Religious Liberty and the Supreme Court of the United States

Godfrey P. Schmidt
ON JUNE 28, 1787 the Constitutional Convention at Philadelphia had listened to a rather boring, two-day harangue by Luther Martin, the delegate from Maryland. He had been speaking in favor of an equal vote for each state as an essential to the federal idea. He made long quotations from Locke, Vattel, Somers, Priestley and Samuel Rutherford, all of them contemporary intellectual leaders, to support his particular theory of emphasized states' rights. According to James Madison, Martin spoke "with much diffuseness and considerable vehemence"; and according to Oliver Elsworth, he spoke with "eternal volubility." When at last Luther Martin had finished his plea to the Convention, others joined in the discussion. Indeed, the debate grew so acrimonious that delegates openly intimated that the Convention was at the brink of failure.

At this point, the aged Benjamin Franklin, the oldest member of the Convention, and, according to many, the wisest, asked to be heard. He was recognized by the President of the Convention, George Washington. Thereupon Benjamin Franklin proceeded to read the following speech:

"The small progress we have made after 4 or 5 weeks close attendance & continual reasonings with each other—our different sentiments on almost every question, several of the last producing as many noes as ays, is methinks a melancholy proof of the imperfection of the Human Understanding. We indeed seem to feel our own want of political wisdom, since we have been running about in search of it. We have gone back to ancient history for models of government, and examined the different forms of those Republics which having been formed with the seeds of their own dissolution now no longer exist. And we have viewed Modern States all round Europe, but find none of their constitutions suitable to our circumstances.

"In this situation of the Assembly, groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? In the beginning of the Contest with Great Britain, when we were sensible of danger we had daily..."
prayer in this room for the divine protection.—Our prayers, Sir, were heard, and they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending providence in our favor. To that kind of providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity. And have we now forgotten that powerful friend or do we now imagine that we no longer need his assistance? I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, that “except the Lord build the house they labor in vain that build it.” I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded and we ourselves shall become a reproach and byeword down to future ages. And what is worse, mankind may hereafter from this unfortunate instance, despair of establishing Governments by Human Wisdom and leave it to chance, war and conquest.

"I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of the City be requested to officiate in that service."  

Roger Sherman, the delegate from Connecticut, seconded Mr. Franklin’s motion. But it was never put to a vote:

"Hamilton and several others expressed a variety of opinions. To begin prayers now, so late in the session, might cause talk, and lead the public to suspect that there was trouble behind the closed doors. It was not the Quaker custom to have prayers at political gatherings, and this was Philadelphia. Among the delegates were members of various Protestant denominations—Quaker, Episcopalian, Presbyterian, Methodist, Baptist—and Roman Catholics. Williamson of North Carolina pointed out that the convention had no money to pay a chaplain or chaplains."  

The delegates did not pray as a group. But it is clear that they did not strike an atheist pose. They might have had too much “respect of persons.” Still they did have respect for God. They may have acted as if one religion was as good as the other. They did not act as if all religions were bad or undeserving of consideration or cooperation.

The skein of history has ravelled and knotted in millions of ways since 1787. But to me at least it seems odd that in 1948 the Supreme Court of the United States should have used the very Constitution in whose wise building Benjamin Franklin participated, as if it were a message

1. Van Doren, The Great Rehearsal 100 (1948).
2. Id. at 101.
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from the Founding Fathers to our times in support of a godless thesis by the atheistic Vashti McCollum.

The case of Illinois ex rel. McCollum v. Board of Education, Champaign County, has already evoked considerable comment and criticism. It will, no doubt, continue to do so until the amazingly gross historical errors committed by Mr. Justices Black, Frankfurter, Rutledge, Burton and Jackson are corrected by the sound jurisprudence and the correct historical analysis presented in the dissenting opinion of Mr. Justice Reed.

The facts in the case are fairly simple. In 1941 some Catholics, Jews and Protestants of Champaign County, Illinois, banded together in a voluntary association called the "Champaign Council on Religious Education." They obtained the permission of the Board of Education of the local school district to offer classes in religious instruction to public school pupils in the fourth to ninth grades, inclusive. Only children whose parents had signed printed cards requesting such religious education were permitted to attend. The classes were held once a week in the regular classrooms of the public school building. The Champaign Council on Religious Education procured the religious teachers without expense to the school authorities. There were Protestant teachers for Protestant pupils, Catholic priests for Catholic pupils, and a Jewish Rabbi for Jewish pupils. All of these instructors were subject to the approval and supervision of the local Superintendent of Schools. Nothing in the case suggests that the Champaign Council on Religious Education would have excluded other religions or theistic or atheistic sects. Students whose parents did not authorize religious education were not released from their secular studies at the public school. On the other hand, students who, in accordance with parental authorization were released from secular studies for religious instruction, had their presence or absence noted on the school records.

The individual religious and patriotic motivations of those who constituted the Champaign Council on Religious Education are not set forth in the case; but those motivations can be reconstructed for our purposes out of quotations from Jewish, Protestant and Catholic sources.

Rabbi Lewis Finkelstein speaks from the point of view of Judaism:

"The central doctrine of Judaism is the belief in the One God, the Father of all mankind. The first Hebrew words which a Jewish child learns are the confession of faith contained in the verse, 'Hear, O Israel, the Lord is our God, the Lord is One,' and every believing Jew hopes that as he approaches his end in the fulness of time, he will be sufficiently conscious to repeat this same

confession. . . . It is a cardinal principle of Judaism that the highest form of piety is to perform the will of God out of love for Him, rather than out of fear of Him. . . . While Judaism does not consider fear of punishment the principal reason for submission to Divine will, it recognizes the fact that disobedience necessarily entails suffering. This is not due to the fact that God, like an angry human parent or ruler, penalizes those who transgress His will. It is, rather, because the Divine discipline, as incorporated in Jewish tradition, is directed toward giving man as much happiness as can be obtained in life. . . . The revelation of the Divine will, through the Law, the Prophets, and the Holy Writings, was a singular phenomenon in history. The people to whom this revelation was made was the people of Israel, of which only a remnant now survives, known as the Jewish people. The fact that the people of Israel received the Law and heard the Prophets does not, according to Jewish teaching, endow them with any special privileges. But it does place upon them special responsibilities. These responsibilities, to observe the Law, to study it, and to explain it, are expressed in the term, 'The Chosen People.'

Dr. M. Searle Bates published in 1945 the study entitled Religious Liberty, An Inquiry, under the auspices of a joint committee appointed by the Foreign Missions Conference of North America and the Federal Council of Churches of Christ in America. From that work the following Protestants’ statement of motivation is quoted:

"Despite the extensive gains for religious liberty during the past century, recent intensifications of nationalism have fused with the increasing power and functions of the State to imperil and even to crush, in some lands, a liberty of religion formerly achieved. Insecurity and war sharpen the issues of ultimate loyalty and stimulate the will of each national state to command the full devotion of its members. These developments reach an abnormal pitch in the states called totalitarian.

