

FREEDOM OF RELIGION AND STATE NEUTRALITY

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

I

UNTIL RECENTLY, the meaning of these words of the First Amendment had seldom been litigated in the Supreme Court, and the few interpretations which the Court had made had provoked little criticism. Decisions of the past five years, however, have raised a controversy which fills hundreds of pages in the law reviews, church papers, and other journals of opinion. In 1947, the Court upheld a New Jersey statute permitting school districts to reimburse the cost of bus transportation to parents of children attending parochial schools.¹ In 1948, the Court held unconstitutional the Champaign public school program of "released time" religious instruction.² In 1952, the Court sustained the New York City released time program which differed from the Champaign chiefly in that the New York classes in religion were not conducted in public school buildings.³

* The controversy has centered upon the principle first clearly stated in Mr. Justice Black's majority opinion in the bus case, the principle that the First Amendment (made applicable to state action by the Fourteenth Amendment) requires not only neutrality between religious groups, but also neutrality between "religious believers and non-believers." The "establishment" clause forbids not only laws which prefer one religion over another, but also laws which "aid all religions."⁴ Compliance with the First Amendment means separation of church and state:

The First Amendment has erected a wall of separation between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.⁵

None of the justices dissented from this principle. The majority held that the principle did not preclude the inclusion of parochial school pupils in a general program of using public funds for bus fares of school children. The four dissenters not only agreed that the First Amendment forbids nondiscriminatory aid to religion, but found the principle violated by the New Jersey statute.

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

² *McCullum v. Board of Education*, 333 U.S. 203 (1948).

³ *Zorach v. Clauson*, 343 U.S. 306 (1952).

⁴ *Everson v. Board of Education*, 330 U.S. 1, 15, 18 (1947).

⁵ *Ibid.*, at 18.

In the Champaign case, the Board of Education urged the Court to overrule the principle of "no aid to religion" and to sustain the released time program. The Court reaffirmed its stand, however, speaking again in terms of separation of church and state. In the language of Mr. Justice Frankfurter,

Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped.⁶ (Concurring opinion.)

Eight of the justices found the Champaign program unconstitutional. The dissenting opinion of Mr. Justice Reed did not reject the "no aid" principle. He found in the Champaign plan, however, mere "incidental advantage" and not "purposeful aid."⁷

The principle thus twice affirmed by all of the justices was widely and excitedly challenged.⁸ Most of the criticisms reflected a fear that a rule of government neutrality between religious believers and nonbelievers would in practical effect be hostile to religion. For example, the statement of a group of twenty-seven Protestant leaders predicted that the Court's "hardening" of the concept of separation "will greatly accelerate the trend toward the secularization of our culture."⁹ They asserted that free "cooperation" between church and state is permissible so long as no special privilege is granted to any church.

On the other hand, the "absolute separation" principle was vigorously defended by many writers and by civil liberties organizations.¹⁰ The controversy reached its peak as the New York City released time case reached the Supreme Court. The Court voted six to three to sustain the New York program.¹¹ Mr. Justice Douglas, speaking for the Court, did not disavow the "no aid" principle, but he seemed carefully to avoid reaffirming it. He spoke with approval of state encouragement of religious instruction and of state cooperation with religious authorities. The neutrality of which he spoke was neutrality "when it comes to competition between sects."¹²

The three dissenters charged in the strongest terms that the majority had violated the "no aid" principle. Mr. Justice Black regretted that "the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law."¹³ Mr. Justice Frankfurter found that "Happily [the principles of the Champaign case] are not disavowed by the Court. From this I draw the hope that in future variations of the problem which are bound to come here, these principles may again be honored in the observance."¹⁴ Mr. Justice

⁶ *McCollum v. Board of Education*, 333 U.S. 203, 231 (1948).

⁷ *Ibid.*, at 248-49.

⁸ See, e.g., articles in the symposium, *Religion and the State*, 14 *Law & Contemp. Prob.* 1-169 (1949).

⁹ 8 *Christianity & Crisis* 90 (1948).

¹⁰ See note 8 *supra*.

¹¹ *Zorach v. Clauson*, 343 U.S. 306 (1952).

¹² *Ibid.*, at 314.

¹³ *Ibid.*, at 320.

¹⁴ *Ibid.*, at 323.

