Judicial Mediation of Religious Freedom and Governmental Authority in the United States

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JUDICIAL MEDIATION OF RELIGIOUS FREEDOM AND GOVERNMENTAL AUTHORITY IN THE UNITED STATES

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The constitutional tradition of the United States has numerous interesting and telling examples which illustrate how a political society copes with the problem of freedom and authority. And it is in the area of religious freedom that the constitutional problems tackled by the courts reveal the real character of American society and government. "Of all our liberties," maintains Leo Pfeffer, this country's leading authority on questions of church and state, "perhaps the most important is religious liberty."1 He goes even one step further, saying that it is also "the progenitor of most other civil liberties."2 It is hard to conceive a society which can attain a measure of freedom, particularly religious freedom, and satisfy all its members optimally. The political requirements of a society's subsistence will forever complicate the tendency of man to liberate himself from authority. Leo Pfeffer correctly maintains that "social living means that individual desires regardless of their motivation will be curbed in the interests of the community."3 We may impetuously though humanly stake a fictive claim in an absolute realm and affirm it apodictically, but in the daily realities of a shared existence, where bread has to be broken and only some wine can be drunk, our claim dissolves. Nevertheless, it is a fascinating exercise to trace the American experience in this area of tensionful, dynamic relationship between religious freedom and governmental authority.

In every society one may trace three types of limitations upon religious freedom: one arising from activities of individuals, another from activities of organizations, and the most weighty arising from the activities of the government. Anyone practicing religion is bound to encounter (or inflict) some or all of these types of potential limitation. In a society in which religious freedom clashes with any one of these and where this clash may constitute a litigable controversy to be settled in the courts which are easily (and inexpensively) accessible to anyone, settled through painstaking and conscientious familiarization with the detailed facts involved in such a controversy, by professionals, whose

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1 PFEFFER, THE LIBERTIES OF AN AMERICAN 31 (1956).
2 Ibid.
3 Id. at 48.
training, character, and intelligence has been subject to long-lasting formal and informal scrutiny and observation and whose political and psychological independence from the government and other groups of the day is as much insured as such independence is capable of being insured—in such a society religious freedom and human freedom in general will have a fairly good chance of being maximized. The limitations upon religious freedom in such a society will, most likely, be kept at a tolerable point. It would seem that the American constitutional experiment in this area is not only interesting; it is also successful and pedagogically valuable.

The first sentence of the first amendment of the American Constitution succinctly prescribes: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” With this provision, proposed and adopted in the First Congress of the United States, and soon after ratified, “the United States furnishes the first example in history of a government deliberately depriving itself of all legislative control over religion.”4 Its intent was to prevent religion from dividing society. Religious freedom is to be insured by a twofold provision of the amendment, one prohibiting congressional or legislative encroachment into the domain of its pursuit, the other proscribing Congress from establishing religion by legislation. The full concept of the American constitutional notion of religious freedom is thus breached by a twofold aspect: neither of which can be fully understood if taken singly, and both of which are mutually presupposing. It establishes freedom for religion, as well as freedom from religion. That is to say, the government has been constitutionally prohibited to either burden or benefit religion.5

I Freedom For Religion

While these constitutional limitations upon Congress and upon the legislatures of the different states (upon the legislatures due to the infusion of the first amendment, applicable only to Congress, into the ‘due process’ clause of the fourteenth amendment, applicable to the states)6 speak in plain language, their meaning—in exposition and ap-

4 Schaff, Church and State in the United States 23 (1888).
6 The federal courts have often raised the question of whether the first ten amendments “ought to be construed as to restrain the legislative power of a state, as well as that of the United States.” Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833). Chief Justice Marshall in the Barron case refused to apply the “due process” clause of the fifth amendment to protect an individual against a municipality, because “these amendments contain no expression indicating an intention to apply them to state governments.” Supra at 250. Justice Catron in Permoli v. First Municipality, 44 U.S. (3 How.) 589 (1844) confirmed this rule. However, after the fourteenth amendment the Court tacitly acknowledged the applicability of the first amendment as a restraint upon the states in matters of religion even though it sustained an Idaho
lication—is complicated, filled with potential controversy, and unyielding to generalizations. "The word religion," claims Justice Waite in Reynolds v. United States—pinpointing one of the most important problems here arising—is not defined in the constitution." Judge Learned Hand claimed that "religious belief arises from a sense of inadequacy of reason as a means of relating the individual to his fellow men and to his universe . . . [It] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God." Obviously, religion is not something entirely private, but related to other individuals through some overt form of communication, articulated symbolically, ritualistically and in other malleable forms of human expression and activity. This is why it is hard to disentangle the concept of religion from the notion of "church" which contrasts harshly with a definition of religion that makes it a strictly private, purely individual affair. If the function of religion is to relate human beings to other human beings, and to God, it is hard to see how one could then settle with a definition of "religion" which omits reference to a context of interpersonal relationships without which no human expression or activity could find meaningful reflection and realization. The constitution itself, when referring to religion in the first amendment, speaks of its "free exercise." However, the Supreme Court of the United States has furthered a notion of religion, particularly in Everson v. Board of Education which served to obfuscate issues, as will be shown. According to this notion religion is purely a matter of private conscience.

