LAW OR PREPOSESSIONS?

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The constitutional law written in the Everson\(^1\) and McCollum\(^2\) cases is obviously not what is called learned law; consequently one who is not a lawyer, learned in the law, may speak his mind on it. In fact, to do so is a matter of civic duty, since, as the Journal of the American Bar Association pointed out, these decisions contain “a pronouncement by our Supreme Court on a fundamental principle, not only of national policy but of our civilization and way of life.”\(^3\) Reasoned civic judgment on such a pronouncement is very necessary. Obviously, as embodying a rule of law, these decisions impose themselves on the collective will as norms of action; but by the same token they present themselves to the individual intelligence as matter for reflection; for law, I take it, ought to be reason and not arbitrary will.

My concern is with the reasoning of the Court in support of its new rule of law—with this reasoning in itself and as it reveals a concept of the problem of separation of church and state. These decisions represent the first formal efforts of the Court to work out an official contemporary philosophy of the political principle enshrined in the “establishment” clause of the First Amendment. Such an essay in philosophy is a much more crucial matter than the simple laying down of pragmatic rules to govern the relations between religion and government; it therefore deserves close scrutiny. No one who knows a bit about the literature on separation of church and state, that for centuries has poured out in all languages, will be inclined to deny that hardly another problem in the religious or political order has received so much misconceived and deformed statement, with the result that the number of bad philosophies in the matter is, like the scriptural number of fools, infinite. As I see it, the original American philosophy that inspired the First Amendment was fundamentally sound; it is therefore important to see that it is not corrupted, under the pretext, for instance, of “development.”

A second reason for close scrutiny of the Court’s reasoning in these cases derives from the absoluteness of the rule of law that has emerged from them: “no aid of any kind to religion in any form.” I have been given to understand that the present Court has a certain horror of absolutes, and is disinclined to give room for them in its jurisprudence; if this is so, it is somewhat ironical that the Court should suddenly have come up with one: “absolute separation of church and state, as an absolute principle.” At all events, dogmas that pretend to be absolute must rest

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\(^3\) 34 A. B. A. J. 483 (1948).
on reasons that are themselves absolute, unchallengeably ultimate. One would like to know therefore what these reasons are in the case.

Moreover, the far-reaching consequences of this absolute doctrine, if it should be logically applied, make it further imperative that the reasons for the doctrine should be unshakably valid. Justice Reed in his *McCollum* dissent pointed out that the Court's "rigid interpretation" of the First Amendment "conflicts with accepted habits of our people," and is capable of "upsetting practices embedded in our society by many years of experience." Moreover, it is the considered opinion of many that the decision will contribute towards an alteration in the very quality of American society by altering the traditional friendly, cooperative attitude of government toward religious forces, especially in the field of education. It may be that the state is still neutral as between religious belief and unbelief, as Justice Black in the *Everson* decision said it should be (although to fly through the air between these two trapezes is in itself an act not to be accomplished with the greatest of ease). At all events, the *McCollum* decision gives rise to a decided impression that the state—to apply the famous Irish phrase—is now neutral against religious belief. I understand that one must be chary about drawing out the logical implications of a particular decision; we are constantly being given the soothing assurance, on Holmes's paramount authority, that the life of the law is not logic but experience. However, there can be no complementary assurance of the Court's complete immunity from sudden attacks of logic; it seems to have had one in the *McCollum* case. It is not therefore comforting to see lying about, ready to the legal hand, a premise of deduction as sweeping and absolute as the *McCollum* rule.

Finally, the decision seems to mark the assumption by the Court of a new role; I mean a role in the field of educational policy. This is much more delicate ground than, for instance, the field of economic policy. To touch education is to lay hands on the child-parent relationship; and this is a far more sensitive zone of right than the one marked out by the relationship between the citizen and his property. If therefore the Court is to venture into this field (in what must seem a rather heavy-footed way), it must at very least have cogent reasons for doing so, as for instance, the protection of clearly threatened rights.7

I

Given then the need of good tight reasoning in support of our new constitutional doctrine, it is dismaying to the citizen not to find it. Let me be precise about the

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5 The Court's disclaimer of any intent hostile to religion is of course accepted. It remains to consider the effects of the ruling, and the use that will be made of it, e.g., by anti-religious groups. For my part, I fully agree with the public statement made by a group of the most thoughtful minds in Protestantism: "We believe that, whatever its intention may be, this hardening of the idea of 'separation' by the Court will greatly accelerate the trend toward the secularization of our culture." 8 *CHRISTIANITY AND CRISIS* 90 (1948).
7 No such threat to any rights—personal or property—was visible in the *McCollum* case.
issue. It is not a question of the reasons for a constitutional separation of church and state in some general sense, but for the particular rigid, radical, and absolute doctrine laid down in the *Everson* and *McCollum* cases. What needs justification is the absoluteness of the doctrine; and at this point the Court fails. Actually, it has advanced two separate lines of reasoning. Taken together, they tend to negate one another; taken singly, neither of them is valid.

In the *Everson* case the Court undertook to show that “no law in aid of religion” was the original meaning and native intent of the clause, “no law respecting an establishment of religion,” as this meaning and intent emerges from its general historical background. Justice Rutledge for the minority took the same line; his opinion differed from that of the Court chiefly by its more extensive allegation of the supposedly unique authority of James Madison, and consequently by the more radical and rigid character of its conclusions.

In the *McCollum* case this line of argument was severely challenged by appellee. Assembling all the available historical data, he argued that the clause in question natively and originally forbade only laws “respecting” (i.e., favoring or disfavoring) “an establishment of” (i.e., preferential status in law for) “religion” (i.e., the doctrines, practices, or modes of worship of a particular religious group). The historical evidence does not yield the absolute *Everson* conclusion: “no aid of any kind to religion in any form.” In reply, the *McCollum* decision simply stated that the Court was “unable to accept” appellee’s historical argument. It did not go on to say why the argument was unacceptable, whether for the reason that it was bad history or for other reasons, not historical. Nor has one any way of knowing what impression was made on the judges (other than Justice Reed, whose dissent reveals that he was impressed) by a presentation of the historical data far more complete and scientific than their own. At all events, a new line of argument appears in the *McCollum* case. It does not appear in the opinion of the Court, which is content curtly to reaffirm the sweeping *Everson* doctrine, without pausing to consider that the grounds had been shot out from under it; the new line appears in the opinion of Justice Frankfurter, in which the original *Everson* minority concurred.

