keep in mind the force of these pronouncements. As Timothy Burnham says on behalf of Benchley, himself a former presidential speechwriter, "Why bother with proclamations? Nobody ever reads them, let alone heeds them. The newspapers print them between the obituaries and the neuter-your-pet notices."[2]

Heeded or not, presidential prayer proclamations have become an annual ritual, and for the purpose of setting aside May 5, 1988, as the day for "all Americans to pray, each after his or her own manner, for unity in the

hearts of all mankind," President Reagan's real speechwriters chose the mealymouthed approach: "Americans in every generation have turned to their Maker in prayer."[3] Several hundred words later, however, the tone changes from statements of historical fact to proclamations of national faith evoking the ringing cadences of the revivalists: "Let us [pray] for the love of God and His great goodness, in search of His guidance and the grace of repentance, in seeking His blessings, His peace, and the resting of His kind and holy hands on ourselves, our Nation, our friends in the defense of freedom, and all mankind, now and always."[4]

This is pretty strong language from the president of a country in which the separation of church and state is a central tenet of the national creed. Even fictional Timothy Burnham had the presence of mind to worry about "that piece of parchment called the Constitution." As far as he was concerned, "It's none of the President's business who prays when, how or to whom. The law says he has to keep his sticky fingers off religion."[5] And so it does, in the First Amendment to the Constitution. Yet at the same time, generations of Americans, from the days of the Puritans to the present, have proclaimed that God and country are joined together in pursuit of this nation's special role in world history. We are thus a nation pursuing with equal vigor a commitment to both a divine destiny and a complete separation of church and state. It is small wonder, then, that the relationship of religion to the republic over the last two centuries has been difficult and complex.

For this and a multitude of other reasons, studying the relationship between church and state is fascinating. Not only do church-state issues regularly receive front-page coverage in the national news media, but they are the focus of scholarly inquiry in a number of disciplines, including law, religious studies, history, and political science. Each field brings its distinct perspective to bear on church-state questions, and while there is inevitably some cross-fertilization, several relatively independent bodies of literature have developed. Lawyers tend to ask how to interpret the law in particular cases, church historians focus on the interaction of governmental and ecclesiastical institutions, and so on. Even libraries have realized this methodological pluralism, shelving books on church-state issues in three or four different places under a variety of call numbers.

To some extent, the church-state literature can be visually represented as an unfinished bicycle wheel. At the hub are all of the facts and circumstances surrounding the relationship of religions and governments. Radiating out from the hub in several directions are spokes, one for each of the scholarly disciplines dealing with church-state issues. Frequently missing, however, is the outer rim—the part needed to smooth out the bumpy ride inevitably created by a handful of spokes working independently. I would like to say that my goal is to complete the circle in church-state studies by drawing together all of the rich resources developed over the

centuries in several scholarly fields. Thus completed, the wheel could roll more smoothly and quickly for all who are concerned with this complicated subject. Such wheel making is, unfortunately, beyond the scope of my abilities, let alone this work on the establishment clause. Nevertheless, as someone who has, at one time or another, practiced law, studied religion and history, and taught political science, I feel inclined towards an interdisciplinary approach.

My focus is on the establishment clause of the First Amendment to the Constitution, and my question is one typically posed by lawyers and political scientists but frequently answered with appeals to history—What does the establishment clause mean? Since the Supreme Court is the final arbiter of constitutional questions, I will begin by tracing the Court's interpretation of the establishment clause from its early nineteenth-century decisions through the most recent cases. This discussion will show how heavily the Court has relied on both the historical background to the establishment clause and the changing role of religion in American culture. Then, to evaluate the Court's interpretive positions, I will look at the origins of the First Amendment as well as the evolving relationship of religion and government as it has been manifested in the courts. Finally, I intend to return to the original question by drawing both on this complex historical and cultural background and on the theories of constitutional interpretation developed by lawyers and political scientists to suggest a new approach to the establishment clause.

One stylistic note: Teachers of good writing often urge writers to avoid quotations. I have chosen to ignore this advice, especially in my discussion of Supreme Court cases. For lawyers, Supreme Court opinions are the Mishna to the Constitution's Torah. Over the last 200 years, the skeleton of the Constitution has necessarily taken its flesh from the Court's dictums, and lawyers hang on every available word.