Among the several types of limitations upon the "free exercise" of religious activity, the most significant and most difficult to evade is provided by governmental authorities, both local and national. However, it is noteworthy that, while the Supreme Court of the United States declared numerous acts of state legislatures or local governmental authorities unconstitutional, it has never annulled an act of Congress. In 1878, an act of Congress condemned polygamy as a criminal offense in the territory of Utah where Mormons tended to congregate, a religious sect to whom polygamy was an essential tenet of dogma. Under this one law one Reynolds was prosecuted and sentenced, and the Supreme Court of the United States dealt with the problem in Reynolds v. United States, and upheld his conviction. The opinion of Justice Waite in this case reveals the rudimentary philosophy of the Court in respect to
liberties at the time, and it also shows how the notion of religion as a purely private affair had been incorporated by the Court. Justice Waite held that laws "cannot interfere with mere religious belief and opinions, [but] they may with practices." He sided with Congress, justifying its anti-bigamy law by pointing to the powers of Congress over territories, and by assuming something which he should have proven, namely, that legislative law is in fact superior to religion as protected from such law by the first amendment. His opinion would seem to indicate that the first amendment prohibits Congress and the legislatures to do something which they could not inhibit in any case,—to wit: burden private opinions. For, matters of conscience are in any case beyond legislative fiat and therefore can be without specific protection. Waite maintained that to permit a man to excuse his practices on account of his religious belief "... would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." Obviously, Waite was pressed to generalize exaltingly, in an ad horrendum type of argument, and he was prompted toward this by the difficulty of having to justify legislative restraint upon practices which, although they did not comport with the mores of the majority, resulted from religious convictions and religious conscience. The mandatory nature of the first amendment's prohibition against legislative invasion into religious freedom, and yet the necessity to justify precisely such an invasion, drove Justice Waite to shift the argument from a qualification of exercise guaranteed by the first amendment to an argument for freedom of mere belief rather than exercise. Instead of making an attempt at interpreting what exercise might mean in the constitutional and socio-political context, he distorts the meaning of the first amendment. This he accomplished by elevating the so-called Jeffersonian "wall of separation" into "an authoritative declaration of the scope and effect of the amendment," as he puts it. It permitted him to hold that "... congress was deprived of all legislative power over more opinion, but was left free to reach actions which were in violation of social duties or subversive of good orders." Today, there is less assurance even regarding belief. Even Leo Pfeffer argues for "free belief, perhaps, but not the free exercise of religion." Certainly, it is a short step to implicit recognition that there is not a wall between conscience and practice; that if practice can be obnoxious, opinion can be too, and perhaps conscience also. This recognition seems to contrast with Jefferson's own views, views

12 Id. at 166.
13 Id. at 167.
14 Id. at 164.
15 Ibid.
16 PFEFFER, op. cit. supra note 1, at 47.
which the Court chose to utilize to make is constitutional interpretation clear and authoritative. Jefferson said as follows to the Danbury Baptists: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislatures 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." Note that Jefferson's wall stands between Church and State, while Justice Waite, though quoting Jefferson, shifts, the object of separation from exercise to mere belief from church to conscience, a privatization of religion which could not be subject to legislative fiat in any case, constitution or no constitution. It can only be subject, we might add, to social pressure that sensitizes the intimacy of one's conscience. But, with this accomplished Waite could divest the case under his disposition from the relevancy of the first amendment, an operation he could perform with a privatizing notion of religion, and only such a notion. He is thus free to state the real reasons why the act of Congress should be upheld, referring to the mores of Western people, to the common law of England and the colonies, finally saying:

Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations . . . a civic contract, and usually regulated by law . . . . There cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.18

What did Waite mean by "unless restricted by some form of constitution?" It appears that he had doubts on the subject; the phrase seems an admission of awareness that his decision was not logical, that he tried to uphold the amendment at the same instant when he was de facto amending it, a thought which was—at the time—impermissible to a judge who thought he was merely interpreting the text of the Constitution. His opinion signifies an attempt to circumvent the uncomfortable fact that both Congress in its legislative capacity and the Court in its adjudicative capacity had come into contact with religion and had crossed the wall which Waite, in order to divest himself from the possible implication of judicial amendment, exaltingly elevated into that "authoritative declaration" below which both Congress and the Court can then move unhindered touching exercise. Despite the fact that Church and State, by the very nature of the inextricable interrelationships that prevail between all activities in the human environment, are bound to be in some sort of contact, the Court dogmatically asserts that there is a wall between them, not fully realizing

17 8 Jeff. Works 113.
perhaps that this can be affirmed only upon the supposition that the Church is nothing more than a figment of an individual's imagination which cannot be reached by any governmental means. Regardless of the probable necessity of some form of intervention regarding polygamy, the ideologizing tendency of the Court, unwittingly engaged in masking the first amendment by a quixotic affirmation of the "wall doctrine," is evidently protruding and easily recognizable.

However, the Court has not always been so tender on first amendment provisions. In an Idaho case of 1878, where a statute disenfranchised bigamists, Justice Field held that "crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" In another case of 1892, the Court held that an act done only as a matter of religious worship will not protect a person from consequences if such an act has been prohibited by law. Although the Court has exaltingly reiterated the notion of "separation," pretending to an inviolability of "religion," meaning conscience, it has allowed acts of Congress and those of states to touch upon religious exercise without guiding Congress on legislation touching such exercise. Thus, the Court gave a green light to Congress because it burdened its thinking by an unrealistic notion instead of tackling the problem, as it should have, head on. Had it done so it might have come up sooner with distinctions such as the "clear and present," or "probable danger" doctrines which it developed in response to the equally important subject of freedom of speech.

