# Jackson: Dissent

MR. JUSTICE JACKSON, dissenting.

I find myself, contrary to first impressions, unable to join in this decision. I have a sympathy, though it is not ideological, with Catholic citizens who are compelled by law to pay taxes for public schools, and also feel constrained by conscience and discipline to support other schools for their own children. Such relief to them as **[p. 19**] this case involves is not, in itself, a serious burden to taxpayers, and I had assumed it to be as little serious in principle. Study of this case convinces me otherwise. The Court's opinion marshals every argument in favor of state aid, and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion, yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering

**I**

will ne'er consent,' -- consented."

**I**

The Court sustains this legislation by assuming two deviations from the facts of this particular case; first, it assumes a state of facts the record does not support, and secondly, it refuses to consider facts which are inescapable on the record.

The Court concludes that this

"legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools,"

and it draws a comparison between "state provisions intended to guarantee free transportation" for school children with services such as police and fire protection, and implies that we are here dealing with "laws authorizing new types of public services. . . ." This hypothesis permeates the opinion. The facts will not bear that construction.

The Township of Ewing is not furnishing transportation to the children in any form; it is not operating school busses itself, or contracting for their operation, and it is not performing any public service of any kind with this **[p. 20**] taxpayer's money. All school children are left to ride as ordinary paying passengers on the regular busses operated by the public transportation system. What the Township does, and what the taxpayer complains of, is, at stated intervals, to reimburse parents for the fares paid, provided the children attend either public schools or Catholic Church schools. This expenditure of tax funds has no possible effect on the child's safety or expedition in transit. As passengers on the public busses, they travel as fast, and no faster, and are as safe, and no safer, since their parents are reimbursed, as before.

In addition to thus assuming a type of service that does not exist, the Court also insists that we must close our eyes to a discrimination which does exist. The resolution which authorizes disbursement of this taxpayer's money limits reimbursement to those who attend public schools and Catholic schools. That is the way the Act is applied to this taxpayer.

The New Jersey Act in question makes the character of the school, not the needs of the children, determine the eligibility of parents to reimbursement. The Act permits payment for transportation to parochial schools or public schools, but prohibits it to private schools operated in whole or in part for profit. Children often are sent to private schools because their parents feel that they require more individual instruction than public schools can provide, or because they are backward or defective, and need special attention. If all children of the state were objects of impartial solicitude, no reason is obvious for denying transportation reimbursement to students of this class, for these often are as needy and as worthy as those who go to public or parochial schools. Refusal to reimburse those who attend such schools is understandable only in the light of a purpose to aid the schools, because the state might well abstain from aiding a profit-making private enterprise. Thus, under the Act **[p. 21**] and resolution brought to us by this case, children are classified according to the schools they attend, and are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths.

Of course, this case is not one of a Baptist or a Jew or an Episcopalian or a pupil of a private school complaining of discrimination. It is one of a taxpayer urging that he is being taxed for an unconstitutional purpose. I think he is entitled to have us consider the Act just as it is written. The statement by the New Jersey court that it holds the Legislature may authorize use of local funds "for the transportation of pupils to any school," 133 N.J.L. 350, 354, 44 A.2d 333, 337, in view of the other constitutional views expressed, is not a holding that this Act authorizes transportation of all pupils to all schools. As applied to this taxpayer by the action he complains of, certainly the Act does not authorize reimbursement to those who choose any alternative to the public school except Catholic Church schools.

If we are to decide this case on the facts before us, our question is simply this: is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?

**II**

Whether the taxpayer constitutionally can be made to contribute aid to parents of students because of their attendance at parochial schools depends upon the nature of those schools and their relation to the Church. The Constitution says nothing of education. It lays no obligation on the states to provide schools, and does not undertake to regulate state systems of education if they see fit to maintain them. But they cannot, through school policy any more than through other means, invade rights secured **[p. 22**] to citizens by the Constitution of the United States. *West Virginia State Board of Education v. Barnette,* 319 U. S. 624. One of our basic rights is to be free of taxation to support a transgression of the constitutional command that the authorities "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S.Const., Amend. I; *Cantwell v. Connecticut,* 310 U. S. 296.

The function of the Church school is a subject on which this record is meager. It shows only that the schools are under superintendence of a priest, and that "religion is taught as part of the curriculum." But we know that such schools are parochial only in name -- they, in fact, represent a worldwide and age-old policy of the Roman Catholic Church. Under the rubric "Catholic Schools," the Canon Law of the Church, by which all Catholics are bound, provides:

"1215. Catholic children are to be educated in schools where not only nothing contrary to Catholic faith and morals is taught, but rather in schools where religious and moral training occupy the first place. . . . (Canon 1372.)"

"1216. In every elementary school, the children must, according to their age, be instructed in Christian doctrine."

"The young people who attend the higher schools are to receive a deeper religious knowledge, and the bishops shall appoint priests qualified for such work by their learning and piety. (Canon 1373.)"