I owe many thanks to a large group of people who contributed to this project. In particular, I want to mention Robert Alley, Horton M. Davies, Edward M. Gaffney, Jr., Anne Larsen, Terry Nystrom, Albert J. Raboteau, Robert P. Seawright, Lori J. Smith, and John F. Wilson, as well as my parents, who supported my education over almost three decades, Cindy and Amy Drakeman, whose thirst for ever more knowledge serves as a model for any scholarly inquiry, and especially Lisa Drakeman, whose love of learning and demanding standards of scholarship have inspired me throughout this work.

NOTES

1. Peter Benchley, *Q Clearance* (New York: Random House, 1986), p. 3.
2. Ibid.
3. *Federal Register*, vol. 53, no. 24 (February 5, 1988).
4. Ibid.
5. Benchley, *Q*, p. 3.

CONTENTS

1

THE SUPREME COURT AND THE ESTABLISHMENT CLAUSE

THE CONTEXT OF INTERPRETATION

When " 'I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' "[1] For one select group, the United States Supreme Court, Humpty Dumpty's aphorism is more than idle chatter. The Court seized final authority over the meaning of the Constitution in *Marbury v. Madison* (1803), announcing that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[2] Since then, the nine justices of the Supreme Court have set the terms for constitutional debate. With or without the help of all the modern aids to textual criticism and interpretation—from dictionaries to deconstructionism—the Constitution means exactly what the Supreme Court chooses it to mean, neither more nor less. And so, when Alice asks Humpty Dumpty "whether you *can* make words mean so many different things," he responds as the Supreme Court did in *Marbury*, "The question is, . . . which is to be master—that's all."[3]

Textual interpretation is a task that the Court shares with many groups, but the closest analogy may be the way teachers and preachers try to elicit meaning from sacred writings. The Constitution has had almost as many exegetes as the Holy Scriptures, and the process of interpretation is remarkably similar. In each case, the document is seen as inspired, the author is unavailable for comment, and the limits of language make the interpretive process essential. As James Madison wrote in defense of the inevitably

imperfect Constitution, "When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated."[4] There is, however, one major difference in the interpretation of Scripture and the Constitution. Theologians taking their scriptural cases up to the Heavenly Council for final appeal are usually unable to share the outcome with us. Not so in the law, where almost every constitutional controversy reaching the Supreme Court provides the opportunity for the public ritual of interpretation: First, the parties make written and oral petitions to the Court; then the justices retire for secret discussions; finally, after the public invocation of God's blessing, the nine black-robed justices proceed into the High Court to render their interpretation of the Constitution's mandates.[5]

The Supreme Court has employed a variety of tools in this process of constitutional interpretation. It has frequently used the acts and statements of the "Founding Fathers" to shed light on what the Constitution's words meant to the men who enacted them. And the Court has also looked at a variety of political and cultural factors, the "plain meaning" of the words, the rules of grammar, preconstitutional law and a number of other lexical aids.

Constitutional interpretation is complicated by changes in circumstances over the two centuries since 1787, when the Constitution was adopted. Nowhere is this more clear than in the Court's struggles with the establishment clause of the First Amendment to the Constitution. The establishment clause, together with the free exercise clause, reads: "*Congress shall make no law respecting an establishment of religion* or prohibiting the free exercise thereof" (emphasis added). These religion clauses were adopted by the First Congress of the United States in 1789, and ratified by the states shortly thereafter; but the establishment clause was not discussed at length by the Supreme Court until 1947. In the intervening 160 years, the place of religion and religious institutions in American culture changed dramatically. Yet the Supreme Court justices have consistently relied heavily on their reading of the First Amendment's eighteenth-century historical and cultural backdrop to determine its meaning. We must ask, therefore, not only what the Founding Fathers intended but whether their eighteenth-century perceptions of what an establishment of religion meant should hold sway in light of twentieth-century church-state problems. And, ultimately, we must answer the question that, in the Supreme Court's hands, may have a significant effect on American religion and law in the years to come: What do the words "respecting an establishment of religion" mean in the context of the first amendment?