In matters of health and public welfare the Court went along with governmental restraint notwithstanding the religious scruples and objections of individuals. About a decade ago the Court refused to consider a case, thus affirming the lower court's ruling, appealed by Jehovah's witnesses parents of a baby who was taken from them and given a blood transfusion over their protest. There is no doubt about the nature of the treatment of the Rowe brothers who claim divine inspiration for the need to practice nudism in public were they to display more than their religious convictions.

The most intricate and interesting problems of religious conscience arise in connection with an individual's refusal to bear arms on ac-

20 Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1892). Compare Cleveland v. United States, 329 U.S. 14 (1946) in which a Mormon bigamist was prosecuted under the Mann Act because he took an extra wife over a state line.
21 People ex. rel. Wallace v. Labrenz, 344 U.S. 824 (1935). In Bunn v. North Carolina, 336 U.S. 942 (1949) the state of North Carolina was upheld in prosecuting petitioner for handling a live copperhead snake even though this was done as part of a religious service. Much earlier, the Court in Jacobson v. Massachusetts, 197 U.S. 11 (1905) held against a citizen who because of his religious faith objected to compulsory vaccination.
count of his religious convictions. Congress has been granted powers by the Constitution to raise and support an army, which implies the power to draft citizens for purposes of defense. Now, religious conscience forbids some people to engage in war, and the first amendment supports their claims on this ground. In World War I the Court refused conscientious objectors exemption from the draft on the basis of their claim that their refusal was religiously motivated. Then, it later affirmed a California statute which required students at the University of California to take military training. A student was expelled from the University because he refused to take part in paramilitary exercises on account of his conscience, even though the exercises were prescribed by the California statute for all schools. The Court unanimously upheld the statute and Justice Butler explicitly refuted the arguments of Hamilton that it is a fixed principle of our Constitution that it exempts conscientious objectors from bearing arms and partaking in war. "The conscientious objector," maintained Butler, "is relieved from the obligation to bear arms... because and only because, it has accorded with the policy of Congress thus to relieve him." Apart from this general point, the Court pointed out that to be a student at a university is entirely optional, not obligatory. In 1945, a conscientious objector was denied license to practice law in Illinois. He refused to take the oath to support the Constitution of Illinois because one clause in it called for duty in the National Guard, and the Supreme Court upheld the courts of Illinois on grounds that an officer charged with the administration of justice in the state of Illinois and under the Constitution of Illinois may be required to support the Constitution of Illinois fully. Justice Black forcefully dissented, joined by Douglas, Murphy, and Rutledge, because he could not "agree that a state can lawfully bar from a semi-public position a well qualified man of good character solely because he entertains a religious belief which might prompt him at some time in the future to violate a law which has not yet been and may never be enacted."

Conscientious objectors have since won a victory, though their victory is really a victory for freedom for religion in the United States. The government generously has allowed them to exempt themselves from combatant service. The Selective Service Act of 1940, which contains no specifications as to what is to be considered religious belief, exempts conscientious objectors. So does the Selective Service Act of

23 Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934).
24 Id. at 264.
26 Id. at 758.
1948, with a qualification which remedies the omissions of 1940 in that
it defines religious belief: "Religious training and belief in this connec-
tion means an individual's belief in a relation to a Supreme Being in-
volving duties superior to those arising from any human relation, but
does not include essentially political, sociological, or philosophical views
or a merely personal moral code." The Universal Military Training and
Service Act of June, 1951, is explicit as to who may qualify as a con-
scienious objector and codifies the categories of objectors who have
been sanctioned as such by the Court. These advances in the statutory
provision of Congress regarding conscientious objectors have been
encouraged by Supreme Court decisions. In the case of Estep v. United
States, for the first time, the Court subjected a draft board order
to judicial scrutiny in order to guarantee fair procedure and prevent
arbitrariness; it has since continued to impose such scrutiny. In
Dickinson v. United States the Court ruled that a conscientious ob-
jector cannot be questioned in his sincerity on a mere affirmation of
the board unsupported by cogent evidence. The status of conscientious
objectors is constitutionally guaranteed now, even though their social
situation exposes them to silent approbation, psychological ostracism,
and other forms of subtle discrimination. The fact that the courts have
guided Congress toward scrupulous attention for decency in the treat-
ment of these people is a most encouraging example of governmental
humanitarianism.

The Court has been quite generous regarding the admission of im-
migrants with religious and conscientious scruples insofar as the oath
requirement "to bear arms" is concerned. In Girouard v. United States
the Court reversed three earlier decisions in which the Court had
denied citizenship to applicants unwillingly to swear that they would
bear arms. Girouard was granted citizenship upon condition that he
will be available for non-combatant service. In Cohnstein v. Immigra-
tion and Naturalization Service even this was not considered essen-
tial for admission to citizenship.