Jackson concluded: "Today's judgment will be more interesting to students of psychology and the judicial process than to students of constitutional law."¹⁵

The majority opinion may be read as holding that aid to religion is a proper legislative purpose so long as the aid involved is relatively minor. The opinion speaks of "the religious nature of our people." It refers to customs such as Thanksgiving Day proclamations and the opening of Court sessions with the words of the marshal, "God save the United States and this honorable Court."¹⁶ The decision need not be interpreted, however, as such a watering down of the neutrality principle. Such an interpretation would slight a passage in terms of which the entire problem might be clarified. In this passage, the Court puts the doctrine of separation of church and state in its proper place—as a summary or paraphrase of the provisions of the First Amendment concerning religious freedom:

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other.¹⁷

This passage suggests that "separation of church and state" is not an independent principle, that the primary principle is that of religious liberty—protected by the First Amendment against government action either establishing religion or prohibiting its free exercise. These protections are conveniently summarized in the phrase "separation of church and state," since religion is thus to be insulated from governmental power whether exerted for its establishment or to prohibit its free exercise.

In many situations, however, complete separation of church and state would operate to restrain religious freedom. Where this is the case, the opinion implies, there is no constitutional requirement of separation. In other words, the limits of the separation doctrine are to be found by reference to the constitutional principle of religious liberty, not vice versa.

The recognition of this proposition would place the recent controversy in a new light. Much of the opposition to the "no aid" principle has arisen because the principle was expressed in terms of strict "separation." If it is understood that the separation principle does not preclude action to avoid restraints on religious freedom, one source of confusion would be eliminated and a more objective and dispassionate examination of the entire problem would be promoted.

In the next two sections of this article the "separation" and "no aid" principles will be examined more closely. In the following section, the fear of Roman Catholic religious oppression will be noted, a fear which apparently accounts

¹⁵ *Ibid.*, at 325.

¹⁶ *Ibid.*, at 313.

¹⁷ *Ibid.*, at 312.

for much of the insistence on absolute separation. Finally, some of the specific problems with respect to religion and elementary education will be briefly reformulated in the light of the distinction between affirmative aid and protection of the free exercise of religion.

II

The secondary and relative nature of the principle of church-state separation is most clearly illustrated in areas where the state takes over the ordering of the lives of groups of citizens, as in the armed forces, in prisons, and in institutions to which delinquent or dependent children are committed. Here the effect of strict separation would be seriously to limit the religious freedom of the citizens concerned. Effective freedom of religion in these areas often requires some sort of implementation or cooperation by the state. It is impossible both to protect religious freedom and to keep the state completely insulated from religion and religious controversy. In these areas such insulation is not required by the First Amendment. This is not to say that individuals here have an enforceable constitutional right to implementation of their religious freedom. The point is rather that the First Amendment leaves a wide area of legislative discretion which strict separation of church and state would foreclose.

In *Quick Bear v. Leupp*,¹⁸ the Commissioner of Indian Affairs had agreed with the Bureau of Catholic Indian Missions to pay for education in mission schools for children whose parents chose such schools. Payment was to be from tribal "trust funds" or "treaty funds." Congress had previously declared "the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school." The plaintiffs contended that this declaration should be interpreted as covering payments from the tribal funds "on the ground that the actions of the United States were to always be undenominational, and that, therefore, the Government can never act in a sectarian capacity." The Court ruled otherwise, however, and approved the government administration of the trust funds in the interest of freedom of religion. The Court pointed out that the plaintiffs' contention attributed to Congress an intention to prohibit the free exercise of religion among the Indians.

In the armed forces or in federal prisons, absolute separation of church and state would invalidate regulations facilitating religious worship. Their validity, however, seems indubitable, although it is unlikely that this question can ever reach the Supreme Court. The Court has strictly limited the scope of federal taxpayers' suits and this doctrine has been held to require dismissal of a suit to outlaw the system of army and navy chaplains.¹⁹ In government communities such as Oak Ridge, Tennessee, the provision of churches for the isolated inhabitants apparently raised no question under the Constitution.

Similar questions have arisen with respect to children who become wards of the state. Illinois statutes provide for commitment of neglected and delinquent

¹⁸ 210 U.S. 50 (1908).

¹⁹ *Elliott v. White*, 23 F. 2d 997 (App. D.C., 1928).

children to institutions controlled by persons of the same religious faith as the parents.²⁰ A taxpayer sought to enjoin payments under such a statute to a Roman Catholic industrial school. It was contended that "under the Constitution no ward of the State can be committed to any institution where there are religious services or where religious doctrines are taught." The court rejected this view, saying:

It would be contrary to the letter and spirit of the Constitution to exclude from religious exercises the members of any denomination when the State assumes their control or to prevent the children of members from receiving the religious instruction which they would have received at home.²¹

Payments to such schools were held not precluded by a constitutional prohibition of appropriations in aid of sectarian schools.