Justice Frankfurter’s concern is not with what the First Amendment meant in 1791, which was the concern of the whole Court in the *Everson* case, but singly with what the First Amendment meant in 1948. The appeal now is not to the wisdom of the Founding Fathers, led by James Madison, but to the developed wisdom of their children, uttered by Justice Frankfurter. In token of this alteration of viewpoint, the constitutional formula, no “establishment of religion,” drops completely out of sight, in favor of the more accordion-like slogan, “separation of church and state.” From the *Everson* opinions it would indeed have seemed that the content even of this latter formula had been defined by the constitutional consensus of the

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states in 1791. Not so, Justice Frankfurter now says. We have to do here “not with a full-blown principle”\(^{10}\) but with one historically subject to progressive inflation. Separation of church and state is a “spacious conception”;\(^{11}\) and, contrary to Justice Rutledge’s *Everson* view (in which Justice Frankfurter concurred), its interior reaches of space were not measured out by James Madison and made the native dimensions of the First Amendment. Rather (Justice Frankfurter corrects himself and his colleagues), they have awaited survey in later ages, and the “metes and bounds”\(^{12}\) (a phrase of Madison’s), so far from being fixed by Madison, are not yet finally fixed.

The first Congress did indeed erect a wall of separation between church and state, on Jeffersonian specifications. However, time and “changing conceptions regarding the American democratic society”\(^{13}\) alter all constitutional blueprints. Always impregnable, the wall has not been immovable; originally high, it has not proved high enough. The Founding Fathers, whose Madisonian masonry Justice Rutledge had viewed as architecturally complete, actually left much building for future masons to do. And the masons have appeared to do it. They have, on Justice Frankfurter’s account, progressively walled religion out of the public school, and likewise walled government off from aid to religious education. Finally, in contradiction of Justice Rutledge’s *Everson* thesis, in which the “wholly secular” atmosphere of the public school is a federal “constitutional necessity”\(^{14}\) by intrinsic exigence of the First Amendment in its native meaning as determined by Madison, Justice Frankfurter now asserts that the “basis of the restriction [of government to purely secular education] is the whole experience of our people.”\(^{15}\)

Here in brief are the two lines of argument presented by the judges to persuade the American people that an absolute doctrine of separation of church and state, as having rigid application in the field of education, is reason and not arbitrary will. In the *Everson* case the Court in effect said: “Absolute separation always was the meaning of the First Amendment, as determined by the Founding Fathers.” In the *McCollum* case we read in effect: “Absolute separation has become in time the meaning of the First Amendment, as determined by the whole experience of our people.”

Well, one asks, which is it? The judges can hardly have it both ways. It is not a question here of two mutually supporting lines of argument; on the contrary, the two lines negate one another. (Unless it be that lawyers possess some philosopher’s stone for dissolving logical inconsistencies that is denied to a mere philosopher?) Moreover, the poor citizen is left at a loss even to know what jurisprudential theory the judges intend to apply in interpreting the First Amendment. Is it to be an appeal to legislative intent—to the meaning of the First Amendment “in the light of its history and the evils it was designed forever to suppress”\(^{16}\) (the *Everson* line)?

\(^{10}\) *Id.* at 217.  \(^{11}\) *Id.* at 213.  \(^{12}\) *Id.* at 217.  \(^{13}\) *Id.* at 214.


\(^{15}\) *Id.* at 217.


Or is it to be an appeal to some contemporary sociological theory of values (the McCollum line)? If one takes the former line, is the "history" to be written after the manner of Ranke—to explain *wie es eigentlich geschehen ist*? Or after the manner of Voltaire—to play some tricks on the dead? If one takes the latter line, whose values are to be adopted as decisive—Holmes's or Justice Frankfurter's or the common values of an immense section of the American people whose hierarchy of values is not Holmesian?

After reading the three opinions in the *McCollum* case, Justice Reed dissenting confessed: "I find it difficult to extract from the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional." In addition to that difficulty I have another more fundamental one: after reading the seven opinions in the two cases I find it difficult to extract from them any conclusion as to why it was that something in the Champaign plan was declared unconstitutional, whatever it was. Doubtless a legal realist, interested in the psychological elements in the judicial process, could have a field day with the opinions; but one whose concern is for history, rationality, logic, and an ordered system of religious, social, and educational values must inevitably experience bewilderment. He will indeed submit to the "judgment of the doom"; but he will not be convinced that the doom has been pronounced (in the good old legal phrase, that one hopes has not lost all its meaning) *iustæ et rationabiliter*.

II

Let us first take the *Everson* line. The essence of it, as laid down both by the Court and by the dissent, is that James Madison's concept of the relations between religion and government, together with the philosophy on which this concept rests, became in 1791 the fundamental law of the land by act of the states ratifying the First Amendment. Two questions arise: First, is this the historical fact? And second, could it have been the historical fact? The answer to both questions is, quite flatly, no. Moreover, I find it extremely difficult to believe that the Court could seriously have meant to answer yes.

Justice Black, for instance, is far too good a historical scholar not to have known that the First Amendment met sharp and serious objection in the Virginia senate, on grounds of its inadequacy in comparison with the Virginia statute, with the result that ratification was held up for nearly two years. Against this historical fact his central argument shatters; for it is derived from a supposed continuity in purpose and identity in meaning between the Virginia statute (the Madisonian idea) and the First Amendment. Again, Justice Rutledge is far too good a legal scholar not to realize that the First Amendment, as an act of the states, did not and could not incorporate the total personal ideology of James Madison. He must further know that any such assumption is contradicted by historical facts—Madison's own

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18 *III Annals of Cong.* 54 (1849). See the Historical Note at the end of this article.
words in the Congressional debates, the whole legislative history of the Amendment, and the practical construction given it in subsequent acts of the legislative and judicial branches on both federal and state levels.\textsuperscript{19}

Finally, the whole Court must know that, as a piece of history, its argument in the Everson case is one which a considerable body of scholarship finds itself, in Justice Black's words, "unable to accept."\textsuperscript{20} When one has performed the very modest feat of scholarship involved in mastering the historical data that determine the meaning of the First Amendment as first formulated and ratified, one is driven to the conclusion that, if Justice Black and Justice Rutledge are essaying history, it is only in the Voltairean sense. The tricks they play on the dead are astonishing. If the Court wishes in 1948 to pour the total Madisonian concept into the First Amendment, it cannot justify this procedure by saying that the total Madisonian concept was poured into it in 1791. The facts invalidate this justification.

I go farther, to the second question. Madison's total concept could not have been poured into the First Amendment in 1791, and by the same token it cannot be now. (I make the point, first, because I suspect that the Court was really saying that Madison's idea should have been the idea of the First Amendment, whether it actually was or not; and secondly, because the point I shall make leads to the heart of this whole matter: what is the American philosophy of separation of church and state?)