29 Ibid.
30 Act of June 19, 1951, ch. 144, 65 Stat. 75. It recognizes some 125 types of
religious objectors. See Annot., 99 L.Ed. 443 (1954); Corwin, Constitution
of the United States, Revised and Annotated 94-99 (1952); Sibley & Jacob,
Conscription and Conscience (1952).
31 327 U.S. 114 (1946).
32 United States v. Nugent, 346 U.S. 1 (1953); Simmons v. United States, 348
33 346 U.S. 389 (1953).
34 328 U.S. 61 (1946).
35 Schwimmer v. United States, 279 U.S. 644 (1929); Macintosh v. United States,
The most interesting, most delicate, and judicially the most demanding type of controversy between religious conscience and social and governmental restraint arises in connection with the litigation unleashed by Jehovah’s Witnesses. This intolerantly litigious and exasperatingly fermentive minority stormed the Courts in the forties, and their activity provided numerous occasions for a clash of values and interests arising from a juxtaposition of their liberty to exercise their religion and the local police powers. One could literally speak of their “offensive” against the police powers of various localities. The court did not always grant them relief. In the case of Cox v. New Hampshire\(^3\) for instance, the Court upheld a municipal ordinance prohibiting a procession on public streets without a license despite the Witnesses’ claim that their religious liberties were unconstitutionally encroached upon. The Court claimed that “the authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.”\(^38\) Then, in Jones v. Opelika,\(^39\) the Court again upheld a municipal ordinance which had imposed non-discriminatory taxes upon sales of printed matter, despite the Witnesses’ attempt to circumvent the tax on the basis of their religious belief. The Court set a limitation to propagation of religion of a Witness who used “fighting words” against an officer who interfered with his preaching in Chaplinsky v. New Hampshire.\(^40\) Speaking through Justice Murphy, the Court upheld the state’s law prohibiting abusive language, saying: “... we cannot conceive that cursing a public officer in the exercise of religion is any sense of the term.”\(^41\) In Kovacs v. Cooper,\(^42\) the Court affirmed the conviction of a Witness whose sound truck emitted “loud and racous noises” which were prohibited by the municipal ordinance of Trenton, holding the ordinance to have been in line with reasonable limitations and regulations. However, in the previous year, in Saia v. New York,\(^43\) a similar ordinance was struck down on grounds that “when a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas.”\(^44\) The dissenters, among whom Frankfurter was the most predictive one, always giving the benefit of the doubt to legislative judgments rather than his judicial opinions,

\(^3\) 312 U.S. 569 (1941).
\(^38\) Id. at 574.
\(^39\) 316 U.S. 584 (1942).
\(^40\) 315 U.S. 568 (1942).
\(^41\) Id. at 571.
\(^42\) 336 U.S. 77 (1949).
\(^43\) 334 U.S. 558 (1948).
\(^44\) Id. at 562.
spoke of the "opportunities of aural aggression ... which if left/unc
controlled, the result is intrusion into cherished privacy." Thus he
brought into focus the extent to which the exercise of religious liberties
by one group can impede the freedoms of other groups. From what
has already been said it is evident that Jehovah's Witnesses have con-
tributed greatly to the clarification of constitutional conceptions re-
garding the nature and extent of religious freedom. Moreover, they
have brought to awareness the fact that religious freedom and govern-
mental authority clash in a variety of contingent manners and that only
pragmatic case-by-case adjudication can effect a modicum of reconcili-
ation or harmony between these seemingly incompatible, yet nearly
equally important values.

Perhaps the best way to illustrate this point is to recall the so called
"flag salute cases," *Minersville School District v. Gobitis* and West
Virginia Board of Education v. Barnette. The Gobitis children were
of an age when the laws of Pennsylvania make school attendance com-
pulsory. Yet, the children were expelled from school for refusing to
salute the American flag (pledging allegiance to it) because it was con-
trary to their religious belief, although the flag salute was prescribed
in all Minersville schools by the local board of education. The father
of the children sought court action to enjoin the local board from con-
tinuing to exact this ceremony from his children, because otherwise
he would have felt compelled to send them at exorbitant cost to private
schools where there was no mandatory requirement to salute the flag.
The local courts granted this injunction which the circuit court of
appeals affirmed. The Supreme Court, speaking through Justice Frank-
furter, reversed the disposition of the lower courts and thus upheld
the flag salute requirement. Justice Frankfurter a dogmatic disciple
of Holmes, was a convinced practitioner of "judicial self-restraint,"
and he refused to follow the "preferred position" doctrine regarding
freedom guaranteed by the first amendment which was, by then, already
well established. According to this doctrine, all acts touching first
amendment freedoms are automatically infested with presumptive in-
validity. The very first paragraph of his opinion implies a denigration
of the "preferred position" by placing religious conscience in a position
comparable with values of national unity, in a manner, however, which
accentuates the difficulties judges face in a free society particularly
when they aim to preserve it: "A grave responsibility confronts this