"Experience of totalitarian oppression and persecution, on the other hand, is driving important elements of mankind to prize more highly the values of liberty and to struggle to establish and protect them. The significance of religion to the individual life, to the local or national community, and to international and interracial relations is more widely recognized. Statesmen and educators reckon anew with the objects and processes of devotion, with faith that nerves to steadfast action, with deep forces of solidarity that bind together diverse men—men of diverse groups.

"Hence there is not merely a concern of believers, but a public concern for religious liberty, for the rightful, wholesome growth of free religion, for the protection of the life of the spirit from oppression and authoritarian abuse."

Many authoritative Papal statements illustrate the Catholic point of view on this subject. The following is a quotation from the Encyclical

6. BATES, RELIGIOUS LIBERTY, AN INQUIRY 1 (1945).
of Pope Pius XI, entitled: "Ubi Arcano Dei," issued on December 23, 1922:

"A long time before war, through the fault of individuals and nations, set Europe ablaze, the principal cause of so many misfortunes was developing its action: This cause would have been removed and destroyed by the very fear of war, if the significance of those appalling events had been generally understood. Who is there who does not know the words of Scripture... 'they that have forsaken the Lord shall be consumed' (Isaias, i, 28). The momentous words of Christ, the Redeemer, and master of men, are equally familiar:... 'without me you can do nothing' (John xv, 5), and again... 'he that gathereth not with me, scattereth' (Luke xi, 23).

"These Divine judgments have been realized at all times; now they are being verified more than ever before the eyes of all. It is because they have pitiably strayed far from God and Jesus Christ that men have fallen from their former prosperity and now wretched in this morass of troubles.... God and Jesus Christ being therefore excluded from law and government, authority seeks its source no longer in God, but in man; the first consequence is that laws are deprived of the real substantial guarantees and the supreme principles of justice which even Pagan philosophers, such as Cicero, conceived to be solely situate and enclosed within the eternal law of God; the very foundations of authority are thereby sapped and the primary reason justifying in one case the right to command and in the other the duty to obey is abolished....

"It must be observed that the doctrine and the rules laid down by Christ with regard to the dignity of human personality, the purity of morals, the duty of obedience, the organization by God of the human society, the sacrament of marriage, and the sanctity attaching to the Christian family, His teaching and all truths He came to bring from Heaven to earth, have been entrusted by Christ to the exclusive custody of His Church....

"The Church alone having, by reason of the truth and power of Christ invested in her, the task of forming souls to virtue, can alone at the present day restore the true peace of Christ and guarantee it for the future by removing the fresh danger of war to which we have referred. The Church alone, by her mission and the order of God, teaches that the eternal law of God ought to serve for rule and measure to every human activity, public or private, individual or social."

In contrast with such religious motivations one might cite an atheistic statement—one made some years ago by Julian Huxley, until recently the head of UNESCO:

"I do not believe in the existence of a god or gods. The conception of divinity seems to me, though built up out of a number of real elements of experience, to be a false one, based on the quite unjustifiable postulate that there must be some more or less personal power in control of the world. We are confronted with forces beyond our control, with incomprehensible disasters, with death; and also with ecstasy, with a mystical sense of union with some—
thing greater than our ordinary selves, with sudden conversion to a new way of life, with the burden of guilt and sin and of ways in which these burdens may be lifted. In theistic religions, all these elements of actual experience have been woven into a unified body of belief and practice, in relation to the fundamental postulate of the existence of a god or gods.

"I believe this fundamental postulate to be nothing more than the result of asking a wrong question, 'Who or what rules the universe?' So far as we can see, it rules itself, and indeed the whole analogy with a country and its ruler is false. Even if a god does exist behind or above the universe as we experience it, we can have no knowledge of such a power: the actual gods of historical religions are only the personifications of impersonal facts of nature and of facts of our inner mental life. Though we can answer the question, 'What are the Gods of actual religions?' we can only do so by dissecting them into their components and showing their divinity to be a figment of human imagination, emotion, and rationalization. The question, 'What is the nature of God?' we cannot answer, since we have no means of knowing whether such a being exists or not."  

Certainly it is no part of the function of the Supreme Court or of civil government as envisaged in the United States Constitution to establish one of these viewpoints or creeds to the exclusion of the others. Still less would it seem, as a matter of constitutional theory and history, within the Supreme Court's competence to establish Mr. Huxley's or anybody else's atheism in a favored position in our state school systems. A law suit to influence our schools atheistically has less constitutional warrant than an action to influence them with Christianity. After all, those who attended the Constitutional Convention were overwhelmingly theists who favored religious education.

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7. HUXLEY, I BELIEVE 129 (1940).
8. WALSH, EDUCATION OF THE FOUNDING FATHERS OF THE REPUBLIC (1935). The theism of the Founding Fathers is clear from the prevalence of natural law doctrine: "... the American tradition of judicial review stems from Coke's dictum in Bonham's Case, and so antedates the earliest American constitutions by more than 160 years. Nor has it ever ceased entirely to imbibe sustenance from its doctrinal source. A decade after Otis converted the dictum into a weapon against British pretensions in the Colonies, George Mason leveled it against an act of the Virginia colonial assembly under which certain Indian women had been sold into slavery. Said the future author of the Virginia Declaration of Right: 'If natural right, independence, defective representation, and disavowal of protection, are not sufficient to keep them from the coercion of our laws, on what other principles can we justify our opposition to some late acts of power exercised over us by the British legislature? Yet they only pretended to impose on us a paltry tax in money; we on our free neighbors, the yoke of perpetual slavery. Now all acts of the legislature apparently contrary to natural right and justice are, in our laws, and must be, in the nature of things, considered as void. The laws of Nature are the laws of God; whose authority can be superseded by no power on earth ... all human constitutions which contradict their laws, we are in conscience bound to disobey. Such have been adjudications of our courts of justice.' Mason concluded by citing Coke and his successor, Hobart. The court adjudged
Almost any library could furnish dozens of additional examples of each of the four viewpoints illustrated above. But the ones quoted are, I believe, typical. They present fundamental and typical inspirations and inducements for the Champaign Council on Religious Education on the one hand, and Vashti McCollum’s law suit on the other. They present no possible reason why, as a matter of reason or constitutional law, the federal government should prefer the atheistic postulate (itself a blind and inverted faith or creed seeking salvation in history and in emancipation from the true God of religion). They exhibit no reason why the Supreme Court should constitute itself a super-school board to design state-school curricula as if the belief in God were unimportant or a figment of the imagination.

