JUSTICE RUTLEDGE AND THE RELIGIOUS CLAUSES OF THE FIRST AMENDMENT*

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A number of cases were decided by the Supreme Court of the United States in the late thirties and early fourties which involved the First Amendment's guarantee of the free practice of religion. Most of these cases involved members of the sect known as Jehovah's Witnesses. Three such cases upholding legislation requiring licenses for the street distribution of literature were decided by the Court on June 8, 1942. The decision was five to four, the majority consisting of Justices Reed, Roberts, Jackson, Frankfurter and Byrnes.

Shortly after these cases were thus decided, Justice Byrnes resigned to accept the position of Director of War Mobilization. President Roosevelt nominated Justice Rutledge to fill the vacancy on January 11, 1943. He was confirmed by the United States Senate on February 8th, and took the oath an his seat on the Court on February 15th. In the meantime the Court ordered reargument of the Jehovah's Witnesses cases which took place on March 10th and 11th. The earlier decision was reversed the following May. This essay deals with the participation of Justice Rutledge in those cases, who joined the previous four dissenters to swing the Court the other way by another five to four vote.

I

"Ye Are My Witnesses"

The religions of the world have been organized in many forms and their faiths reflected in numerous creeds. It is probably not too much to say that all societies in all ages have had some more or less systematic way of explaining life's mysteries which could be called religion. This is, indeed, a believing world. Western Europe and the Americas have for centuries been religiously dominated by Christianity with slight Judaic overtones. Catholics and Protestants compete for ascendency in the various nations, the former more

* The material in this article will constitute a chapter in a forthcoming book on justice Rutledge to be published by the Bobbs-Merril Company.

numerous in South America and Southern Europe, the latter predominating with minor exceptions, elsewhere.

Protestantism is divided into a dozen or more major denominations, with minor offshoots, differing on lesser matters of discipline, ceremony and faith. In addition, it has from time to time, been plagued with small crackpot sects or movements, some merely fanatically motivated, others originating from political and financial considerations, with varying degrees of moral and intellectual dishonesty in their leaders. But as Justice Jackson pointed out in the "I Am" cult case, "The chief wrong which false prophets do to their following is not financial.*** The real harm is on the mental and spiritual plane. There are those who hunger and thirst after higher values which they feel wanting in their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they are deluded and then disillusioned, cynicism and confusion follow. ***But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish."[1] In one of the most sensitive areas of human thought, where tolerance is least to be found, this is strong doctrine. But so far as the law is concerned, it "knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[2]

Jehovah's Witnesses is a fanatical, fundamentalist religious organization founded in 1872 by a man named Charles Taze Russell of Pennsylvania. It seems that at first this was an informal group which gathered together to study the scriptures. Apparently they became fascinated with the idea of the second coming of Christ and the end of the world. Some years later the group incorporated and established headquarters in Brooklyn, New York. The movement grew and expanded. "Since 1938, with the adoption of a Theocratic organization extending all the way down to the congregational level, Jehovah's Witnesses have made their most amazing increase. In the ten years following that date new ministers were being baptized and entering the field at the rate of a thousand a week."[3] Today the organization carries on its programs in England, Europe and other

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1 United States v. Ballard, 322 U. S. 78, 94-95 (1944), dissenting opinion.
2 Justice Miller, in Watson v. Jones, 80 U. S. (13 Wall.) 679, 728 (1871).
3 Cole, Jehovah's Witnessess 106 (1955).

parts of the world. It is essentially an evangelical organization, "preaching" the "word" in the streets and engaging in door to door canvassing to sell or give away the numerous tracts and pamphlets put out by the Watchtower Bible and Tract Society, its Pennsylvania corporate publishing house.

Little is known of the finances of the society. Presumably most of its revenues are derived from sales of its literature and the contributions of its members, who, although for the most part of small income, are of great faith and devotion. The Society has acquired some real estate over the years and several radio stations, but as income producers these are probably of comparatively little value.

In addition to literature, the Society has used portable phonographs extensively in its recruiting and proselyting activities. It also manufactures records for sale as well as for street use. From time to time it uses sound trucks with amplifiers sufficient to reach audiences of considerable size.

The bulk of its evangelistic activities is caried on by the rank and file who carry the message, personally, to the public. The words of Isaiah (43:10) are taken literally and personally: "Ye are my Witnesses." These colporteurs consist of men, women and children "thoroughly consecreated to the program and eager to sacrifice everything, if necessary, for the work to which they believe Jehovah has called them." [4] This work is not carried out on a hit or miss basis. It is carefully organized, the preachers being assigned to definite areas by direction of a local central organization.

The Witnesses who work in the streets were originally called "Pioneers." Stroup writing in 1945, reported that the Pioneers received full maintenance (room, board and clothing), travel expenses and ten dollars a month as an allowance—"the same as any full-time worker in the Brooklyn factory or on the farms. Missionaries sent abroad by the Society work on the same basis as do the Pioneers at home." [5]

The *Watchtower* for January 1, 1962, contains a summary of the widespread activities of this group. It reports that the average number of "publishers," that is, colporteurs who devote a substantial amount of their time to "preaching" on the streets and public places for the United States was 248,681. The total pieces of literature

[4] Stroup, The Jehovah's Witnesses 61 (1945).
[5] *Ibid.*, 62.

distributed annually was 6.240,290 in 37.232,858 hours of canvassing. It also disclosed activities, varying in numbers and extent, in 175 different countries as divergent as the Islands of Tobago, Taiwan, the Azores and Iceland on the one hand, and the Argentine, Sudan, China, India, Pakistan, France, Great Britain and Sweden. The grand total of "publishers" all over the world came to 851,378. That this sect is still active and growing in the United States is evidenced by the fact that in July, 1963, in a single ceremony, 2,251 converts were baptized at Orchard Beach in the Bronx. (New York Times, July 13, 1963).

Persecution of the witnesses in small cities and towns in the United States was nothing new to them. Their fanatical attacks upon Catholicism had brought them many violent reprisals in Italy and other European countries. With the advent of the Hitler dictatorship in 1933, their troubles in Germany increased. Their property was seized, their printing plant closed, their meetings and activities forced underground.[6] As might be expected, the Witnesses fared no better under Communist rule. They report in *Jehovah's Witnesses in the Divine Purpose*: "The expansion in Europe following World War II was not accomplished without great difficulties. This was especially true in those countries where Communist influence was strongly felt. As Russia gradually lowered the Iron Curtain in Europe after 1948, thousands of Witnesses found themselves subjected to persecution, in many ways, worse than that which they had experienced under Nazi rule. After only three or four years of freedom from concentration camps, thousands again found themselves forced back into such devilish institutions or were sent to work as slaves in Russian mines, or, worse still, were banished to Siberia... In 1948, there were 440 still in prison." [7]

In 1941, the American Civil Liberties Union published a pamphlet outlining the troubles of violence suffered by the Witnesses in the United States. Not since the persecution of the Mormons, it noted, had any religious minority been subjected to such lawless attacks by irresponsible mobs. The worst outbreak occurred after the 1940 decision in the *Gobitis* case[8] in which the Supreme Court

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[6] Qualified to be Ministers 324 (an official tract of the Watchtower Bible and Tract Society, 1942).

[7] 277-278 (1945).

[8] Minorsville School District v. Gobitis, 310 U. S. 586 (1940).

upheld the compulsory flag-salute regulation of a local school board. The Gobitis children had refused to comply because of their conscientious objections and those of their parents.

Most of the attacks were made on helpless house-to-house canvassers in small communities. Legionnaires and other self-proclaimed "patriots" insisted that they "salute" the flag. Men and women were beaten, jailed and chased out of town. Instance after instance was recorded of shameless and cowardly assaults with police protection refused. Their literature was seized and destroyed repeatedly and their property damaged. In few cases were attorneys for the Witnesses able to obtain warrants for the arrest of members of the mob whom they had positively identified. The situation became so scandalous that in June, 1940, Attorney General Biddle addressed the nation on a radio network. "A religious sect known as Jehovah's Witnesses," he said, "have been repeatedly set upon and beaten. They had committed no crime; but the mob adjudged they had, and meted out punishments ** We shall not defeat the Nazi evil by emulating its methods." [9]

At about this time a series of cases, eventually to reach the Supreme Court, were in the making, challenging official restrictions on the behavior of members of the Society. The Court had already decided three cases[10] involving basically the same issue but there was dissension and conflict ahead.

In one, *Lovell* v. *Griffin* a unanimous Court, in an opinion by Chief Justice Hughes, held void a sweeping ordinance which required a license to distribute any kind of literature. The City Manager was given authority to grant such licenses in his discretion. Although the convicted Witness had been distributing religious pamphlets, the case was decided solely on the freedom of the press issue. This was in March, 1938.

Mr. Justice Roberts delivered the opinion in the Schneider case in November 1939. Only Justice McReynolds dissented. Again the decision turned on freedom of the press rather than religion. Ordinances of several cities were involved, either prohibiting pamphlet distribution on the streets or requiring a permit from the police. All were struck down, the Court holding that neither the

[9] The Persecution of Jehovah's Witnessess 22 (1941).

[10] Lovell v. Griffin, 303 U. S. 444 (1938); Schneider v. New Jersey, 308 U. S. 147 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940).

purpose of keeping the streets clean nor the prevention of fraudulent advertising was sufficient to justify invasion of the privilege of freedom of the press. There are other obvious methods of protection against such evils which are reasonable and less restrictive. The *Cantwell* case, decided the following May (1940), involved both freedom of speech and religion. Justice Roberts again speaking for the Court, held invalid a Connecticut statute requiring the approval of a state official for any religious or philanthropic cause as a condition to the solicitation of money from persons other than members of the soliciting organization.

On February 15th, 1943, the New York Times had carried a news story, in part as follows: "Wiley Blount Rutledge, Jr. was sworn in today as an Associate Justice of the Supreme Court and within half an hour the Court issued two unexpected orders aimed at speedy disposition of important cases affecting civil liberties"[11]

"One order, rare in the tribunal's history, granted reargu ments in three cases in which the Court decided 5 to 4 last June that Jehovah's Witnesses must obey city ordinances prohibiting distribution of literature without a license.***

"Some observers who have followed the cases of Jehovah's Witnesses in the Supreme Court believe that with Justice Rutledge upon the bench, the Jurists may now reverse themselves not only in the literature-peddling cases, but also in the Gobitis decision of three years ago that school children of that sect must salute the American flag regardless of religious convictions."

The previous June the Court had upheld city ordinances of cities in Alabama, Arkansas and Arizona imposing license taxes on the sale of printed matter, as applied to Jehovah's Witnesses' itinerant street evangelists.[12] The case is commonly referred to as the *Opelika* case. The ordinances had been attacked as in violation of the free speech and press provisions as well as the free practice of religion clause of the First Amendment made applicable to the state through the Fourteenth Amendment. The decision was five to four, Chief Justice Stone and Justices Black, Douglas and Murphy dissenting. As reported in the Times, rehearing was ordered on the day Rutledge took his seat on the Court. After argument, the decision was reversed on the same day that the Court handed down

[11] The Times, February 15, under the by-line of Thomas Wood.
[12] Jones v. Opelika, 316 U. S. 584 (1942).

decisions in three other related cases involving activities of this particular sect. Rutledge, of course, cast the deciding vote. The remaining four Justices of the former majority dissented.[13]

It is almost impossible to find a rational explanation for the series of Supreme Court decisions involving the Witnesses during these years. To be sure there were slight differences in the city ordinances involved in these various cases, but it is hard, indeed, to find constitutional distinctions. Nor does the changing personnel of the Court clarify things until the Rutledge appointment and the second *Opelika* decision. In the 1938 case, Justice Cardozo took no part because of illness but he no doubt would have joined in the opinion of Chief Justice Hughes, as did the other seven Justices, in invalidating the city law. In 1939 Justice McReynolds was a lone dissenter in the *Schneider* case. Justices Frankfurter and Douglas, who had replaced Justices Cardozo and Brandeis, joined the four other Justices in supporting Roberts' opinion that the ordinance involved was unconstitutional. Justice Butler had died a week before and had not participated in the judgment. In the Connecticut case, Justice Murphy had taken Butler's seat and the decision was again unanimous. Within two weeks after this decision came the first flag salute case. A law requiring children of the Witnesses to salute the flag in public schools was upheld by the same Court, Stone being the only dissenter. Two years later, with Byrnes filling Stone's place when the latter succeeded Hughes as Chief Justice, the first *Opelika* decision came down, upholding the license ordinance by a five to four vote.