Justice Rutledge correctly stated the essence of the Madisonian concept and its ultimate premise when he said: "As the Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or support."\textsuperscript{21} Correctly too, Justice Rutledge points out that the characteristic of this concept is its unrelenting absoluteness. But the crucially important thing is the basic reason for this unrelenting absoluteness. In his Remonstrance Madison advances a variety of reasons for his view, some derived from principle, others from expediency. He appeals to the common-law tradition of the distinction between ecclesiastical and civil authority;\textsuperscript{22} to natural rights, as he understood the term, after the fashion of John Locke;\textsuperscript{23} to the principle of political equality, which is violated by civic distinctions on religious grounds;\textsuperscript{24} to the exigencies of civic unity, "moderation and harmony," in a religiously divided society. He also argues from expediency: establishment is not necessary for religion\textsuperscript{26} nor good for it;\textsuperscript{27} it is not necessary for political society nor good for it.\textsuperscript{27} Finally, he uses the

\begin{itemize}
  \item \textsuperscript{19} See the Historical Note at the end of this article.
  \item \textsuperscript{20} McCollum v. Board of Education, 333 U. S. 203, 211 (1948).
  \item \textsuperscript{21} Everson v. Board of Education, 330 U. S. 1, 39-40 (1947).
  \item \textsuperscript{22} Memorial and Remonstrance Against Religious Assessments, §§2, 5. This document is printed in II The Writings of James Madison 183-191 (Hunt ed. 1901-1910), and also as an Appendix to the opinion of Justice Rutledge in Everson v. Board of Education, 330 U. S. 1, 63-72 (1947).
  \item \textsuperscript{23} Remonstrance, supra note 22, §§1, 15.
  \item \textsuperscript{24} Id. §§4, 9.
  \item \textsuperscript{25} Id. §6.
  \item \textsuperscript{26} Id. §§7, 12.
  \item \textsuperscript{27} Id. §§8-10.
\end{itemize}
famous emotional argument, the entering-wedge argument (nowadays, the camel's-nose, or the crack-in-the-wall, argument). All these arguments persuaded Madison of the necessity of a constitutional separation of church and state.

My point, however, is that neither singly nor collectively do these arguments yield, as a conclusion, the special concept that was Madison's own. In its distinguishing characteristic of absoluteness, this concept rested, as Justice Rutledge perhaps unwittingly pointed out, on a particular sectarian concept of "religion." For Madison, Justice Rutledge rightly says, "religion was a wholly private matter," and therefore (this reason is by itself adequate to the conclusion and supplants all the rest, as it runs all through the *Remonstrance*) must be absolutely free from governmental restriction and likewise absolutely "free" from governmental aid. Here is the basic reason—a reason, be it noted, of the theological order—for Madison's unrelenting absolutism. The other arguments, notably the common-law tradition of a duality of jurisdictions (that had indeed been badly obscured by Protestant Reformation theology), forbid restraints on religion. All of them contribute to prove that any governmental aid to religion ought to be ruled by principles of natural right, political equality, and social harmony, and by considerations of the "necessities" and "goods" of both religious and political life. But none of them singly, nor all of them collectively, reach the absolute conclusion: "No form or degree of official relations between religion and government, and no aid to religion." Only Madison's theological premise supports a conclusion of such comprehensive sweep and utter rigidity.

For Madison, as for John Locke his master, religion could not by law be made a concern of the commonwealth as such, deserving in any degree of public recognition or aid, for the essentially theological reason that religion is of its nature a personal, private, interior matter of the individual conscience, having no relevance to the public concerns of the state. The state could indeed and should create an interest for itself in the freedom of religion, as a matter of individual "natural right" that it is bound to guarantee, and as a means to the social harmony amid conflicting creeds that it is bound to protect. But in religion itself the state can have no interest; for by very definition (Madison's personal definition) it has no rank among the civil and social interests that may claim the aid of government. Legislation, therefore, whose purposes or effects would be in the slightest degree an aid to religion, would ipso facto be legislation for private purposes and therefore illegitimate. Religion, as a "wholly private" interest, lies behind a wall. In fact; it exists in another world from that of the state. It is, in Justice Rutledge's echo of the Madisonian theology, "the

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28 *Everson v. Board of Education, 330 U. S. 1, 39 (1947).*

29 Justice Frankfurter in the *McCollum* case says that "the deep religious feeling of James Madison is stamped upon the Remonstrance." *McCollum v. Board of Education, 333 U. S. 203, 216 (1948).* Possibly; it depends on whether one can attribute depth of religious feeling to one steeped in eighteenth-century deism, which I personally consider a rather superficial and conventional form of religion. At all events, it ought to be added that likewise stamped on the *Remonstrance* is Madison's radically individualistic concept of religion, that is today quite passé.
kingdom of the individual man and his God." It is the single duty of government to halt its armies on the threshold of that kingdom, encircling it with legal force, to keep it (in Justice Rutledge's extraordinary phrase) absolutely "free from sustenance, as also from other interferences, by the state." Aid to religion is political interference with what is theologically a private interest. Therefore it is absolutely forbidden.

This is the essence of Madison's concept of separation of church and state. Its ultimate ground is a religious absolute, a sectarian idea of religion. The separation therefore is itself absolute. And no other grounds may be assigned for its absolute-ness but its theological premise. I should add too that Madison's principle of separation stands as an absolute in its own right. It need not be sustained by any functional relationship to "free exercise." It forbids all governmental aid to religion even in the demonstrable absence of any coercion of conscience, any inhibition of full religious liberty, any violation of civil equality, any disruption of social harmony. These considerations are secondary, and irrelevant to the principle in as much as it is absolute. They prop the wall, if you will, with some flying buttresses; but the wall itself is built, not by an idea of liberty, but by an idea of religion.

This is the philosophy of separation advanced by the Supreme Court in the Everson case, implicitly by the Court's opinion, explicitly by the dissent, on which the Court fell back in the McCollum case. Justice Rutledge's exposition lacks the hard clarity of Madison's own thought, but the essential thesis is sufficiently clear.

And it is absolutely unacceptable. That is my point. This philosophy could not in 1791, and cannot in 1948, be poured into the First Amendment. The simple reason is that it is an irredeemable piece of sectarian dogmatism. And if there is one thing that the First Amendment forbids with resounding force it is the intrusion of a sectarian philosophy of religion into the fundamental law of the land.

We

80 Everson v. Board of Education, 330 U. S. 1, 57-58 (1947). I take it that atheism is analogously the kingdom of the individual man and his Infinite Blank or Ultimate Doubt or whatever inhabits that kingdom, and has a similar sacredness.

81 Id. at 53.

82 I dismiss the wedge argument, so called—the notion that the wall must be absolute because, if any little crack is made in it, the crack will inevitably widen and the whole wall will come crashing down. Its appeal (in the contemporary camel's-nose form) is highly successful emotionally; but its fallaciousness demonstrates the precarious nature of argument from metaphor. First, it begs the question: is the wall an absolute? Second, it proves too much; would the wedge argument be admitted, for instance, in a labor dispute or in any other case where the question is one of rights (as it is here)? Third, it has the same legal fallaciousness that Holmes recognized when he swept away Marshall's famous dictum in his Panhandle dissent: "The power to tax is not the power to destroy while this Court sits." Panhandle Oil Co. v. Knox, 277 U. S. 218, at 223 (1928).