THE PROCESS OF INTERPRETATION

The Supreme Court's first significant case dealing with the religion clauses of the First Amendment was *Reynolds v. United States* (1879).[6]

George Reynolds, a member of the Mormon church and private secretary to Brigham Young, had been indicted under a federal statute providing a fine of $500 and imprisonment for up to five years for those found guilty of bigamy. One of Reynolds's defenses was that his church required men to practice polygamy and his refusal to do so would bring about his eternal damnation. The court had to decide whether the free exercise clause of the First Amendment would forbid Reynolds's conviction under the bigamy legislation. In reaching its decision to uphold both the law and Mr. Reynolds's indictment, the Supreme Court discussed at length the meaning of the word "religion" in the First Amendment, thus setting the stage for subsequent establishment clause cases.

Since there is no definition of the word "religion," the court said, "We must go elsewhere . . . to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted."[7] The Court first reviewed the laws that had been enacted before the adoption of the Constitution providing public support for religion and for the punishment of various types of "heretical opinions." According to the Court, the "controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia."[8] The Virginia dispute involved a bill proposed in 1784 to provide an assessment to support teachers of the Christian religion. In opposition to this bill, James Madison prepared his famous "Memorial and Remonstrance" in which, according to the Court, "He demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government."[9] After defeating the 1784 bill, the legislature enacted the bill for establishing religious freedom drafted by Thomas Jefferson. The Court then quoted from Jefferson's bill, observing that to permit the magistrate "to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty."[10] Yet even Jefferson conceived that this liberty could be constrained, for, in his words, "there is time enough for the rightful purposes of civil government for its officers to interfere when principles break out to overt acts against peace and good order."[11] In these statements by James Madison and Thomas Jefferson, the Court declared, "is found the true distinction between what properly belongs to the Church and what to the State."[12]

The Court then proceeded to review the history of the adoption of the First Amendment's religion clauses, beginning with Jefferson's disappointment that the draft Constitution had no declaration of religious freedom. Noting that several states in ratifying the Constitution had proposed amendments providing for religious freedom, the Court observed that the First Congress responded by adopting the First Amendment, which, the Supreme Court declared, was drafted by James Madison (an important historical issue to which we will return in the next chapter). The Court then

quoted at length from Thomas Jefferson's letter to the Danbury Baptist Association, thus giving birth to one of the most troublesome judicial glosses in constitutional jurisprudence: "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."[13] According to Chief Justice Waite's majority opinion, Jefferson's letter "[c]oming as this does from an acknowledged leader of the advocates of the measure . . . may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."[14] Justice Waite failed to point out, however, that this "acknowledged leader" was not a member of the First Congress and was, in fact, in Europe when the First Amendment was adopted. And on this dubious historical reconstruction, numerous Supreme Court justices as well as politicians and even religious leaders have waxed eloquent about the American "wall of separation" between church and state.

Turning to the crime of polygamy and its treatment in Anglo-American law, the chief justice observed that Virginia had enacted a statute providing the death penalty for bigamy *after* it had passed the act establishing religious freedom. And so, since polygamy had never been tolerated in the United States, even in Virginia, the Court concluded that "it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."[15] Although the free exercise clause prohibited Congress from interfering with religious beliefs, the Court saw nothing in the Constitution restricting the government's ability to regulate actions contrary to the public interest. This distinction between belief and action has proved a nettlesome one in free exercise cases, but for our establishment clause concerns, the importance of *Reynolds* lies in the Court's heavy reliance on Madison and Jefferson in its search for the meaning of the religion clauses of the First Amendment.

Almost one hundred years after its enactment, the establishment clause first surfaced in a Supreme Court case. This suit, *Davis v. Beason* (1890), also involved the indictment of a member of the Mormon church under a polygamy statute.[16] This time the defendant was not a practicing polygamist; he was convicted of falsely taking an oath (required of voters) that he was not a member of an organization advocating polygamy. After reviewing the religious freedom argument discussed in *Reynolds*, the Court reached the argument of counsel that "because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and furthering them."[17] The Court refused to accept this aggressive reading of the establishment clause. Rather, it

argued, "Whilst legislation for the establishment of religion is forbidden, and its free exercise permitted, it does not follow that everything that may be so called can be tolerated."[18] Thus, with little fanfare, the establishment clause made its debut in Supreme Court jurisprudence.