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45 *Id.* at 563.
46 See *Barber, Religious Liberty v. the Police Power: Jehovah's Witnesses*, 40
47 310 U.S. 586 (1940).
48 319 U.S. 624 (1943).
49 108 F. 2d 683 (3rd Cir. 1940).
Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But, when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test.\textsuperscript{51} And he went on toning down the function of the Court to restrain only legislative majorities insofar as they judge in the areas of religious freedom, because "to the legislature no less than to courts is committed the guardianship of deeply cherished liberties."\textsuperscript{52} In a sense, Justice Frankfurter was quite willing to surrender the function of judicial review: "The wisdom of training children in patriotic impulses is not for our independent judgment."\textsuperscript{53} And yet, he was fully cognizant of the gravity of the question involved: "Situations like the present are phases of the profoundest problem confronting a democracy . . . ."\textsuperscript{54} But then, in a superb gesture, he magically envelops the salutation requirement into "an interest inferior to none in the hierarchy of legal values,"\textsuperscript{55} namely national unity as "the basis of national security."\textsuperscript{56} With a heave and a sigh linguistically inspiring and legally almost unexampled, at least in its attentiveness to niceties of effect, he affects the ceremony of saluting the flag with an aura that overshadows religion and religious scruples. Perhaps, sensing the legitimacy of exemption in the case at hand, he was prompted to exalt the flag salute requirement into an almost indispensable ritual of national survival, which then enabled him to uphold the Minersville School Board instead of the Jehovah's Witnesses.

The dissent of Justice Stone was a more promising and a more generous gesture, and quite down to earth insofar as national security was concerned. Stone begins his dissent by emphasizing the loyalty of the Gobitis family notwithstanding their refusal to let their children salute the American flag. He maintains that "constitutional guarantees of personal liberty are not always absolutes,"\textsuperscript{57} and he admits that they may be restrained from time to time.

But it is a long step, . . . to the position that government may, as a supposed educational measure . . . compel public affirmation which violates their religious conscience. . . . [E]ven if we believe that such compulsion will contribute to national unity, there are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil

\textsuperscript{51} Id. at 591.
\textsuperscript{52} Id. at 600.
\textsuperscript{53} Id. at 598.
\textsuperscript{54} Id. at 596.
\textsuperscript{55} Id. at 595.
\textsuperscript{56} Ibid.
\textsuperscript{57} Id. at 602.
to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions."\(^{58}\)

And then, Justice Stone strikes at the root of the Frankfurter pose: "There have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good."\(^{59}\) Justice Stone authenticates the meaning of the First Amendment, because to him it is inconceivable that the framers of the Constitution "intended or rightly could have left any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection."\(^{60}\) This was in retort to Justice Frankfurter's claim that "nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant."\(^{61}\)

In *West Virginia State Board of Education v. Barnette*,\(^{62}\) the Court followed Justice Stone's dissent in the Gobitis case, driving Justice Frankfurter into a dissent which reiterated the traditional Holmesian position of judicial restraint or "judicial abdication."

II. FREEDOM FROM RELIGION

The first amendment not only forbids Congress to prohibit the free exercise of religion, it also forbids Congress to make any law "respecting an establishment of religion." This clause is designed to guarantee what is called the separation of Church and State.

Before one can discuss the first amendment provision in this respect, it would be useful to say something plausible about the notion of "Church." When we speak of the "Church" we do not always entertain clear-cut conceptions. In the dynamic and constantly changing environment which molds and reflects our conceptions, this is probably not even desirable. Loosely speaking, we may define it as the institutionalized communication of man's religious aspirations; or as an institutionalized communication of man, where the content of communication is religion. The Church thus defined is more than religion, and nothing without religion. Religion is the *sine qua non*, the necessary although not the sufficient condition of churchly existence. The word etymologically derives from a translation of Greek *ekklesia* which in early Christian communities denoted moments of togetherness and electedness. The early Christian communities expressed through it a claim to be the true people,\(^{63}\) or the God's own people.\(^{64}\) However, the more

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\(^{58}\) *Id.* at 603-04.

\(^{59}\) *Id.* at 604.

\(^{60}\) *Id.* at 605.

\(^{61}\) *Id.* at 594.

\(^{62}\) 319 U.S. 624 (1943).

\(^{63}\) Gal. 6:16; Rom. 9:6; Hebr. 2:16.

\(^{64}\) 2 Cor. 6:18; 1Pet. 2:9.
original denotation of "that which belong to the Lord" was termed *kyriakon* or *kyriaka* in Greek. And this is phonetically closer to the English term "Church" or the Germanic "Kirche." It was first applied to the place of worship probably by the Aryan Goths. Thus, "Church," in its linguistic as well as in its social sense connotes two elements; a definite place of congregation and a particular practical association with it.

Even Protestant religious thinkers are by now forced to abandon a quite compulsive attitude toward religion engendered by their juxtaposition to Catholicism and the Church which had led them to a theologico-psychological bias against organized religion, a bias not always unwarranted.

