FRANK JOSEPH SORAUF

The Wall of Separation

The Constitutional Politics of Church and State

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To four of my teachers,
to whom this book and its author
owe a great deal:

LEON D. EPSTEIN
DAVID FELLMAN
RALPH K. HUITT
WILLIAM H. YOUNG

PREFACE

This project has been "in progress" for an inordinately long time. On occasion, in fact, the progress was almost imperceptible. To the best of my recollection it all began in 1962, and the field interviewing extended intermittently between 1963 and 1972. Work was interrupted by a departmental chairmanship and a venture into academic administration, as well as by the usual academic responsibilities. I mention this little bit of history chiefly to indicate how much I often depended on the help of others to keep the project moving forward. It will also explain in part how I came to be obliged to so many people.

My debts in this study are of many kinds. Not the least of them is to the agencies that supported it, especially its considerable field research. The John Simon Guggenheim Foundation and the College of Liberal Arts at the University of Minnesota, through its McMillan funds, both supported me generously. The Graduate School of the University of Minnesota was both generous and patient, making more research grants to this project than anyone might wish to remember. I am especially grateful to those Graduate School committees for their continuing confidence.

A number of undergraduate and graduate assistants helped me in many important ways over the years. They worked chiefly in the library data-gathering tasks and in the coding and management of the data. Some of them worked so long ago that they must surely have forgotten about the project. In alphabetical rather than chronological order they were Gary Engstrand, John Erickson, Eugene Gaetke, Caroline Wolf Harlow, Michel Nelson, R. Chris Perry, Rolf Sonnesyn, Louis Vincent, and Herbert Weisberg. The late Frank Ashman worked courageously and all too briefly.

The field interviewing was entirely my responsibility, and in it I met an encouraging helpfulness everywhere I traveled. Busy people interrupted their schedules to talk with me, and their candor and cooperation contributed enormously to this volume. Their friendliness, interest, and hospitality remain very pleasant memories. I could not begin to mention all of these individuals, and so

I will mention none. Should any of them read this preface, I hope they will accept these thanks as if they were more personal.

My researches carried me repeatedly to the files and archives of the American Civil Liberties Union, the American Jewish Congress, and Americans United for Separation of Church and State. The various librarians at all were unfailingly helpful. For additional assistance and courtesies I should like to record special thanks to Franklin Salisbury of AU and to Leo Pfeffer and Joseph Robison of AJC. Augusta Winkler and Sophie Zerlanko of the AJC were also kind far beyond the call of duty.

As this manuscript began to materialize, Gloria Priem typed two drafts in her usual calm and reliable way. My secretary, Gloria Thayer, helped in many ways. Jeanna Struthers helped tremendously in reading the page proofs. Leo Pfeffer and Joel Grossman read the first of those drafts and saved me from many inaccuracies and misjudgments. I am especially obliged to them for their careful and thoughtful readings. Those shortcomings which remain do so despite their warnings. Finally, I am also grateful for the patience of Sanford Thatcher and the Princeton University Press in waiting through those last, very slow years.

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I THE CONSTITUTION AND THE SEPARATION

Aphorisms about the growth and exposition of the American Constitution center largely on the judges. In the famous words of Charles Evans Hughes, "We are under a Constitution, but the Constitution is what the judges say it is." The Supreme Court itself is, depending on the commentator, "the living voice of the Constitution" or "almost . . . a continuous constitutional convention."[1] It is as if we reveal all of constitutional politics when we part the veils that surround the judges and their judgments.

Yet if the Constitution is what the judges say it is, it is also true that the range of the judges' options is sharply limited. They are not roving Robin Hoods in search of injustice, nor are they constitutional draftsmen in pursuit of constitutional ambiguity or anomaly. They are, above all, prisoners of the cases brought to them, trapped in the facts and the arguments of the litigants who bring the cases. It advances the cause of realism in American constitutional law to say that the Constitution is what the judges say it is. But it also advances that cause to recognize that the Constitution is both what others permit the judges to say it is, and what they recognize the judges to have said it was.

In no way does it denigrate the appellate courts to explicate the roles of other actors in the judicial process. It is a commonplace that the appellate courts are passive instruments, that they are largely limited to deciding the issues others bring to them. If it is important to understand the passive actors, it is also useful to study the active initiators. Groups and individuals decide—sometimes purposefully, sometimes willy-nilly—which issues will appear on the judicial dockets and which ones will not. They and their attorneys decide in what form questions will come to the

[1] The Hughes words apparently came from a speech made in 1907 in Elmira, New York; President Franklin Roosevelt "immortalized" them by quoting them in a fireside chat on March 9, 1937. The next two quotations, in order, belong to James Bryce, *The American Commonwealth,* rev. ed. (New York: Macmillan, 1931), vol. 1, 273; and to Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York: Vintage, 1941), pp. x–xi.

courts, in what facts and argument they will be encased. Others in this subtle interplay will assess the judicial decision, gauge its impact, even assure its enforcement and, perhaps, also take the next step in the process by posing a new constitutional question.

In looking at the colloquy between constitutional litigators and the courts, one can imagine it as an episodic, almost random dialogue. A much-vexed taxpayer or a heavily pressured school board, for example, reacts to purely local conditions and precipitates action that raises constitutional issues. The courts eventually decide, and that body of constitutional law then awaits the more or less random occurrence of another controversy—related perhaps only distantly to the previous one—to come to it or to the high court of another jurisdiction. In some areas of American constitutional law, however, the process is considerably less haphazard. Large national groups have organized and structured the litigation of constitutional questions with a considerable degree of proficiency. In these instances the initiating groups have raised the quality of their interchange with the courts to something approaching a Socratic dialogue on some clause of the constitution. Probing question preceeds precise—perhaps even cagey—answer, which in turn suggests—even invites—the next artful query. And in the dialogue, even when it is far more fragmented and discontinuous, one must understand the questions and the questioners if one is to understand the answers.