Reynolds and *Davis v. Beason* provide a brief case study of the Supreme Court's hand in the course of American religious history. Brigham Young had declared polygamy to be a tenet of the Mormon church in 1852, based upon an earlier revelation of the Prophet, Joseph Smith. Strong public sentiment in opposition led Congress to outlaw polygamy in the Territories, and several prominent churchmen were indicted, including George Reynolds and Brigham Young. The Reynolds case showed that the Supreme Court would stand behind the government's efforts to stamp out this practice. Then *Davis v. Beason*, involving a nonpolygamist who merely belonged to the Mormon church, demonstrated the long reach of the government's ability to prosecute. Finally, in *Church of Jesus Christ of Latter-Day Saints v. United States* (1890), the Court upheld a federal law revoking the Mormon church's charter and confiscating much of its property.[19] Faced with public antipathy, the potential of widespread criminal prosecutions, and the forfeiture of the church's property, the president of the Mormon church issued a proclamation saying that polygamous marriages were no longer sanctioned. This proclamation came only a few months after the decisions in *Davis v. Beason* and *Church of Jesus Christ of Latter-Day Saints v. United States*. Ultimately, there was a grant of amnesty and presidential pardon for all who abstained from polygamy after the proclamation.[20]

The Supreme Court's next establishment clause case came in 1899 in *Bradfield v. Roberts*.[21] Mr. Bradfield sought to enjoin the United States from paying any monies in support of the Providence Hospital in Washington, D.C. He argued that the hospital was owned and operated by the "Sisters of Charity of Emmitsburg, Maryland," a "Monastic Order" of the Roman Catholic church. To allow federal funds to go to this hospital, in Bradfield's view, would not only violate the establishment clause but would also provide a "precedent for giving to religious societies a legal agency in carrying into effect a public and civil duty which would, if once established, speedily obliterate the essential distinction between civil and religious functions."[22] The Court, however, concluded that Bradfield had no cause of action. Even assuming, "for the purpose of this question only," that federal support of a religious corporation operating a hospital would be an unconstitutional establishment of religion, there was no violation because the Providence Hospital was not a religious corporation. It was incorporated for the care of the sick in Washington and its certificate of incorporation said nothing about religion. Moreover, the federal legislation funding the hospital did not mention religion. Therefore, there could be no violation of the establishment clause. The religious beliefs or affiliations

of the directors and officers of the corporation were irrelevant. As the Court stated, "[This] is simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the [secular] law under which it exists."[23] The Court gave no further explanation of its interpretation of the establishment clause.

A decade later the Supreme Court heard the case of *Reuben Quick Bear v. Francis E. Leupp* (1908)[24] involving a dispute over the use of trust funds administered by the United States on behalf of American Indians as "the price of land ceded by the Indians to the Government."[25] Rueben Quick Bear, Ralph Eagle Feather, and several other members of the Sioux Tribe in South Dakota contested a proposed expenditure of the trust funds by the commissioner of Indian affairs. The funds were to go to the Bureau of Catholic Indian Missions for the education of a number of Indian children at a mission boarding school. A discussion of the establishment clause came almost as an afterthought. "Some reference is made to the Constitution, in respect to this contract with the Bureau of Indian Missions. It is not contended that it is unconstitutional, and it could not be [citing *Bradfield v. Roberts*]."[26] The plaintiffs then contended that the "spirit of the Constitution" required that no federal funds be appropriated for use in sectarian schools, especially since there was a statutory requirement to such effect applying to some of the funds held for the Indians. The Court decided that the trust funds were merely held for the benefit of the Indians who should be entitled to choose secular or sectarian education for their children. To refuse to allow the funds to be used for the Indian children to attend Catholic school would be to prohibit their free exercise of religion.[27]