The Illinois Supreme Court has also upheld action by the Cook County Commissioners authorizing the erection and operation of a Roman Catholic chapel on the grounds of the county poor farm.²²

Analogous state cooperation in the interest of religious freedom is prescribed by the Chicago Medical Center Act. The Medical Center Commission is authorized to acquire land in a large area by purchase or eminent domain. The act authorizes the Commission to sell parcels to religious as well as medical and educational organizations "who shall use the same for serving persons using the facilities offered within the District."²³ Here is legislative recognition that where the state takes over the development of a large area, a strict separation of church and state would unduly restrain the free exercise of religion. One may be confident of the validity of this provision under both the First Amendment and (in view of the industrial school precedent) the state provision against "grants or donations" of land for religious purposes.

In state universities provision for religion raises somewhat different questions. There is increasing recognition of the fact that in a program based on strict separation of church and state it is difficult to avoid anti-religious teaching, however unintended. The following is from a report of the American Council on Education on "The Relation of Religion to Public Education":

[I]n many institutions of higher education and of teacher education, a system of philosophy is taught—in the traditional indoctrinational sense of that word—which negates the religious beliefs of millions of Americans. To present such a system of philosophy with the emphatic endorsement of the instructor while at the same time contending that religion must be kept out of public education is strangely inconsistent. For a naturalistic philosophy involves religious assumptions quite as much as a supernaturalistic philosophy. To call supernaturalism a religion and naturalism a philosophy

²⁰ Ill. Rev. Stat. (1951) c. 23, §§ 211, 299b1.

²¹ *Dunn v. Chicago Industrial School*, 280 Ill. 613, 618, 117 N.E. 735, 737 (1917).

²² *Reichwald v. Catholic Bishop*, 258 Ill. 44, 101 N.E. 266 (1913).

²³ Ill. Rev. Stat. (1951) c. 91, § 130.

and on that basis to exclude the one and embrace the other is, we think, a form of self-deception.²⁴

Provision in state universities for the study of religion and for religious organizations and activities is justifiable, but not because the promotion of religion is in any degree a proper state purpose. Since the state is, in large degree, organizing the intellectual and social life of the students, provision for voluntary religious study and activities is proper as an effort to avoid discrimination against religion.

This question is in litigation at the University of Minnesota. A taxpayer is seeking to restrain the use of university buildings for meetings of student groups held under the auspices of denominational foundations.²⁵ He objects also to the appointment of a Coordinator of Student Religious Activities in the office of the Dean of Students and to the university's cooperation in projects such as a religious census, and "Religion in Life Week." No decision on the merits has as yet been reached.

In such controversies, one is reminded of the plan for the University of Virginia presented by Thomas Jefferson, the originator of the "wall of separation" metaphor. In a report as rector of the university,²⁶ Jefferson referred to the "want of instruction in the various creeds of religious faith" as a "chasm in a general institution of the useful sciences." He presented a plan for the establishment of "sectarian schools of divinity" "on the confines of the University." The plan was recommended as a device to "complete the circle of the useful sciences embraced by this institution, and fill the chasm now existing, on principles which leave inviolate the constitutional freedom of religion." It was also presented as having the "further . . . advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under impartial regulations . . . or in the lecturing room of such professor."

The "G.I. Bill of Rights," with its provisions for veterans' educational benefits, furnishes another illustration of the limits of church-state separation.²⁷ These benefits include tuition and support for education in church operated colleges and for ministerial training in sectarian seminaries. Congress had decided upon a program of supervised educational benefits with tuition payments direct to the colleges or schools and with the Veterans Administration passing upon their standards. It was permitting the veterans to choose their schools and fields of study. Adherence to complete separation of church and state would

²⁴ 11 American Council on Education Studies, Reports of Committees and Conferences Ser. I, No. 26, at 20 (1947).

²⁵ State ex rel. Sholes v. University of Minnesota, 54 N.W. 2d 122 (Minn., 1952).

²⁶ 19 Writings of Thomas Jefferson 414-16 (Mem. ed., 1905).