The case of Illinois ex rel. McCollum v. Board of Education, Champaign County, is not merely a legal problem. It is a conflict of persons actuated by profound religious differences, deeply-rooted, psychological impulses and intellectual influences. That conflict is not new in history. The acerbity of the contestants might fluctuate up and down, depending upon the historical era. But the contest has been there for generations. It was already old when Benjamin Franklin recommended invocation to the “Father of lights.”

According to the concrete logic of everyday events, the Champaign Council on Religious Education did something very practical about their value-judgments respecting the role of religion in the education of the children in whom they were particularly interested. They were not foisting their opinion upon unwilling parents. They were not coercing children into a mold of education which the parents of those children either resented or were indifferent about. They were not even challenging Mrs. McCollum’s legal right to be an atheist or to educate her child atheistically. They were merely acting upon that natural law right which had long been recognized by the Supreme Court of the United States: the right of parents to control the education of their offspring, provided certain minimum standards are observed.9

On the other hand, Vashti McCollum was guided, very obviously, by a value-judgment which directly contradicted that of the Champaign Council on Religious Education. Being a professed atheist, Vashti McCollum did not believe that any form of religion or theism should be an ingredient of any educational process conducted in the physical premises of a public school or under the “joint public-school religious-group program” which the Champaign Council on Religious Education had insti-

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tuted. Whereas the latter was only interested in the voluntary cooperation of parents who wished their children to be religiously educated (as a result of which only some children were to be exposed to religious education), Mrs. McCollum by her legal technique of mandamus, sought to coerce all parents (and, therefore, all children affected negatively or positively by the program) into the pattern of her particular atheistic indifference or belief respecting schooling and curriculum.

The legal contentions and civic aspirations of the Champaign Council on Religious Education were entirely consistent with religious and irreligious pluralisms regardless of what they thought of pluralism theologically or philosophically. The Council was neutral so far as the free choice of parents was concerned. The Council's program left it entirely within the discretion of individual parents to choose, according to their lights or obscurities, the religious or irreligious components of their children's education. The Council's program could and did function without evidence of hostility to atheist or to theist, no matter what the particular brand of atheism or theism involved. But Mrs. McCollum's atheism was less tolerant of opinion inconsistent with atheism.

The pretense at neutrality which was involved in the invocation of the First Amendment masked an intolerant anti-religionism. Actually it was the Champaign Council on Religious Education which manifested neutrality and Mrs. McCollum who manifested hostility.

If Mrs. McCollum had merely said to the State, acting through the Board of Education of School District No. 71 in Champaign County, Illinois: "You must profess no theology, you must have no theory about Divinity, you must own no conviction about religion, you must boast of no platform of ideas respecting God or His worship," I could respect her argument on constitutional grounds, even while I disagreed with her theologically. But she went much further. In effect, she said to the State of Illinois: "Under the American Constitution, you must not only be theologically barren and neutral; you must not even permit people who are theists or religionists to use any of your school properties or public buildings for the inculcation of religious principles. You must do as atheists do when they plan a school-system. It is unconstitutional to permit people to use school property as the mere location where religionists disseminate ideas about the 'Father of lights,' the supernatural nature of man, his destiny or his soul."

Because Mrs. McCollum did not want to profess belief in God, she did not want anyone in a public school to profess publicly a position regarding God. I wonder that she did not object to the legend on our coins: "In God We Trust."

Apparently, neither the Supreme Court nor Mrs. McCollum was able
to see that such a position of alleged “neutrality” respecting religion is really more at variance with the First Amendment historically and logically than the program of the Champaign Council on Religious Education:

“What the nineteenth century did not see was that this position of neutrality was in itself a positive program and necessarily an anti-religious one. . . . But the very logic of the position demanded a change for the worse. By the fact of proclaiming itself neutral concerning differing convictions about God and man and his destiny, the State practically denies God and the soul, and thus allies itself officially with the atheist and the materialist, who must certainly still be in the minority in our country as a whole. Thus it actually has taken sides, while professedly practicing neutrality. It ended up by representing only the materialist.

“This strange result of freedom of conscience, so called, is especially evident in the schools, which will always be the battle ground of convictions. It is ridiculous to say that the school professes no position regarding God; that is in itself a position, and a position against God, for ignorance of God is the same as denying Him. From the school this denial has inevitably spread to all of life. It is becoming obligatory on any one holding public office that he admit that he acts from no religious conviction, nor from any philosophical one, for that matter, except the vague and shifting notions that constitute what the newspapers call ‘Americanism.’

Or, to put the matter in another way, Mrs. Vashti McCollum, being an atheist, did not wish the theists to have an advantage in favor of religion in public school instruction, no matter what the circumstances. Her way (and the Court’s way) of curing a situation which encompassed what she deemed to be an advantage for religion, was to demand that schools and everybody ignore God—that was to claim all of the advantages for the atheists. What kind of a school system would a thorough-going atheist devise, if not the kind that Mrs. McCollum demanded and got from the Supreme Court of the United States?

For the moment I am not concerned with the crude historical errors made by the Justices who participated in the majority decision. These errors are the more inexcusable because they were clearly pointed out by the dissenting opinion. But I am concerned with the principles of logic and of political science which are involved directly or indirectly. If I were a practical atheist, I can imagine nothing more to my liking than a school system forbidden by the Constitution itself to permit religious indoctrination or its properties under any circumstances. In its zeal to be tolerant and to be neutral, the Supreme Court has in effect replaced the theism or the deism of the Founding Fathers with Mrs.

Vashti McCollum's Twentieth Century atheism. And on examination, this Twentieth Century atheism proves to be no different than the Eighteenth Century kind with which the Founding Fathers were familiar. The Founding Fathers would never have dreamed of formulating a constitutional limitation upon the State's rights over its own educational facilities.

Justice Black's opinion on behalf of the majority transforms the issue between Vashti McCollum and the Champaign Council on Religious Education in such wise as to mutilate it and make it unrecognizable. The petitioner had charged that the Champaign Council's program violated the First and Fourteenth Amendments of the United States Constitution. Accordingly, Mr. Justice Black wrote:

"This case relates to the power of a state to utilize its tax-supported public school system in aid of religious instruction insofar as that power may be restricted by the First and Fourteenth Amendments to the Federal Constitution."11

Of course, from an historical point of view, the Fourteenth Amendment was never intended by its draftsmen (Thaddeus Stevens, Rosco Conkling and John A. Bingham) to cover or to refer to any problem like the "establishment" of a religion by the states.12 It required some rather bald judicial legislation on the part of the Supreme Court of the United States to import any part of the First Amendment into the Fourteenth Amendment.13 The McCollum case completes the cycle of this judicial legislation by the Supreme Court of the United States. For, in this case as in the Everson case,14 the Court has unhistorically expounded the meaning of the phrase "no law respecting an establishment of religion" in Article I of the Amendments to the American Constitution. In interpreting the First Amendment, the Supreme Court majority assumed, despite Mr. Justice Reed's undeniably correct historical analysis in his dissenting opinion, that James Madison's private views and public actions in Virginia during 1784 to 1786 constitute, despite contradicting historical documentation, the legislative intent behind the First Amend-