There is much to be explained. How did Justice McReynolds come to hold unconstitutional the ordinances in the *Lovell* and Connecticut cases? He failed to explain his dissent in the *Schneider* case. Indeed he said nothing in any of these cases. Why did Butler so vote in Lovell? How to explain Frankfurter's votes in the *Schneider* case and his contrary vote in both *Opelikas* not to mention the flag salute case? Finally, who would have supposed that Douglas and Black would have upheld the flag salute law? Stone's position throughout this series of cases appears to be the only consistent one of the various Justices involved.

The original *Opelika* opinion had been written by Justice Reed.

[13] Jones v. Opelika, 319 U. S. 103 (1943).

The city ordinance had required a ten dollar yearly license fee for book agents and a five dollar fee for transient agents or distributors. The licenses were subject to revocation in the discretion of the licensing commission, with or without notice. The two other cases, decided at the same time, involved slightly different license requirements or city ordinances. Appellants, convicted for non-compliance, relied both on the free press and freedom of religion clauses of the First Amendment. Reed's opinion pointed out the difference between "censorship and complete prohibition" on the one hand, and "regulation of the conduct of individuals in the time, manner and place of their activities." He placed emphasis upon the fact that since the appellants' evangelism was also used as a source of funds, "the financial aspects of their transactions need not wholly be disregarded. To subject any religious or didactic group to a reasonable fee for their money-making activities does not require a finding that the licensed acts are purely commercial.*** If we were to assume, as is here argued, that the licensed activities involve religious rites, a different question would be presented. These are not taxes on free will offerings. But it is because we view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances, as here presented, valid." Stone's dissent was powerful. He started with *Lovell* v. *Griffith*[14] in which a unanimous Court had held void on its face the requirement of a license for the distribution of pamphlets to be issued in the sole discretion of an administrative officer. "That purpose (freedom from previous restraint upon publication) cannot rightly be defeated by so transparent a subterfuge as the pronouncement that, while a license may not be required if its award is contingent upon the whim of an administrative officer, it may be if its retention and the enjoyment of the privilege which it purports to give are wholly contingent on his whim." He then blasted the argument that the ordinances merely regulated the "time, place and manner" of appellant's activities. "None of the ordinances, if complied with," he wrote, "purports to or could, control the time, place or manner of the distribution of the books and pamphlets concerned. None has any discernible relationship to the police protection or the good order of the community. The only condition and purpose of the licenses *** is suppression of

[14] 303 U. S. 444.

the specified distributions of literature in default of the payment of a substantial tax fixed in amount and measured neither by the extent of the defendants' activities under the license nor the amounts which they receive for and devote to religious purposes in the exercise of the licensed privilege." He thought that if such taxes as those involved in the three cases before them were sustained, the way was open for the effective suppression of speech, press and religion. "In its potency," he concluded, "as a prior restraint on publication, the flat license tax falls short only of outright censorship or suppression."

Another case (*Murdock* v. *Pennsylvania*),[15] decided the same day as the second *Opelika* decision, invalidated a city ordinance requiring a license for which the licensee paid a reasonable fee to canvass, take orders or deliver any merchandise within the city. Several Witnesses had been arrested for non-compliance. The opinion of the Court was rendered by Justice Douglas, with the same dissenters as in *Opelika*. He pointed out that the cases involved no unlawful act during the solicitation, nor any question of registration of solicitors. "The cases present a single issue," he wrote, "the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities." The activity of the Witnesses "is more than preaching; it is more than the distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting."

He distinguished the situation before the Court from one involving purely commercial activities. The mere fact that the colporteurs "sold" or gave away their literature did not make it a business enterprise. "If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." Douglas hammered away at his theme: "An itinerent evangelist, however, misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom

[15] 319 U. S. 105 (1943).

of religion are available to all, not merely to those who can pay their own way."

In his dissent, Justice Reed insisted upon the right of the states to tax publishing houses and religious organizations. "It may be concluded," he wrote, "that neither in the state or the federal constitutions was general taxation of church or press interdicted. Is there anything in the decisions of this Court which indicates that Church or press is free from the financial burdens of government? We find nothing." [16] To which Douglas answered:

"We do not mean to say that religious groups and the press are free from all financial burdens of government. ***We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation." [17]

Here, Douglas may have pushed a good argument too far. As Justice Frankfurter in his dissent pointed out, "the power to tax is the power to destroy only in the sense that those who have power can misuse it." He then quoted Justice Holmes, as disposing of this "smooth phrase," when he added not "while this Court sits." But Holmes' dictum in this context may also be too "smooth." The real issue is when, if ever, may a state impose a tax on the exercise of a right guaranteed by the Constitution of the United States?

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[16] 319 U. S. 105, 127-128.
[17] *Ibid.*, 112.

A third case decided the same day as the *Opelika* decision involved a municipal ordinance of the Ohio town of Struthers[18] which made it unlawful for any person distributing handbills, circulars or advertisements, to ring doorbells, sound doorknockers or otherwise summon householders to the door to receive them. The ordinance was held unconstitutional by the usual five to four decision. Mr. Justice Black wrote for the Court. Mr. Justice Murphy wrote a concurring opinion in which Justice Rutledge and Douglas joined.

Justice Rutledge's file on this case discloses a curious sequence of events. The original vote had been for upholding the ordinance. Black, Jackson, Roberts, Frankfurter and Reed constituting the majority, with Stone, Murphy, Douglas and Rutledge dissenting. Black was to write the opinion for the Court. Black wrote his opinion and circulated it. His position, briefly, was as follows: While the Constitution assures to everyone the right to believe and worship in accordance with his individual conscience, it does not grant an unrestrained liberty to engage, even in the name of religion, in conduct which may seriously jeopardize the rights of others. Religious liberty is not a license to interfere in the affairs of another who does not share his beliefs. There was evidence that *Struthers* was an industrial community near Youngstown where the iron and steel mills operated swing shifts around the clock. This meant that many workers slept in the daytime. Black thought that callers selling pots and pans or distributing leaflets could interfere with the peaceful enjoyment of a home as much as a neighborhood glue factory or a railroad yard. The rubric "a man's home is his castle" is no mere rhetorical phrase.

At this point both Stone and Rutledge wrote and circulated dissenting opinions. The Rutledge draft pointed out that the record was meager as to the extent of swing shifts and the number of night workers. "Neither common knowledge nor unsupported assertions of counsel can supply foundation in fact for belief that handbill distributors are more disturbing than others." He denounced the law as altogether arbitrary. The ordinance, as written, includes everyone who knocks or rings the bell with paper in hand and itends to give it to the occupant. It excludes all who come without the circular. The prohibition is not confined to the nuisance who rings pestiferously or persistently. "One knock is enough." The thrust of this

[18] Martin v. Struthers, 319 U. S. 141 (1943).

opinion was the discriminatory character of the ordinance although it also pointed out that the law was broad enough to exclude circular distributors who were welcome to the householder and thus to usurp the owner's "right to control his property."

Stone's opinion made somewhat the same point as Rutledge's. Further, he could not accept a decision which could open the way to complete suppression in every town and city in the land, of all personal communication of ideas by a stranger to the people in their homes, however willing they might be to receive them. Such ordinances would have stamped out the form of evangelism—to say nothing of political appeals by handbills and pamphlets—which has been the historic means of communicating ideas to people in their homes, both in Europe and in the United States. He pointed out that a community which today, if moved to do so, could by the use of this device suppress the house-to-house communication of ideas and solicitations of funds by Jehovah's Witnesses, could in other days have similarly suppressed the collection of funds and the dissemination of ideas in the support of Protestantism and Catholicism and many another faith now accepted and cherished by millions. If only accepted causes, which no longer need the house-to-house appeal, are entitled to enjoy the benefits of the First Amendment, he thought, its guarantees serve little purpose and could as well not have been written.

Neither Black's opinion referred to above nor Stone's and Rutledge's was ever published. Black switched his vote to join the dissenters who then constituted the majority to invalidate the ordinance. He then wrote the opinion for the Court as it eventually appeared. Stone was content with the reasons expressed therein while Rutledge joined in a concurring opinion by Murphy. Reed wrote a dissenting opinion in which Roberts and Jackson joined, Frankfurter wrote a short opinion which he neither characterized as "concurring or dissenting."

The last of the May 3rd Jehovah's Witnesses cases was *Douglas* v. *Jeannette*,[19] in which the Court held an injunction not available to prohibit City officials from enforcing an ordinance requiring a license, for which a tax must be paid, to solicit orders for any kind of merchandise. It was the usual manifestation of the reluctance of

[19] 319 U. S. 157 (1943).

the federal courts to interfere with or embarrass proceedings in state courts except to prevent irreparable and imminent injury. There was no reason to believe that the complainants were threatened with injury other than that incidental to any criminal prosecution brought in good faith. Adequate relief, if their claims were justified, would be available by resort to normal appellate procedure, i. e., if convicted, they could appeal through the state courts to the Supreme Court of the United States.

The *Prince* case,[20] decided the following term of Court involved the validity of the Massachusetts Child Labor Law as applied to a nine-year old Jehovah's Witness girl selling or offering for sale religious literature on the streets of Brockton. The law forbade boys under twelve and girls under eighteen to "sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack," etc. on the streets.

The girl, accompanied by her aunt had violated this statute, making the usual claim that this was a part of a religious duty, to woship God and "engage in preaching work." The aunt, Mrs. Prince, was prosecuted and convicted under the provision of the law which made parents or guardians violators by compelling or permitting violation by under-age children. Against her First Amendment plea, the State court affirmed her conviction. "We think that freedom of the press and religion," the court said, "is subject to incidental regulation to the slight degree involved in the prohibition of selling of religious literature in streets and public places by boys under twelve and girls under eighteen and in the further statutory provisions herein considered, which have been adopted as means of enforcing that prohibition." [21]

Rutledge, writing for the Court, affirmed the State court in upholding the law. Actually the only point in issue was the free-practice-of-religion clause. Appellant did not stand on freedom of speech or press. She conceded that Massachusetts might regulate the distribution of secular literature by these means, but not religious matter. She also sought to buttress her position with a claim of parental right under the due process clause of the Fourteenth Amendment. But as Rutledge pointed out, in the circumstances of the case before

[20] Prince V. Massachusetts, 321 U. S. 158 (1944).
[21] Commonwealth v. Prince, 313 Mass. 223, 229 (1943).

the Court, "all that is comprehended in the former (due process) is included in the latter (freedom of religion)."