"1217. Catholic children shall not attend non-Catholic, indifferent schools that are mixed, that is to say, schools open to Catholics and non-Catholics alike. The bishop of the diocese only has the right, in harmony with the instructions of the Holy See, to decide under what circumstances, and with what safeguards **[p. 23**] to prevent loss of faith, it may be tolerated that Catholic children go to such schools. (Canon 1374.)"

"1224. The religious teaching of youth in any schools is subject to the authority and inspection of the Church."

"The local Ordinaries have the right and duty to watch that nothing is taught contrary to faith or good morals in any of the schools of their territory."

"They, moreover, have the right to approve the books of Christian doctrine and the teachers of religion, and to demand, for the sake of safeguarding religion and morals, the removal of teachers and books. (Canon 1381.)"

(Woywod, Rev. Stanislaus, The New Canon Law, under imprimatur of Most Rev. Francis J. Spellman, Archbishop of New York and others, 1940.)

It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.

Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development, dating from about 1840. \* It is organized on **[p. 24**] the premise that secular education can be isolated from all religious teaching, so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that, after the individual has been instructed in worldly wisdom, he will be better fitted to choose his religion. Whether such a disjunction is possible, and, if possible, whether it is wise, are questions I need not try to answer.

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.

**III**

It is of no importance in this situation whether the beneficiary of this expenditure of tax raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil, with indirect benefits to the school. The state cannot maintain a Church, and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.

The Court, however, compares this to other subsidies and loans to individuals, and says,

"Nor does it follow that a law has a private, rather than a public, purpose because **[p. 25**] it provides that tax raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. *See Carmichael v. Southern Coal & Coke Co.,* 301 U. S. 495, 301 U. S. 518."

Of course, the state may pay out tax raised funds to relieve pauperism, but it may not, under our Constitution, do so to induce or reward piety. It may spend funds to secure old age against want, but it may not spend funds to secure religion against skepticism. It may compensate individuals for loss of employment, but it cannot compensate them for adherence to a creed.

It seems to me that the basic fallacy in the Court's reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which beneficiaries of this expenditure are selected. A policeman protects a Catholic, of course, -- but not because he is a Catholic; it is because he is a man, and a member of our society. The fireman protects the Church school -- but not because it is a Church school; it is because it is property, part of the assets of our society. Neither the fireman nor the policeman has to ask before he renders aid, "is this man or building identified with the Catholic Church?" But, before these school authorities draw a check to reimburse for a student's fare, they must ask just that question, and, if the school is a Catholic one, they may render aid because it is such, while if it is of any other faith or is run for profit, the help must be withheld. To consider the converse of the Court's reasoning will best disclose its fallacy. That there is no parallel between police and fire protection and this plan of reimbursement is apparent from the incongruity of the limitation of this Act if applied to police and fire service. Could we sustain an Act that said the police shall protect pupils on the way to or from public schools and Catholic schools, but not **[p. 26**] while going to and coming from other schools, and firemen shall extinguish a blaze in public or Catholic school buildings, but shall not put out a blaze in Protestant Church schools or private schools operated for profit? That is the true analogy to the case we have before us, and I should think it pretty plain that such a scheme would not be valid.

The Court's holding is that this taxpayer has no grievance, because the state has decided to make the reimbursement a public purpose, and therefore we are bound to regard it as such. I agree that this Court has left, and always should leave, to each state great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. It may socialize utilities and economic enterprises and make taxpayers' business out of what conventionally had been private business. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. There is no answer to the proposition, more fully expounded by MR. JUSTICE RUTLEDGE, that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business, and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to **[p. 27**] keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends, I cannot but think, are immeasurably compromised by today's decision.

This policy of our Federal Constitution has never been wholly pleasing to most religious groups. They all are quick to invoke its protections; they all are irked when they feel its restraints. This Court has gone a long way, if not an unreasonable way, to hold that public business of such paramount importance as maintenance of public order, protection of the privacy of the home, and taxation may not be pursued by a state in a way that even indirectly will interfere with religious proselyting. *See* dissent in *Douglas v. Jeannette,*319 U. S. 157, 319 U. S. 166; *Murdock v. Pennsylvania,* 319 U. S. 105; *Martin v. Struthers,* 319 U. S. 141; *Jones v. Opelika,* 316 U. S. 584, *reversed on rehearing,* 319 U. S. 103.

But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them. *Pierce v. Society of Sisters,* 268 U. S. 510. Nor should I think that those who have done so well without this aid would want to see this separation between Church and State broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds, only to find that it carried political controls with it. Indeed, this Court has **[p. 28**] declared that "It is hardly lack of due process for the Government to regulate that which it subsidizes."*Wickard v. Filburn,* 317 U. S. 111, 317 U. S. 131.

But, in any event, the great purposes of the Constitution do not depend on the approval or convenience of those they restrain. I cannot read the history of the struggle to separate political from ecclesiastical affairs, well summarized in the opinion of MR. JUSTICE RUTLEDGE, in which I generally concur, without a conviction that the Court today is unconsciously giving the clock's hands a backward turn.

MR. JUSTICE FRANKFURTER joins in this opinion.

\* *See* Cubberley, Public Education in the United States (1934) ch. VI; Knight, Education in the United States (1941) ch. VIII.