11. 333 U. S. 203, 204 (1948). (Italics supplied.)
13. Gitlow v. New York, 268 U. S. 652, 666 (1925). The holding in this case insofar as relevant here was simply this: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."
ment which was drafted by James Madison in 1791. But that is an un-provable assumption. 16

I come now to an analysis of a fundamental error contained in the

15. See Mr. Justice Reed’s dissenting opinion; Parsons, The First Freedom, c. 3 (1948).

“Both Justices Black and Rutledge in the majority and minority opinions in the Everson Case relied almost exclusively on historical arguments to expound the amplitude of ‘no law respecting the establishment of religion.’ Both rely on what can honestly be said to be true but inapposite historical data. Their historical foundation is essentially what James Madison thought and did about the separation not merely of church and state but of political authority and religious forces in Virginia. . . . Mr. Irving Brant in his recent second volume on Madison, like the Supreme Court, has also assumed that these earlier Virginia views of Madison are necessarily inherent in the no-establishment clause of the First Amendment. For it is the unproved assumption of both Mr. Brant and the Supreme Court that Madison’s private views and public actions in Virginia, 1784-6, are the touchstone of the constitutional interpretation of the First Amendment.

“How can this assumption be denied, it might be asked, since it was Madison himself who introduced into Congress what is now the First Amendment? Madison in introducing this and several other proposals was merely attempting to make good the promises of the supporters of the new constitution to propose as amendments what certain states had suggested as the price for their ratification of the Constitution. It was not a case of Madison introducing this religious clause as his own personal idea. If we had no account of the congressional debates on the formulation of the no-establishment clause, we might assume that its words were measured by the sense in which Madison stood for separation in Virginia from 1784-6. Fortunately there is evidence—if not in abundance—of the sense in which these words were accepted by Congress when it proposed this amendment to the states.

“In its primitive form the proposal read: ‘The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national (sic) religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretexts, infringed.’ (Cf. Annals I, p. 434—June 8, 1790). This text along with texts of other proposed amendments went to a Select Committee on Tuesday, July 21. When referred back to Congress on August 15th, the proposal in question read, ‘No religion [N. B. national is omitted] shall be established by law, nor shall the equal rights of conscience be infringed.’ (Cf. Annals I, p. 729—August 15). On these words the entire extant debate ensued. (Cf. Annals I, 729-731—August 15). Sylvester of New York feared that these words might be misconstrued to abolish religion altogether. Gerry of Massachusetts felt it more appropriate to say that ‘no religious doctrine shall be established by Law.’ Carroll of Maryland favored the committee’s phraseology on the score that dissenters, now disgruntled with the constitution might be won over by learning that no one religion could be established by Congress to the disadvantage of others. The plain assumption in these three utterances is that the words were intended to oppose the exclusive establishment of one religious faith, not that they commanded a divorce between government and religion in all its moods and tenses. . . .

“It is curious, therefore, after this survey of the only pertinent history to read what Mr. Justice Black in the Everson Case asserted as the minimum meaning which history gave to this clause:

“‘Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions [this is the illegitimate historical conclusion], 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.’ (Brackets mine).” Burke, Busses, Released Time and the Political Process, Jesuit Educational Quarterly 15-19 (June 1948).
opinion of the Court delivered by Mr. Justice Black in the McCollum case. Why did the Supreme Court take the case at all? As Professor Edward S. Corwin, perhaps the foremost authority on Constitutional Law in America, stated in this connection: "... the justification for the Court's intervention was most insubstantial." It is true, as the Court points out in its first paragraph, that the Champaign Council on Religious Education program called for a certain utilization of the tax-supported public school system's physical premises for the purpose of sectarian education. But it is quite apparent from the decision itself that the "utilization" in question did not amount to any usurpation or displacement of the public school system itself such as the State of Illinois regarded as objectionable.

There was no deterioration of the usual service rendered by the State school system. Under any rational and historically sound theory of reserved powers, it was for the State of Illinois to make that decision for itself. It is entirely clear from the decision under discussion that whatever the slight actual utilization of tax-supported public school buildings in Champaign County, Illinois, the program of the Champaign Council on Religious Education did not interfere in any manner with the educational process conducted under the auspices of the State of Illinois in its public school system. On principle, resolution of such questions should be left to the State, rather than to the Supreme Court of the United States, which is not qualified as a Board of Regents.

Under any fair construction was the utilization of the tax-supported public school system (which is certainly not the same as the school buildings) under the Champaign Council's plan "in aid of" religious instruction, as Mr. Justice Black suggests in the initial paragraph of the decision? That depends in part on what the phrase "in aid of" is made to mean. It means, I submit, one, some or all of the following dictionary meanings: to contribute to; to support; to facilitate; to serve; to promote; to defend; to be enthusiastic about; to approve; to cooperate with; to participate in; to be positively benevolent about; to profess a preference for: a particular type of religious instruction. I cannot understand how, under the Champaign Council's plan on religious education, any of these verbs were involved with the Champaign school system as subject. Certainly the Champaign Council on Religious Education never asked the State of Illinois or its school system to do any of these things. One can hardly be said to utilize a facility like a school system "in aid of religious instruction" if one simply uses the system's building or classroom or if one is indifferent, genuinely neutral, impartial, disinterested, a-religious (as contrasted with both "religious" and "irreligious").

17. See text accompanying note 11 supra.
A school system can exist and function without this or that particular building or physical facility. But a school system without a teaching personnel and without curricula is impossible. The Champaign Council's plan did not mean that teachers or the curricula of the public school system were under the control of this or that religion. They were not utilized for this or that religion. The McCollum case sanctions their utilization for the purposes of atheists.

The state or the municipality whose facilities are used to put out a fire in a Catholic Church or parochial school does not thereby take sides in the quarrels between sects or between theists and atheists. In doing so it does not even use its facilities "in aid of" religion. It is acting for the common political good. The common good presupposes and encompasses all sorts of institutions and organizations with variant aims and methods. The alternative is regimentation and an artificial, merely superficial, oneness, dictated by tyranny. What does the Everson case itself mean? Public facilities like busses were utilized in aid of the common good because they transported children to competent schools which happened to be conducted by religionists.