Even a full accounting of the actors and the actions within the judicial process, however, does not wholly depict the politics of constitutional growth and interpretation. Constitutional issues and actors wander freely across the unmarked borders between the judicial process and political processes in the other branches of government. Litigants often, indeed, try to convert losses or inattention in those other processes into victory in the courts. Decisions in the courts, moreover, have impacts and consequences far beyond the judiciary. Constitutional decisions, especially, have a forceful impact on the subsequent making of public policy; they may also spur constitutional amendments and battles over compliance and enforcement. So although it is true that the authoritative constitutional interpretations are the work of the courts, the broader politics of constitutional development can touch virtually any point or institution in the entire political process.

This is the point of view from which this study departs. In more specific terms, it is the story of litigating one area of constitutional

law—that on the separation of church and state—in American appellate courts from 1951 to 1971. It portrays the plaintiffs, attorneys, and the groups bringing the litigation, their strategies and goals, their successes and failures. It suggests, as well, something of the community context and group conflict in which the litigation develops, and of the broader policy problems and social attitudes behind it. It is an attempt to chronicle the entire process and politics of litigating one area of American constitutional law, and in so doing, to say something more generally about the politics of constitutional growth.

At the same time, it is the story of some of the most anguished constitutional controversies of the time. Only the furor over desegregation and the rights of racial minorities rivaled the intensity of feeling on prayer in the public schools, or public aid to private religious schools. These were not only constitutional questions of baffling complexity and closely matched equities. They were also issues of public policy to excite the most fervent beliefs and to test the resilience of American religious heterodoxy. It is, too, a story whose plot is matched by its dramatis personae. Madalyn Murray O'Hair's assaults, first against prayer in the city schools of Baltimore and then against virtually all public religious influences in American society, made her perhaps the best known of all constitutional plaintiffs. But she was not alone. There were at all points dozens of other committed individuals, and an impressive array of local and national litigating groups.

THE CONSTITUTIONAL CASES

From 1951 through June of 1971, high American appellate courts decided a total of sixty-seven cases primarily concerned with constitutional issues of church-state separation. They are the subject of this book, for it is their origin, their issues, their sponsorship, their decision, and their aftermath that form the recent development of this one area of American constitutional law. The great majority of these cases, fifty-nine in all, originated in state courts. All of them reached the highest state appellate courts, and six of them were ultimately decided by the United States Supreme Court. The remaining eight originated in the federal courts; four progressed only as far as a court of appeals, and four went to the Supreme Court for substantive decision. All of these cases, in other words, have reached either a high state appellate court or a federal

appellate court. Furthermore, they are the only cases between 1951 and 1971 to have raised substantial constitutional questions of church-state separation in those courts. They are the universe of constitutional cases in that period, and taken together they are the constitutional precedents—the known, reported, and final decisions—available to judges and legal scholars.[2]

While the sixty-seven cases all raise questions of church-state relationships, some raise them under state constitutions, some under the U.S. Constitution, and many under both. In general those questions can be embraced by the enduring metaphor of the wall of separation between church and state; under the U.S. Constitution they are the cases argued under the "no establishment" clause of the First Amendment.[3] As a matter of logic rather than constitutional law, these separation cases fall easily into two subcategories. There are those that involve public aid or support to some religious practice or institution: aid to religious schools or hospitals, for example. And there are issues of religious influence in public life—questions, for instance, of prayer or Bible-reading in public schools or crosses in public parks.

Even within one carefully defined area of American constitutional law there is, however, a rich diversity of conflict that the two subcategories do not begin to disclose. The largest single number of the cases (12) touched on questions of transporting pupils in religious schools at public expense. (In the 1950s, one must remember, "busing" was an issue of separation of church and state!) Another 10 cases involved prayer or Bible-reading in the public schools. Indeed, the overwhelming majority of the cases (43 of the 67) in some way or another involved the elementary and secondary schools, either public or private religious schools. The nonschool cases included those questioning tax exemptions for religious buildings, aid for buildings at religious colleges and universities, a cross on public property, and the reference to the Deity in the pledge to the flag.[4]

The settings of the sixty-seven cases are equally diverse. They

[2] Appendix I describes at greater length the criteria used in identifying this universe of cases.

[3] The reader will note, therefore, that there are no cases concerned with issues of religious freedom (such as those arising under the "free exercise" clause of the First Amendment); see Appendix I.

[4] Some of the cases fall into more than one fact category, and some of these fact categories must be refined additionally. These matters will be further developed.

came from every part of the country: from Maine to Florida, and from Washington to Arizona and California. Two originated in Alaska, and one in Hawaii. They came from New York City and other metropolitan centers, but they also came from small towns in isolated Appalachian valleys. They came from the areas of heaviest Roman Catholic strength—the states of Connecticut and Rhode Island—and from areas of Southern Protestant fundamentalism. There are cases from areas of greatest Jewish population, as well as from the special religious strength of Buddhists and Shintoists in Hawaii and Mormons in Utah.

The diversity of the sixty-seven cases extends, furthermore, to differences in their importance in the fabric of American constitutional law. Among them are the "great" cases, those that produced a vast and public impact, and dot the casebooks and the commentaries. Among them would certainly be the prayer and Bible-reading decisions of 1963 and 1964 (*Engel* v. *Vitale, Schempp* v. *School District,* and *Murray* v. *Curlett*) and the clutch of decisions in 1971 ruling on direct state aid to religious schools (especially *Lemon* v. *Kurtzman* and *DiCenso* v. *Robinson*).[5] But also included are cases of little or no note. There is one man's quixotic attack on the national motto "In God We Trust," a case decided with the briefest possible per curiam paragraph (*Aronow* v. *U.S.*). There is also a case (*Miller* v. *Cooper*) charging religious influences in the public schools of Lindrith, an unincorporated and virtually uninhabited town in the northwest section of New Mexico. Obviously, no criterion of intrinsic "importance" has governed the selection of the cases. All cases decided in the time period and in the specified appellate courts, and that raised substantial issues of church-state relations, are here.