²⁷ Servicemen's Readjustment Act of 1944, 58 Stat. 284 (1944), Title II.

have required forbidding the choice of theological seminaries or church related colleges. The refusal by Congress thus to restrict the religious freedom of veterans was clearly within the area of discretion left open by the separation doctrine.²⁸

The foregoing illustrations do not show that aid to religion, if relatively minor, is a proper legislative purpose. They are examples, rather, of legislation which a strict rule of church-state separation would preclude, but which is permissible to avoid hampering the free exercise of religion. It was Mr. Justice Black's failure to make clear this distinction in the bus case which left his opinion vulnerable to the ridicule of Mr. Justice Jackson. Black insisted both on a wall of separation "high and impregnable" and also on legislative discretion to include parochial schools in a bus fare reimbursement program. Jackson could thus charge him with following the precedent of Byron's Julia who, "whispering 'I will ne'er consent,'—consented."²⁹

The distinction between aid to religion and the avoidance of hostile discrimination may be further illustrated in relation to tax exemptions and deductions.³⁰ In the Champaign released time case, the Board of Education argued that tax exemptions must either be considered as "the greatest anomaly in modern jurisprudence" or must be accepted as evidence that nondiscriminatory aid may be granted to religious groups without violation of the First Amendment.³¹ This argument ignores the distinction illustrated in this section. One may accept the "no aid" rule and yet defend the familiar religious tax exemptions. A government granting tax exemption to nonreligious agencies for charitable, educational, and cultural purposes may grant and should grant exemption to similar religious institutions to avoid restraining the free exercise of religion. The same argument applies to income tax deductions for church contributions. In assessing tax burdens, as in other situations discussed in this section, the doctrine of church-state separation requires only neutrality; it does not forbid legislation designed to avoid anti-religious discrimination. This seems to be the point made by Mr. Justice Reed in the Champaign case where he referred to the freedom of churches from taxation as an incidental advantage which they have "with other groups similarly situated."³²

Furthermore, in the absence of deductions for contributions to private institutions, taxation to support the vast public programs of assistance, education, and recreation would greatly hamper the freedom of individuals to support private programs, religious and nonreligious. With increasing tax rates, such deductions are important if acceleration of the trend toward state monopoly of welfare

²⁸ A Wisconsin veterans' educational bonus was upheld over the objection that it involved aid to religious schools. *State ex rel. Atwood v. Johnson*, 170 Wis. 251, 176 N.W. 224 (1920).

²⁹ *Everson v. Board of Education*, 330 U.S. 1, 19 (1947).

³⁰ The few cases dealing with tax exemptions are discussed in Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 *Law & Contemp. Prob.* 144 (1949).

³¹ Brief for Appellees at 71, *McCullum v. Board of Education*, 333 U.S. 203 (1948).

³² *McCullum v. Board of Education*, 333 U.S. 203, 249 (1948) (Reed, J., dissenting).

and cultural activities is to be checked. This is a point of considerable importance from the viewpoint of democratic pluralism.

It must be added that it has not always been found practicable to avoid discrimination against religion. For example, state provision of subsidized professional education necessarily tips the scales in favor of secular vocations. Whatever comment one makes as to such discrimination, one must admit that the greater the expansion of government activity in fields of education and welfare, the more serious is the problem of incidental restraint of the free exercise of religion.

III

As already noted, much of the recent controversy has centered around the proposition, first clearly stated in the New Jersey bus case, that the "establishment" clause forbids "aid to all religions" as well as aid to a favored denomination. It has also been noted that many religious leaders have criticized the proposition, fearing that it implies a "hardening" of the doctrine of church-state separation. We have seen, however, that the "no aid" rule does not preclude state recognition of religion when necessary to preserve religious freedom. One may therefore examine the "no aid" rule free from the fear that it embodies hostile indifference to religion.

To the present writer, the difficult questions raised by this rule are questions as to whether by proper interpretation it may be found in the First and Fourteenth Amendments. They are not questions as to its soundness as a matter of policy and political philosophy. The rule reflects a view that religion is truly free only when it is free from coerced support as well as coercive restraints. The classic statement of the case against state aid is that of James Madison in his famous "Memorial and Remonstrance Against Religious Assessments."³³ The proposal which was pending was "A Bill Establishing a Provision for Teachers of the Christian Religion." Madison's argument, however, treated the proposal as one of nondiscriminatory support for all religion. He condemned it as inconsistent with the nature of religion and as harmful in many ways to both church and state. The arguments are as cogent for mid-twentieth century America as for 1785.

Nor is a rule of "no state aid" in any sense hostile to religion if one views religion as man's free response to God. In the words of William E. Hocking:

. . . it is of the essence of the religious spirit and of its ideal always to persuade, never to compel. . . . Again, religion is never political in its nature. It has no speech except to free spirits. Its aim is to draw men to devotion to its ideal, and a devotion that is enforced is not sincere. . . . When it mistakenly uses the organs of power the very object of religion is undermined.³⁴

³³ This document is added as an appendix to the opinion of Mr. Justice Rutledge in *Everson v. Board of Education*, 300 U.S. 1, 63 (1947).