The Everson case concerned a public transportation facility or system. The McCollum case involved a school system or facility. If the transportation system were used in such a way as to discriminate in favor of one religion, or as to hinder or thwart the basic finality of its transportation facilities because of some service to a sect, the rule of the Everson case would be violated. If in Champaign the use of the school's physical structure by the Council had one-sidedly warped, obstructed or prevented the proper functioning of the school system, nothing could be said constitutionally in favor of the program inaugurated by the Council. But there was no blocking or lessening of the finalities of state paid education. On the contrary the state paid education, far from being interfered with, was complemented and completed by the Council's plan. The difficulty arises because of our nominalism in using such words as "education" as if you can have education apart from a specific content of education. The semantics of sentences which express the purposes of fire departments and bus systems are vastly different from those which express the purpose of our public educational system. The former are simpler. With respect to them we are realists. It requires no deep thought to realize that fire departments put out fires and busses transport people. About that there is not much dispute. But what is education or what is the end of education are other matters. What are the best or most convenient means of education (i.e., teachers and curricula) is a question that has evoked all sorts of controversy. The atheist and the Supreme Court have one answer. The Champaign Council another. As long as
the latter does not impair or defeat the state program of education, why should religious citizens be regimented to the educational program of the atheist or even of the Supreme Court?

The power of the State of Illinois was not attracted toward one religion rather than another, or toward theism rather than atheism. The State of Illinois, under the Champaign Council plan, did not itself participate in any religious instruction. It simply offered physical school facilities to theists and atheists, to religionists and irreligionists alike for the implementation of secular education by such doctrine or belief as parents might choose to authorize.

As Mr. Justice Reed pointed out, there are many "incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society." He mentions such matters as freedom from taxation, the transportation of children to Church schools for safety reasons, the free textbook statute of Louisiana, the National School Lunch Act, the payment of Federal monies to build additions to hospitals chartered by Roman Catholic Sisterhoods, the provision of chaplains for each House of the national legislature, the commissioning of chaplains for the Armed Forces, government financing of the education of veterans in denominational schools, the reading of the Bible and the Lord's Prayer in the District of Columbia schools, and the religious activities at the United States Naval Academy and at the United States Military Academy. The logic of the McCollum case should make such things as these unconstitutional, because they amount to the utilization of tax-supported facilities in aid of religious instruction as patently as, or much more patently than, the Champaign Council's plan.

Indeed, the logic of the McCollum case comes to this: the only ones constitutionally entitled to any incidental advantages as by-products of our organized society are atheists. The Supreme Court, in its majority opinion in the McCollum case, seems to have come to the conclusion that the sole, constitutionally permissible alternative to an exercise of state power "in aid of" religious instruction is the contradictory of "in aid of": to hinder, to oppose, to embarrass, to curb, to inconvenience, to be hostile to, to distain, to reprove, to be anti-religious, to be atheistic, to discriminate against religious instruction.

Moreover, what is the meaning of the words "religious instruction"? Does it not go to the very heart of the rationale of the Supreme Court's attack upon the Champaign Council plan, that it assumed that instruction or teaching must always be a positive act? As a matter of fact, mere silence and inaction can also teach very effectively. It has been said that "they also serve who only stand and wait." It can be said, too, that

they also teach who remain silent. Constantly to avoid any contact with a particular type of problem or thinking is itself a manifestation of one's indifference, fear, coldness or hostility toward that subject. An educational system which talks incessantly about such things as home economics, esthetics, philosophy, art, history, science and technology and which always neglects or avoids even the mention of God or religion, publicly teaches the importance it attaches to some subjects and the unimportance in its calculations of other subjects. Its very silence hinders, opposes, embarrasses, curbs, inconveniences, distains, discriminates against, and shows hostility for religious instruction and God. All sorts of gadget subjects are fitted into the framework of public school curricula. But the slightest contact with or incidental aid to the cause of any religion is steadfastly eschewed. Such a deliberate aversion from such a subject necessarily brims with implications against religion and in favor of atheism. The product of that kind of schooling can hardly be blamed if he comes to the conclusion that God and religion must be trivial and insignificant indeed since the whole educational system avoids any, even incidental, reference to them or to religious instruction. Can not the young student draw the inference that a subject must be useless if no little room can be found for it in the big Christmas tree of our educational system from which all sorts of important and unimportant novelties dangle? When it is made unconstitutional to permit a public building to be used for religious instruction, can a student be blamed for regarding such instruction as stigmatized—as unpatriotic? The student's mind is formed and warped as much by what they fail to teach him as by what they teach him. If we needed any illustrations, we could easily cite the educational systems of Nazi Germany, Fascist Italy, and the present, gigantic tyrannies behind the Iron Curtain. Goebbels could hardly have wanted more than a propaganda machine which treats with studied silence such an embarrassing subject as God's justice or Christian charity. The whole educational system is "in aid of" atheism when its silences are so sedulously planned on constitutional grounds.

There are two ways of being an atheist. One can be a militant atheist always attacking theism. One can be a practical atheist never attacking theism, but always acting as if God did not exist. In a sense, the man who hates God and therefore always attacks His existence really must believe in Him. You do not hate or attack what does not exist! No teacher ever spends much time informing his pupils that the moon is not made of green cheese or attacking an ugly superstition to that effect. No one today excitedly lambasts belief in the Grecian chimaera. We form impressions of men from what they do not say, as well as from what they say. I can get some idea of a man's character by visiting his home.
to see what is there and also what is not there. I can appraise an educational system by its curriculum—that is by the things that are absent as well as the things which are included in its teaching schedule. Imagine a course in Constitutional Law which always avoided Marshall's opinions!

Countries which are enslaved by modern dictatorships present us with object lessons. Behind the Iron Curtain there are two kinds of propaganda. There is the positive indoctrination in ideological myth. But more important and more pregnant with oppression is the negative aspect of silence about the verboten subjects, a knowledge of which would be ideologically “dangerous.” The scourge and the arrogance of the modern dictators consist precisely in this: that they undertake to decide for their people what may be studied and what may not be studied; what may be learned and what may not be learned; what may be published and what may not be published.

Actually, the Supreme Court had three alternatives to choose from. Should it favor religious education? Should it discriminate against religious education? Should it be impartial? It acted on the vulgar assumption that silence constituted impartiality. But silence has often meant contempt. Would it be extraordinary if a product of the kind of educational system approved by the McCollum case should regard religion and the Divinity as contemptibly negligible because they were never important enough to be included among subjects to be studied? The average tax-supported public school under the McCollum case will be as silent about God and religion as it will be about the Sun God, Ra, in Egyptian mythology or the pagan Hittite worship of Cybele and Attis, or the superstitious cult of some forgotten Mayan deity. Would not a child be entitled to ask himself: “Are all of these studies excluded from my course for the same reason?”