Forty years passed before the Court turned again to the establishment clause, and, thus, it was not until 1947 that the Supreme Court gave the establishment clause more than a passing reference. In *Everson v. Board of Education* (1947), the Supreme Court was asked whether it was constitutional for the state of New Jersey to reimburse parents for money spent to transport their children to school by means of the public bus system.[28] Some of the state funds were used to reimburse parents of children attending Roman Catholic parochial schools. The statute was, therefore, challenged on the grounds that the state's support of the Catholic schools in this way was an unconstitutional establishment of religion. This is the first case asking the Court to invalidate a state action under the establishment clause since it decided in *Cantwell v. Connecticut* (1940) that the First Amendment's religion clauses apply to the states as well as to Congress (an issue to which we must return later).[29]

In *Everson*, Justice Black's majority opinion first briefly reviewed the history of religious freedom (and lack thereof) in America. The persecution of Quakers, Catholics, and Baptists, combined with the imposition of taxes

to support certain churches "shock[ed] the freedom-loving colonials into a feeling of abhorrence."[30] Although no particular group in the American colonies deserves the "entire credit for having aroused the sentiments that culminated in the adoption of the Bill of Rights' provisions embracing religious liberty," Justice Black noted that Thomas Jefferson, James Madison, and other Virginians "provided a great stimulus and able leadership for the movement."[31] Citing the cases discussed above (especially *Reynolds*), Justice Black reaffirmed the Court's earlier conclusion that the "provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and intended to provide the same protection against governmental intrusion on religious liberty as the Virginia [Bill for Religious Liberty]."[32] Thus, the Court's broad interpretations of the First Amendment in cases involving the free exercise clause should apply equally to establishment clause cases. To implement this broad interpretation, Justice Black proposed the following nonexclusive test:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount . . . can be levied to support any religious activity or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious groups and vice versa.[33]

Again citing the *Reynolds* decision, Justice Black summarized by saying, "[I]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' "[34]

In applying this establishment clause test, and asserting that the "wall of separation" must be kept "high and impregnable," a majority of the justices decided that the bus fare reimbursement statute did *not* violate the establishment clause. Rather, it merely provided "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[35] The purpose of the establishment clause was not to handicap religion, but to require the state "to be a neutral in its relations with groups of religious believers and nonbelievers."[36]

The Court's decision prompted a vigorous dissent by four of the nine justices. Justice Jackson called the case's "most fitting precedent . . . that of Julia who, according to Byron's reports, 'whispering I will ne'er consent,'—consented."[37] Justice Rutledge's dissenting opinion, joined by Jus-

tices Frankfurter, Jackson, and Burton, agreed completely with Justice Black that "the [First] Amendment was the direct culmination" of colonial Virginia's struggle for religious freedom and disestablishment.[38] While earlier opinions of the Supreme Court focused heavily on Thomas Jefferson's efforts, Justice Rutledge gave considerable attention to James Madison's actions as co-author with George Mason of the religion clause in Virginia's Declaration of Rights, primary sponsor of Jefferson's Bill for Religious Freedom, and leader of the opposition to Patrick Henry's bill to provide assessments for teachers of the Christian religion. It was in this last conflict that Madison wrote his "Memorial and Remonstrance" which was, according to Justice Rutledge, "at once the most concise and accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.' "[39] Justice Rutledge then described Madison's efforts to have the First Congress adopt a bill of rights.[40] Through Madison's person, Virginia's preconstitutional disestablishmentarianism became embodied in the First Amendment:

> All the great instruments of the Virginian struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive phrasing.[41]

Thus, the nine justices unanimously interpreted the establishment clause broadly in the context of the Jeffersonian and Madisonian approach; the only question in *Everson* was whether the school bus fare reimbursement program breached the high and impregnable wall of separation. Barely a majority said that it did not.

Two years after *Everson*, another establishment clause case involving schools worked its way to the Supreme Court. In that case, the Court considered a program in Illinois providing for religious teachers (Protestant, Catholic, and Jewish) to come to the public schools once a week during school hours to provide religious teaching to the pupils. For less than an hour, the pupils, with the consent of their parents, were released from secular classes and were permitted to attend the religious instruction. Pupils not attending the religious classes were required to leave their classrooms (where the religious education took place) and take part in secular educational activities elsewhere in the school. This released-time religious education program was approved by the local board of education, and the teachers were subject to the approval of the superintendent of schools.