THE INTERESTS AND THE PARTIES

It is in the nature of the adversary conflict in these cases that the plaintiffs generally acted on behalf of a "separationist" interest. They were objecting to some government program of aid to religion, some entanglement of government with religion, or some religious influence in public life. The public policy against which they acted seemed not to keep church and state sufficiently apart. Occa-

[5] The sixty-seven cases are listed with full citations at the end of Appendix I. They will be footnoted in the text only where more specific notation or comment is necessary.

sionally the plaintiffs were "accommodationists"—that is, they sought closer cooperation (or a less distant relationship) between church and state. Plaintiffs in West Virginia argued, for example, that private school pupils were discriminated against by a school board decision to bus only children going to the public schools (*State ex rel. Hughes* v. *Board of Education*). But there were only ten accommodationist suits out of the sixty-seven.

Also as a matter of the logic of these adversary cases, the accommodationist defendants were usually a governmental body. They were, in other words, the governmental authorities that had in some way brought (or permitted the bringing of) church and state together. Not surprisingly, the most common defendant was a local school board or district; these appeared as the defendant (or one of the defendants) in thirty of the cases. In many of these cases, of course, the defendant may have acted only as a proxy in wedding church to the state. Consider the case of school boards that appeared as defendants in cases challenging the transportation of children to private religious schools. In the majority of those cases the school boards were merely providing bus service at the insistence of a mandatory state law. In some instances, indeed, the members of the boards may have been personally and collectively opposed to the law, either because of convictions about church-state separation, or because they preferred to spend school funds for other programs. Thus "interests" in these cases were not as clearly defined as one might suspect. The nature of the case or controversy in the American court system casts the action in adversary terms, and often "creates" a sharper or different confrontation of interests than exists in reality.

We thus have two broad categories of interest in church-state relationships: the "separationists" and the "accommodationists." Each, however, contains a wide range of positions on church-state relationships. The lines dividing the two camps shift from case to case. A little-known case from Seattle (*Calvary Bible Presbyterian Church* v. *Regents of University of Washington*) illustrates the problem. Ministers of the Bible Presbyterian Church charged that a course on the Bible as literature taught at the University of Washington reflected only one or some theologies of the Bible, and by reason of that selectivity amounted to an establishment of religion. The state affiliate of the American Civil Liberties Union, whose views are usually strongly separationist, supported the university and its interpretation of academic freedom. Nomi-

nally, at least, the ACLU unexpectedly found itself in an accommodationist camp.

Part of the problem, of course, is in the easy use of the "separationist" and "accommodationist" labels. Both cover and embrace a considerable range of views. The "separationist" tag, at least, has some philosophical or constitutional point of reference in the Supreme Court's explications of the "no establishment" clause. But the "accommodationists" have little more in common than their collective role as defendants in most of this litigation. It would certainly be unfair and inaccurate to imply that their position is 180 degrees opposite that of the separationists. In many instances, indeed, they are only some small distance away from the separationists; but even small ideological distances can foster substantial constitutional conflict. Writers and scholars in the field of church-state law have been notably uncertain what to call these interests and groups on "the other side." On behalf of the term "accommodationist"—awkward though it surely is—one can at least say that it is more defensible than "antiseparationist," and that it is winning the slow battle of general usage.

THE SETTING

On one day in late June, 1971, the Supreme Court, in a veritable frenzy of judgment, disposed in one way or another of eight church-state cases. Most prominent among them were the challenges to direct aid to religious schools in Pennsylvania and Rhode Island, and to Congress's construction grants for religious colleges and universities. As a terminal date for the cases of this study, that day marks, if not the end, at least a point of culmination in several decades of increasingly feverish litigation on the constitutional separation of church and state.

And feverish it was by any standards. The pace of the litigation accelerated steadily from 1951 to 1971; over half of the cases—thirty-four of the sixty-seven—were decided in the last third of the period, the years between 1965 and 1971. And it overshadowed any earlier period of church-state litigation. The eight cases decided in the United States Supreme Court in the period were, for example, more than the Court had decided in its entire prior history. Church and state came very late to the U.S. Supreme Court. The entire body of major precedents in the area contains only two decided before 1951, and both of them were decided

in the 1940s: the New Jersey bus case (*Everson* v. *Board of Education*), and the released-time case from Champaign, Illinois (*McCollum* v. *Board of Education*).[6]

Behind such swiftly moving constitutional litigation were the events of a very turbulent period in American religious history. The period from 1951 to 1971 includes, quite incredibly, both a period of religious revival and a time of religious decline. Paradoxes and ironies abound. For Roman Catholics they were decades that saw Bishop Fulton Sheen become a television celebrity, and John F. Kennedy become president of the United States; and yet the period culminated in the decline of a parochial school system that had been the envy of Catholics in the rest of the world. For Protestants the years were rife with reform and change; it was a time of ecumenical movements and church mergers, of theological and doctrinal change, of radical social ethics and involvement. But for all of that, at least by the 1970s, it was, ironically, the conservative and fundamentalist Protestants, the groups least touched by the currents of the period, that seemed to flourish most.

Above all, these were the years of the dismantling of the "Protestant Establishment." There had indeed been an implicit or silent American religious establishment, and it had been Protestant. The American social, economic, and political elites had been largely Protestant, and public piety—whether in the schools, in the public calendar, or in celebrations and occasions—had been largely Protestant. But all of that came to an end in the years after World War II. Catholics and Jews challenged it, and so did nonbelievers and secular humanists. Both those challenges and the public policies to which they led eventually found their way to the courts. They ultimately led to the first fully sustained development of an American constitutional law of church-state relations.

[6] 330 U.S. 1 (1947) and 333 U.S. 203 (1948). There had, of course, been earlier church-state decisions (see, for example, *Bradfield* v. *Roberts*, 175 U.S. 291 [1899]), but the Court's decisions in those cases were either narrowly or ambiguously framed.