³⁴ Hocking, *The Principles of Religious Liberty*, 20 *Internat'l Rev. of Missions* 493, 500, 501 (1931).

As a matter of policy, the case for "neutrality between religion and non-religion" is compelling. Less satisfactory, however, is the route by which the principle has emerged as a rule of constitutional law applicable to both federal and state governments.

Much of the controversy has focused upon the history and meaning of the First Amendment clause, "Congress shall make no law respecting an establishment of religion. . . ." The issue is as to whether anything more was here intended than prohibition of a national church and preferential aid to one denomination or religion. The issue is much more debatable than would be concluded from opinions of Mr. Justice Black or from the long opinion of Mr. Justice Rutledge in the bus case. Professor Corwin, the Princeton constitutional historian, has flatly stated that the Court's view that the First Amendment forbids Congress to "pass laws which . . . aid all religions," is "untrue historically."³⁵

The various lines of evidence will not be examined here. One conviction emerges from a study of the various attempts at "proof." This is the melancholy conviction that the heat generated by questions concerning religion has made fairness in the handling of historical evidence almost impossible. For example, Mr. Leo Pfeffer, in his article in this Review,³⁶ emphasized the Senate debate on the First Amendment. In this debate the Senate rejected two early formulations which were drafted in terms of "establishing one Religious Sect or society in preference to others" and "establishing any particular denomination or religion in preference to another." He offered the defeat of these drafts as strong evidence of intention to forbid nondiscriminatory aid and twitted opposing writers for not referring to this Senate action. Mr. Pfeffer himself, however, suppressed or ignored the fact emphasized by some of these writers that the wording approved by the Senate (six days after the action just referred to) was also a prohibition of a national orthodoxy: Congress shall make no law "establishing articles of faith or a mode of worship. . . ."³⁷

Doubt must remain as to the "intention" of Congress in adopting the report of the conference committee, and also as to the "intention" of the ratifying bodies in the states. The question of aid to religion had apparently been much discussed in connection with the development of the Northwest Territory. On July 23, 1787, the Continental Congress authorized a sale of lands in the Northwest Territory with the following provision:

The lot N29 in each township or fractional part of a township to be given perpetually for the purposes of religion.³⁸

There was apparently no uniform policy, but the original constitution of Ohio (1802) provided:

³⁵ Corwin, *The Supreme Court as National School Board*, 14 *Law & Contemp. Prob.* 3, 10 (1949).

³⁶ Pfeffer, *Church and State: Something Less Than Separation*, 19 *Univ. Chi. L. Rev.* 1, 15 (1951).

³⁷ *Journal of the First Session of the United States Senate* 128 (1820).

³⁸ 33 *Journals, Cont. Cong.* 400 (*Lib. of Cong. ed.*, 1936).

That laws shall be passed by the legislature, which shall secure to each and every denomination of religious societies, in each surveyed township which now is, or may hereafter be formed in the state, an equal participation, according to their number of adherents, of the profits arising from the land, granted by congress, for the support of religion, agreeably to the ordinance or act of congress, making the appropriation.³⁹

Whatever may be the scope of the First Amendment, its provisions affect state statutes only to the extent that they are made applicable by the due process clause of the Fourteenth Amendment. Recent church-state cases have apparently been decided on the assumption that the Fourteenth Amendment makes applicable to the states the specific prohibitions of the First Amendment. In cases of certain other classes, the majority of the court has held that the Fourteenth Amendment incorporates only those provisions of the Bill of Rights which are "implicit in the concept of ordered liberty."⁴⁰ The Court has thus rejected Mr. Justice Black's view that the Fourteenth Amendment was intended to make the entire Bill of Rights applicable to the States. Recent historical research has confirmed the Court's interpretation⁴¹ and has indicated in particular that the Fourteenth Amendment was not understood as incorporating the "establishment of religion" clause.⁴² In the latest case, however, the court continues to speak of

the First Amendment which (by reason of the Fourteenth Amendment) prohibits the states from establishing religion or prohibiting its free exercise.⁴³

This is somewhat paradoxical since the prohibition of congressional legislation "respecting an establishment of religion" (whatever its additional scope) seems clearly to have precluded Congress from disturbing the preferential "establishments" which persisted in a number of states well into the nineteenth century. It is ironic that the due process clause of the Fourteenth Amendment comes to forbid state "establishment of religion" by incorporating the very words of the First Amendment which originally forbade its abolition.