83 Consider Justice Rutledge's Everson dictum, echoed by Justice Frankfurter in the McCollum case: "... we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." Everson v. Board of Education, 330 U. S. 1, 59 (1947). First, we have not staked the existence of our country on any "faith," but on a set of rational political principles. Second, if we had staked it on the secularist faith implied in that dictum, it was as reckless a gamble as history ever saw. Third, by what constitutional authority is the Supreme Court empowered to legislate as to what is "best for religion"? I thought church and state were separated here. Judgment on what is best for religion is strictly reserved to the religious conscience; it does not fall to the competence of secular government, which judges only what is best for the state, in consultation with the religious consciences of its citizens.
have got here a paradox that would be laughable were it not so serious in its con-
sequences: in the effort to prove that "no establishment of religion" means "no aid to
religion" the Supreme Court proceeds to establish a religion—James Madison's. In
order to make separation of church and state absolute, it unites the state to a
"religion without a church"—a deistic version of fundamentalist Protestantism.
In the name of freedom of religion it decrees that the relations of government to
religion are to be controlled by the fundamental tenet of secularism—the social
irrelevance of religion, its exclusion from the secular affairs of the City and its
educational system, its relegation to the private forum of conscience or at best to
the hushed confines of the sacristy. Justice Jackson thought up an apt allusion, but he got its reference wrong; actually, it is the philosophizing of the whole Court
that reminds one of Byron's Julia, who, in momentary disregard of her original lines
and the exigencies of metre, "screaming, 'I will ne'er consent to an establishment of
religion,' imposed one on the American people."

The issue here is serious. And, I repeat, it concerns the reasoning of the Court,
as it shapes itself into a philosophy of separation. If there is to be a sort of official
American philosophy in the matter, promulgated by the Supreme Court, it must be
constructed in the absence of all appeal to sectarian dogmas—Madison's as well as
anybody else's. I do not deny that the dogma in question is widely held—by educa-
tionists like Kilpatrick, Thayer, Hook et al.; by jurists in the tradition of Holmes and
by jurisprudents of the positivistic schools; by a variety of Protestants; by the
secularists en masse; in fact, even an atheist would grudgingly grant that religion
is "a wholly private matter." But this dogma is not part of our fundamental law,
and no constitutional doctrine can be erected on it. It was repudiated by jurists of
the stature of Story and Cooley, standing in a genuine American tradition of
great original strength; it is repudiated by an enormous number of American citizens
today of all faiths. And what is more important, it is demonstrably false in terms
both of religious philosophy and the lessons of political experience. It is therefore
intolerable to see it endowed somehow with a constitutional status that it never had
and could not have. If today the Court were to take as a premise of argument
Madison's particular theory of "natural rights" as deriving from a pre-social "state
of nature" (a theory borrowed from Locke), there would be legal howlings. It is
not more legitimate to adopt Madison's particular theory of religion in its relation
to organized society.

III

Be it noticed that in all this I am arguing only against Madison's (and the
Court's) absolutism, on the ground that it can rest only on a religious absolute, a

54 Justice Frankfurter, too, comes perilously close to establishing the "religion of patriotism."
56 Certainly not all; the most serious Protestant thinkers were shocked by what one of them, Dr. F.
Ernest Johnson, called "the extreme secularism of the minority opinion" in the Everson case. Johnson,
Church, School and Supreme Court, 17 Religion in Life 483-484 (1948).
57 See Corwin, The Supreme Court as National School Board, supra.
theological premise. Take away this premise, and you can combine Madison’s other arguments into a satisfactory theory of separation of church and state—a satisfactory theory because it will not make separation an absolute, and its reasons will be such as to command consensus. The distinction of the ecclesiastical and civil jurisdictions, the immunity of conscience from coercion by civil authority in the free exercise of religion, the principle of political equality, the legitimate demands of political unity in a religiously divided society, the general requirements of the common good (which include the need of society to be a “good” society)—these are proper and adequate materials from which to fashion an acceptable American philosophy of separation of church and state. They were in fact the original materials from which that philosophy was fashioned and made the premise of the First Amendment. Madison’s added element, the absolutizing element, was not included.

There were two merits to this original philosophy, both of which perish in the new philosophy of the Court. The first is that separation of church and state, thus put on its proper grounds, appears in its true relation to the free exercise of religion. It appears as instrumental to freedom, therefore as a relative, not an absolute in its own right. As a Congregationalist writer recently put it: “Separation of church and state, then, is simply a means, a technique, a policy to implement the principle of religious freedom. It assumes organic separation but dynamic interaction between church and state; it functions through cooperation without favoritism. As a method, separation of church and state can never be an absolute.”

Precisely at this point—the relation between the establishment clause and the free exercise clause—the Court’s reasoning falters badly. In the *Everson* decision, Justice Black made no attempt to analyze the relation of the two clauses, but simply said: “There is every reason to give the same application and broad interpretation to the ‘establishment of religion’ clause,” as the Court has given to the “free exercise” clause. But the question is not broad or narrow interpretation. It is a problem of functional interpretation: How is an issue of “aid to religion” to be decided in such wise as to make the decision instrumental to “free exercise of religion”? Justice Black seems obscurely to feel the problem, without firmly grasping it, where he says that, despite the “no aid to religion” doctrine, “on the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion.”

A distinction, be it noticed, that recognizes that there are certain areas of common interest to both state and church, notably education. Moreover, even within these areas there is no “fusion,” “commingling,” or “confusion” (loose, question-begging terms used by the Court) of the two functions. The distinction remains: there is simply cooperation.

*Keen, Church-State Relations, Social Action,* Nov. 15, 1948, p. 31.

Justice Rutledge asserts the same thing, but he undertakes to inflict some unusual exegetical torture in order to fit the two clauses to the Procrustean bed of his absolutism.

*Everson v. Board of Education,* 330 U. S. 1, 16 (1947).
problem it is bound to seem fumbling, and, I confess, vulnerable to Justice Jackson's charge of being Julia-like. And again the Madisonian absolutism, which totally separates the problem of aid to religion from that of free exercise, is at fault. One cannot balance an absolute against anything.

Obviously, a firm, realistic grasp of these two problems in their relation puts to the Court a much more severe task. It is much easier to hew one's way out of the difficulty with the axe of Madison's absolutism. The trouble is that the axe then falls on "free exercise," as the McCollum decision, in which the axe was more ruthlessly swung, luminously shows. But this is a perversion of the whole intent and philosophy of the First Amendment. And this is actually what has happened: so far from being instrumental to "free exercise," a means relative to an end, the "establishment" clause (in the meaning of "no aid to religion") has now assumed the primacy, the status of an absolute, an end-in-itself; and the "free exercise" clause has become subordinate to it. The First Amendment has been stood on its head. And in that position it cannot but gurgle juridical nonsense.

The second great merit of the original American philosophy (pragmatic as it was in the best sense, as a political philosophy, based on sound concepts of freedom, equality, and the common good) is that it would permit an equitable, socially healthy solution to a new American problem for which there is no solution in the new ideological and doctrinaire philosophy of the First Amendment. I mean the educational problem—the relation of religion to public education, and of government to the religious school. The McCollum decision "solves" this problem, in its double aspect, simply by looking the other way and refusing to see it. Or what is worse, without taking a fair look at the problem, the Court comes perilously close to slamming the door on a solution by its sweeping negativism.