II THE LEGAL AND RELIGIOUS CONTEXT

The period from 1951 to 1971 was for almost every major religion in the United States a period of questing and questioning. Virtually every tradition and orthodoxy came under fire, and the settled conventions were challenged by movements as diverse as ecumenism and the use of popular music in religious services. It was also a time of rapid, confusing, enormously disconcerting change. In the early 1950s, for example, religious denominations were noting impressive gains in memberships, in Sunday worshippers, and in financial resources. Not much more than a decade later church attendance began to fall off, and national denominations admitted a crisis in declining contributions.

Perhaps no religious group or body better illustrates the changes in these two decades than the Roman Catholic church. Long one of the strongest and most thriving of the national churches in Catholicism, it saw the departure of large numbers of priests and nuns, and by the late 1960s its once affluent system of parochial schools was deep in financial crisis. Changes in the forms of worship and religious obligation—away from the Latin mass and the ban against meat on Friday, for instance—were only one indication of the winds of change set loose by Pope John XXIII, the Vatican Council, and young American priests and theologians. Never the authoritarian monolith that many Protestants (and some Catholics) had imagined, the American Catholic church went through perhaps the greatest challenges to the authority of the hierarchy it had known since the Reformation. Lay groups began to question the power of the bishops and win a growing voice in the management of the Catholic schools, the parishes, and even the dioceses. Councils of priests even began to be formed, and by the 1970s they had in a few celebrated instances expressed votes of "no confidence" in the hierarchy.

That such a period of religious change and crisis should have been the period during which we had such extensive litigation of church-state relations is no accident. In some instances the rela-

tionship between these trends and constitutional litigation is transparent. The problems of organized religion became public problems; the crisis of the parochial schools gave rise to public aid, and that in turn led to constitutional litigation. In other instances the tie is less obvious. Perhaps a time of religious controversy and change exacerbates latent religious conflict by publicizing differences and dissatisfactions. Perhaps, too, each erosion of religious authority and solidarity invites a challenge.

Whatever the explanation, the two decades from 1951 to 1971 also saw the growth of an impressive body of constitutional law on the separation of church and state. Many of its most perplexing problems were decided by appellate courts for the first time in the period. The nine church-state cases the Supreme Court decided from 1962 to 1971 were more than it had decided previously in its entire history. There is probably no avoiding the treatment of these sixty-seven cases as more or less bleeding chunks of litigation ripped from the contexts both of our religious life and the broader political conflicts over public policy. But one should at least know something of the context from which they are taken.

ORGANIZED RELIGION, 1951–1971

The change and diversity that mark American religious life in the 1950s and 1960s complicate the task of making quick but intelligible summary statements about it. To some extent the currents and countercurrents, the little eddies, and even the backwaters that one saw depended where one stood in the stream. From the viewpoint of eventual constitutional litigation on church-state issues, however, one could identify four significant trends.

The Return to Religion

In the less churchly days of the 1970s it is difficult to remember that less than a generation earlier Americans talked widely, and with no little self-satisfaction, of a "return to religion." There was considerable confidence that the materialism of the 1930s and the war years had been overcome, and preachers such as Bishop Fulton Sheen and the Reverends Billy Graham and Norman Vincent Peale became national celebrities. The "return" was symbolized for many Americans by the election in 1952 of Dwight D. Eisenhower to the presidency. A somewhat late convert to the strengths of organized religion himself, President Eisenhower put the stamp

of officialdom on the religious revival with prayer breakfasts, regular church attendance, and homely exhortations at press conferences.

A good deal of popular culture also reflected the return. Religious works dotted and even dominated the nonfiction best seller lists in the early 1950s. In 1953, for instance, the top ten sellers for the year included the new Revised Standard Version of the Bible (about three million sold in that year and the preceding one), Norman Vincent Peale's *Power of Positive Thinking,* Bishop Sheen's *Life Is Worth Living, A Man Called Peter* (a biography of a young and noted minister by his widow), and *The Greatest Faith Ever Known.* The Peale volume, in fact, made the top ten list for all four years between 1952 and 1955, one year more than did the Revised Standard Version.[1] Popular magazines such as the *Reader's Digest* became the medium—if not the message itself—of the revival. From 1951 through 1954 Episcopal Bishop Henry Knox Sherrill, Rabbi Louis Finkelstein, Bishop Fulton J. Sheen, Bishop Otto Dibelius, Pope Pius XII, the Archbishop of Canterbury, and the Reverend Billy Graham all graced different covers of *Time* magazine.

The religious revival did not, however, proceed without criticism. One conspicuous and much-published critic deplored the "piety along the Potomac."[2] Serious religious thinkers and theologians deplored it as middle-class, simplistic religion; distinctions appeared between piety and piousity. And indeed, at its most banal, the new religious renaissance was an inviting target. Much of it (the power of positive thinking, for instance) seemed to have more to do with Dale Carnegie, a revival of Couéism, or the psychology of success than it did with theology or serious ethical thought. Much of the criticism also pointed out—quite correctly in many cases—that the return to religion was bound up with the contemporary crusade against domestic and international communism. Indeed the enemy came to be known—positively, if a bit redundantly—as "godless atheistic communism." A somewhat nationalist religion in some quarters justified the excesses of Senator Joe McCarthy's search for domestic communists. And a good

[1] The listings come from Alice Payne Hackett, *Seventy Years of Best Sellers* (New York: Bowker, 1967); it relies in turn on the sales data of *Publishers' Weekly.*

[2] See, for example, William Lee Miller, "Religion, Politics, and the 'Great Crusade'," *Reporter* (July 7, 1953), pp. 14–16; and "Piety along the Potomac," *Reporter* (August 17, 1954), pp. 25–28.

deal of the public religiosity of the time had as its rationale the strengthening of the moral fiber of American youth against the seductions of godless alien doctrines.