The device of incorporating the First Amendment was not a necessary device and it might have been preferable to develop the limitations upon state action affecting religion out of the Fourteenth Amendment due process clause itself. Without reference to the First Amendment, the Court held that the "liberty" protected by the Fourteenth includes freedom for religious schools;⁴⁴ the rule forbidding affirmative aid to religion might easily have been similarly derived as implicit in the liberty of disbelief. The point will be of little practical importance, however, so long as it remains clear that neither amendment requires absolute separation of church and state.

³⁹ Ohio Const. Art. VIII, § 26 (1802), in 1 Statutes of Ohio 83 (Chase ed., 1833).

⁴⁰ *Adamson v. California*, 332 U.S. 46 (1947).

⁴¹ Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stanford L. Rev. 5 (1949).

⁴² Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. Rev. 939 (1951).

⁴³ *Zorach v. Clauson*, 343 U.S. 306, 309 (1952).

⁴⁴ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

IV

One might expect that where strict separation is incompatible with the free exercise of religion, individuals deeply concerned for the protection of civil liberties would prefer protection of religious freedom to the maintenance of strict separation. This is not always the case, however, as witness Mr. Justice Rutledge's opinion in the bus fare case and the position of the American Civil Liberties Union in all of the recent cases. Speculation is invited as to why absolute separation is supported in quarters such as these, apparently regardless of the resulting restraint of religious liberty.

One influential factor is probably a fear of the Roman Catholic Church as a potential threat to religious freedom. It would be pleasant to follow the practice of most writers in this field and leave this factor behind the scenes. I believe, however, that the confusion beclouding many of these issues will never be dispelled unless this fear is considered with as much objectivity as is possible. It has some justification both in writings of Roman Catholics and in action sometimes taken where they are the dominant group.

The central question is as to the proper function of the state in relation to religion. Msgr. John A. Ryan, a prominent Roman Catholic spokesman of the last generation, argued on the basis of papal encyclicals that it is a duty of the state to promote the true religion and legally to prohibit assaults upon it.⁴⁵ He noted that, in practice, this could have "full application" only in the "completely Catholic State"; that is, a community "either exclusively, or almost exclusively, made up of Catholics." He argued that a Catholic state could not logically permit dissenting groups to carry on "general propaganda" nor could they continue to share in privileges such as tax exemption. Referring to constitutional guarantees which might stand in the way, he commented:

[C]onstitutions can be changed, and non-Catholic sects may decline to such a point that the political proscription of them may become feasible and expedient.⁴⁶ He insisted, however, that all this should not give anyone cause for concern:

While all this is very true in logic and in theory, the event of its practical realization in any State or country is so remote in time and in probability that no practical man will let it disturb his equanimity or affect his attitude toward those who differ from him in religious faith.⁴⁷

Msgr. Ryan may have come to realize that his language concerning feasibility and expediency of proscription of non-Catholic sects was offensive and provocative, for in his 1940 edition, he eliminated these phrases although leaving his position unchanged.⁴⁸

The Rev. Robert C. Hartnett, S.J., writing in 1948, concedes that Msgr.

⁴⁵ Ryan, Comments on the "Christian Constitution of States," in Ryan and Millar, *The State and the Church*, 26, 37-39 (1922).

⁴⁶ *Ibid.*, at 38.

⁴⁷ *Ibid.*

⁴⁸ Ryan and Boland, *Catholic Principles of Politics* 320 (1940).

Ryan's book provides "a little arsenal of objections to our theology on church-state relations." He assumes, however, that objectors will be sufficiently reassured if they are told:

It is just as possible to draw from Catholic teaching a set of principles about Church-State relationships much more in accord with American democratic principles.⁴⁹

As an example, he cites the position of Jacques Maritain, who wrote as follows concerning freedom of conscience, the right "of the human person to make its way toward its eternal destiny along the path which its conscience has recognized as the path indicated by God."

With respect to God and truth, one has not the right to choose according to his own whim any path whatsoever, he must choose the true path, in so far as it is in his power to know it. But with respect to the State, to the temporal community and to the temporal power, he is free to choose his religious path at his own risk, his freedom of conscience is a natural, inviolable right.⁵⁰

It is not surprising that the fears of non-Romans persist despite a few such statements reconciling political libertarianism with Catholic theology. Reports of religious oppression in Spain, outspokenly defended by Spanish bishops, give evidence that the "practical realization" of oppressive policies "in any State or country" is not as remote as Msgr. Ryan thought. Concern of Americans is increased, furthermore, by reports of abuse of the public school system for Roman Catholic religious teaching.⁵¹

In view of these facts and in the absence of any authoritative and explicit repudiation of the line of teaching illustrated by Msgr. Ryan's statement, it is not surprising that issues like that presented by the bus fare case are usually discussed in an atmosphere of distrust.