"It is in the interest of youth itself," wrote Rutledge, "and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." And, he added, "neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." [22]

It was conceded by the opinion that a statute identical in terms would be invalid as applied to adults. "The state's authority over childrens' activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. ***It is true children have rights, in common with older people, in the primary use of highways. ***Street preaching, whether oral or by handing out literature, is not the primary use of the highway, even for adults. While for them it cannot be wholly prohibited, it can be regulated within reasonable limits in accommodation to the primary and other incidental uses." While the presence of parent or guardian might protect the child against some street risks, it could not forestall all of them. Zealously propagandizing the community in public places, Rutledge thought, whether politically or religiously, creates situations difficult for adults, much more so for children including emotional excitement and psychological as well as physical harm. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children..." [23]

But, the appellant argued, for Jehovah's Witnesses and their children the streets were their church, and to deny them access for religious purposes is on the level with the exclusion of altar boys, choir boys and other children from their places of worship. To this, Rutledge replied that "the public highways have not become their religious property merely by their assertion. And there is no denial

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22 321 U. S. 158, 165-166.
23 *Ibid.*, 168-170.

of equal protection in excluding their children from doing there what no other children may do."

In one of the relatively few cases involving First Amendment issues, Justice Murphy here found himself in disagreement with Rutledge. The Justice's papers disclose traces of kindly but serious badinage on the issue in which eight members of the Court were in agreement on a highly controversial issue. "Frank wants the solitary glory of dissent," wrote one of the Justices to Rutledge. In a scribbled note, Frankfurter explained why he had left the conference on this case. He had to see an old friend who had a personal problem "and so could not enter into talk when you began to say some joshing thing to me. I came later to listen to you at length and to rejosh, if I could."

"Solitary glory" or not, Murphy's opinion was a strong one, both from the heart and the mind. After the circulation of Rutledge's draft opinion, he, too, in a penciled note, wrote: "Wiley—I am never happy disagreeing with you. And there is so little I can contribute here but I am a profound if not an adequate Jeffersonian on freedom of conscience. So I will write a note—inoffensive I'm sure—in the *Prince* case when it comes down."

In fact, although his "note" was inoffensive as they invariably were, Murphy made points which Rutledge did not answer to the satisfaction of many "profound," if not "adequate Jeffersonians." Relying on the "preferred position" of First Amendment rights, Murphy pointed out that "we are not aided by any strong presumption of the constitutionality of such legislation. On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid... The burden was therefore on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case. The burden in this instance, however, is not met by vague references to the reasonableness underlying child labor legislation in general... The vital freedom or religion cannot be erased by slender references to the state's power to restrict the more secular activities of children."

It can hardly be denied that the facts, as revealed in the Court's opinion, indicate little more than "slender references" to the state's

power to protect children from the evils of activities in the streets. During oral argument it appears that the Chief Justice had made some remark to the effect that the Court would take judicial notice of street dangers to children. Council for the Witnesses later wrote a letter asking the Court to take judicial notice of a study by the Metropolitan Life Insurance Company concluding that "the home is relatively more dangerous than the public sidewalks." Nevertheless, to many readers and critics who may be as "profound," and perhaps, more "adequate Jeffersonians," the decision may appear to be a common sense, pragmatic accommodation of the power of the state, as *parens patria* to the right of the free practice of religion in a situation created by a fanatical, though consecrated minority.

The Court's position and Murphy's position in this case are perfectly clear regardless of one's point of view as to the merits. But there was another opinion—characterized as "separate," by Justice Jackson. He had joined in Frankfurter's dissent in *Murdock* v. *Pennsylvania*. In his Prince opinion, he dissented from Murdock all over again. It is in fact a concurrence. "I have no alternative," he said, "but to dissent from the grounds of affirmance of a judgment which I think was rightly decided, and upon right grounds, by the Supreme Judicial Court of Massachusetts."

It is not too clear just what it was that troubled Jackson. Apparently, it was the accent on youth of the Rutledge position. He quoted from Douglas' *Murdock* opinion that the street evangelism of the Witnesses occupies the same high estate under the First Amendment as does "worship in the churches and preaching from the pulpits" and stressed the Court's refusal to regard it as a commercial enterprise. In some curious way, he then arrived at the nonsequitur that "if the *Murdock* doctrine stands along with today's decision, a foundation is laid for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare." [24]

After the circulation among the Justices of this opinion, Rutledge received a scribbled complaint from the irked Douglas, suggesting that Jackson's point be somehow met. The result was the addition of the final paragraph of the opinion, to which Douglas agreed, as follows:

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[24] *Ibid.*, 177.

"Our ruling does not extend beyond the facts the case presents. We neither lay the foundation 'for any (that is, every) state intervention in the indoctrination and participation of children in religion' which may be done 'in the name of their health and welfare' nor give warrant for 'every limitation on their religious training and activities.' The religious training and indoctrination of children may be accomplished in many ways, some of which, as we have noted, have received constitutional protection through decisions of this Court. These and all others except the public proclaiming of religion on the streets, in so far as this may be taken as either training or indoctrination of the proclaimer, remain unaffected by the decision." [25]

Two days before opinion day Rutledge received a note from Frankfurter to the effect that he wished to withdraw his previously indicated concurrence with the Court's opinion. Since the Jackson opinion was based on approval of the grounds taken by the Massachusetts Supreme Judicial Court and sice he thought those were the right grounds, he had decided to join Jackson. Roberts had already indicated that he would concur with the Jackson opinion. Both Justices had dissented in *Murdock*.

The opinion of the Massachusetts court was mostly devoted to an interpretation of the provisions of the child labor law and the question of self-incrimination involved when appellant refused to give the child's name to the school attendance office for which she was convicted on the first count of the indictment. Scarcely more than a page of the opinion dealt with the First Amendment constitutional issue. The grounds for decision on the point may be summed up in one sentence. "These provisions belong to a type of legislation long regarded as within the duty of the State to protect the health, morals, and welfare of its people." [26] When Justice Black returned the Rutledge draft with his approval, he added he liked its "clarity, force and brevity." It is not obvious that the opinion of the Massachusetts Court was superior in any of these respects, unless it was "brevity."

It appears that a majority of the Court had originally favored dismissal of the appeal for want of a substantial federal question and

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[25] *Ibid.*, 171.
[26] 313 Mass. 223, 228-229.

a typewritten "Per Curiam" memorandum to that effect was circulated. Murphy, who dissented, and Jackson who had his axe to grind over *Murdock*, circulated memoranda urging that the appeal be granted. Jackson's argument was substantially that which appeared in his "separate" opinion.

Rutledge worked hard on his opinion and was, as always, open to criticism and suggestions from his brethren although he did not, of course, invariably follow them. Sometimes, however, he made too many concessions. For example, he accepted a suggestion from the Chief Justice which actually weakened his *Prince* opinion. The draft of the opinion as originally circulated, contained the following:

"The fallacy of the (appellants) argument is obvious. It assumes a child's freedom to practice his religion is coextensive with an adult's and the parent's to aid and encourage him to do so in public is as broad as his own. In other words, the state's power to limit what the child may do under a claim of practicing religion is no broader than in the case of a mature person."

This paragraph was omitted. "You seem to say," the Chief Justice wrote, that the First Amendment, standing by itself, makes a difference between the religious freedom guaranteed to an infant and that guaranteed to an adult. This does not seem to me to be strictly accurate. The difference, it seems to me, is not to be found in any distinction to be derived from the First Amendment but from the fact that other provisions of the Constitution have conferred the power on the state*** to forbid the employment of children in the streets***." Stone thought the point important and Rutledge followed his suggestion.

A Law Review commentator argued:

"It cannot be denied that the *Prince* decision in part qualifies the *Murdock* decision. It is one thing for the Court to classify the public activities of house-to-house canvassing and hand distribution as such a part of the sect's religious activity as to be immune from any supervision by licensing and freed from any fees in payment thereof. It is another thing to hold that if the acts are performed by *minors*, they are subject to state regulations. It therefore follows that all such 'religious activity' is immune from regulation only when practiced by adults. The effect of the Court's decision is to make age rather than the nature of the activity the determinative

feature," citing Justice Jackson's "separate" opinion.[27] To this it may be observed that the Court presumably would follow *Murdock* if, rather than a Child Labor law, the Massachusetts statute required children to obtain licenses.

Justice Jackson joined in another "separate" opinion in a similar case the following March.[28] A municipal ordinance of a small South Carolina town imposed a license tax on book agents which a local Witness refused to pay. He peddled the usual tracts, devoting full time to it. His entire income consisted of the proceeds of his proselyting activities. Justice Douglas, writing for the Court, took the position that there was no substantial difference between this case and the *Opelika* and *Murdock* cases. He made the same point, that "Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their calling for a living. Freedom of religion is not merely reserved for those with a long purse."

Justices Roberts, Frankfurter and Jackson thought the decision extended the rule announced in the *Opelika* and *Murdock* cases. "Follett the (Witness) is not made to pay a tax for the exercise of that which the First Amendment has relieved from taxation. He is made to pay for that for which all others similarly situated must pay—an excise for the occupation of street vending." They declared that "In effect the decision grants not free exercise of religion*** but, on the other hand, requires that the exercise of religion be subsidized."

The subsidy argument was met in Justice Murphy's concurring opinion. "It is suggested," he wrote, "that we have opened the door to exemption of wealthy religious institutions like Trinity Church in New York City, from the payment of taxes on property investments from which support is derived for religious activities.*** I am neither disturbed nor impressed by these allegations.*** There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character.*** "[29] It is something of an over simplification, but in many of its aspects, the nub of the issue

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[27] 32 Geo. L. J. 309, 312 (1944).
[28] Follett v. McCormick, 321 U. S. 573 (1944).
[29] *Ibid.*, 579.

here again was whether to characterize the Witness as a preacher or a book agent—were his activities primarily religious in character or were they commercial.

Professor Kurland has called attention to the fact that although the opinion of Jackson, Roberts and Frankfurter made the point that to relieve the Witness of paying the tax is to relieve him from "the contribution to the cost of government which everyone else will have to pay," it did not take up the question whether this does not violate the separation clause. Kurland's explanation is that the Justices failed to recognize the inseparable nature of the free exercise and establishment clauses.[30] It would appear here that the two clauses may, in some situation be in conflict, a point recognized by some of the Justices when the Court developed more awareness of the complexity of these problems and a more sophisticated treatment of them.

Prior to the first flag salute case, decided by the Supreme Court, it had dismissed several appeals from state court decisions upholding salute requirements of school children. The Court could detect no "substantial federal question." [31] In fact, as Justice Frankfurter pointed out in his dissenting opinion in the second flag case, the Court had actually affirmed a similar decision in another case before *Gobitis*.[32]

On June 3, 1940, it handed down its decision holding valid a requirement of a Pennsylvania School Board that all children in public schools must salute the flag and pledge allegiance to it. The Gobitis children had refused on religious grounds and had been expelled. Mr. Justice Frankfurter wrote the opinion for the Court, with Chief Justice Stone the lone dissenter. Some three years later *Gobitis* was overruled in *Board of Education* v. *Barnette*.[33] Between the two decisions, Chief Justice Hughes had retired and Justice Stone had taken his place. McReynolds had retired. The two vacancies were filled by Justices Jackson and Byrnes. Byrnes in turn resigned in 1942 and was replaced by Justice Rutledge. Thus there were two

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[30] Kurland, Religion and the Law 67-68 (1962).

[31] For example, Leoles v. Landers, 302 U. S. 656 (1937); Hering v. Board of Education, 303 U. S. 624 (1938); Gabrielli v. Knickerbocker, 306 U. S. 621 (1939).