With regard to religious schools, the "underlying issue," as a writer in the Harvard Law Review put it, "is brutally simple: are parochial schools to be encouraged or not? Until American society has reached an equilibrium, the judicial decisions will continue to reflect uncertainty." I must put the issue with even more brutal simplicity: the problem of "encouragement" here is not a financial one but a juridical one; it is not a question primarily of "aid" by money but of "aid" by legal recognition. The essential question concerns the juridical status, within the American system of education, of the non-profit school with religious affiliations, that serves a public purpose by educating for the public life of citizenship, without being a "public" school in the narrow sense, because it is only under partial, not total, governmental supervision and control. This problem of juridical status is funda-

42 Justice Reed in his courageous and thoughtful McCollum dissent is the only member of the Court that seems to have seen the specialty of the field of education, and to have called attention to the fact that in Virginia Jefferson likewise saw it, and did not hold a "no aid" doctrine in that field. This, together with his distinction of the concept of "aid" and his sense of the realities of American history, are outstanding merits of Justice Reed's argument.

43 Note, 60 Harv. L. Rev. 793, 800 (1947).
mental, antecedent to all questions of financial support of any kind—questions which cannot in fact be solved except by prior solution of the fundamental problem.

Moreover, this problem is posited today concretely, in a set of particular circumstances. A determinant circumstance is the existence of a powerful and articulate philosophy of “American” education in whose explicit tendency is the denial or diminishing of the juridical status of these schools. The major premise of this philosophy is a concept of the “historic unity” of the American people and a rather mystical concept of “democracy.” The minor premise is the “divisiveness” of “segregation” in education on religious grounds; it is a manifestation of “isolationist religious practices,” that are “disruptive” of the “democratic community.” The conclusion of the philosophy was put, for example, in a resolution of the American Federation of Teachers, which asserts “the basic principle that the interests of the democratic community are best served where children of all component groups of American society are enrolled in a common public school.”

This is the “rightful” position; any other is to be given only toleration, more or less provisional. The conclusion is further supported by some theorists on grounds that only in the public schools can children be nourished with a robust, quasi-religious faith in the “unifying secularism” of American democracy. And a final rib in the theory is the principle that, although (at least for the moment) the child may not be the creature of the state, the school definitely is. Government is the primary educator; its interests are paramount; in particular, it makes its own interests (democratic unity and “faith” in democracy) the controlling norm of parental interests, by right of superior situation in the hierarchy of social values.

On these ideological grounds, about which clings an aura of mysticism, experiments such as “released time” are opposed or reluctantly submitted to. They are “encroachments” by religion on education; they are a “sectarian invasion” of the public school; or, most damning of all adjectives, they are “divisive.” Again, any attempt at rational argument for some measure of financial aid to schools not “public” in the narrow sense is usually met with some variant of the fear-instilling speech of Demetrius of ancient Ephesus: “The temple of the great goddess Diana will count for nothing; she will be shorn of her greatness, the goddess whom Asia and all the world reveres.” Whereupon all the silversmiths of Teachers College take up the cry: “Great is Diana of Ephesus! And their uproar filled the whole city.” The city, is not Ephesus but, of course, Washington, where “the meeting was all in confusion.

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45 The idea as put, for instance, by Mrs. Agnes E. Meyer, is that our society, which is itself secular, has a “tolerance of religious diversity, which alone makes brotherhood possible in our country [the churches, she explains, would by themselves destroy it]. This spiritual unity is the saving grace of democracy and its real defense against totalitarianism or against the divisive influence of sectarianism. Therefore, what can justly be called the unifying mission of secularism has a sanctity all its own,” which imparts to the public school, wherein true social salvation is found, a holiness transcendent to any that may attach to the destructively divisive churches. Meyer, The School, the State and the Church, ATLANTIC MONTHLY, Nov. 1948, pp. 45, 49, and passim. I cite Mrs. Meyer for her significance, not as a thinker, but as the purveyor of a thought that is widely propagandized.
and most of them could not tell what had brought them together”; for indeed the cult of Diana, the Divine Public School, brings together an ill-assorted lot.

Most of them will, of course, concede a formal legality to the existence of religiously affiliated schools. Parents whose religious scruples will not permit their children to drink deep at the genuine well-springs of democracy are “free” to send them to other schools. But the “freedom” here is a simple immunity, on a par with that which government grants to the religious eccentricities of Jehovah’s Witnesses, which forbid them to salute the flag. These children forego the great American right to a “public” education, behind which stands all the juridical and financial power of our great democracy; they avail themselves of an immunity, taking refuge behind the famous wall. Or in Justice Rutledge’s phrase, they embrace “the greater, the most comprehensive freedom,” freedom from all governmental aid. What more (the proponents of this philosophy exasperatedly ask) could one want than that?

I deliberately put this contemporary sociological and educational situation with a tinge of rhetorical emotion, because the situation itself is (more than slightly) tinged with emotion. Inevitably; for something fundamentally important is involved here. There is a clash of basic philosophies of education and of democracy. In addition there is a clash of power; for behind the philosophy of education as the agent of a unifying, democratic secularism powerful organized forces are aligned—professional educational associations, for instance, and other groups pursuing ideological interests. And the contention, I repeat, primarily is not over money but over principle, and over money as it gives to the soul of principle a visible, juridical body.

It is into this delicate, troubled situation, marked by a struggle of ideas and forces, that the Everson and McCollum policy decisions and reasoning are projected. And my contention, in contrast to the Harvard writer’s implication, is that the Court has not left American society to reach an “equilibrium,” and it does not “reflect uncertainty.” On the contrary, it weights the scales; it betrays an appalling certainty. One

47 There is a vocabulary in the matter: these schools are “protest” schools, their pupils “withdrawal pupils,” who have to get “permission” from the state to attend. The Supreme Court was introduced to the vocabulary in the brief *amicus curiae* of the Civil Liberties Union in the Everson case. The Appellate Division of the Supreme Court of New York got a good whiff of the conclusion of the theory in the Lewis case. Appellant’s brief stated: “We may add that no true educator in our judgment could have any real interest in the perpetuity of the parochial school system in this country or faith in the calibre of education dispensed in a sectarian institution of learning.” Brief for Appellant, filed by Arthur G. Hays, p. 32, Lewis v. Graves, 219 App. Div. 233, 219 N. Y. S. 189 (1927).
48 Everson v. Board of Education, 330 U. S. 1, 58.
49 I note here that this is the heart of the Catholic case for the inclusion of religious schools in pending federal aid legislation. There are further reasons, but central is the fact that the first such bill passed will be pattern legislation, not only determinant of future federal programs of aid but also indirectly determinant of the juridical status of parochial schools; their omission from the first program will initially damage them, not financially but juridically. Of the essence of the Catholic case is the contention that these schools are public in every sense save two: the secular education they impart is not secularized, and they are under only partial, not total governmental supervision; but neither of these two characteristics are disqualifications from public aid in some just, proportional measure, since they are legitimate expressions of parental rights.
consideration will make this clear; I mean a striking omission in the Court's reasoning.