I have raised the question: What does “religious instruction” mean? Now I ask: What does “religious instruction” mean? That comes down to the question: What is religion? Whatever the variety of answers which students have given to this question from time to time, I would cover most definitions by saying generally that religion is ambiguously considered to be either a philosophy based on reason or a creed (with or without a cult) taken on faith. Atheism, too, is a philosophy, however bad a philosophy. Also, atheism is a creed, however unfounded and infidel, a creed. The judge, the statesman, or the legislator is not asked to, and cannot settle, the controversy between the theist and the atheist; between the religionist and the anti-religionist. But certainly under our constitutional system no earthly reason can be assigned for giving atheism as a “philosophy” or a “creed” the advantage over theism simply because a constitutional amendment forbids you from giving one brand of theism advantage over a rival form of theism.
The three choices confronting the Supreme Court could be framed as follows, to borrow Mr. Justice Black's language:

1. Did the State of Illinois have power to utilize its tax-supported public school system in aid of religious instruction?
2. Did the State of Illinois have power to utilize its tax-supported public school system to oppose or belittle religious instruction?
3. Did the State of Illinois have power to utilize the tax-supported public school system neutrally—neither in aid of or in opposition to religious instruction?

Legally and in the light of historical development and the genesis of the First Amendment, the first two questions should have been answered in the negative. The third question should have been answered in the affirmative. The solution demanded and obtained by Vashti McCollum is suggested by the second question. In trying to avoid an affirmative answer to the first question, the Supreme Court actually answered the second question affirmatively while suffering from the illusion it was answering the third question affirmatively.

According to the logic of meaning and according to the logic of history, it is nothing short of fantastic to read the First Amendment language:

"Congress shall make no law respecting an establishment of religion. . ."10

as forbidding religious instruction under the circumstances of the McCollum case. The constitutional language clearly refers to the setting up of an established church. For a State to permit its school buildings to be used for the purpose of instruction of the children of parents who have elected this form of instruction is certainly not the establishment of a church or religion. One who has studied the history of the adoption of the First Amendment on religious liberty must come to the same conclusion as Father Parsons:

"It is abundantly clear . . . that all that both branches had in mind to propose to the States for amendment was a limitation on the Federal Government against imposing a national religion on the States and using its power to enforce any specific profession of belief on any citizen. Beyond this, no historical scholar and no commentator on the Constitution is entitled to go."20

Mr. Justice Story, the Republican appointee of James Madison, has this to say on the subject in his commentaries:

"An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . . The real object of the amendment was . . .

to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.\textsuperscript{21}

Every dictionary and every encyclopedia which carries a definition of the word "establishment" applies it to the existence of some definite, and distinctive and preferred relation between the State and a preferred church or religious society. It is true therefore, that, according to its original meaning, the First Amendment was intended to prevent the passage of Federal laws which aid one religion or which prefer one religion over another. But there is nothing in the history of the First Amendment or in the text of the First Amendment which warrants the suggestion that impartial and equal aid to all philosophies or creeds, including atheism, is unconstitutional.\textsuperscript{22} Nor is there anything in logic or history which supports the hackneyed metaphorical language of Mr. Justice Black, that the First Amendment's language, properly interpreted, had erected "a wall of separation between Church and State." Of course, the Constitution itself is a legal "wall" that forbids the establishment of a church or state religion. The erection or extension of such a wall for any other purpose is entirely of judicial architecture.

Mr. Justice Black further argues that "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not... manifest a governmental hostility to religion or religious teachings. ... For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."\textsuperscript{23}

It will not do to disaffirm (somewhat guiltily) by mere words a hostility which is implicit in the act and decision of the Court itself. To use phrases about the "lofty aims" of religion and then to indulge in a piece of judicial legislation which reads from the First Amendment, which was passed to guarantee liberty of conscience and to prevent the creation of an established church or religion, a mandate that public property can never be used for the slightest aid and comfort of religion, is brittle hypocrisy. It is like saying that Democrats and Republicans, who sometimes do not agree, both have lofty aims but one must never help the other. It is like saying that people or institutions with different objectives, both of which, despite differences of viewpoint, are related to the

\textsuperscript{21} 2 Story, Commentaries on the Constitution §§ 1874, 1877 (4th ed. 1873).
\textsuperscript{22} From the point of view of revealed religion and of morals, atheism and error as such have no rights; atheists and mistaken persons do.
\textsuperscript{23} 333 U. S. 203, 211 (1948).
common good (or would the Supreme Court deny that both the State and religion in the United States work toward the common good?), must exhibit no mutual and reciprocal congeniality or sociability. How can anyone sincerely believe that two institutions which really have "lofty aims" must be hermetically sealed from one another?

No, the motivation goes deeper and is more hidden. But not so hidden that it does not gleam through chinks in Mr. Justice Frankfurter's concurring reasoning. Religion is quite apparently deemed a threat of division, regardless of lip service to lofty aims. I can conceive of no other reason why the State should give a cold shoulder to religion (in the manner prescribed by the Supreme Court's faulty reading of the First Amendment). That is why the State is expected to have one or the other or several of the following reactions toward religion: hostility, fear, coldness, indifference, contempt, disinterest. None of these motivations is very flattering to religion. None of them is consistent with a concession of "lofty aims." None of them represents the motivations of the Founding Fathers or of the draftsmen of the First Amendment. None of them can be derived, by any process of fair interpretation, from the language and the intention of the First Amendment. All of them are belied by the actual history of the First Amendment down to our own day. The litany of contacts between Church and State, recited in Mr. Justice Reed's dissenting opinion, has nothing whatever in common with hostility, coldness, contempt, indifference, etc. Neither Madison, who drafted the First Amendment, nor Thomas Jefferson, exhibited any such attitude toward religion.

The third draft of the amendment, which is now the First Amendment of the American Constitution, read as follows:

"... Congress shall make no laws touching religion, or infringing the rights of conscience." 24

The second version read:

"No religion shall be established by law, nor shall the equal rights of conscience be infringed." 25

James Madison himself, during a discussion of the second version and before the introduction of the third version, expressed himself very precisely with respect to the purpose he had in mind:

"Whether the words are necessary or not ... they had been required by some of the State Conventions, who seemed to entertain an opinion that under this clause of the Constitution, which give Congress power to make all laws

24. 1789-1824: 1 ANNALS OF CONG. 731 (1789).
25. Id. at 729.
necessary and proper to carry into execution the Constitution, and the laws
made under it, enabled them to make laws of such a nature as might infringe
the rights of conscience, and establish a national religion; to prevent these
effects . . . the amendment was intended. . . ."26

During the debate on the versions in question, someone suggested (what
the present Supreme Court has made a reality) that the amendment
might favor those who had no religion at all. In this connection Mr. Madison is reported as follows:

". . . if the word 'national' was inserted before religion, it would satisfy
the minds of the honorable gentlemen. He believed that the people feared that
one sect might obtain a pre-eminence, or two combine together, and establish
a religion to which they would compel others to conform. He thought if the
word 'national' was introduced it would point the amendment directly to the
object it was intended to prevent."27

Referring to quotations such as these from the Annals of Congress,
the Brief on behalf of the Appellees in the McCollum case made the fol-
lowing comment:

"In the face of the representations . . . on the part of Mr. Madison, it is
little short of remarkable that anyone can ascribe to Mr. Madison an intention
that the first amendment should be given a different meaning than he himself
assigned it in such debate. Are we to brush aside the indisputable historical
fact that when questioned by his legislative colleagues, Madison said he appre-
hended the meaning of its word to be: 'that congress should not establish a
religion, and enforce the legal observation of it by law, nor compel men to
worship God in any manner contrary to their conscience?'