[32] Johnson v. Deerfiled, 306 U. S. 621 (1939), decision below, 25 F. Supp. 918 (1939).

[33] 319 U. S. 624 (1943).

new members of the Court when the Barnette case came before it. But since there was but one dissent in *Gobitis* and a six-judge majority in Barnette, it is obvious that three Justices had changed their votes. The three were Justices Murphy, Black and Douglas.

The latter three Justices concurred in *Barnette* with an explanatory opinion by Black and Douglas. "Reluctance" they wrote "to make the federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong," (citing the second decision in *Opelika*, which overruled the first one.) "Neither our domestic tranquility in peace," they continued, "nor our martial effort in war depends on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation... The ceremonial, when enforced against conscientious objectors, more likely than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constituion's plan and purpose."

These three Justice had, in fact, already announced their change of heart in their dissent in the first *Opelika* case. They there wrote: "The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which *Minersville School District* v. *Gobitis*, 310 U.S. 586, took against the same religious minority, and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it also was wrongly decided. Certainly our democratic form of government, functioning under the historic Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the *Gobitis* case do exactly that." [34]

Justice Jackson, in the *Barnette* case wrote one of the Court's great opinions of all time. "The case is made difficult," he observed,

[34] Jones v. Opelika, 316 U. S. 584, 623-624 (1942).

"not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intelectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." It should not require a war between an open and a closed society to recognize the profound truth of Jackson's solemn admonition: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinions achieves only the unanimity of the graveyard." [35]

Justice Jackson concluded with an eloquent paragraph, repeatedly quoted in subsequent opinions. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[36]

Quite naturally, all this Witness litigation attracted wide-spread attention. After the first *Opelika* case upholding the tax ordinance against them, the Court came in for extensive criticism from liberal sources both lay and professional. Raymond Moley in *Newsweek*[37] declared, "The decision of the Supreme Court upholding the imposition of fees on Jehovah's Witnesses for the privilege of distributing religious tracts is... shocking in its implications. For to whittle away the freedom of one religion is to attack the freedom of all religion. To suppress one liberty is to threaten all liberty." *Time*,[38] heading its news story "Ominous Decision," quoted similar opinions from various newspapers' editorials.

Comment in the law journals was also highly critical. Here are some samples: "***An unlimited power of revocation would seem to make the ordinance clearly unconstitutional..." [39] "It would seem that the decision is wrong ...since the power to revoke a license appears as great a threat of censorship as the power to deny

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35 319 U. S. 624, 641.
36 *Ibid.*, 642.
37 June 29, 1942.
38 June 22, 1942.
39 91 U. Pa. L. Rev. 75, 76 (1942).

one in the first place."[40] It is feared that the principle case... "will offer an excellent opportunity to those who seek the suppression of this unpopular minority." In fact the writer anticipated the precise analogy subsequently used by Mr. Justice Douglas in the *Murdock* case. "Jehovah's Witnesses are no more peddlers than the ordinary minister who preaches a sermon from the pulpit and pases a collection plate." [41] Critical of the Court's treatment of the activities of the Witnesses as "commercial" the Fordham Law Review asked, "when is 'money earned?' ...In the instant case the majority appears content with a finding that money was *collected*." [42] (Emphasis original.) The Yale Law Journal expressed the thrust of most comment, namely, that the decision was "a serious threat to civil liberties." [43]

The *Gobitis* flag case had aroused similar expressions of concern as to the future of religious freedom in the country. "If individual liberties are something more than the by-product of a democratic process, if in fact they have an intrinsic value worthy of protection, it is difficult to justify a decision which subordinates a fundamental liberty to a legislative program of questionable worth," declared the Michigan Law Review.[44] The New York University Law Review expressed a similar view: "The Court's acceptance of so vaguely defined an interest as 'national unity' and its refusal to scrutinize the legislative judgment is open to criticism." [45] Writing a year and a half after the decision, William A. Fennell observed: "The unfortunate effects of the decision during the past year are now a matter of public record." [46] He then discussed a New Hampshire case in which, after two children had been suspended from school for refusing to salute the flag and their parents, unable to send them to a private school, were instructing them at home. The children were committed to the State Industrial School as delinquents. Fortunately for this troubled family, the Supreme Court of the State reversed this decision on the grounds of statutory interpretation. It could not attribute to the legislature an intent "to authorize the

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[40] 42 Colum. L. Rev. 1200, 1201 (1942).
[41] 29 Va. L. Rev. 339, 340 (1942).
[42] 11 Fordham L. Rev. 304, 310 (1942).
[43] 52 Yale L. J. 168, 174 (1942).
[44] 39 Mich. L. Rev. 149, 152 (1940).
[45] 18 N.Y. L.Q. Rev. 124, 127 (1940).
[46] 19 N.Y. L.Q. Rev. 31, 42 (1941).

breaking up of family life for no other reason than because some of its members have conscientious religious scruples not shared by a majority of the community.*** [47] A similar case in New York arrived at the same result.[48]

When the Court reversed the first *Opelika* case, the liberal press was exultant. "The outright about-face," wrote Irving Dilliard in the *New Republic*,[49] "of the United States Supreme Court on the constitutionality of city ordinances under which members of the Jehovah's Witnesses sect were convicted for distributing religious literature without a license is one of the most notable acts in the entire span of 154 years of Supreme Court history."

The New York Times, in its editorial for May 4, 1943, commented as follows: "The vote of the Supreme Court's latest member, Justice Rutledge, was decisive in two opinions rendered yesterday, one of which reversed a position taken last June, and both of which taken together, reaffirmed the right of Jehovah's Witnesses to agitate for their unusual creed... It is a gross under-statement to say that Jehovah's Witnesses are not popular in this country. Their beliefs are their own concern, but their methods of urging them upon other people are annoying... Yet, if we permit extremists of an unpleasant sort to be deprived of their rights, it is hard to tell where the line can be drawn and who is to be deemed secure. We think the rights of all Americans are a little safer because Jehovah's Witnesses have had their second day in court."

The Washington Post[50] declared "Monday's action by the Court is of tremendous historical importance." The St. Louis Post Dispatch[51] expressed the view that "The first two of President Roosevelt's four freedoms—freedom of speech and freedom of religion—have been staunchly bulwarked in the United States by the Supreme Court by the reversal of its sorely mistaken *Opelika* decision of last June 8th... Justice Rutledge has tipped the scales on the side of the cherished freedoms of the Bill of Rights." Even the Chicago Tribune,[52] a newspaper not often belligerent in support of the Bill

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47 New Hampshire v. Lefebvre, 91 N. H. 382, 385, 20 A. 2d. 185, 187 (1941).
48 In re Reed, 262 App. Div. 814, 28 N. Y. S. 2d 92 (1941).
49 May 24, 1943.
50 May 5, 1943.
51 May 4, 1943.
52 May 5, 1943.

of Rights, applauded the decision. The reason, however, was apparent—the shoe had been on a different foot or the other axe had been ground. "The Tribune greets this opinion with special satisfaction because the Court has carried forward the trend to which this newspaper contributed much of the original impetus." It then referred to its victory in a libel suit brought against it by the City of Chicago,[53] and the Minnesota free press case[54] in which the Supreme Court held invalid an injunction against the publication of a newspaper as "previous restraint," contrary to the First Amendment.

With the resignation of Justice Byrnes, it was recognized in many quarters that a shift in the Court's point of view on such controversial issues by a sharply divided Court was quite possible. The *Christian Century* for January 13, 1943, had editorialized:" ...The man whom President Roosevelt appoints to the Supreme Bench may well have it within his single power to answer that question. The greater the importance, therefore, that the choice be made with great care and passed on by the Senate with full consideration of all that is at stake." In its January 27 issue, the magazine expressed satisfaction with Rutledge's nomination by the President. "The new Justice should prove to be a stalwart champion of religious liberty and civil rights... The Christian Century has tried to emphasize the interest which the churches have in securing a Justice who, in the present evenly divided state of the Supreme Court, can be depended upon to uphold freedom of conscience and speech. President Roosevelt appears to have chosen just such a man." No editor ever made a more accurate prediction.

Justice Rutledge's performance in the Jehovah Witnesses cases was in fact surprising to no one who had followed his work on the Court of Appeals. Less than a year before he took his seat on the High Court, he had dissented in a case involving much the same issues as in *Opelika*. Several Witnesses had been convicted of selling tracts on the streets of the District of Columbia without a license or paying a tax. Each had been fined five dollars (what the license in question would have cost) and sentenced to one day in jail. The license law was upheld by two members of a three-Judge Court.[55]

In his dissent Judge Rutledge indicated that the statute should

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[53] City of Chicago v. Tribune Co., 307 Ill. 595, 139 N. E. (1923).
[54] Near v. Minnesota, 283 U. S. 697 (1931).
[55] Busey v. District of Columbia, 129 F. 2d 24 (1942).

not be applicable to appellant's "selling" their pamphlets. With them, it was a religion, not a business. (The same issue, over and over again.) But, if applicable, he thought the law unconstitutional. Referring to the *Gobitis* flag case, he wrote: "Jehovah's Witnesses have had to choose between their consciences and public education for their children. In my judgment, they should not have to give up also the right to disseminate their religious views in an orderly manner on the public streets, exercise it at the whim of public officials (the law vested discretion without express limitations in the licensing officials), or be taxed for doing so without their licenses."

Although it had not always been true of previous, nor, for that matter, of succeeding Justices, it was not to be assumed that Rutledge would change his attitude or his constitutional philosphy once he found himself in a position to make it most effective. When appointed, it was altogether predictable what his position would be in this series of cases with the possible exception of the Massachusetts child labor case.

After the 1943 favorable decisions, the Witnesses took great pride in themselves as "molders of constitutional law." They referred to May 3rd and June 14th of 1943 as "Field Days" by winning 12 out of 13 cases, leading ones, of course, being *Opelika*, *Murdock* and *Barnette*. "As a result, beginning in the summer of the year 1943, there was a marked decline in the number of cases brought against Jehovah's Witnesses. Simultaneously, there was a tremendous increase in the number of prosecutions that were dismissed." [56] Charles A. Beard pleased them greatly when he wrote, "Whatever may be said about the Witnesses, they have the courage of martyrs. And they have money to hire lawyers and fight cases through the courts. As a result in recent days, they have made more contributions to the development of the constitutional law of religious liberty than any other cult or group." [57] And this remains true today.

II

The "Wall"

The New Jersey school bus case (*Everson* v. *Board of Educa-*

[56] Jehovah's Witnesses in the Divine Purpose 209 (1945).
[57] The Republic 173 (1943).

tion),[58] decided in 1947, was one of the most controversial cases in which Justice Rutledge took part and wrote an opinion. The state legislature had enacted a law authorizing local school boards to make rules and enter into agreements for the transportation of children to schools and back home. Pursuant to this statute a township board provided for reimbursement of parents for transportation costs in buses of the public transportation system. It included reimbursement to parents who sent their children to public schools and to Catholic parochial schools. Transportation to private schools operated for profit was expressly excluded. The parochial schools, of course, gave religious as well as secular instruction. A taxpayer challenged the power of the school board to reimburse from public funds parents of Catholic school children.

Although a number of cases had reached the Supreme Court involving the free practice of religion clause of the First Amendment, this was the first to raise questions concerning the meaning and scope of the provision forbidding any "law respecting the establishment of religion." The principal issue was whether this law was one which violated the establishment clause, as applicable to the states through the Fourteenth Amendment, by being in substance a law aiding religion. A secondary point raised was whether the law offended the due process of law clause of the Fourteenth Amendment as taking money from some people by taxation to help others carry out their personal desires and purposes.