Without much discussion, the Court, in *Illinois ex rel. McCollum v. Board of Education* (1948),[42] held that the released-time religious education program violated the establishment clause. Justice Black's majority opinion, referring to the *Everson* test, noted that this case clearly involved the

"utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[43] The Court rejected the claim that the First Amendment only forbids preference of one religion over another but not the impartial governmental assistance of all religions. Justice Black also noted that the Court's interpretation was not hostile to religion, but that "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."[44]

Justices Frankfurter, Jackson, Rutledge, and Burton, who dissented from the Court's decision in *Everson*, submitted a concurring opinion in *McCollum*. Taking the majority opinion to task for simply applying the constitutional principle enunciated in *Everson* to the immediate facts of the case, Justice Frankfurter traced the history of American education back to the Massachusetts Bay Colony. According to Justice Frankfurter, the original motivation of the Puritans for education in America was to give children the ability to read the Scriptures. The "modern public school," however, developed from "a philosophy of freedom reflected in the First Amendment." Horace Mann and others (after difficult battles) barred all sectarian influence in public schools, according to Justice Frankfurter, who overlooked the fact that even Horace Mann supported Bible reading in the schools to support moral growth (as we will see in chapter 2). In any event, the justice concluded, "The upshot of these controversies, often long and fierce, is . . . that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people."[45] Thus, according to Justice Frankfurter, the public school became a "symbol of our secular unity. . . . "Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."[46]

The released-time program grew out of the desire of a variety of religious groups to extend Sunday school during the week, lest religion be viewed as a one-day-a-week obligation. According to Justice Frankfurter, two million pupils in 2,200 communities were participating in some form of released-time program (some were in schools, some were on church property). With this background, the four concurring justices concluded that the Illinois program "presents powerful elements of inherent pressure by the school system in the interest of religious sects."[47]

In his dissenting opinion in *McCollum*, Justice Reed was the first member of the Court to break ranks on its interpretation of the establishment clause. Up to this point, all of the justices had appeared to support the reading of the disestablishmentarian efforts of Jefferson and Madison in Virginia directly into the First Amendment. Referring to Madison's statement in the First Congress that the establishment clause meant that "Congress

should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience," Justice Reed suggested that the "phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church."[48] Even if that original intent had been interpreted more broadly in earlier cases, Justice Reed asserted that it had never been interpreted to encompass an optional, extracurricular released-time educational program. He then set out to show that a "reading of the general statements of eminent statesmen of former days . . . will show that circumstances such as those in this case were far from the minds of the authors."[49] For example, according to Thomas Jefferson's regulations for the University of Virginia, students at the university should be free "and expected to attend" religious worship services; thus, according to Justice Reed, Jefferson's "wall of separation" did not exclude religious education from the public university he founded. In Justice Reed's opinion, "A rule of law should not be drawn from a figure of speech."[50] Moreover, Reed said that Madison's "Memorial and Remonstrance" is inapplicable to this case. That great document was written to defeat a tax bill designed to support certain religions. Nothing in the "Memorial and Remonstrance" suggested to Justice Reed any particular conclusions about the constitutionality of religious education in the public schools. This historical background, then, must be weighed against the long-standing practice of released-time religious education in many states. In Justice Reed's view, the Court should give the states "great leeway" in their attempts to deal with "important social problems," and the Court's "[d]evotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people."[51]

Also noteworthy in the *McCollum* case is Justice Jackson's concurring opinion, in which he spoke eloquently of the importance of religion in a variety of elements in American culture. He then punctured the Court's inflated view that constitutional principle and history can simply solve cases such as the one at bar.

> It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and where the sectarian begins in education. Nor can we find guidance in any other legal source. . . . [W]e are likely to make the legal "wall of separation between church and state" as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.[52]

Justice Jackson's remarks may seem increasingly apt as we wind our way through subsequent establishment clause cases.

In *Zorach v. Clauson*, the Supreme Court was asked to rule on another released-time religious education program.[53] In that case, decided in 1951,