In the *McCollum* case there was squarely presented to the Court the issue of parental rights in education. And the Court greeted the presentation with a blank, unseeing stare. Yet the issue is woven all through the facts of the case; the whole Champaign plan hung suspended on the right of parents to have effective voice in regard to what their schools should do for their children, what role in the community their schools should play. Yet the Court does not betray by so much as a word any awareness of this outstanding fact of the case. It passes the issue by on the other side of the street, grimly pounding the sidewalk of its own absolutism. What is worse, its clear assumptions are that the public school system belongs singly to the state and is under its sole supervision; that its functions are determined solely by the state; that the state's compulsory education machinery grinds away with only the state at the controls; that even the child's time in school is owned by the government; that the child has a "legal duty" to put all this time in on secular subjects, none on religious subjects, apart from the state's sovereign permission, which (the Court says) the state is constitutionally powerless to give.

This silence on the parental right is equivalent in the context to positive statement. It implicitly qualifies the *Pierce* doctrine; now apparently the child is not a creature of the state—until he crosses the threshold of a public school. Parents have a right to direct the education of their children—limited by the exigencies of a "unifying secularism" that is a constitutional necessity in public education. The Court's silence on the parental right argues that it is not a factor in the case; and this is particularly damaging at the present moment, when this right is under open or veiled or unconscious attack from highly articulate groups. It tends to undermine the juridical status of the parental right in American law. Correlatively, it tends to render exclusive the rights of the state in education. In a moment of delicate balance it weights the scales, as I said, in favor of a philosophy of education of decidedly statist flavor. And the parental right which, as a sheer immunity, is already like the smile on some sort of disembodied educational Cheshire cat, begins to fade under the Court's unseeing stare.

Yet the parental right in education is the very pivotal point of a democratic system. It is, to change the metaphor again, the touchstone of difference between democratic education and the monolithic systems of cultural totalitarianism, whether on the Soviet or even on the Third Republic style. When the modern state with its immense power embarks (as indeed it must) on the spiritual mission of educating its children, its whole native tendency (as recent developments in United States

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69 Admittedly, appellee did not adequately present the issue in his brief. The issue was excellently drawn out by appellee before the New York Supreme Court, defending the New York released time program from the attack of Mr. Joseph Lewis, President of the Freethinkers of America. Brief for Appellee, filed by Mr. Charles H. Tuttle, pp. 21-67, Lewis v. Spaulding, 193 Misc. 66, 85 N. Y. S. 2d 682 (Sup. Ct. Albany Co., Nov. 12, 1948).

educational theory and practice abundantly show) is toward state monopoly. And it is only held back on its plunging course toward the extreme of l'école unique, symbol of the Kulturstaat, by the frail barrier of the parental right to control and direct the education of their children. After the McCollum decision this barrier is, I think, frailer than ever. I sometimes think it is already too frail a legal barrier to confine the bursting expansionism of the new educational Leviathan.

One might have thought that a "civil rights Court" would have been sensitive on this neuralgic point of democratic theory; instead it is callous to the extreme of complete and utter insensibility. It did not even feel the point as present. It erects massive barriers to protect the right of Jehovah's Witnesses to take highly uncivil liberties with the rights of other citizens; it pursues to the verge of quixotism a hypersensitive concern for individual religious freedom of the most individualistic kind. But it does not lift a judicial finger to fortify against insidious attack a right that is the cornerstone of democracy in education—the parent's last rampart against the "unification" of his child with other children into a standardized "democratic" mass.

It pursues, this time over the verge of quixotism, a hypersensitive concern for the absoluteness of separation of church and state, with resultant legal damage to a human right that rests on the most absolute political and religious grounds, and is the foundation of a social freedom of the most indispensable sort. A right is legally damaged when, in a case where it appears as central and clamors for recognition, it meets judicial blindness and deafness.

IV

There is worse. Enter Justice Frankfurter, with the two operative concepts that stand out in his McCollum opinion. The first, that seems to be basically decisive of his judgment, is a quasi-mystical one—the public school as "a symbol of our secular unity," a sort of sacrament (if I may for a moment stay with him on the religious level) of our democracy, which works with a sort of Tridentine efficacy ex opere operato, being "designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people." The public school is, it seems, the educational embodiment of the Great American Absolute, separation of church and state, and like it "one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities." It is the efficacious "symbol of our democracy."

This sounds familiar. Is it not the original Gobitis case redivivus? The promotion of national unity is "an interest inferior to none in the hierarchy of legal values." Only now it is "secular" unity. Justice Frankfurter is still saying, with Holmes, "We live by symbols." Only now the life-giving symbol is not Holmes's flag but Horace Mann's public school. Now too the argument from symbol, which

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53 Id. at 216.
54 Id. at 231.
56 Id. at 595.
was used to help support the legislative freedom of the Minersville school board, is
used to strike down the legislative freedom of the Champaign school board. The
Frankfurter national-unity argument was of course rejected in the *Murdock* and
*Barnette* cases; but now the stone rejected by the builders of the wall of religious
freedom has become the cornerstone in the wall of separation of church and state.
And the final piquancy is to see Justice Jackson, who in the *Barnette* case saw the
term of the national-unity argument as the “unanimity of the graveyard,” now
solemnly unanimous over Justice Frankfurter’s new symbol of unanimity. “’Tis now
the very witching time of night, When churchyards yawn . . .”—and yield up old
arguments.

One might be tempted to yawn too, were it not that this old argument, which
we thought we had “had,” is so potentially dangerous in its new setting. First, if
there is a symbol of democracy in education, it is not the public school as the single
“democratic” school; rather it is (or would be) the coexistence of several types of
schools, including church-affiliated schools, on a footing of juridical equality, with a
consequent proportionately equal measure of state encouragement and support. It
would be an educational system pivoting on the parental right as fully operative, not
on a doctrinaire concept of “national unity.”

Second, the national-unity concept itself needs to be brought down to the earth
of reality and divested of all fuzzy mysticism. Our national unity is a political unity,
supported by shared sentiments in regard to the demands of freedom, justice, civic
charity, and all the political virtues—the virtues of a citizen—as these emerge from
sound ethical principles. It involves too a sense of a great common historic past,
and a still greater destiny (if we do not fumble it). But it has nothing to do with an
artificial, government-promoted levelling of differences, especially religious differ-
ences. Still less has it to do with the substitution by governmental policy and pres-
sure of a unified “religion of patriotism,” a common quasi-religious “democratic
faith,” as a value “inferior to none” in American society. Whatever spiritual mission
of promoting unity government may have, it is conditioned (and I thought the
*Murdock* and *Barnette* cases had established this) by its primal duty of promoting
justice, guaranteeing an order of rights, insuring the equality of *differences*. Are we
at this date to go in for the creation by government, through education, of “the soul
of our people,” à la Schleiermacher and the German “enlightened despots”?