The Court upheld the state law by a five to four vote of the Justices. In his majority opinion, Justice Black quickly disposed of the due process argument: "The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected," he wrote, "is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need." He declared that legislation intended to facilitate opportunity for children to get a secular education serves a public purpose. So also does legislation to enable children to avoid the "risk of traffic and other hazards incident to walking or "hitch hiking" to school. Moreover, subsidies to individuals, whether parents of school children, farmers or home owners, to further a public purpose, are valid. A case closely in point, decided in 1930, had

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

upheld a Louisiana law challenged under the due process clause, (but not the First Amendment), which provided for the use of tax funds for the purpose of buying school books for children attending private and parochial schools. In an opinion written by Chief Justice Hughes, such expenditures were held to be for a "public purpose" and valid under the Fourteenth Amendment.[59]

The case under the establishment clause, however, was not a "horse (so) quickly curried." [60] There were no judicial guideposts. There were, however, the writings of Jefferson and Madison, which, more than any other force, were responsible for the First Amendment. Particularly, there was Madison's famous "Memorial and Remonstrance," which brought about the termination in Virginia of taxation to support religion, and Jefferson's "Bill for Religious Freedom" enacted shortly thereafter, in 1786. Then, of course, there was the history of religious intolerance with its bloody record of torture, persecution and execution of individuals and even wars between nations.

Champions of the "Wall of Separation" believed it necessary for the purity of religion and the integrity of the state although some would emphasize the one more than the other. Roger Williams, a deeply devout man, was one of the first to declare for separation and for which he has banished from Massachusetts. The great danger, for him, was the corruption of religion. One of the things he regarded as intolerable was a uniform and compulsory prayer which he characterized as "spiritual rape." [61] This view was shared by Madison. "Experience shows," he wrote, "religion corrupted by establishments." [62] He also emphasized, of course, the corrupting effect of religion on the state. "What influence in fact," he asked, "have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen as guardians of the liberties of the people." [63]

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[59] Cochran v. Board of Education, 281 U. S. 370 (1930).

[60] Frankfurter, J., in Olberding v. Illinois Central R. Co., 346 U. S. 338 (1953).

[61] See Cahn, On Government and Prayer, 37 N.Y.U.L. Rev. 981, 984 (1962).

[62] Letters and Writings, Vol. 1, 16 (Lippencott, 1885).

[63] Memorial and Remonstrance Against Religious Assessments.

It was on such a note that Justice Black began his discussion. "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." He then continued: "With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured and killed.*** These practices of the old world were transplanted to and began to thrive in the soil of the new America." [64]

After reviewing the history of the separation struggle leading to the First Amendment, Black began a catalogue of the things neither state nor Federal government can do. Neither Government "can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.*** No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.*** " [65]

As to what New Jersey had done, he found that it was not a law prohibited by the establishment clause although it might approach "the verge" of the state's constitutional power. It was true that children were "helped to get to church schools." Perhaps some children might not be sent to church schools if free transportation had been limited to public schools. But, Black argued, the same result might ensue if policemen paid by the city did not protect children from traffic hazards on their way to parochial schools or if the city cut off from them such general public services as fire protection and sewage disposal. But the First Amendment was not intended to prevent the state from furnishing such services. It "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." And then the final conclusion: "the State con-

[64] 330 U. S. 1, 8-9.
[65] *Ibid.*, 15-16.

tributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of religion, safely and expeditiously to and from accredited Schools." [66]

To many readers, Black's opinion makes little sense. By the time he finishes with what a state may *not* do, there seems no way in which the decision can be supported. This was Irving Brant's reaction. "When I started to read the Everson case," he wrote to Rutledge, "I flipped the leaves and missed the break in it, therefore thought it was a unanimous decision. As I read along through Hugo's opinion, I got a real lift; it showed such a complete understanding of the principles which governed the writing of the First Amendment. At one point, I got out the manuscript of one of the chapters of the (i. e., Brant's) unpublished volume on Madison and read parallel sections to Hazeldean (Mrs. Brant), to show how even the wording was almost duplicated. Then, by gosh, on a point negatived by his own prior reasoning, he jumped over and affirmed the decision." [67]

Justice Jackson, in the beginning of his dissenting opinion also pointed up the apparent inconsistency between what he called "the undertones of the (majority) opinion advocating complete and uncompromising separation of Church from State" and the conclusion upholding the New Jersey law. It was, he thought, another case of Byron's Julia who, "Whispering, 'I will ne' er consent'—consented." [68]

He also thought that the law made the character of the school rather than the needs of the children determine whether the parents could be reimbursed. Payments could be made for transportation to public schools and Catholic schools but not to private schools operated for profit. Moreover, under the provisions made by the local board, transportation to any religious school other than Catholic was excluded. Thus, if "all children of the state were objects of impartial solicitude," there was no sound reason for discrimination.

But it was Justice Rutledge's classic dissent, reviewing the history of the struggle for the separation of government and religion, which brings conviction, in Justice Jackson's words, that the Court's decision gave "the clock's hands a backward turn." With scholarly

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[66] *Ibid.*, 17-18.
[67] Letter from Vancouver Island, British Columbia, March 11, 1947.
[68] *Ibid.*, 19.

care he reviewed the Virginia fight for religious freedom. Although reliance on Madison and Jefferson had been recently belittled by some critics,[69] Rutledge made a convincing case that the great instruments of the Virginia experience "became the warp and woof of our constitutional tradition" and that Madison was indeed the architect of the Federal "Wall." "By contrast with the Virginia history, the congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled." [70]

In view of the events leading up to the Amendment and its history, it was clear to Rutledge that any appropriation from public funds to aid or support any religious exercise was forbidden. Not even "three pence" contribution, as Madison had declared. Did the New Jersey law furnish aid or support for religion by the taxing power? "Certainly it does," he insisted, "if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own." But the majority appeared to take the position that the collateral "aid" to religious instructions was not what the law contemplated as "support" to religion. To this, Rutledge answered: "But Madison and Jefferson were concerned with aid and support in fact, not as a legal conclusion 'entangled in procedents.' " He thought New Jersey's action was exactly the type of evil at which they struck. "Under the test they framed it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given." And he added, significantly, "that it is a substantial and necessary element is shown most plainly by the continuing and increasing demand for the state to assume it." [71]

It was also obvious to Rutledge that where transportation was required to get children to school, its cost is as much a part of the expense of education as the cost of school books, school lunches, athletic equipment or any other item of the total financial burden. There was, of course, no denial that the Catholic schools gave both religious and non-religious instruction. The very purpose of their

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[69] See Corwin, The Supreme Court as National School Board, 14 Law & Contemp. Prob. 3 (1949).

[70] 330 U. S. 42.

[71] *Ibid.*, 46.

existence was the combination of the religious and the secular. But "this very admixture is what was disestablished when the First Amendment forbade 'an establishment of religion.'" Would the Constitution permit the state to defray the cost of transportation of children to Sunday School, week day special religious classes at the church or parish house or to meetings of young people's religious societies, such as the Y.M.C.A., the Y.W.C.A., or the Y.M.H.A. even though some nonreligious subjects might be discussed? The argument that defraying transportation cost was not "support" was as flimsy to Rutledge as the same argument would be if applied to the payment of tuition, teachers' salaries or the cost of construction of a school building He could find no substantial difference except "between more dollars and less." If all that is necessary to evade the force of the Amendment is to find that the appropriation is for a "public purpose," that it is "public welfare legislation," then, indeed the state could build school buildings for religious groups, equip them, pay teachers' salaries and pupils' tuition. The trouble with the "public purpose" argument was, he thought, that it ignored the religious factor, the vital element in the case.

The Justice recognized the hardship upon those who are taxed to pay for the education of other people's children but have an added cost for the education of their own. But this is because they are not content with what the state can constitutionally furnish in the field of education, namely, purely secular instruction. And if the state were to include religious training in any faith but their own, they would be the first to protest. Thus Rutledge concluded his opinion:

"Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools.*** In my opinion both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now, as in Madison's day, it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the

question from becoming entangled in corrosive precedents." [72] Certainly recent history in the country confirms the fact that the "two great drives" are still very much in motion "to abridge the division of religious and civil authority which our forefathers made."

At several places in his dissent, Rutledge emphasized the point that the relatively small amount of tax aid to religious schools which was involved was not significant. This apparently inspired the editorial writer for the Washington Post, as follows:[73] " ***Justice Black's argument favoring this small encroachment upon a constitutional principle reminds us of the young woman who tried to excuse transgression of the moral law by saying that her illegitimate child was 'only a small one.' It is the principle that is vital, as Justice Rutledge made clear in his powerful dissent, and not the amount of the assistance given. Taxes are wholly public. The religious function is wholly private. The two cannot be intermingled in our opinion without grave damage to both." And the Times observed, prophetically, that the vigor with which four Justices dissented in this case suggests that "this is only the beginning of a grave judicial controversy."

The controversy was resumed the very next year in the *McCollum* release time case[74] in which the Court held invalid under the establishment clause, the practice in the Illinois public school system which excused students, whose parents so elected, from school classes in order to take religious instruction on the school premises. Others were required to continue their secular studies. Justice Black again wrote the opinion of the Court. Justice Reed alone dissented.

The situation had developed from the adoption by the school board of Champaign, Illinois of a plan for religious instruction originated by the Champaign Council on Religious Education which included representatives of Protestants, Catholics and Jews. When the program was inaugurated, each parent received a "Parents' Request Card" with instructions to furnish the information desired. These cards were in the following form:

"Please permit ——— in Grade ——— at ———
School to attend a class in Religious Education one period a

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[72] *Ibid.*, 63.
[73] Feb. 13, 1947.
[74] McCollum v. Board of Education, 333 U. S. 203 (1948).

week under the auspices of the Champaign Council of Religious Education.

(Check which)
( ) Interdenominational
( ) Protestant
( ) Roman Catholic
( ) Jewish

Date ——————."

The mother of the McCollum boy refused to let him participate. She had been reared as a Freethinker and would have no part of the traditional, organized religions. When she learned that her son had been given a place at a desk in the hall during "release-time" and was the butt of jeers and sneers by conforming pupils, Vashti McCollum started her lawsuit.

Although the sponsoring organization which also supplied the religious instructors, was inter-faith, it in fact failed to provide instruction in all three faiths for every school, with the result that in several instances Catholic and Jewish pupils were sent to Protestant classes. Many church groups expressed disapproval of the program, particularly Unitarian and Jewish. Indeed, some Baptists, presumably following in the tradition of Roger Williams, reputedly the founder of the first American Baptist Church in Rhode Island after leaving Massachusetts, vigorously opposed the practice although others supported it. Notwithstanding Jewish participation, a brief, *amicus curiae* (friend of the court) was filed on behalf of the Synagogue Council of America. The brief protested the use of the public schools and facilities on the grounds that it amounted to financial aid to sectarian religious instruction, that it favored one religion over another and thus discriminated, and that it in fact influenced and enforced religious instruction upon children contrary to theirs and their parents' wishes.

Four years later, the Court backtracked, upholding a release time New York law which required the children who were excused for religious training to leave the school premises to obtain it. The off—premises factor was thought to distinguish the situation from the Illinois case. Justices Black, Frankfurter and Jackson wrote separate dissents in this case. Justice Douglas wrote for the Court, joined by Chief Justice Vinson, Justices Reed and Burton as well

as Justice Minton and Clark who had taken the seats vacated by the deaths of Rutledge and Murphy.[75] One could safely guess that the decision would have been otherwise had they lived.