The policy consequences of religious education expanded as young students trouped for an hour or two every week from their public schools to local churches, parish houses, and synagogues for religious instruction. Public educators explored new ways of teaching moral and spiritual values, and of teaching "about" religion in the public schools. And prayer and Bible-reading entered the public schools in parts of the country in which those practices had earlier been rare or unknown. Even into the sixties and seventies, indeed, the fragments of this movement for public religiosity struggled to the verge of success in writing into the U.S. Constitution an amendment permitting prayer in the public schools.

The Crisis in Religious Education

For signs of the crisis it is again easiest to take the Roman Catholic schools and institutions of higher education as examples. The parochial school system, less than a generation earlier the pride of American Catholicism, was by 1971 closing fifty elementary schools a month. Pressures mounted in the late 1960s for aid to keep religious schools open; the alternative, proponents warned, was the closing of the parochial schools and the dumping of millions of new pupils onto the public education system. Signs on religious schools in various parts of the country proclaimed them "the taxpayer's best friend." And a national interest group, Citizens for Educational Freedom, grew to maturity in the fight for state legislative aid for religious schools.

To be sure, the crisis in the religious schools extended beyond Roman Catholic institutions. But by sheer bulk the problem was largely a Catholic problem. About ninety percent of the pupils enrolled in religious schools, elementary and secondary, were Catholic. Furthermore, by general agreement, the problems of the Catholic schools were qualitatively, as well as quantitatively, more severe than those of Lutheran, Reformed, Jewish Orthodox, Episcopal, or other schools. And Catholic colleges and universities tended to maintain closer ties with the church, in contrast, say, to the attenuated relationships that characterized the nominally Congregationalist or Presbyterian colleges. Most important, the crisis in the religious schools and the search for public aid were perceived in terms of Roman Catholicism by many Americans.

Certainly it is no secret that the struggles over state aid to religious schools awakened some identifiable old anti-Romanism.

The reasons for the crisis in the religious schools are not easy to sort out. Certainly the Catholic parochial schools were caught in a cost squeeze, and one component of the squeeze was the increasing inavailability of nuns, priests, and brothers to staff the schools. In 1970 a majority of the teachers in Catholic elementary schools were lay people, while only a decade earlier they had been a third. Catholic schools were also troubled in many of the older cities with deteriorating physical plants and with families migrating out of the area to the suburbs. Part of the cost squeeze, too, resulted from lower levels of Catholic support for the schools, part of the phenomenon of generally lower levels for all religious giving.

The crisis gave rise directly and clearly to a remarkable campaign for state aid to religious schools. (That form of aid came to be called "parochaid." In some quarters the term has pejorative connotations, but none is suggested here.) By the time of the Supreme Court's decision in mid-1971 eleven state legislatures had passed some form of parochaid. On June 28th the U.S. Supreme Court struck down three of the first state laws, but the battle continued in the courts and legislatures to find some form of aid that could pass muster under the First and Fourteenth Amendments. And to that search for a modus operandi Richard Nixon pledged himself in the summer of 1971 in a public assurance of help and good will to Terence Cardinal Cooke of New York. His opponent in the 1972 election, Senator George McGovern, pledged his help later in the campaign.

Internal Change and Innovation

The shifting theologies, doctrines, and styles within most American religious denominations in the fifties and sixties disturbed and confused even the most devout. Novel and unorthodox theologies sprang up, and in many congregations great gulfs yawned between the preaching of those recently come from the seminaries and theological schools on the one hand, and the multitude's simple faith and belief in a personal God on the other. Old truths and regularities came under question. Some theologians even proposed aphoristically that God was dead.

At the same time substantial minorities, especially among the clergy, developed new social concerns. Priests, nuns, rabbis, and ministers marched with Southern blacks in the freedom marches

of the fifties and early sixties. Later they led a substantial segment of the peace movement and opposition to the war in Vietnam. A heightened social ethic led to new social action, even to radicalism; the Berrigan brothers, both Roman Catholic priests, languished in jail for assaults on selective service records, and were even accused of complicity in a bizarre plan to kidnap Henry Kissinger, then President Nixon's adviser on foreign affairs.

The religious upheaval was manifested in a number of other ways. Priestly rebellions against bishops exemplified the Catholic challenges to religious authority. Protestant seminaries encountered new demands for freedom, and some of their national conventions were wracked by doctrinal debates. And everywhere laymen sought a greater role in the governance of denominations that had had traditions of clerical rule. Ecumenical movements produced new junctures; Congregationalists, for example, joined the Evangelical and Reformed church to make the United Church of Christ. And new forms of religious worship shook the more traditional liturgies. Roman Catholics dropped Latin from the mass, and the sounds of folk and rock music became more common in the new ways of worship.

The political result of all of these changes has been a further splintering of the political voice of organized religion. It had always been the case that denominations differed in public policy debates; now it was increasingly the case that single denominations were also divided. There were Roman Catholics opposed to aid to religious schools, as well as those in favor of it. Protestants were increasingly divided on the wisdom of tax exemptions for religious property, and the social concerns of the National Council of Churches embroiled it in continuing controversy with more conservative Protestants. There were new internal pressures within almost all denominations in favor of cutting ties with public authority; the possibility of legalizing prayer in public schools drew increasing opposition from within the churches. In short, organized religion began to speak with an ever more divided voice, and with a voice robbed of some ring of authority by criticism and opposition from within.

New Moralities and Ethics

The twenty years of this study were years in which the Protestant domination of American life and culture largely ended. In the immediate sense, much of the public religiosity that was ended in

that period was Protestant in nature. But in more general matters of morality, too, it was the end of the dominant Protestant ethic in American life; gone was the ethic of work and industry, of frugality, and of a stern sexual morality. Just as organized religion in the United States endured substantial internal convulsions in the fifties and sixties, it also faced enormous external challenges to its prevailing ethic.