"Are we now, 160 years after the amendment was explained by Madison,
to examine his writings and speeches outside of the legislative chamber and
from them seek to determine what was his own personal political philosophy
as to the relationship of Church and State, and then, disregarding his words
at the time of the framing of the amendment, ascribe to the amendment the
meaning thus given?

"The plain fact is that whatever Mr. Madison's personal political or philo-
sophical views were about the undesirability of conferring benefits and aids
upon religion and religious education, he did not as a legislator attempt to
write into the amendment any prohibition against equal government aid to
all religions."28

The fourth, fifth and sixth versions of the amendment were respec-

26. Id. at 730.
27. Id. at 731.
County, 333 U. S. 203 (1948).
Fourth. "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." 29

Fifth. "Congress shall make no laws establishing articles of faith or a mode of worship or prohibiting the free exercise of religion..." 30

Sixth. "Congress shall make no laws respecting an establishment of religion or prohibiting a free exercise thereof." 31

In all of the succeeding historical periods the Church and the State were, of course, recognized as distinct from one another. But this valid distinction did not mean a lack of a capacity for cooperation between the two. After all, cooperation is a reciprocal relationship. If the Church is expected to cooperate with the State, why should not the State be expected to cooperate with the Church to the limited extent of permitting use of buildings? The Supreme Court's rhetoric about the "lofty aim" of religion was, in view of its decision in the McCollum case, mere verbalism. It lacked the ring of sincerity characteristic of those famous words from Washington's farewell address:

"Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. ... And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

"It is substantially true that virtue or morality is a necessary spring of popular government. ... Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge."

That was Washington's view. Should public schools be deemed unconstitutional if their doctrine agrees with Washington's? The materials cited by Mr. Justice Reed in his dissenting opinion indicate that the views of Jefferson and Madison were similar. Particularly interesting and important were the efforts of Madison and Jefferson to get the University of Virginia, a State institution, to teach religion as a regular part of its curriculum. The Constitution and the First Amendment were almost three decades old at that time. Yet neither Madison nor Jefferson, both Republicans (the modern equivalent of Democrat) regarded the teaching of religion in a state institution as a violation of the genius of the United States Constitution. It is hard to believe that Jefferson or Madison would have been deflected from this view by a reading of the Fourteenth Amendment.

29. 1789-1824: 1 ANNALS OF CONG. 766 (1789).
31. Id. at 913.
Atheism is a "faith," although there are people who would gag at calling it a "religious" faith. But in our day we have lived to see such monstrosities as the "religion of humanity" or "religion without God." Does Mr. Justice Black's language mean that the First and Fourteenth Amendments prevent the utilization of a public school system in aid of any or all religious faiths or sects; but those amendments do not prevent utilization of the public school system in aid of atheistic (or non-religious) faiths or sects? If the meaning is that the amendments in question prevent state school systems from aiding any kind of faith or sect, then the language constitutes impossible nonsense. There are all sorts of faiths (i.e., beliefs without demonstration or proof) which constitute an integral part of any school system; to say nothing of the books used in that school system. The history teacher and the author of the book he uses have faith in some versions of history and not in others. The teacher of sociology or economics yields credence to one form of theory, which cannot be definitely demonstrated, rather than to another. Books on these subjects are equally selective. Political parties constitute sects which are not religious sects. Labor and Management constitute sects which are not religious sects. Their opinions are often very decided and generally taken on faith. Often teachers who are pro-labor or pro-management have only a "faith" rather than a proof or demonstration to rely upon.

On the other hand, if only religious faiths and sects are comprehended in the Court's reasoning on religious instruction, what about the faiths and sects of atheists? May the State consistently with the First and Fourteenth Amendments utilize its public school system to aid any and all atheistic or irreligious faiths or sects in the dissemination of their doctrines and ideals? Is not the silent neglect of religious doctrine by school teachers, who are looked upon as leaders by their pupils, an actual dissemination (by the silence of contempt or by the silence of belittlement) of negative doctrines and "ideals"?

It is well enough to state that religion and government can best work to achieve their "lofty aims if each is left free from the other within its respective sphere." But the whole question comes to a definition of what is the "respective sphere." The State of Illinois had defined "respective spheres" in a particular way, it said to religionists: "You may use public buildings." Implicit in that definition was a legislative finding that the sphere of secular education was not invaded or obstructed by such use of public school buildings. The State of Illinois was free from sectarianism in the sphere of secular education and in the permission it gave to religionists to use its school buildings. The Champaign Council was free from secularism and from State restriction in the sphere of uncoerced religious education. The system was practical because it worked. Both
the religionists and the State government were achieving their "lofty aims" without bumping into each other. Neither got in the other's hair. But their freedom from each other seemed to annoy an atheist woman. I do not know what she thought was the "lofty aim" of government. But it is quite apparent that she did not think that religion had a lofty aim. Maybe the poor woman even thought that atheism has a lofty aim. If she did, she joined that "lofty" aim with the "lofty aim" of government as defined by Mr. Justice Black. The combination were able to work a conspiracy of silence with respect to God and religion. In public school buildings that silence had to reign because of an over-all limitation in our constitutional system. The atheist stands for no teaching about God and religion in those buildings. The theist wants some teaching (limited to the children whose parents authorize it without coercion).

The case started because an atheist was jealous of the right which, under the Champaign plan, some parents enjoyed to educate their children religiously. Mrs. McCollum claimed the right to educate her child irreligiously. But she wanted her "right" to be so paramount as to rule out a corresponding right in other parents to choose religious instruction for their children. The Court settled the controversy by taking from the religionists the right given them by the State; the right to have their children educated according to the doctrine of their choice in a public school building. Mrs. McCollum was permitted with constitutional blessing to educate her child in the public school system and buildings according to the doctrine of her choice. That is practical favoritism extended to atheists even though it was not consciously intended as favoritism. It all happened because a majority of the Justices of the Supreme Court of the United States misread history and did not understand that silence and the closing of opportunity to learn are as potent a form of indoctrination as any positive teaching ever foisted upon an unwilling people by an ideological tyrant.

