# Rutledge: Dissent

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE BURTON agree, dissenting.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S.Const., Amend. I.

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"Well aware that Almighty God hath created the mind free; . . . that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . . ."

"*We, the General Assembly, do enact,* That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief. . . .[[1]](#footnote-1) " **[p. 29**] I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision. Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth.[[2]](#footnote-2) New Jersey's statute sustained is the first, if indeed it is not the second, breach to be made by this Court's action. That a third, and a fourth, and still others will be attempted we may be sure. For just as *Cochran v. Board of Education,* 281 U. S. 370, has opened the way by oblique ruling[[3]](#footnote-3) for this decision, so will the two make wider the breach for a third. Thus, with time, the most solid freedom steadily gives way before continuing corrosive decision.

This case forces us to determine squarely for the first time[[4]](#footnote-4) what was "an establishment of religion" in the First Amendment's conception, and by that measure to decide whether New Jersey's action violates its command. The facts may be stated shortly, to give setting and color to the constitutional problem.

By statute, New Jersey has authorized local boards of education to provide for the transportation of children "to and from school other than a public school" except one **[p. 30**] operated for profit wholly or in part, over established public school routes, or by other means, when the child lives "remote from any school."[[5]](#footnote-5) The school board of Ewing Township has provided by resolution for "the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier. . . ."[[6]](#footnote-6)

Named parents have paid the cost of public conveyance of their children from their homes in Ewing to three public high schools and four parochial schools outside the district.[[7]](#footnote-7) Semiannually, the Board has reimbursed the parents from public school funds raised by general taxation. Religion is taught as part of the curriculum in each **[p. 31**] of the four private schools, as appears affirmatively by the testimony of the superintendent of parochial schools in the Diocese of Trenton.

The Court of Errors and Appeals of New Jersey, reversing the Supreme Court's decision, 132 N.J.L. 98, 39 A.2d 75, has held the Ewing board's action not in contravention of the state constitution or statutes or of the Federal Constitution. 133 N.J.L. 350, 44 A.2d 333. We have to consider only whether this ruling accords with the prohibition of the First Amendment implied in the due process clause of the Fourteenth.

## I

Not simply an established church, but any law respecting an establishment of religion, is forbidden. The Amendment was broadly, but not loosely, phrased. It is the compact and exact summation of its author's views formed during his long struggle for religious freedom. In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was "a Model of technical precision, and perspicuous brevity."[[8]](#footnote-8) Madison could not have confused "church" and "religion," or "an established church" and "an establishment of religion."

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily, it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the **[p. 32**] spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof, the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.

"Religion" appears only once in the Amendment. But the word governs two prohibitions, and governs them alike. It does not have two meanings, one narrow, to forbid "an establishment," and another much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress, and now the states, are as broadly restricted concerning the one as they are regarding the other.

No one would claim today that the Amendment is constricted, in "prohibiting the free exercise" of religion, to securing the free exercise of some formal or creedal observance, of one sect or of many. It secures all forms of religious expression, creedal, sectarian or nonsectarian, wherever and however taking place, except conduct which trenches upon the like freedoms of others or clearly and presently endangers the community's good order and security.[[9]](#footnote-9) For the protective purposes of this phase of the basic freedom, street preaching, oral or by distribution of **[p. 33**] literature, has been given "the same high estate under the First Amendment as . . . worship in the churches and preaching from the pulpits."[[10]](#footnote-10) And on this basis, parents have been held entitled to send their children to private religious schools. *Pierce v. Society of Sisters,* 268 U. S. 510. Accordingly, daily religious education commingled with secular is "religion" within the guaranty's comprehensive scope. So are religious training and teaching in whatever form. The word connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature, regardless of those details.

"Religion" has the same broad significance in the twin prohibition concerning "an establishment." The Amendment was not duplicitous. "Religion" and "establishment" were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.

## II

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia,[[11]](#footnote-11) of which the Amendment **[p. 34**] was the direct culmination.[[12]](#footnote-12) In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.

For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general. Remonstrance, Par. 15, Appendix hereto. Madison was coauthor with George Mason of the religious clause in Virginia's great Declaration of Rights of 1776. He is credited with changing it from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual.[[13]](#footnote-13) He sought also to have the Declaration **[p. 35**] expressly condemn the existing Virginia establishment.[[14]](#footnote-14) But the forces supporting it were then too strong.

Accordingly, Madison yielded on this phase, but not for long. At once, he resumed the fight, continuing it before succeeding legislative sessions. As a member of the General Assembly in 1779, he threw his full weight behind Jefferson's historic Bill for Establishing Religious Freedom. That bill was a prime phase of Jefferson's broad program of democratic reform undertaken on his return from the Continental Congress in 1776 and submitted for the General Assembly's consideration in 1779 as his proposed revised Virginia code.[[15]](#footnote-15) With Jefferson's departure for Europe in 1784, Madison became the Bill's prime **[p. 36**] sponsor.[[16]](#footnote-16) Enactment failed in successive legislatures from its introduction in June, 1779, until its adoption in January, 1786. But, during all this time, the fight for religious freedom moved forward in Virginia on various fronts with growing intensity. Madison led throughout, against Patrick Henry's powerful opposing leadership until Henry was elected governor in November, 1784.