It was above all a time of loosening the old moral constraints. So great was freedom in the arts—all of them—that by the early seventies one could seriously wonder if terms such as "obscenity" or "pornography" could any longer sustain any meaning. Nudity and sexual explicitness became art forms in themselves and, indeed, captured a substantial part of the book and movie market. The open, serious discussion of birth control, sexual love, and abortion that was common in 1971 would have been unthinkable twenty years earlier. One cannot, of course, group all of the new moralities together. They ranged from the brittle and casual hedonism of *Playboy* magazine to the earnest debates over such issues as abortion reform. They nonetheless shared a common challenge to the traditional Judeo-Christian morality.

At the same time, millions of Americans by the late sixties and early seventies increasingly rejected traditional, organized religion. Church attendance and financial collections declined. A Gallup poll in early 1972 showed weekly church-going down to 40 percent in 1971 from 49 percent in 1958. Opinion polls also indicated that belief in the old verities—a God, personal salvation, eternities in heaven or hell—had also declined. A *Newsweek* poll in mid-1971 disclosed that 58 percent of American Catholics thought that a good Catholic could ignore the church's position on contraception, and 53 percent thought priests should be permitted to marry.[3] An increasing percentage of Americans did not identify with any religious denomination, and young Americans were especially wary of traditional religion. The impressive denominational centers that ringed the campuses of most large American universities fell on especially bad times.

These developments also had their political ramifications. They built a contrareligious sentiment, while they challenged the prevailing religious consensus and hegemony. They provided support for a new American secularism, and perhaps they were also the beginning of a vague, still inarticulate American anticlericalism. Ameri-

[3] *Newsweek*, October 4, 1971.

can society had always had a small but vocal group of humanists and atheists—sons and daughters of Voltaire, perhaps, or Robert Ingersoll—but they gained new support in the sixties. They threw their weight against attempts to write traditional Christian morality into law, and into legal attempts to broaden the definition of religious freedom. Above all they rejected the influence of traditional Christianity in American public schools.

It was, then, a time of trouble for organized American religion. The changes in American religion, diverse as they were, echoed through American political and legal controversy. Opposition grew up even within the organized religions. The faithful became estranged from their religious leaders. What else is one to make of the vote in the House of Representatives in November 1971 on the constitutional amendment to permit prayer in public places? Despite the opposition of virtually every major religious denomination and a good many religious federations (such as the National Council of Churches), the amendment carried a majority in the House of 240 to 162.[4]

THE CONSTITUTIONAL LAW OF SEPARATION

Almost 150 years in its history passed before the United States Supreme Court confronted the First Amendment. Congress legislated only rarely in areas touching it, and the Bill of Rights had no force against state action.[5] In the mid-1920s, however, the Court finally began interpreting the due process clause of the Fourteenth Amendment to incorporate some of the protections of the Bill of Rights against the states. In 1940, in a case involving the Jehovah's Witnesses, the Supreme Court incorporated the "no establishment" and "free exercise" clauses into the Fourteenth Amendment.[6] For the first time issues of state involvement with religion could easily reach the Court.

The Supreme Court wrote, therefore, on something very close to a clean slate as it decided *Everson* v. *Board of Education* in 1947. Between 1790 and 1945, in fact, it had decided only three cases touching in any substantial way on church-state relationships. In 1899 it held that Congressional payments to a religious hospital

[4] Since the constitutional amendment had to be passed by a two-thirds majority, it was, of course, defeated. See Chapter XIII for a fuller account of the attempts at amendment.

[5] *Barron* v. *Baltimore*, 7 Pet. 243 (1833).

[6] *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

in the District of Columbia—the payments were for the care of the poor—did not violate the First Amendment. The sisters of the hospital were merely providing a public service, the Court held; hence there was no aid to religion. Nine years later the Court upheld payments under a treaty to Roman Catholic schools on an Indian reservation on the ground that they came from treaty funds merely held by the government in trust for the Indians themselves. Then, in 1930, it upheld Louisiana's purchase of nonsectarian textbooks for pupils attending all schools, including parochial schools run by religious denominations. The decision was notable both for announcing the "child benefit" theory—aid was to the child rather than the religious institution, and hence no problem—and for being the only pre-*Everson* establishment case to deal with state action.[7] None of these three early decisions, however, explained in any substantial way what the Court considered an impermissible joining of church and state.

The modern constitutional law of separation begins with *Everson*. New Jersey had authorized local school boards, if they chose, to reimburse parents of children going to private schools for the cost of bus transportation to and from school. The township of Ewing elected to do so, and a challenge to its payments to parents of children attending religious schools eventually reached the U.S. Supreme Court. In a 5–4 decision the Court upheld the reimbursement. The majority opinion, written by Justice Hugo Black, reached back to *Cochran* for the child benefit theory. But while the decision upheld the bus rides for parochial school children, it was enveloped in the language of the most absolute doctrine of the separation of church and state. In construing the "no establishment" clause of the First Amendment for the first time in the Court's history, Justice Black revived the Jeffersonian metaphor of the wall of separation. The clause, wrote Justice Black, means "at least this":

> Neither a state nor Federal Government can set up a church. Neither can pass laws which aid one religion, and all religions, or prefer one religion over another. Neither can force nor

[7] The citation to *Everson* is 330 U.S. 1 (1947). The three earlier cases, in the order discussed here, are: *Bradfield* v. *Roberts*, 175 U.S. 291 (1899); *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908); and *Cochran* v. *Louisiana Board of Education*, 281 U.S. 370 (1930). The *Cochran* case came to the Supreme Court on the assertion that Louisiana was taking private property for a private purpose in violation of the Fourteenth Amendment.

> influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.' . . . That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.[8]

The majority had succeeded, if "succeeded" is the right word, in combining the strictest separationist rhetoric with an accommodationist outcome.

The *Everson* result pleased very few. The four-man minority on the Court rejected the dichotomy between aid to the child and aid to the school. And for the gulf between rhetoric and outcome, Justice Jackson had only scorn. It reminded him of Byron's Julia, who "whispering 'I will ne'er consent'—consented."[9] Separationists not on the Court were displeased with the outcome, and Catholics, although pleased with the legitimizing of bus transportation, quickly saw the greater loss they suffered in the explication of the First Amendment's few words on establishment.