For my part, I find it disconcerting to see in a Supreme Court opinion the

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*Id.* at 641.

*I say “proportionately equal”; I mean that the juridical status of these schools is equal to that of
the public school, as an equally valid expression of the parental right. They have therefore an equal
right to aid. But not a right to equal aid; only to a proportionate measure of aid—the proportion to be
determined according to the canons of distributive justice which are applied under consideration of a
number of juridical and factual elements in a given context. In my personal opinion, total support of
parochial school education (the good old camel behind the nose!) is neither a right nor a desideratum.
At the other extreme, to declare that this type of education, because of its religious element, has no right
to any aid is clear injustice and unwise social policy.
ideology and phraseology proper to a genuinely sectarian philosophy of public education—lightly underlined, if you will, but discernible; particularly discernible by reason of the omission of all reference to parental rights. The public school is not a temple in which our children are to be baptized into the unity of the secular democratic faith, while those who stand without are somehow faintly heretical. Viewed realistically and with all respect for its idealisms and achievements, it is actually the symbol of our religious disunity and the sign of an experiment in dealing in a particular way—there are other ways—with the fact of that disunity. And it is the symbol of our democracy only in so far as it deals with this fact honestly and fairly, not blinking it or chipping away at it in the name of some dubious ideal of national unity. This brings me to Justice Frankfurter’s second operative concept.

It is of course the concept of “pressures.” Pressures by religious groups on government, “inherent pressure by the school system in the interest of religious sects” these, together with its “divisiveness,” were the constitutionally damnable features of the Champaign plan. This is a pretty piece of legal unrealism. I omit the obvious fact that neither government nor any child—even James Terry McCollum—was “pressured” into doing anything it did not want to do. The unrealism is in Justice Frankfurter’s implication. Take away these awful divisive sectarian pressures, and you have what he wants: “an atmosphere free from pressures in a realm in which pressures are most resisted.” Justice Frankfurter, although an eminent jurist, is not an expert in education; even so, this naïveté is too extreme to be credible. Thousands of educators of all religious convictions are increasingly agreed that the atmosphere of public schools is not free from pressures. Their supposed “neutrality” is itself a pressure. Their sheer omission of religion from the curriculum is itself a pressure against religion. In fact, the whole weight of the public school system tends to be thrown against the child’s religious conscience and consciousness. Contrary to its original intention and often to the regret of its high-minded administrators and teachers, the system as such has become a formidable ally of secularism, either as a positive philosophy or as a sort of spiritual vacuum that is itself a faith à rebours. This, I had supposed, is a well-known view, and a primary concern of very many of our leading educators.

My point is not the problem itself nor whether nor how it can be solved; I am only concerned with Justice Frankfurter’s argument. Are we to suppose that “pressure by the school system in the interest of religious sects” is unconstitutional, whereas immeasurably more powerful pressure against their interests, against the idea of religion itself, is quite constitutional? To use Justice Jackson’s antithesis, is this “law” or “prepossessions”? One does not expect the Supreme Court to solve the problem of pressures in the public school atmosphere; likewise one does not expect it utterly to misconceive the problem. And the argument from pressures, like the wedge argument, reveals a basic misconception of the educational and sociological

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63 Id. at 216.
64 Id. at 238.
world we are living in. There are various kinds of pressures, and of wedges. Should the Supreme Court in the name of religious freedom throw its weight behind the secularist pressure, and in the name of separation of church and state use its hammer upon the secularist wedge?

V

Here briefly are my conclusions. First, the absolutism of the Everson and McCollum doctrine of separation of church and state is unsupported, and unsupportable, by valid evidence and reasoning—historical, political, or legal—or on any sound theory of values, religious or social. Second, in consequence of an absolutizing of separation, the very problem is misconceived; that is, the instrumental relationship of separation to the free exercise of religion is destroyed. Third, the necessary further consequence is that, when separation as an absolute principle is ruthlessly thrust into the field of education, the result is juridical damage to the freedom of religion and to the natural rights of parents. Fourth, this damage is particularly harmful in the existent religious and educational situation; in a moment of tension between contending sets of values—religious vs. secularist, statist vs. popular and parental values—the Court has sided with the wrong set.

If we are not to embark on “a century of error,” some essential clarifications are imperative. What we need is, first, a return to the original political philosophy of the First Amendment, and second, its realistic application in a situation wherein the alignment of forces and the conflict of values is substantially different from what it was in 1791. This means development. But the essential development must take place in the concept of “freedom of religion.” Woodrow Wilson in The New Freedom showed how exclusive insistence on freedom as sheer immunity from governmental power opens the way to the tyrannies of other powers, not governmental, that gain control of governmental processes. The lesson has been heeded in the economic field; it needs to be hearkened to in the religious and educational fields. Join a rigidly negative concept of religious freedom, as sheer immunity from coercion by governmental power, to a rigidly absolute, end-in-itself concept of separation of church and state, as meaning absolutely no aid to religion by government, and you have opened the way to the subtle tyrannies of irreligion, secularist ideologies, false political and educational philosophies, and the dangerous myth of “democracy as a religion.” Such a development is utterly foreign to the letter, spirit, and intent of the First Amendment, and will be consequentially disastrous to American society.

Shall we have, then, a new freedom for religion, born of old American principles, made a positive empowerment by a just measure of governmental aid? Or shall we have some new tyrannies, born of the rising secularist myths, fastened on us by their alliance with the expanding powers of government? That, I think, is the basic issue underlying the questions presented in the Everson and McCollum cases. Is there to be cooperation between parents and public schools towards the religious
education of their children, and is the right of parents to educate their children in religious schools to remain a sheer immunity or to become a genuine freedom, endowed with the full juridical status that only a just measure of governmental aid can give it? These questions have a common element: How free do we want religion to be? The Court has given one answer. I think it is unreasoned and unreasonable.

**Historical Note**

The following notes may serve to clarify the original historical meaning of the First Amendment, as conceived by Madison and the first Congress. In the Virginia ratifying convention that met in June, 1788, when the elimination of religious tests was being discussed, Madison said: "I confess to you, sir, were uniformity of religion to be introduced by this system, it would, in my opinion, be ineligible; but I have no reason to conclude that uniformity of government will produce that of religion. This subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it: the least reflection will convince us there is no danger to be feared on this ground."

The italicized words indicate the basic problem of the time: a national government must not mean a national religion made obligatory on all by federal law; for this would be a violation at once of the sovereignty of the states and of the individual conscience. In Madison's consistent view the danger was removed by the sheer fact that the Federal Government was one of delegated powers; and "no jurisdiction" over religion was committed to Congress. Congress has no legal power to legislate as to what the religious beliefs or practices of the American people shall be, imposing on them a national religion. Madison maintained, therefore, that no further explication on the point was necessary. However, he accepted the decision of the committee on amendments (twenty members, chairmanned by George Wythe) to submit the following amendment (its twentieth):

"That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural and inalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others."