And then, the Prayer case, in which Black once again writes for the Court, Justices Frankfurter and White taking no part, Justice Stewart, the lone dissenter.[76] A government agency had composed a prayer for school children to recite. But although the Court did not characterize it as "spiritual rape," it thought that "it is no part of the business of government to compose official prayers***."

Justice Black reviewed the clash of opinions over the prayers of the Church of England and the history of the Book of Cannon Prayer: "The controversies over the Book and what should be its content," wrote Black, "repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular rule that happened to be control at the time.*** It is an unfortunate fact of history that when some of the very groups which had most strenously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religions the official religion of their respective colonies.*** By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer.*** The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say.*** " [77]

Justice Stewart found that Black's historical review of the quarrels over the Book of Common Prayer in England and the history of the early establishment and later rejection of an official church in our own states threw no light for him on the issue in the case.

[75] Zorach v. Clauson, 343 U. S. 306 (1952).
[76] Engel v. Vitale, 370 U. S. 421 (1962).
[77] *Ibid.*, 426, 427, 429.

He simply could not understand how it could be a violation of the Constitution to permit school children who wished to do so to recite the twenty-two word prayer. He thought it neither interfered with the free practice of anyone's religion nor established an official religion. On the contrary, according to Stewart, to deny the wish of the children to join in the prayer was "to deny them the opportunity to share in the spiritual heritage of the Nation."

Justice Douglas had voted with the majority in the New Jersey school bus case and had written the opinion for the Court in the New York release time case. But in the prayer case, he was not content merely to join in the decision. He apparently felt constrained to write a concurring opinion even though the prayer involved was only a "little one." It may or may not be significant that in Justice Black's opinion, no mention is made of the New Jersey case except, altogether collaterally, in a footnote. But Douglas felt it necessary to repent in public and, belatedly, join in Rutledge's dissent in that case. And so he wrote:[78] "Mr. Justice Rutledge stated in dissent what I think is durable First Amendment philosophy" and thereupon quoted the following passage:

"The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now, as when it was adopted, the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrace, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from interference, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. Id., Par. 7, 8. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. Id., Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. Ibif. The end of such strife cannot be other

[78] 370 U. S. 421, 443-444.

than to destroy the cherished liberty. The dominating group will achieve the dominate benefit; or all will embroil the state in their dissensions. Id., Par. 11."

Justice Rutledge's post *Everson* mail was especially heavy—more so, indeed than about any other case in which he participated. Most of it was extremely favorable. This was true not only from personal friends but from strangers, as well, in all walks of life. Not untypical was a brief note from Max Lerner, then writing for New York's P. M. and who had never met the Justice. Lerner wrote as follows:

"Dear Mr. Justice Rutledge:

"I want to tell you how exciting I found your dissent in the *Everson* case. I count it as one of the great opinions of recent years, and it puts you in the company of the choice spirits in the great tradition of the Court."

An article in the magazine *America* by R. F. Drinan, S. J., summarized the comments of the leading law journals on the case. "The *Everson* case," he wrote, "in which a New Jersey statute authorizing funds for bus transportation of children going to parochial schools was held constitutional, elicited some twenty comments, more than did any case decided by any court in the nation in recent years. The overwhelming majority of these comments specifically support the *dissent* of Justice Rutledge, in which he held that any State aid to a religious organization, however incidental, is forbidden by the First Amendment. Discrimination against religious institutions in the gratuitous distribution of public funds is *commanded* by the Constitution, according to the *Michigan Law Review*. The commentator in the *Harvard Law Review* questions the validity of the 'child-benefit' theory (i.e., the *child* in a sectarian school gets the benefit of incidental aid, not the *school*) and insists that all state aid to sectarian institutions should be barred.*** New York University's Law Review gives a qualified approval to the decision but observes that further extensions of the doctrine might very well be disastrous so far as separation of Church and State is concerned." [79]

Among the professional critics of the Court and its decisions, few have exceeded the late Professor T. R. Powell of the Harvard Law School in perspicuity or perspicacity. In discussing the *Everson* case in the Harvard Educational Review,[80] he wrote:

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[79] America, March 5, 1949, 593.
[80] Vol. XVII, 82 (1947).

"Public assistance to private worship within ecclesiastical walls seems clearly to be support of such worship even though the money goes to carry communicants and not for heat and light and pay of priests and persons. How is it different to go to rooms with desks and blackboards instead of to transept, nave and choir? The majority do not tell us. Quite possibly they may have been influenced by the facts that parochial schools save public expense and that Catholic citizens are taxed to support public schools and their appurtenances. They might differentiate free rides to private churches because there are no public churches. No one can be compelled to go to church. Children may be compelled to go to school, but they may not be compelled to go to public school. Thus a public ride to the school of their choice helps them to do a duty laid down by law. So might the majority reason. The reasoning would be acceptable if the only question were whether the expenditure is for a public or for a private purpose. It is far less acceptable when to the public purpose of education is added the private purpose of indoctrination in denominational dogma. Then the state is spending public funds to aid access to private preaching of a sectarian creed. To add to the audience is *pro tanto* to promote the preaching."

Editorial, critical and popular opinion appeared highly divided after the *McCollum* and *Regents' Prayer* cases. For example, a Tennessee newspaper, heading its editorial, "Court Rules Against God," declared that "American citizen who fear and worship God should be deeply disturbed by the United States Supreme Court's far fetched ruling, in a Champaign, Ill. case, that a voluntary Bible study plan in public schools is unconstitutional.*** It was an arbitrary ruling in keeping with the so-called 'liberalism' with which society is currently afflicted." [81]

On the other hand, a Missouri newspaper, anticipating the Court's ruling, thought that the public school is no place to teach sectarian beliefs. Denominational teaching is the responsibility of pastors and parents. The places for it are the church, the Sunday School and the home.[82] Similar approving editorials appeared in the Washington Post, The Evening Star (Washington, D. C.), and a

[81] Chatanooga News-Free Press, March 10, 1948.
[82] St. Louis Post-Dispatch, December 7, 1947.

number of other city newspapers, including, surprisingly, the Chicago Tribune.[83]

Professor S. Corwin of Princeton took a different view. In an article in Fordman University's magazine *Thought*, he severely criticized the case. His summary of the argument against the decision follows:[84]

" ***In the first place the justification for the Court's intervention was most insubstantial. In the second place the decision is based, as Justice Reed rightly contends, on "a figure of speech," the concept of "a wall of separation between Church and State." Thirdly, leaving this figure of speech to one side, the decision is seen to stem from an unhistorical conception of what is meant by "an establishment of religion" in the First Amendment. The historical record shows clearly that the core idea of "an establishment of religion" comprises the idea of *preference;* and that any act of public authority favorable to religion in general cannot, without a falsification of history, be brought under the ban of that phrase. Undoubtedly, the Court has the right to make history, as it has often done in the past; but it has no right to *remake* it. In the fourth place, the prohibition of the establishment of religion by Congress is not convertible into a similar prohibition on the States, under the authorization of the Fourteenth Amendment, unless the term 'establishment of religion' be given an application which carries with it invasion of somebody's freedom of religion, that is, of 'liberty.' Finally, the decision is accompanied by opinions and by a mandate which together have created great uncertainty in the minds of governing bodies of all public educational institutions. And of course, as is always the case, the Court's intervention is purely negative. It is incapable of solving the complex problems with which forty-six states and 2,200 communities have been struggling by means of the 'released time' expedient. With the utmost insouciance the Court overturns or casts under the shadow of unconstitutionality the 'conscientious attempt' of hundreds of people to deal with what they consider to be a pressing problem in a way that they considered to be fair and just to all."

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[83] See the sampling of editorial comment in Liberty Magazine, Third Quarter, 1948.

[84] Thought, 681 (December, 1948).

After the prayer cases, an extensive sampling of conflicting views went something like this:[85]

"The Congress should at once submit an amendment to the Constitution which establishes the right to religious devotion in all governmental agencies—national, state or local."—*former President Herbert Hoover.*

"I realize, of course, that the Declaration of Independence antedates the Constitution, but the fact remains that the Declaration was our certificate of national birth. It specifically asserts that we as individuals possess certain rights as an endowment from our common creator—a religious concept—*former President Dwight D. Eisenhower.*

"I am shocked and frightened that the Supreme Court has declared unconstitutional a simple and voluntary declaration of belief in God by public school children. The decision strikes at the very heart of the Godly tradition in which America's children have for so long been raised—*Cardinal Spellman of New York.*

"The recitation of prayers in the public schools, which is tantamount to the teaching of prayer, is not in conformity with the spirit of the American concept of the separation of church and state. All the religious groups in this country will best advance their respective faiths by adherence to this principle.—*New York Board of Rabbis.*

"This is another step toward the secularization of the United States. Followed to its logical conclusion, we will have to take the chaplains out of the armed forces, prayers cannot be said to Congress, and the President cannot put his hand on the Bible when he takes the oath of office. The framers of our Constitution meant we were to have freedom of religion not freedom from religion.—*Evangelist Billy Graham.*

"I am surprised that the Court has extended to an obviously nonsectarian prayer the prohibition against 'the establishment of religion' which was clearly intended by our forefathers to bar official status to any particular denomination or sect.—*Bishop James A. Pike, of the California Protestant Episcopal diocese.*

"All parties agreed that the prayer was religious in nature. This being so, it ran contrary to the First Amendment—which is

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[85] New York Times, June 30 and July 1, 1962.

well grounded in history and has served to save the United States from religious strife.—*Representative Emanuel Celler, D., New York.*

"I believe it is no loss to religion but may be again in clarifying matters. Prayer that is essentially a ceremonial classroom function has not much religious value.—*Dr. Sterling M. McMurrin, United States Commissioner of Education.*

It is important that people not be misled by distorted statements about the decision. The Supreme Court has nowhere in its decision denied belief in God, prayer, religious songs, Bible reading, or any other religious belief or practice.—*Rabbi Albert M. Lewis, Los Angeles, West Cost president of the American Jewish Congress.*

"We hear a good deal of talk about the rights of minorities in a democratic society—and this is as it should be. But we have come to the point where we must give some attention to the rights of majorities as well and very few are prepared to raise their voices in this cause. As in the present situation concerning prayer in school, the long-standing traditions of the Republic are under continual assault.—*The Pilot, Roman Catholic weekly, Boston.*

"We are not excited about the decision, either way the decision denies no one his opportunity to pray in the manner his conscience dictates. If our religious faith is weakened by lack of a public school prayer, it is already on the road to extinction.—*Detroit News.*

"Wisely, the founders of this country saw that the power to embrace or sponsor any particular religious form or religious group likely would be abused.*** Monday's decision has not dealt a blow to religion.*** On the contrary, it has fortified constitutional guarantees that our Government must leave each individual free to worship in his own way.—*Atlanta Constitution.*

"The United States Supreme Court has extended the logic of the constitutional prohibition of the 'establishment of religion' straight out of the realm of common sense.*** This decision interprets the Constitution with a rigidity which is ridiculous.—*Raleigh (N.C.) News and Observer.*

"I think that it is important for us, if we're going to maintain our constitutional principle, that we support Supreme Court decisions even when we may not agree with them. In addition, we have in this case a very easy remedy, and that is to pray ourselves.—*President Kennedy.*

"The decision came as no surprise to me. It is just one in line

with the philosophy this group of men sitting over there have been handing down for a long time.*** There are many instances where the Court has overstepped its bounds.—*Representative Francis E. Walter, D. Pa., Chairman House Committee on Un-American Activities.*

"I disagree with the Supreme Court's decision.*** Having said this, I must also express my concern about some of the reaction to the Supreme Court's decision. It should not be used as an excuse for another massive assault upon the institutions of the Court. Right or wrong, the Supreme Court is a vital part of our Republic, and it does not serve any point of view in this controversy to heap abuse upon its members or to undermine its status.—*Senator Kenneth B. Keating, R., N. Y.*

"Can it be that we, too are ready to embrace the foul concept of atheism... Is this not in fact the first step on the road to prompting atheistic and agnostic beliefs?*** Somebody is tampering with America's soul. I leave to you who that somebody is.—*Senator Robert C. Byrd, D., W. Va.*

"For some years now the members of the Supreme Court have persisted in reading alien meanings into the Constitution of the United States... they have sought, in effect, to change our form of government. But never in the wildest of their excesses.*** have they gone as far as they did on yesterday.—*Senator Herman Talmadge, D., Ga.*

"We do not impugn the sincerity of most of those who favor the Supreme Court decision, many of whom are themselves devoted to religion. But they are in serious error if they think nonsectarian prayer to God, not forced on anyone, is a violation of rights. Rather it is the Supreme Court which is guilty of violating the 'free exercise' of religion guaranteed by the Constitution.—*San Francisco Examiner.*"

"If we accept the ruling with respect, and calm, we will not stumble to the conclusion that a serious blow has been struck to the very core of religious teaching.