Just a year later, in the *McCollum* case, the Court confirmed the worst suspicions of the accommodationists.[10] At issue was the "released-time" program of the Champaign (Illinois) schools, in which students were released from their usual classroom responsibilities for an hour every week for instruction in the religion of their preference. The Court held that the public aid to the program of religious instruction—especially the free use of school buildings, and administration and supervision of the program—constituted a degree of aid forbidden by the "no establishment" clause. Only Justice Reed dissented, although a concurring opinion was at pains

[8] 330 U.S. 18.
[9] *Ibid.*, p. 19.
[10] *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

to point out that the decision was not a rejection of any and all varieties of released-time programs.

That, in substance, was where the constitutional law of church-state relationships under the U.S. Constitution stood in the late 1940s, when the earliest of the sixty-seven cases under scrutiny here began to reach trial court hearings. The corpus of constitutional litigation included only five cases; and only two of those came from the contemporary court. The legal aftermath of *Everson* and *McCollum* was one both of debate and uncertainty. The Court reaped more than a full measure of criticism for the two decisions: Justice Black, in a dissent in 1952, confessed, "I am aware that our *McCollum* decision . . . has been subjected to a most searching examination throughout the country. Probably few opinions from this Court in recent years have attracted more attention or stirred wider debate."[11] Litigating groups, or anyone else searching the two decisions for auguries, found that the cues were mixed. There was much rhetoric and rationale that encouraged the separationists and discouraged their opponents; a very sizable majority of the Court seemed agreed, at least in principle, on an unqualified, absolute separation of church and state. And yet the willingness to separate aid to individuals from aid to religious institutions left doubts about the application of the separationist words to real cases.

Between 1951 and 1971 the Court did clarify its intentions and stake out the major outlines of a constitutional law of church-state relations. In that period it decided ten cases bearing directly on the "no establishment" clause, exactly twice the number it had decided in the preceding 162 years of activity. Indeed, only one of the ten—the decision in *Zorach* v. *Clauson,* the New York released-time case—came between 1951 and 1961, leaving the 1961–1971 period as the time of major development.[12]

The ten Supreme Court cases fall into a small number of categories of fact. The first of them, *Zorach* v. *Clauson,* held in 1952 that the New York City released time differed enough from that in Champaign to pass the litmus tests of constitutionality. Religious groups held their classes in places other than the public schools, and they, rather than public school authorities, selected teachers and administered the program. A second case, *Walz* v. *Tax Com-*

[11] *Zorach* v. *Clauson,* p. 317.

[12] Citations to the cases of 1951 to 1971 (and thus the data of this study) can be found in Appendix I.

mission, brought to the Court for the first time (in 1970) the issue of tax exemptions. The Court held that the granting of a tax exemption was not an aid or subsidy to organized religion but simply a legislative decision not to force the church to support the state.

The eight remaining cases fall into two groups of four apiece. Four of them, all decided between 1962 and 1964, dealt with religious observances in the public schools. In 1962 the Court, in *Engel* v. *Vitale,* struck down the saying of a prayer written and recommended to local school districts by the New York Board of Regents:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.

A year later it ruled against reading the Bible and saying the Lord's Prayer in the public schools (the *Schempp* and *Murray* cases). The fact that the observances were formally voluntary did not save them; the Court appeared to take the position that any act of religious instruction or devotion in the public schools would fall. Only Justice Potter Stewart dissented in the three cases. The fourth case in this set was little more than a summary application of these full-length decisions to a case (*Chamberlin* v. *Dade County*) challenging a number of religious practices and observances in the schools of Miami.

The final set of four cases all came within the years 1968 to 1971, and all dealt with government aid to religious schools. The first of the cases, *Board of Education* v. *Allen,* upheld the New York state program in which textbooks for secular subjects were lent to pupils in religious schools. The Court followed the spirit of the *Everson* decision, to hold that the loan program benefitted the children and their parents rather than the religious schools. On June 28, 1971—the end point of this study—the Court disposed of the other three cases. In one set of opinions it voided both the Pennsylvania and Rhode Island programs of aid to private secondary and elementary schools; Pennsylvania proposed to purchase secular educational services for nonpublic schools, and Rhode Island planned to pay salary supplements to some teachers in private schools whose per pupil expenditure fell below the public school average.[13] In both instances the Court found, with only Justice White dissenting in the Rhode Island case, that the

[13] The two cases are: *Lemon* v. *Kurtzman* from Pennsylvania and *DiCenso* v. *Robinson* from Rhode Island.

programs advanced the cause of religion, and that the result of the programs was to foster an excessive entanglement between government and religion.

Then, on the same day and by the narrowest of margins—a vote of 5–4—the justices upheld in *Tilton* v. *Richardson* the Higher Education Facilities Act, which the Congress had passed in 1963. It provided construction grants for secular buildings on the campuses of religious colleges. Plaintiffs in Connecticut had challenged the grants to four Catholic institutions for libraries, science buildings, and language laboratories in that state. In certifying the constitutionality of that law the Court distinguished between elementary and secondary schools on the one hand and colleges and universities on the other. Religious education and indoctrination was the chief mission of most of the former, but not of the latter; students in the former, too, were more susceptible to religious influence than were college students. In short, they said, the religious influences, mission, and control of the religious colleges and universities were considerably less marked and less important.

The pattern of these ten Supreme Court cases relates directly to the currents and concerns of their time in American religious life. The first of them, *Zorach* v. *Clauson,* may be considered a follow-up to the *McCollum* decision, and the attempt of released-time advocates to fashion a constitutionally acceptable program in its aftermath. The four prayer and Bible-reading cases of the early 1960s follow the public piety of the 1950s, with its heightened attention to religious training in the schools. The four cases testing aid to religious schools and universities follow the emerging financial crisis in religious education and the political pressures in Congress and state legislatures to act on it. And, just as surely, one can anticipate that the next wave of cases in the 1970s will involve new attempts to find constitutionally acceptable ways of aiding those same schools and universities.