Nothing could be clearer than this statement. First, the concept of "no establishment" is subordinated to the concept of "free exercise" as means to end; second, "no establishment" means "no favor, no preference in law."

While maintaining his position that a bill of rights was not "essential" but likewise "neither improper nor altogether useless," Madison assembled and presented to the first Congress the following text embodying the wishes of the states which had either explicitly (by submitting an amendment: New Hampshire, Virginia, South Carolina) or implicitly (in their ratifying resolutions: New York, North Carolina) demanded an amendment: "Fourthly. That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."

Again the idea is clear: political equality regardless of religion, no one national religion, equality before the law of all consciences or religions.

This draft was committed to a committee of eleven, Madison among them, by which

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68 III Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 93 (1836). (Italics supplied.)

67 Id. at 659.

69 Id. at 434.
it was reported out in this form: "No religion shall be established by law, nor shall the
equal rights of conscience be infringed." The brief debate turned on two points. First,
was the amendment necessary? Roger Sherman of Connecticut and others thought it was
not, "inasmuch as Congress had no authority whatever delegated to them by the Consti-
tution to make religious establishments." I would note that everywhere in the recorded
debate "establishment of religion" was used uniformly in its proper technical sense, "to
favor or prefer." The second question was, Was the amendment too radical? Peter
Sylvester of New York "had some doubts about the propriety of the mode of expression
used in this paragraph. He apprehended that it was liable to a construction different
from what had been made by the committee. He feared it might be thought to have a
tendency to abolish religion altogether." Benjamin Huntington of Rhode Island agreed
"that the words might be taken in such latitude as to be extremely hurtful to the cause of
religion." Here I pause to remark how right these gentlemen were. . . Elbridge
Gerry of Massachusetts wanted the intended sense made clearer: "that no religious doctrine
shall be established by law." Whereupon Madison, to calm their fears, explained the narrow and exact sense:
"Mr. Madison said, he apprehended the meaning of the words to be, that Congress should
not establish a religion, and enforce the legal observation of it by law, nor compel men to
worship God in any manner contrary to their conscience. Whether the words are necessary
or not, he did not mean to say, but they had been required by some of the State Con-
ventions, who seemed to entertain an opinion that under the clause of the Constitution,
which gave power to Congress to make all laws necessary and proper to carry into execu-
tion the Constitution, and the laws made under it, enabled them (sic) to make laws of
such a nature as might infringe the rights of conscience and establish a national religion;
to prevent these effects he presumed the amendment was intended, and he thought it was
as well expressed as the nature of the language would admit." Notice that here we have
not Justice Rutledge's Madison, the fiery, implacable doctrinaire denouncing three-pence
levies, but Madison the statesman. The operative words are italicized: the "effects"
barred are (1) compulsion of conscience, by (2) the establishment of, i.e., preference in
law accorded to, a national religion. Here Huntington expressed his wish that "the
amendment would be made in such a way as to secure the rights of conscience, and a free
exercise of the rights of religion, but not to patronize those who professed no religion at
all." "O my prophetic soul!" he would exclaim today. . . Again Madison patiently
explained the precise narrow sense of the words: "Mr. Madison thought, if the word
'national' was inserted before religion, it would satisfy the minds of [the] honorable gentle-
men. He believed that the people feared one sect might obtain a preeminence, or two com-
bine together, and establish a religion to which they would compel others to conform. He
thought if the word 'national' was introduced, it would point the amendment directly
to the object it was intended to prevent." Again we are very, very far from Mr.
Rutledge's Madison. . . And again the sense of the Amendment is luminously not the
sense attributed to it by Justice Black.

There is no need here to comment on the other three versions through which the text
passed in the House, nor on the original Senate version: "Congress shall make no law
establishing articles of faith or a mode of worship or prohibiting the free exercise of
religion." This was reconciled with the final House version by a conference com-
mittee, by a linguistic compromise that issued in the present version. The essential point

70 Id. at 729. 71 Id. at 730. 72 Id. at 729. 73 Id. at 730.
74 Ibid. 75 Ibid. (Italics supplied.) 76 Id. at 730-731.
77 Id. at 731. (Italics supplied.) 78 Records of the U. S. Senate, Sept. 9, 1789 (National Archives).
is that from beginning to end of the debate the legislative intent was perfectly clear and unanimously agreed on: the primary thing was that there were to be no legal constraints on freedom of conscience and on the free exercise of religion; secondly, to this end there was to be no one national religion endowed with legal privilege for its beliefs. It is utterly impossible to get out of the legislative history of the Amendment that construction which Justice Black and Justice Rutledge, supposedly under appeal to history, attempted to put upon it.

As a final indication of an intimate concern of the first Congress I would add the remark of Thomas Scott of Pennsylvania, made in another connection: “My design is to guard against those who are of no religion.”79 The whole problem of the relation between government and religious education in its various forms was not even remotely glimpsed by the first Congress, and the First Amendment can be brought to bear on it only by a process of interpretation and extension of meaning. If the first Congress, however, were doing the interpreting, this concern would be active, lest “those who are of no religion” should somehow use the First Amendment as a club with which to battle their way to a privileged place in American law for “no religion.” As the McCollum doctrine is at variance with the original sense of the First Amendment, so it is (in its tendency) in conflict with the spirit of the First Amendment.

I said in the text that Virginia’s hostile reception of the First Amendment destroys Justice Black’s central contention that the Amendment in design, letter, and spirit is a faithful rendition of the radical Virginian ideas, which therefore become the canon for its interpretation. The pertinent text is a statement by eight Virginia state senators recently uncovered and incorporated by appellee in his McCollum brief: “The third amendment [our First Amendment] recommended by Congress does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the general government, as to give it a decided advantage over the others, and in the process of time render it powerful and dangerous as if it was established as the national religion of the country . . . This amendment then, when considered as it relates to any of the rights it is pretended to secure, will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the amendment proposed by Virginia . . . We conceive that this amendment is dangerous and fallacious. . . .”80 This text makes it clear that distance has lent some manner of enchantment, but certainly no clarity or exactness, to Justice Black’s and Justice Rutledge’s view of the historical meaning of the First Amendment.

I add this historical note simply for the record, with no great hope that it will matter in the result. It seems quite clear from the tenor of the Everson and McCollum decisions that the original idea of the First Amendment, as revealed by the facts of its legislative history, is today in the judicial mind a matter simply of antiquarian interest—rather like the original idea behind the electoral college, for instance. If, however, I had a hope in the matter, it would merely be that in the future we might be spared “historical arguments” that are neither historical nor arguments, but simply a process of selecting pegs from the past on which to hang a philosophy consisting, as Justice Jackson well said, of one’s “own ideas of what is good in public instruction.”81

79 I ANNALS, supra note 68, at 767.
80 Brief for Appellees, supra note 8, at 51-54 citing JOURNAL OF VIRGINIA SENATE, 1789, 61-64 (1828), as reprinted in The Daily Advertiser (New York City) for Jan. 26, 1790, and The Virginia Independence Chronicle.