I cannot refrain from discussing one quotation from the opinion of Mr. Justice Frankfurter:

"As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages."
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32. 333 U. S. 203, 212, 228 (1948). (Italics supplied.)
There is hardly discernable here any recognition of the "lofty aims" of religion. What is frighteningly and tragically discernable is a partiality for a kind of monolithic oneness without religious differences. Certainly, the active furtherance and inculcation of religious tenets does sharpen the consciousness of religious differences. The only possible way to avoid religious differences is to abolish religions or to establish one religion to the exclusion of others. The first is exactly what the atheists would like. The second is exactly what the First Amendment forbids. To a certain dangerous extent, the first is exactly what the atheist got in the *McCollum* case; for religion was abolished not only from the American public school system but also from public buildings. Such a ruling simply sharpens the consciousness of difference between theist and atheist. If we are not big enough to take religious differences, I do not see how in the end we can avoid growing small enough to forbid political differences. The monolithic state is always a tyranny. And it is never really monolithic. Life and nature do not permit egalitarian leveling.

In another place in his concurring decision, Mr. Justice Frankfurter writes:

"The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects."

Mr. Justice Frankfurter's logic and that of the majority decision present "powerful elements of inherent pressure" by the Supreme Court of the United States in the interest of atheism and irreligion.

Then Mr. Justice Frankfurter continued:

"That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon the children to attend."

What of the "obvious pressures" and conformity incentives in a godless educational system? A Court that has been so insensitive to the more considerable pressures created by picket lines as to include practically all those pressures under the term "free speech" has suddenly developed a hypersensitivity in discerning as pressure upon atheist children the practice of religion and religious instruction!

Mr. Justice Jackson does not agree:

"The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may

33. *Id.* at 227.
be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends non-conformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground. 35

But perhaps Mr. Justice Frankfurter's naivete reaches its apex in the following two quotations:

"Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. . . . This development of the public school as a symbol of our secular unity was not a sudden achievement." 36

"The public school is at once the symbol of our democracy and the most pervasive means of promoting our common destiny." 37

Is not the advantage given to atheism and irreligion by the majority opinion and by the logic which Mr. Justice Frankfurter employs, itself a powerful agency for destroying cohesion? The strife of sects is not nearly as conspicuous today in destroying cohesion among the people of the United States as the strife between capital and labor; or, indeed, the strife between political parties. To rule out such differences is the logical road to the monolithic state that is afraid of differences of opinion and of controversy. How can you keep any school scrupulously free from the entanglements of strife? Why would you want to? In the secular universities of the United States there are hardly two philosophy staffs or students of social science who agree. In history and the social sciences, in primary schools, secondary schools, colleges and graduate schools, the differences of opinion are characteristically myriad and extensive. What is a divisive conflict? If there is bad-will, all conflicts are divisive. If there is good-will, few are divisive to any politically significant extent. On what have the public schools achieved veritable unity? The multiplication table? The fundamentals of the three R's? Beyond that unity is a wispy thing indeed.

As a matter of abstract or concrete political science, how is it possible to abolish distrust among our citizenry and to strengthen civic amity and social unity by saying that there are constitutional objections to running public schools (considered not as buildings but as institutions) as people in the Judeo-Christian tradition had run them for centuries; and that there are no constitutional objections to running them as atheists want them run?

37. Id. at 231.
Did Father John Courtney Murray, in June of 1945, anticipate the answer in his article “Freedom of Religion”?

“Our subsistent theological disagreements will cease to generate suspicion and separatism on the level of social life, when both sides have the assurance that their opposing theologies of the Church are projected against the background of an ethic of conscience and a philosophy of political life that are based on reason, that are therefore mutually acceptable, and that are not destroyed by the disagreements in ecclesiology. This ethic of conscience and this political philosophy will stand guarantee that our respective theologies can under no circumstances have such implications in the temporal order as would be injurious to the integrity of conscience, be it Catholic or Protestant.

“It is with a view, not only to following the pattern of the problem itself, but also to working toward this practical concord between Catholics and Protestants, that I would insist on beginning discussion of the problem of religious liberty on the ethical plane. There is also a further reason. It would be unfortunate to see this problem become simply a Catholic vs. Protestant issue. The problem is really much wider, in the form that it assumes in various national scenes, including the American, and in the form that it has on the international level. And there is reason to fear that, while Catholics and Protestants are having a merry dispute, the secularists and totalitarians will move in and solve the problem in their own way—the secularists by evacuating the concept of religious liberty of all ethical content; and the totalitarians, by forcibly destroying the concept itself, whatever its content. The differences between Catholics and Protestants are very real and important; no less real and important is the necessity of seeing that two common enemies of each do not triumph over both. There is a stand to be made against secularism, which makes freedom of religion mean freedom from religion, and which is particularly dangerous in its denial of the relevance of religion to social order and public life. And there is a stand to be made against totalitarianism, which destroys freedom of religion by destroying religion itself, through the imposition of the cult of the absolute State. The stand against these two enemies can be made on the ground of human reason and the natural law, that define the nature of the human conscience and the nature of the State. On this ground, therefore, Catholics and Protestants can make a common stand, as an act of good-will—a will that has for its object a common good."

What is particularly disturbing about the McCollum case is that it has put the Supreme Court, and by it the American Constitution, on the side of secularism which is a this-worldly “religion.” And secularism is only one vestibule removed from the “totalitarianism which destroys freedom of religion by destroying religion itself.” There is no better way of destroying religion itself than by unrooting it from the hearts of young people. The next best way is the way indicated by the Supreme Court

38. VI Theological Studies 240 (June 1945).
decision itself. It is the way of seeing to it that religion never gets rooted into the hearts of young people by means of their educational system. The Supreme Court now says that a constitutional amendment which aimed at establishing freedom of all religions means freedom from any religion in our public school system.

In this connection I find Jacques Maritain more intelligible and with absolutely no Fascist overtones:

"The great conclusions of the modern world are memories of the unity which has been lost. It is metaphysically impossible for it to recover peace without justice, that is to say, in the first place, without the submission which is owing to God—and unity, without the principle of unity on this earth, that is to say, without the effective acknowledgment of the supremacy of the spiritual power. Men may listen to the truth or they may not, the truth must still be told."\(^{39}\)

Furthermore, it seems a little odd that a man who seems so obsessed with the notion of national unity as Mr. Justice Frankfurter should hope to encourage that unity and a pervasive spirit of cohesion by the alleged "great American principle of eternal separation between Church and State." You do not unite people by building impregnable walls between them. It is foolish to seek to unite them by merely political or legal tools. There can be no unity on the basis of a lowest common denominator of conviction or creed.

\(^{39}\). Maritain, The Things That Are Not Caesar's 79 (1931).