The basic question, however, remains. Shall we try to put aside fears of religious oppression when we determine the area of religious freedom, maintaining vigilance and dealing vigorously with acts of religious coercion whenever they appear? Or shall we reduce the area of religious freedom by a strict separation of church and state, hopeful that we may thereby check the growth of power which might coerce? To phrase the alternatives in this fashion is, of course, to indicate a preference for the former, a preference in line with the main stream of civil liberty tradition from the days of Jefferson.

V

The principle of state neutrality, with its distinction between aid to religion and protection of religious freedom, helps to locate the issues actually involved in some of the troublesome church-state problems concerning public and private schools.

⁴⁹ Hartnett, *Federal Aid to Education* 34 (1948).

⁵⁰ Maritain, *The Rights of Man and Natural Law* 81-82 (1943). See also Murray, *The Freedom of Religion*, 6 *Theol. Studies* 229 (1945).

⁵¹ See 2 Stokes, *Church and State in the United States* 668 (1950); *Harfst v. Hoegen*, 349 Mo. 803, 163 S.W. 2d 609 (1942); *Wright v. School District*, 151 Kan. 485, 99 P. 2d 737 (1940).

As to public schools, the problem of neutrality may be stated as a problem of keeping the schools secular (i.e., ruling out any attempt to inculcate religious belief) and yet avoiding inculcation of secularism (i.e., a philosophy of life which leaves no place for religion). Such neutrality is not easy to achieve.

Except in the released time and flag salute cases, the Supreme Court has not yet been required to decide questions concerning public school programs. The problem of Bible reading was recently before the Court, but the case was dismissed without decision.⁵² Devotional exercises in public schools, however simple and nonsectarian, are difficult to reconcile with a rule of neutrality. Such exercises present a problem quite different from that presented by incidental inclusion of religious material in literary and social studies. Occasionally, advocates of strict church-state separation demand careful exclusion of all references to religion. Handling of such material on a basis of neutrality may not always be easy, but consistently to exclude it is to abandon neutrality at the outset.

In dealing with public school programs of released time classes in religion, considerable difficulty is encountered in applying the distinction between affirmative aid to religion and action in the interest of religious freedom.⁵³ Such programs are constitutionally objectionable as aids to religion if they involve coercion or persuasion of students or if they discriminate against nonbelievers. To illustrate the latter point first, if a nonreligious ethical culture society should wish to participate in a released time program, its exclusion should render the program invalid as discriminatory aid to religion.

In the New York case, the plaintiffs sought an opportunity to prove that in actual operation the program was affirmatively promoted by some schools. The state court held that these facts were not properly pleaded and that, in any event, they would not justify invalidating the program unless the supervisory authorities were shown to be implicated.⁵⁴ Such a showing might, of course, be made the basis of a new attack on the program, an attack which would undoubtedly be successful.

The plaintiffs also contended that such programs necessarily operate in a co-

⁵² *Doremus v. Board of Education*, 342 U.S. 429 (1952).

⁵³ The writer of the excellent note in the *Yale Law Journal*, *Released Time Revisited: The New York Plan Is Tested*, 61 *Yale L.J.* 405, 410 (1952), states the problem as follows: "The released time program must be studied in its operation. To determine the encroachment upon the no aid principle, the amount and the effect of actual state aid to religion involved must be ascertained. Against this must be balanced the restraint upon the free exercise which would result if the program were invalidated. Thus, by indicating whether a greater danger to religious freedom exists in state interference or state aid, the fundamental objective of the First Amendment—to prevent state encroachment from either direction—is promoted."

The writer's conclusion is against released time programs. He is apparently little impressed with the position of parents who are unwilling to send their children to full time religious schools and yet believe that Sunday School instruction necessarily leaves the impression that religion is a week end extra, that exclusion of religion from regular week day school hours inevitably makes it appear that religion is relatively unimportant and unrelated to daily life.