If we seek ways to live with the decree against official prayer, to understand it, we certainly can reach an accommodation less troublesome than some see possible in these first hours when striking headlines leave many in a state of disbelief. The court's intent—and eventually, we trust, its great achievement—is to strengthen the

foundation of religious heritage by limiting secular intrusions that could become a mischievous and enervating force. If it does not work this way, changes can be made.—*The New York Herald Tribune.*"

"It is naive to see in this decision the hand of communism. A Communist state does have a state religion—communism—one of whose tenets is atheism. The whole power of the state is behind it. The net result of the court's decision, by contrast, is to leave us free. We can be sure that in God We Trust will remain stamped upon our coins, as it has upon the heart of most of us.—*The Hartford Courant.*"

"The Court has correctly interpreted the Constitution in this instance. Those religious leaders of various faiths who disagree will, we believe, ultimately come to the same conclusion. Separation of church and state is the best guarantee they have that they and their followers will always be permitted to worship God according to the dictates of their own conscience.—*The Chicago Sun-Times.*"

"This is America, and in America loyal citizens accept decisions whether they like them or not, until they can change them legally, just as they changed the Eighteenth Amendment. If they cannot change them legally they accept them. This is the strength of America.

"After all, prayer has not been outlawed in the United States, nor has religion been outlawed—save in the public schools, and attempts to compare the Supreme Court ruling and lack of religion in Soviet Russia are wide of the mark.—*The Cleveland Plain Dealer.*"

"Brief reflection might well induce critics to some second-thought questions. What if the prayer were not as 'neutral' as it is? What if one denomination, numerically large enough to wield political control, had dictated it? What of the freedom of conscience guaranteed freethinkers and atheists and nonconformists as much as to Christians and Jews and every citizen?

"The court has upheld the glorious purpose of the First Amendment. For this Protestants, Catholics, Jews and non-conformists alike should be grateful. Prayer and religious exercises are not for a Government to encourage or discourage; they are for the church, the home, the heart.—*The Louisville Courier-Journal.*"

In his recent penetrating study of Church and State, Professor Kurland has suggested that it was no accident that the free practice clause and the establishment clause were included in the same

Amendment. Keeping the government out of religion and religion out of the government was necessary to make individual religious freedom a reality.[86] He further thought that the two clauses should be "read together as creating a doctrine more akin to the reading of the equal protection than to the due process clause of the Fourteenth Amendment, i. e., they must be read to mean that religion may not be used as a basis for classification for purposes of governmental action, whether that action be conferring of rights and privileges or the imposition of duties or obligations.[87] As one reviewer put it, Kurland emphasizes that the separation and freedom aspects of the first amendment are unitary and inseparable and that the former forbids all that the latter does not require. Government may accord a benefit or exemption to a religious institution or activity only as a part of a larger classification not identified by religion and not otherwise vulnerable to successful attack under the equal protection clause." [88]

The author makes a plausible case that Black "came close" to accepting this interpretation in the school bus case. It is true that the Justice did "read together" the two clauses. But he seemed to regard the "free practice" provisions as a limitation on the "establishment" prohibition rather than the latter as a guarantee of the former. Thus, he wrote: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. 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. Consequently, it cannot exclude individual Catholics*** or the members of any other faith, *because of their faith or lack of it*, from receiving the benefits of public welfare legislation. ***We must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." [89]

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[86] Of Church and State and the Supreme Court, 29 U. Chi. L. Rev. 1, 4 (1962). Also published as a book, *supra*, note 30.
[87] *Ibid.*, 5.
[88] Pfeffer, Book Review, 15 Stan. L. Rev. 389, 400 (1963).
[89] 330 U. S. 1, 16.

The complexity of the two religious provisions of the Amendment thus appears from the fact that although they may complement each other, they also quite clearly protect different interests. As Justice Black pointed out in the case of the New York school prayer, "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom." [90] The Sunday law cases are in point here. A recent case involved a Maryland law under which several employees of a discount house were prosecuted for selling a few trifling articles on Sunday. They defended on the grounds that the statute violated both clauses. The Supreme Court held that they had no standing to raise the question of individual religious freedom. They were certainly not practicing religion by selling toys on Sunday. They could, however, raise the establishment issue. A divided Court thereupon found a justification for the law as one of rest and relaxation rather than one, the operative effect of which was "to use the State's coercive power to aid religion." [91] Nor is the result different if the complainant is an Orthodox Jewish merchant, placed at an economic disadvantage in that he has but five days, as against his competitor's six in which to do business. It offends neither the establishment nor the free practice clause. It merely makes his religious practice "more expensive." [92] This is an "indirect burden" which the Court thought didn't count "unless the state may accomplish its purpose by means which do not impose such a burden." [93] It might have been suggested that the day of rest, relaxation and family get-together-ness could as well have been legislatively designated as say, Wednesday rather than, as in Massachusetts, the "Lords Day," and thus impose no burden on any known religious group.

Justices Brennan and Stewart dissented from the decision as to the free practice clause but concurred as to the establishment clause. The effect of these laws, wrote Brennan, is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen. "This clog," he continued, "upon the exercise of religion, this state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax

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90 Engel v. Vitale, 370 U. S. 421, 430 (1962).
91 McGowan v. Maryland, 366 U. S. 420, 453 (1961).
92 Braunfeld v. Brown, 366 U. S. 599, 605 (1961).
93 *Ibid.*, 607.

levied upon the sale of religious literature." [94] And as put by Justice Stewart, "Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice." A choice, he thought, which "no state can constitutionally demand." Stewart felt strongly about it. For him, it was not "something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness."

In 1956, a study made at the University of Chicago disclosed that twelve states and the District of Columbia have laws requiring Bible reading in the public schools; ten states do not permit it, while twenty-six states permit it by statute or judicial decision.[95] Professor Dierenfield in his 1962 study of religion in the public schools, found, for the country as a whole, 41.74% of the public school systems in the United States conduct Bible reading. The distribution by region was as follows: the East, mostly New York and New England, 67.56%; South, including the eastern seaboard, 76.84%; Midwest, 18.26%; West, 11.03%. Home room devotional services were held in most schools in the East (68.33%) and South (60.53%), but in relatively few in the Midwest (6.40%) and West (2.41%).

In the New York prayer dispute, the "Regents prayer" represented an attempt to provide a "non-sectarian" prayer. "Almighty God, we acknowledge our dependence on Thee and we beg Thy blessings upon us, our parents, our teachers and our Country." Theologically, it was probably as good as any such prayer could be so far as it concerned Catholics, Protestants, Jews and perhaps some other faiths. The effect on non-believers need not be considered here. In any event, however, "non-sectarian" the Regents prayer might have been, it is clear that there is still no such thing as non-sectarian bible. Protestants use the King James version or the new Standard Revision based on it and the Catholics have the Douay version.[96] Scholars of both faiths are coming closer to agreement on a translation but have as yet not attained it. The Jews, of course, recognize only the Old Testament and most congregations use the Jewish Publication Society's version. It is undoubtedly true that

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[94] *Ibid.*, 613.

[95] Conway, Religion and Public Education in the States, International Journal of Religious Education (March, 1956).

[96] Dirnfield, Religion in American Public Schools, Chs. III, IV 1962.

substantially all public schools which have bible reading exercises use a Protestant version thereof.

On June 17, 1963, the Supreme Court handed down its decision in two Bible reading cases, holding laws of both Pennsylvania and Maryland unconstitutional as in conflict with the "establishment" clause of the First Amendment.[97] Only Justice Stewart dissented.

The Pennsylvania law required at least ten verses from the Bible to be read, without comment, at the opening of each public school on each school day. Provision was made for the teacher to excuse any student from attending such reading on written request from his parents. The Maryland case arose under a rule adpoted by the School Board of Baltimore pursuant to a state statute which provided for opening school exercises at which a chapter from the Bible should be read without comment and/or the "use of the Lord's Prayer." Justice Clark, writing for the Court declared that the Court had "rejected unequivocally the contention that the establishment clause forbids only governmental preference of one religion over another." This would appear to be a blow at Professor Kurland's thesis, plausible as it is, that the establishment and free exercise clauses together merely forbid discrimination among faiths. Clark quoted Rutledge's dissent in *Everson* that the Constitution does not deny "the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two-fold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function." [98]

Justice Clark also relied upon a 1961 case in which the Court held that a state may not constitutionally require an applicant for a commission of Notary Public to swear or affirm his belief in God. "Neither the state nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion. Neither can constitutionally pass laws or impose requirements which aid all religious as against non-believers, and neither can aid those religions

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[97] School District of Abington Township, Pa. v. Schempp, 83 Sp. Ct. 1560 (1963).

[98] *Ibid.*, 1569.

based on a belief in the existence of God as against those religions founded on differente beliefs."

The test for constitutionality in this troubled area, Justice Clark thought, was to inquire of the purpose and primary effect of the law. To conform to the establishment clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. He denied that the exclusion of the exercises involved in these cases amounted to the establishment of a "religion of secularism." There was no hostility toward religion involved. There was no preference or advantage or aid to those who believe in no religion over believers, and he denied that the concept of "neutrality" which denies to the state the power to require religious exercises even with the consent of the majority, interferes with the majorities right freely to practice their religion. The majority has no right to the use of governmental machinery to practice its religious beliefs.[99]

Justice Brennan concurred—in forty pages. "The importance of the issue," he wrote, "and the deep conviction with which views on both sides are held seem to me to justify detailing at some length my reasons for joining the Court's judgment and opinion." Like all the other Justices, he attempted to interpret the "establishment" clause and the "free exercise" clause as reflecting a single policy with respect to the relations between the state, the religious establishments and the individual. He noted the difference between the power of government to regulate or prohibit conduct motivated by religious motives such as the Mormon cases and the case of Jehovah's Witnesses violating the Massachusetts child labor on the one hand, and the power to compel behavior offensive to religious principles. He explained the case where students at a state university were required to participate in military training on the grounds that they were not compelled to attend a state university. If they chose to do so, they could be required to conform to a program reflecting a legitimate governmental interest.[100] The second flag salute case was a good example of limitations on the power to coerce conduct against religious principles. The distinction between the two cases, Justice Brennan thought, was important. The one dealt with the voluntary

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[99] *Ibid.*, 1573.