Apart from their obvious importance as the prevailing law of the American Constitution, the ten Supreme Court decisions were in effect a succession of cues and hints to litigating groups and individuals in the period. The first of them, in fact, the New York released-time case, chilled the enthusiasm of the separationists for more test cases. Not only was the decision a retreat from the absolutist implications of the *McCollum* case, but the opinion of Justice Douglas was laced with a language far removed from the separationist severity of *Everson:* "The First Amendment, however, does not say that in every and all respects there shall be a separation

of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other—hostile, suspicious, even unfriendly."[14] Furthermore, noted Mr. Douglas, "We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[15] Reasonable men could and did assume that the Court was signalling a sharp turn away from the direction of *Everson* and *McCollum.*

With the advent of the prayer cases a decade later, the Supreme Court began to piece together a more expanded series of tests or doctrines with which to give concrete meaning to the establishment clause of the Constitution. In *Schempp* the Court turned to a double test of the purpose (or intent) and the primary effect of the governmental action. For a law "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[16] In *Walz,* the New York tax exemption case, the Court added another test: whether the end result of the program, the church-state alliance—whatever its intent or purpose—was an "excessive government entanglement with religion."[17] That "entanglement," the Court made clear, must be more than mere aid; it must include a range of possible effects as marked as the setting of state standards in religious schools or the exacerbation of church-state conflict in American politics.

These two tests became the Court's chief guidance in the aid cases in the late sixties and early seventies. Finally, in *Tilton* v. *Richardson,* the Chief Justice pulled them together for the Court, adding another one in passing. Four questions must be considered, he wrote: "First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?"[18] The extent to which

[14] *Zorach* v. *Clauson,* p. 312.
[15] *Ibid.,* pp. 313–314.
[16] At p. 222.
[17] At p. 674.
[18] *Tilton* v. *Richardson,* p. 678.

words such as those provide much of a test in constitutional law is a matter of conjecture. Constitutional doctrines by their nature flirt with platitude or circularity; perhaps it is enough if they reword the central questions in more easily applicable terms. But there is no gainsaying that the words of the Court seemed to many separationists a suggestion of pre-*Zorach* attitudes. That reading, plus a generalized confidence in the libertarianism of the Warren Court, certainly encouraged the pressing of test cases in the 1960s.

Yet, at the same time, the Court assumed a general posture of uncertainty and confusion about the establishment clause. The decisions of the 1960s are full of judicial hand-wringing over the difficulties of giving concrete meaning to the clause. Justice White noted in *Board* v. *Allen* that "the line between state neutrality and state support of religion is not easy to locate."[19] Chief Justice Burger wrote in *Walz* that the First Amendment's two clauses dealing with religion "are not the most precisely drawn portions of the Constitution."[20] Then in *Lemon* v. *Kurtzman,* the Pennsylvania parochaid case: "Candor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law. . . . The line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[21] It was that sense of judicial groping, plus the seriousness of the financial plight of religious schools, that invited the next wave of litigation in the 1970s on new forms of aid, such as tax credits and tuition payments.

The law of the United States Constitution is not, of course, the totality of American constitutional law. Each of the fifty states has at least one section in its constitution affecting church-state relations. Those sections are as diverse as they are frequent. By far the most usual are clauses that state more fully than the U.S. Constitution a concept of no support for religious groups. For example:

> No money shall ever be taken from the public Treasury, directly or indirectly, in aid of any church, sect, or denomination of religionist, or of any sectarian institution.
>
> (Article I, sec. 1, ch. 2–114 of the Georgia constitution)

[19] *Board* v. *Allen,* p. 242.
[20] At p. 668.
[21] *Lemon* v. *Kurtzman,* pp. 612, 614.

In other instances the prohibition against establishment is put in terms of the rights of the individual:

> no man ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience.
> (Chapter I, art. 3 of the Vermont constitution)

In many of the state documents one also finds more specific clauses prohibiting aid to religious schools, either through a specific sanction or through a protected public school fund.

In any event, the diverse state provisions on church and state could not and have not developed apart from the growth of the First Amendment. Both the state and federal constitutional questions are usually pressed in the same cases. Furthermore, the same social and religious currents shape them, and in the shaping process the sheer intellectual force and the greater visibility of the U.S. Supreme Court's decisions mark them for leadership. Finally, of course, the U.S. Constitution is the supreme law of the land, supreme even over the constitutions of the states. The states may, if they wish, erect a higher wall of separation between church and state, but they are prevented by the U.S. Constitution from setting a lower one. Thus, if policy A violates the U.S. Constitution and policy B does not, the states have no choice but to abandon A, but they may also abandon B, if they choose.

In reality, the law of the state constitutions closely follows the interpretations of the Supreme Court under the U.S. Constitution. Several state decisions on parochaid anticipated both the direction and the rationale of the Supreme Court's decisions in June of 1971. And perhaps because of the force of accommodationist pressure, few states have raised the wall of separation much, if any, above the federal minimum height. Only on the question of transportation and textbooks for children attending religious schools have some states been more separationist than the U.S. Constitution. At least six states prohibit such transportation under the terms of their state constitutions, and several ban the purchase of texts.[22]

[22] See Chapter XIII for a fuller reference to these states; Alaska, Delaware, Hawaii, Missouri, Oklahoma, and Washington do not permit bus rides; New Mexico and Oregon have rejected textbooks. Also for a fuller treatment of the state constitutional provisions, see Anson Phelps Stokes and Leo Pfeffer, *Church and State in the United States* (New York: Harper and Row, 1964) pp. 420–425, and Walter Gellhorn and R. Kent Greenawalt, *The Sectarian College and the Public Purse* (Dobbs Ferry, N.Y.: Oceana, 1970), appendix B.