⁵⁴ *Zorach v. Clauson*, 303 N.Y. 161, 174, 100 N.E. 2d 463, 469 (1951).

ercive manner, but the Supreme Court held otherwise.⁵⁵ It rejected the contention that pupils are inevitably influenced in favor of participation by the fact that those who do not participate must remain in school. This is a closer question than might appear from the majority opinion of Mr. Justice Douglas. It involves difference between such released time programs and programs conducted in "dismissed time," i.e., with all students dismissed at the earlier hour. If it could be shown that released time programs succeed where dismissed time programs fail, the element of affirmative aid in the released time arrangement would seem to have been established. It may well be, however, that a dismissed time program would be just as successful in attracting pupils. In the absence of evidence, speculation on this point seems an insufficient basis for finding affirmative aid. Even dismissed time arrangements, shortening a school day to accommodate religious classes, involve aid to religion in one sense, but not in a sense which violates the "neutrality" rule. Such an accommodation is clearly permissible as an effort to keep the secular public school program from teaching by implication the unimportance of religion.

Two propositions concerning parochial and other church schools are usually regarded as settled. One is the constitutional right to conduct such schools, recognized in 1925 in *Pierce v. Society of Sisters*;⁵⁶ the other is the unconstitutionality of using public funds for their support.

The *Pierce* case was decided by a unanimous Court. It has often been cited in subsequent opinions and never with any indication that the decision is open to question. Very seldom, furthermore, are suggestions made in any quarters that attendance at public schools should be made compulsory. Professor Childs of Teachers College, however, has suggested such a law, somewhat less drastic than that held invalid in the *Pierce* case.⁵⁷ He urges that each child be required to spend at least one-half of the compulsory school period in a public school. Such a statute, he suggests, might well be held valid. Legally, its defense would have to be in terms of the objective of checking the divisive tendencies of school segregation on religious lines. However, the use of any coercion in the promotion of national unity is open to serious question, particularly where claims of conscience are involved. The opinions protecting religious scruples against public school flag salute requirements⁵⁸ furnish a strong indication that compulsory attendance at public schools, even if for only one-half of the period of compulsory schooling, would also be held invalid.

No case in the Supreme Court has directly involved the question of the validity, under the First Amendment, of tax support for parochial schools. In the New Jersey bus fare case, however, both the majority and the minority

⁵⁵ 343 U.S. 306 (1952).

⁵⁶ 268 U.S. 510 (1925).

⁵⁷ Childs, *American Democracy and the Common School System*, 21 *Jewish Educ.* 32 (1949).

⁵⁸ *Board of Education v. Barnette*, 319 U.S. 624 (1943).

clearly assumed that such support is unconstitutional. Until recently, it seemed to me that this assumption was a sound application of the "no aid" rule. It seemed to me that direct payment for educational costs was something more than action to avoid discrimination against religion. Two years ago, I suggested that to protect the freedom of parents in their choice of schools, a tax deduction of some kind for tuition paid to such schools would be permissible.⁵⁹ It seemed to me, however, that affirmative aid to religion would be avoided only if religious schools were limited to the support of individuals paying tuition and voluntary contributions.

This position no longer appears to me to be tenable. The "no aid to religion" rule is a rule prescribing neutrality, forbidding action which aids those who profess religion as compared with those who do not. If one assumes that the religious schools meet the state's standards for education in secular subjects, it is not aid to religion to apply tax funds toward the cost of such education in public and private schools without discrimination.⁶⁰ Like the dissenters in the bus fare case, I am not now able to distinguish between the minor payments there involved and payments for educational costs. I believe, therefore, that none of such nondiscriminatory uses of tax funds are forbidden by the First Amendment.

The widespread rejection of the position just defended may be explained in a number of ways. It may reflect a general bias in favor of government operation for any activity which is to be supported with tax funds. It may reflect a specific bias in favor of public education with only grudging concession of freedom for private schools. It may reflect skepticism as to the quality of education in religious schools and as to the feasibility of enforcing standards. It may reflect distrust of the position of the Roman church as to religious liberty. It may reflect a conviction that the problem is too explosive to be left to ordinary political processes and that the usual principle of state neutrality must, at this point, yield to a principle of absolute and hostile separation.

⁵⁹ Katz, *Canon Stokes on Church and State*, *The Living Church* 14 (Sept. 16, 1951).

⁶⁰ Cf. *Cochran v. Board of Education*, 281 U.S. 370 (1930), which involved a Louisiana statute providing for free school books for children in all schools. It was contended that the inclusion of children in sectarian and other private schools rendered the act a taking of property for a private purpose in violation of the Fourteenth Amendment. The state court interpreted the act as referring to books used in all the schools and as thus excluding books for religious instruction. Its decision upholding the act was unanimously affirmed by the Supreme Court, speaking through Chief Justice Hughes: "The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." *Ibid.*, at 375.