[100] Hamilton v. Regents of the University of California, 293 U. S. 245 (1934).

attendance at college of young adults, the other involved compelled attendance of young children at elementary and secondary schools. The distinction warranted a "difference in constitutional results."

Brennan carefully reviewed the history of Bible reading and prayers in the schools, public and private, from early colonial times including cases under state statutes and constitutions before the ruling that the First Amendment was applicable to the states via the Fourteenth. The conclusion which he reached—and could hardly escape reaching—was that these exercises had always been designed to be and are still intended as religious. Although there may, as claimed, be collateral secular benefits, educational and moral, they are insufficient to take the practices out of the prohibition of the establishment clause. Somewhat inconsistent, perhaps, with his discussion of the distinction between prohibition and compulsion of conduct contrary to religious belief, he brushed aside the argument that provision for excusing offended pupils absolved the religious exercises from unconstitutional contamination. It had no relevance to the establishment question since the practices were religious in character, designed to achieve religious aims through use of public school facilities during school hours. Presumably the vice would still be present if the parents of every pupil had requested in writing the reading of a specific chapter and the recitation of a particular prayer.

The Justice finally met the "foot-in-the-door" argument that the invalidation of the practices in these cases would compel the Court to rule out "every vestige, however, slight, of cooperation or accommodation between religion and government." It would require nothing of the kind. Because religious exercises in the public schools are forbidden does not mean that the national anthem must be expurgated and the legend removed from the silver dollar. "The line we must draw" wrote the Justice, "between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." Justice Brennan then sought to formulate a generalization which deserves careful thought and consideration whenever the establishment clause is under discussion. Forbidden by that clause are "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for

essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."

Justices Goldberg and Harlan in a concurring opinion written by the former, also were at pains to emphasize the point that the decision does not mean that "all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause." They even went so far as to predict that the Court would recognize the propriety of providing military chaplains and of "teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools."

Justice Stewart dissented. He did not think the records in these cases furnished enough information to warrant decision on the merits of the constitutional issue. To him, the vital point was coercion, direct or indirect, by rule, regulation or administration. He would remand the cases for further hearing.

All in all, the opinions of the Justices in their recognition of religion, as a part of American life, should tend to reassure the citizens that, as James Reston expressed it in the Times, "the country is not going to hell with the blessing of the Supreme Court." [101]

The Times in its lead editorial after the Regents' prayer case,[102] after pointing out what the Court did *not* decide observed that "What Justice Black and six other members of the Court did object to was that the State of New York, in formulating and using a school prayer, took a position on a religious matter." This, it may be said, is precisely what the Court did in the Lord's Prayer and Bible-reading cases. The states of Pennsylvania and Maryland had taken a position on a religious matter. Even though joining in the prayer or even listening to it was voluntary, it can hardly be denied that the state takes a position as much so as when it includes a course of study in the curriculum, even though it is elective.

On the last day of the October 1962 term, on June 17th, the Court decided its latest case under the religious clauses of the First Amendment. The state of South Carolina had refused unemployment compensation to a Seventh Day Adventist who refused, from religious convictions to work on Saturday which, for her, was the Sabbath. She was not "available" for work within the state law.[103]

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101 New York Times, June 19, 1963.
102 Sunday, July 1, 1962.
103 Sherbert v. Verner, 83 Sp. Ct. 1790 (1963).

Justice Brennan, in the majority opinion, held that the state law clearly imposed a burden on the free exercise of the woman's religion. Religious practices can be impaired directly, as by criminal sanctions and indirectly as in this case. A person in this worker's position must chose between adherence to her religious beliefs and position must chose between adherence to her religious beliefs and forfeiting the benefits to which she otherwise was entitled or committing what her religious faith regarded as a sin. The Justice rejected the claimed distinction between a "privilege" and a "right" as irrelevant to the issue inasmuch as denial of either could offend the free practice provision. Nor could he find any overriding state interest to mitigate the vice of the law. He rejected the State's argument that a different ruling would open the door to fraudulent claims by unscrupulous claimants on the ground, not particularly convincing, that there was nothing in the record of the particular case to suggest fraud. It is generally recognized that fraud, involving as it does, a state of mind, is frequently difficult to prove.

The lack of a compelling state interest was thought to distinguish this case from the Sunday closing cases in which the Court had found "a strong state interest in providing one uniform day of rest for all workers." That purely secular objective could be achieved only by declaring Sunday to be a day of rest. To exempt "Sabbatarians" would be administratively inexpedient. The Justice insisted that the present case involved the application of a principle announced fifteen years ago in the New Jersey school bus case. No state may constitutionally "exclude individual Catholics, Lutherans, Mohamedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." [104] (Emphasis in original).

Justice Douglas wrote a concurring opinion. He first called attention to the scruples of some of the well-known religious faiths. The Moslams must go to a mosque on Friday and pray five times each day. The scruples of the Sikh require him to carry a real or symbolic sword. The Jehovah's Witness must be a proselyter. The Quaker must refrain from swearing, although he may affirm. The scruples of the Buddist requiere that he not eat flesh or fish. Douglas referred to the cases upholding the Sunday closing laws which held

[104] *Ibid.*, 1797.

that a majority of the community could impose their particular scruples on a minority whose religious scruples were thereby offended—cases in which the Justice had dissented. "That ruling of the Court," he wrote, "travels part of the distance that South Carolina asks us to go now. She asks us to hold that when it comes to a day of rest a Sabbatarian must conform with the scruples of the majority in order to obtain unemployment benefits." He then went on to write:

"The result turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not in measurable damages.

"This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples. The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." [105]

Justice Stewart also concurred in the result of the case but took occasion to expound his views of the religious clauses and his dissatisfaction with the Court's disposition of many of the cases arising thereunder. He had dissented in the decision that the Sunday blue laws did not interfere with the free practice of religion. He insisted that the decision in this case substantially overruled those cases. The "burden" on religious practices for Jewish merchants was much greater than that involved in denial of compensation for twenty-two weeks at most. The blue laws carried criminal penalties but the economic hardship was far worse. Justice Brennan in the case of an Orthodox Jewish storekeeper had observed that if he could not stay open on Sunday, he would lose his capital investment.[106]

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[105] *Ibid.*, 1798.
[106] Braunfeld v. Brown, 366 U. S. 599, 611 (1961).

But Stewart raised a far more important question. He declared that the result in this case, which he approved, was in collision with the Court's interpretation of the establishment clause. It was "aid" or "support" for a religion. "South Carolina," he wrote, "would deny unemployment benefits to a mother unavailable for work on Saturday because she could not get a babysitter (citing a South Carolina case). Thus, we do not have before us a situation where a state provides unemployment compensation generally, and singles out for disqualification only those persons who are unavailable for work on religious grounds. This is not, in short, a scheme which operates so as to discriminate against religion as such. But the Court nevertheless holds that the state must prefer a religious over a secular ground for being unavailable for work—that state finantial support of the appellant's religion is constitutionally required to carry out 'the governmental obligation of neutrality in the face of religious diferences...'" [107] The Court, Stewart thought, was under a duty to face up to the dilemma created by the conflict between the free practice clause and the establishment clause, as interpreted in the school bus, the prayer and the blue-law cases.

Justice Brennan also dealt with the problem of conflict between the two clauses in the Bible-reading cases, decided on the same day as the South Carolina unemployment compensation cases. He referred to government employment of chaplains in prisons and the armed services only to distinguish them from the scripture-reading and prayer cases on the ground that the prison inmates and service personnel are required to be where they are and, unless the government made provision therefor, would be denied devotional opportunities of their choice. He thought, too, that the fact that the school cases involved young children was especially important. The 'conflict' between the two religious clauses did not bother Justice Brennan as much as they did Justice Stewart. In fact, his opinion in the Bible-reading case was a long and labored effort to reconcile previous cases under the religious clauses.

It is, of course, not surprising that the Justices differ on the application of principles to which all subscribe. This is of the essence of judicial interpretation of the many generalities in the Constitution. "Due process of law," "unreasonable searches and seizures," "cruel

[107] 83 Sp. Ct. 1790, 1800.

or unusual punishment," "with respect to the establishment of religion." As Professor Kurland says anyone maintaining that the answer in a particular case is clear is either "deluded or deluding." [108]

There is, indeed, ambiguity and conflict in the historical evidence as to the position Jefferson took or would take on certain specific questions. There is, for example, his Report, as Rector, to the President and Directors of the Literary Fund at the University of Virginia, quoted by Justice Reed in his dissent in the Illinois release time case. There were several items of business reported including resolutions pertaining to the building of a library, ratification of certain accounts of the bursar and other financial matters. The report then called attention to the fact that "the want of instruction in the various creeds of religious faith existing among our citizens presents*** a chasm in a general institution of the useful sciences." He then continued as follows: "A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science." He then continued: "It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University.*** But always understanding that these schools shall be independent of the University and of each other." It seems that the suggestion was adopted by the University and included in its statutes, presumably with Jefferson's approval, so that the students would be "free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour." [109] It should be added that Madison was a member of the Board of Visitors which approved Jefferson's report.

Nevertheless, as Justice Brennan observed in his concurring opinion in the Bible-reading cases, "It may be that Jefferson and Madison would have held such exercises to be permissible.*** But

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[108] 29 U. Chi. L. Rev. 1, 96 (1962).

[109] The Writings of Thomas Jefferson 414-418 (Memorial Edition, 1904).

I doubt that their view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases. A more fruitful inquiry*** is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of inter-dependence between religion and state which the First Amendment was designed to prevent.*** A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem, the historical record is at least ambiguous, and statements can readily be found to support either side of the proposition... Second, the structure of American education has greatly changed since the First Amendment was adopted... Third, our religious composition makes us a vastly more diverse people than our forefathers... Whatever Jefferson or Madison would have thought of Bible reading or recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices." [110]

Of the "two great drives" referred to by Justice Rutledge, it may be that the firm stand taken by the Court and its near unanimity in the *Regents Prayer* case and the Bible-reading cases have blocked at least temporarily the religion-in-the-public-schools program. But the same cannot be said for the campaign to obtain state aid for religious institutions. Since *Everson* that program has flourished luxuriantly. An opinion of the General Counsel of the Department of Health, Education and Welfare in 1961 classified a long list of Government activities and programs under which institutions with religious affiliations receive Federal funds through grants or loans. A few examples are the following.

School lunches, "nutritious midday meals to children attending schools of high school grade and less"; special milk program for "children in nonprofit schools of high school grade an under"; funds under the National Defense Education Act to enable nonprofit institutions of higher learning to make "low-interest loans to needy students"; grants "to strengthen science, mathematics and modern foreign language instruction in secondary schools;" testing students in private elementary schools; training of secondary school counsellors;

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[110] 83 Sp. Ct. 1560, 1578, 1579, 1581.

grants for research in more effective utilization of Television, Radio and Related Media; grants for research on mental diseases; grants to Divinity Schools for instruction on mental health; research relating to "social security matters"; the allocation of surplus property, personal and real, for educational and public health purposes "at a public benefit discount which can be as much as 100% of the appraised fair value"; summer institutes for higher education in fields relating to atomic energy; training of all types for the rehabilitation of war veterans.

This side of the Wall appears to be crumbling away and may collapse utterly unless repairs are soon forthcoming.