The notion of "establishment" respecting which Congress is prohibited to legislate, is interpreted by the Court to mean separation which is complete. While the Court is rather committed to the idea of complete separation, the real problem arises in connection with the unavoidable contacts between Church and State which pose the question whether the State is to be neutral among religions, or neutral between religion and non-religion, religion and atheism. In the first instance, the assumption prevails that society is religious, while in the second instance the state is facing a standard of irreligiousness which it will not be able fully to meet. Since religious groups are most anxious to perpetuate and extend themselves, which is naturally accomplished through educational means, and since education has increasingly become a public responsibility, the most crucial centers of controversy arise from two possible sources: from government aid to religious organizations in and out of school and from the intrusion of religion into the governmentally financed public schools. Before the Court authoritatively defined in the *Everson* case a disestablishment notion of the first amendment and implanted it into the "due process of law" clause of the fourteenth amendment to involve local governments as well, the Court, in *Cochrane v. Louisiana State Board of Education*, held that the state may provide all school children—including parochial school children—with free textbooks, for to do so was not a service to the parochial schools but to the child, and tax money may validly be spent for a private purpose. The *Everson* case was based on a taxpayer's suit wherein an act of the New Jersey Board of Education was challenged for authorizing reimbursement of transport in the range of about forty dollars annually to parents of children who attended parochial schools. The action of the Board was in pursuance of the New Jersey statute which required the boards of edu-

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65 370 U.S. 1 (1947).
66 281 U.S. 370 (1929).
cation of the districts to provide for transportation of school children. One taxpayer challenged the validity of reimbursement to parochial school children on the following constitutional grounds: first, taxes were taken from some and bestowed upon others for private purposes; and second, the statute and ordinance provided support to church schools in violation of the first amendment establishment prohibition. The Court, through Justice Black, rejected the contention that the law had private character. Nevertheless, while agreeing with the second contention in principle, Justice Black found it inapplicable as a limitation in the case at hand. He argued as follows, defining the meaning of disestablishment:

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 it 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 disbelieve in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities of institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."67

Raising here an absolutely untouchable standard of disestablishment by adamantly reiterating that "no tax in any amount, large or small, . . ." Justice Black appears to contradict himself without compunction: "measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school children. . . ."68 But this ambivalence, witting or unwitting, is clearly a catapult to any direction on which the Court may be willing to take us. The stored-up aggregates of a sectarian dogmatism, essentially alien to the pragmatic tradition and the pragmatic requirements of a more complex and quite contingent constitutional situation, bides its time, and not for long. In effect, the decision, while deciding in favor of the Board of Education, leans with a vengeance towards intimating the unconstitutionality of like enterprises. Justice Black winds up his opinion by confirming the "law": "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest

67 330 U.S. 1, 15-16 (1947).
68 Id. at 17.
breach." It is almost as if the tail wagged the dog, due perhaps to the fact that the conscience of the one interpreting separation accepts secularism as the context to be kept separated. Jackson's dissent hits the nail on its head: "The undertones of the opinion, advocating complete and uncompromising separation of church from state, seem utterly discordant with its conclusion." He pokes fun at Black by recalling the case of Julia "who according to Byron's reports, 'whispering I will ne'er consent,'—consented. . . ." However, Jackson, while noting the ambivalence of Black's opinion, runs into the opposite fallacy: "One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities 'shall make no law respecting an establishment of religion. . . .'" The logic of Justice Jackson holds that prohibition of such a transgression is a basic right. But it is one thing to find by judicial means what constitutes a transgression, applying the constitutional precepts to a complex reality, and quite another thing to presume that a public policy transgresses when it employs the spending powers in a manner which may indirectly benefit even parochial schools. The constitutional provisions for non-establishment as a condition of freedom are certainly wise, but it would be foolish to presume that these provisions can be applied as swiftly and streamlinedly as they sound when proposed. Their meaning, in the daily realities of an evolving and fluctuating situation, receives relevance from the character of their subject matter which cannot be ascertained without a continuous and patient search of what is feasible and what is not, what can be included in it and what cannot.

The underlying basis of Justice Jackson's dissenting position is a peculiar conception of the first amendment which completely detaches religion from "the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayer's expense." In other words, it is his privatizing notion of religion which coaxes religion injudicially out of existence in a social world, a world becoming so pervasively public or affected with governmental activities, that the entire problem of disestablishment may well merit serious reconsideration. Justice Rutledge, with whom Justices Frankfurter, Jackson, and Burton agreed, connected on this dogmatism, maintaining somewhat abruptly and strenuously: "The Amendment's purpose . . . was to uproot all such relationships [and] create a complete and permanent separation of the spheres of religious activity and civil authority." He comes quite close to segre-
gating religion from the world and relegating it into a figment: "The dual prohibition makes that function/religion/altogether private." (Emphasis added.) Concretization of Justice Rutledge's opinion reveals its utter meaninglessness. When speaking of the expenditure of money for private purposes, i.e. religion, he holds it to be contrary to the first amendment since it respects establishment; while when money is expended for public purposes, it cannot be allowed to benefit religion which is a private affair. Hence, money spent by the state must in no case benefit religion, directly or indirectly. One may notice this cumulative broadening of the public domain against the alleged purely private domain, religion, which is by implication leading to a displacement of the private domain by the mandatorily taken provisions of the first amendment and absolutisitcally infused sectarian dogmatism which unfolds itself as follows: "There cannot be freedom of religion, safeguarded by the state, and intervention by the Church or its agencies in the state's domain or dependency on its largesse." The question to be asked from Rutledge is where in his opinion could he say quite securely and confidently that the domain of the state ends if he had no referent in religion? It is hardly conceivable that his answer could be clear. But to be incapable to delimit the domain of the state, except by reference to religion conceived as abstract privacy, is to make an insufficiently camouflaged bow to a totalitarian conception of the state. For it seems that, since the only delimitation which the state would here receive in such a philosophy is obtained from an abstract notion of religion, the public domain expands greatly. This is to abdicate the liberty of religious exercise, the possibility of meaningful establishment, and the possibility of effectively delimiting the public domain by an exercise of, rather than a dream of, religion. Possibly, it is to secularize the socio-political context to such an extent that it will in its entirety have to receive a sacral aura overriding religion and develop a Rousseauian totalistic notion of the state. This is why Professor Van Alstyne maintains:

The gradual pervasion of American society by government has caused a number of religious organizations to fear that an unyielding neutrality in the First Amendment must inevitably result in the gradual shrinking of organized religion. In a very real sense, there is cause for this alarm: not because the Establishment Clause itself expresses any hostility toward religion, but simply because the neutralized zone of governmental activity continues to expand, gradually squeezing religion from larger and larger areas of the total environment. . . . As government services expand, however, and as more of the economy and environment is occupied by the increasing, public, governmental

\[Id.\] at 52.
\[Id.\] at 53.
sector of our society, the net effect of the shift is to confine religion to the ever shrinking domain of the relatively diminishing private sector.\textsuperscript{77}

In McCollum v. Board of Education,\textsuperscript{78} a case entertained by the Supreme Court because of the appellant's residence, taxpayer interest in Champaign, Illinois, as well as her parental interest, the Court annulled the "released time" program in the public schools, because 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."\textsuperscript{79} The Court held this to be "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."\textsuperscript{80} Thus, the program fell squarely under the first amendment ban. Curiously and significantly, it was again Justice Black who wrote the opinion, quoting his unreachable standard of separation with more facility this time. He distinguished the case from the \textit{Everson} decision sufficiently to allow him to uphold Mrs. McCollum against the Champaign Board. Justice Frankfurter was more subtle in his concurring opinion, and necessarily so, since he abandoned his cherished Holmesian position of restraint and indulged here in activism under quite unpragmatic assumptions despite lip-service to the protracted process of exclusion and inclusion: "... the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer."\textsuperscript{81} Then, after an excellent review of the historical development, he stated that: "Separation means separation, not something less."\textsuperscript{82} Justice Jackson, also concurring, is more realistic, because he knows that "the task of separating the secular from the religious education is one of magnitude, intricacy and delicacy. ... It is idle to pretend that this task is one for which we can find in the Constitution one word to help us judges to decide where the secular ends and the sectarian begins in education."\textsuperscript{83} He comments that to follow the wall doctrine is "... to decree a uniform, rigid, and if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to imbue us to accept the role

\begin{thebibliography}{9}
\bibitem{78} 333 U.S. 203 (1948).
\bibitem{79} Id. at 209.
\bibitem{80} Id. at 210.
\bibitem{81} Id. at 212.
\bibitem{82} Id. at 231.
\bibitem{83} Id. at 237-38.
\end{thebibliography}
of a super board of education for every school district in the nation.”

This concurring opinion reads more like a dissent, and as a matter of fact, it is more forthright and trenchant than the lonely dissent of Justice Reed. Justice Reed followed Justice Jackson in reiterating that “a rule of law should not be drawn from a figure of speech” re-ferring, of course, to the “wall doctrine.” Besides, “the practices of the federal government offer many examples of this kind of “aid” [which the court here holds unconstitutional] by the state to religion.” The Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for the proceedings. The armed forces have commissioned chaplains from early days, who conduct public services in accordance with the liturgical requirements of their respective faiths, ashore and afloat, employing for that purpose, property belonging to the United States. Under the Servicemen’s Readjustment Act of 1944 eligible veterans may receive training at government expense for the ministry in denominational schools. Justice Reed concludes that affirming this type of aid is not unconstitutional and that to read the Constitution otherwise is to conflict with the accepted habits of the American people. Here, he was developing an idea of neutrality on the part of the government among religions, rather than the idea of neutrality between religion and irreligion.

The McCollum decision day did not pass without connotation. Catholic militants, and other defenders of what seems common sense, attacked the Court most vigorously. Father John C. Murray, a leading Catholic expert on the Church and State problem, challenged the Everson and McCollum decisions of the Court as an “irredeemable piece of sectarian dogmatism,” while Professor Corwin chided the Court for acting as a “national school board,” as Justice Jackson himself had suggested in his concurrent opinion in the McCollum decision. Professor Corwin suggested that “. . . the Court, by its decision in the McCollum case, has itself promulgated a law prohibiting the free exercise of religion, contrary to the express prohibition of the first amendment.” Particularly Professor Corin’s reference to the Frothingham v. Mellon decision is remembered: Justice Sutherland maintained that “. . . the party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result

84 Id. at 237.
85 Id. at 247.
86 Id. at 253.
88 Murray, Law or Prepossession, in Essays in Constitutional Law (Mc-Closkey ed. 1957).
89 Corwin, Supreme Court as a National School Board, 23 Thought 665 (1948).
90 Id. at 681.
91 262 U.S. 447 (1923).
of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." Only Justice Jackson raised doubts on this matter in his concurrent opinion. Professor Corwin rightly points out that the Court, entertaining jurisdiction in the *McCollum* case, implicitly enlarged jurisdiction on the first amendment and reduced the doctrine of special interest to a fiction by allowing a taxpayer with a general interest in the law and a parent of a child admittedly a "problem child" to entertain a suit. When the Court received on its dockets a similar case on the New Jersey "Bible reading" program it held with Justice Jackson in a six to three decision in *Doremus v. Board of Education* that there was "no case or controversy" involved here, for the appellant had no standing to raise the constitutional question, because "Bible reading" did not touch the pocket of the appellant, and in addition the question of constitutionality became "moot" meanwhile since the child had graduated from school. Justices Douglas, Burton, and Reed thought otherwise in their dissent. At any rate, the effect of the Court's refusal was to uphold the New Jersey court which held that "The reading does not, obviously, affect or tend to affect the setting up, or the establishment, of a religion and, just as obviously, it does not prohibit the free exercise of any religion." It is interesting to observe the tone of the New Jersey decision which reflects the strong dose of religious criticism the Court had received after the *McCollum* decision:

The American people are and always have been theistic. . . . The influence, which that force contributed to our origins and the direction which it has given to our progress are beyond calculation. . . . Our way of life is on challenge. Organized atheistic society is making a determined drive for supremacy by conquest as well as by infiltration. . . . We are at a crucial hour in which it may behoove our people to conserve all of the elements which have made our land what it is. Faced with this threat to the continuance of elements deeply embedded in our national life the adoption of a public policy with respect thereto is a reasonable function to be performed by those on whom responsibility lies.

One may note here pertinently that the measure of genuine concern for authentic humanitarian values depends on more than an exalted, though in itself laudable, affirmation of what this Court happens to hold about our heritage. What we mean is particularly exemplified in a similar decision in New Jersey where Justice Vanderbuilt in *Tudor v. Board of Education* held that the distribution of the "Gideon

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92 Id. at 488.
93 342 U.S. 429 (1952).
95 Id. at 888.
96 14 N.J. 31, 100 A. 2d 857 (1953).
Bible” is a type of “establishment” contrary to the first amendment provision, basing much of its evidence upon the psychiatric findings, and upon the damaging effect upon the children’s psyches.

In Zorach v. Clauson, the Court took the opportunity to retreat from its extreme holding in McCollum, upholding the New York “released time” program where classes in religion were held outside the public school buildings; six Justices considered this a sufficiently different element of the case to warrant evading the McCollum precedent. Black, Jackson and Frankfurter dissented. The former two Justices saw here no difference from the McCollum rule while Justice Frankfurter, again side-stepping his habitual position of judicial self-restraint, held that “released time” is really a compulsion. Justice Douglas’ opinion shows an improvement upon the absolutistic opinions of the Everson and the McCollum decisions in which he went along:

The first Amendment . . . does not say that in every aid all respects there shall be a separation of Church and State. Rather it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be alien to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. . . . The appeals to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment.”

Justice Douglas hits the pith of the problem involved in all these cases: “. . . 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 scope of religious influence.” Justice Black reveals his real attachment to the eighteenth century conception of disestablishment in a world of the twentieth century, dissenting on grounds similar to those which compelled him to lead in the Everson and the McCollum decisions. While setting forth the thoughts and practices of a century in which an agrarian civilization could still afford absolutistic notions, he appears to bypass the realities of the twentieth century in which “. . . government . . . takes up more and more of the time of the people, and as more and more non-religious institutions are the beneficiaries of governmental aid, religion which is not similarly aided must suffer in the competition.”

98 Id. at 312.
99 Id. at 314.
100 Konvitz, Bill of Rights Reader, 1032 (1956).
It is somewhat hypocritical to maintain on one hand that the constitutional provision aims at establishing freedom of religion and then on the other that this is possible only on the basis of an extra-judicial, almost legislative absolutism, which ultimately burdens the free exercise, notwithstanding the plain fact that even if one conceives of religion as an entirely private affair—which it is not—total separation is still not feasible under modern conditions. It is for this reason that Robert Horn states that "... if the state withheld what it alone can provide, it would deprive Churches not only of their liberty, but their life. The state which refused to give churches certain minimal public aid would in fact be passing upon them the dread sentence of outlawry."

Since the Zorach decision the court has tacitly accepted the infeasibility of complete separation. Instead, the Court has concerned itself with ascertaining, in each individual case, whether the legislation in question was designed to benefit religious groups, or whether it was serving primarily secular purposes. Even if legislation is shown to be aiding religious groups, the Court will not strike it down, if it can be shown that the legislature cannot otherwise serve the secular purpose as well. These considerations on the part of the Court do not avoid examination into the motives of legislatures, but they do involve examination of the overall effects of legislation and including an independent judgment as to what purpose or purposes specific legislation serves, and may result in the annulment of a law in one state and the legitimation of an almost identical law in another state, depending upon the extent to which the Establishment Clause has been violated by an element of conscious manipulation of secular institutions to advance sectarian interests. This pragmatic position of the Court is an entirely laudable development, and is unlikely to cause religion too much suffering in consequence of the inevitable expansion of the public domain.

In conclusion, one can say that an overbearing lesson can be extracted from this discussion of judicial mediation of religious freedom and governmental authority in the United States; that neither religious or governmental activity can manifest itself unrelated to the other, and neither can evade encounter with the other. Consequently, one must expect a constant interaction between religious and political activities, a great deal of overlapping in their legitimate spheres of influence, and a mutual interdependence.

101 Horn, Groups and the Constitution 52 (1956).
103 See Von Alstyne, supra note 102.