The climax came in the legislative struggle of 1784-1785 over the Assessment Bill. *See* Supplemental Appendix hereto. This was nothing more nor less than a taxing measure for the support of religion, designed to revive the payment of tithes suspended since 1777. So long as it singled out a particular sect for preference, it incurred the active and general hostility of dissentient groups. It was broadened to include them, with the result that some subsided temporarily in their opposition.[[17]](#footnote-17) As altered, the bill gave to each taxpayer the privilege of designating which church should receive his share of the tax. In default of designation, the legislature applied it to pious uses.[[18]](#footnote-18) But what is of the utmost significance here, "in **[p. 37**] its final form, the bill left the taxpayer the option of giving his tax to education."[[19]](#footnote-19)

Madison was unyielding at all times, opposing with all his vigor the general and nondiscriminatory, as he had the earlier particular and discriminatory, assessments proposed. The modified Assessment Bill passed second reading in December, 1784, and was all but enacted. Madison and his followers, however, maneuvered deferment of final consideration until November, 1785. And, before the Assembly reconvened in the fall, he issued his historic Memorial and Remonstrance.[[20]](#footnote-20)

This is Madison's complete, though not his only, interpretation of religious liberty.[[21]](#footnote-21) It is a broadside attack upon all forms of "establishment" of religion, both general and particular, nondiscriminatory or selective. Reflecting not only the many legislative conflicts over the Assessment Bill and the Bill for Establishing Religious Freedom, but also, for example, the struggles for religious incorporations and the continued maintenance of the glebes, the Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is "an establishment of religion." Because it behooves us in the dimming distance of time not **[p. 38**] to lose sight of what he and his coworkers had in mind when, by a single sweeping stroke of the pen, they forbade an establishment of religion and secured its free exercise, the text of the Remonstrance is appended at the end of this opinion for its wider current reference, together with a copy of the bill against which it was directed.

The Remonstrance, stirring up a storm of popular protest, killed the Assessment Bill.[[22]](#footnote-22) It collapsed in committee shortly before Christmas, 1785. With this, the way was cleared at last for enactment of Jefferson's Bill for Establishing Religious Freedom. Madison promptly drove it through in January of 1786, seven years from the time it was first introduced. This dual victory substantially ended the fight over establishments, settling the issue against them. *See* note 33.

The next year, Madison became a member of the Constitutional Convention. Its work done, he fought valiantly to secure the ratification of its great product in Virginia, as elsewhere, and nowhere else more effectively.[[23]](#footnote-23) Madison was certain in his own mind that, under the Constitution "there is not a shadow of right in the general government to intermeddle with religion,"[[24]](#footnote-24) and that "this subject is, for the honor of America, perfectly free and **[p. 39**] unshackled. The government has no jurisdiction over it. . . ."[[25]](#footnote-25) Nevertheless he pledged that he would work for a Bill of Rights, including a specific guaranty of religious freedom, and Virginia, with other states, ratified the Constitution on this assurance.[[26]](#footnote-26)

Ratification thus accomplished, Madison was sent to the first Congress. There he went at once about performing his pledge to establish freedom for the nation as he had done in Virginia. Within a little more than three years from his legislative victory at home, he had proposed and secured the submission and ratification of the First Amendment as the first article of our Bill of Rights.[[27]](#footnote-27)

All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.

As the Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him, religion was a wholly private matter beyond the scope of civil power **[p. 40**] either to restrain or to support.[[28]](#footnote-28) Denial or abridgment of religious freedom was a violation of rights both of conscience and of natural equality. State aid was no less obnoxious or destructive to freedom and to religion itself than other forms of state interference. "Establishment" and "free exercise" were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom. The Remonstrance, following the Virginia statute's example, referred to the history of religious conflicts and the effects of all sorts of establishments, current and historical, to suppress religion's free exercise. With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom. Hence, he sought to tear out the institution not partially, but root and branch, and to bar its return forever.

In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even "three pence" contribution was thus to be exacted from any citizen for such a purpose. Remonstrance, Par. 3.[[29]](#footnote-29) **[p. 41**] Tithes had been the lifeblood of establishment before and after other compulsions disappeared. Madison and his coworkers made no exceptions or abridgments to the complete separation they created. Their objection was not to small tithes. It was to any tithes whatsoever. "If it were lawful to impose a small tax for religion, the admission would pave the way for oppressive levies."[[30]](#footnote-30) Not the amount, but "the principle of assessment, was wrong." And the principle was as much to prevent "the interference of law in religion" as to restrain religious intervention in political matters.[[31]](#footnote-31) In this field, the authors of our freedom would not tolerate "the first experiment on our liberties" or "wait till usurped power had strengthened itself by exercise, and entangled the question in precedents." Remonstrance, Par. 3. Nor should we.

In view of this history, no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. But if more were called for, the debates in the First Congress and this Court's consistent expressions, whenever it has touched on the matter directly,[[32]](#footnote-32) supply it. **[p. 42**] By contrast with the Virginia history, the congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled.[[33]](#footnote-33) Indeed, the matter had become so well understood as to have been taken for granted in all but formal phrasing. Hence, the only enlightening reference shows concern not to preserve any power to use public funds in aid of religion, but to prevent the Amendment from outlawing private gifts inadvertently by virtue of the breadth of its wording.[[34]](#footnote-34) In the **[p. 43**] margin are noted also the principal decisions in which expressions of this Court confirm the Amendment's broad prohibition.[[35]](#footnote-35) **[p. 44**]

## III

Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies.[[36]](#footnote-36) Test oaths and religious qualification for office followed later.[[37]](#footnote-37) These things none devoted to our great tradition of religious liberty would think of bringing back. Hence, today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation, whatever their form or special religious function.

Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own.[[38]](#footnote-38) Today, as then, the furnishing of "contributions **[p. 45**] of money for the propagation of opinions which he disbelieves" is the forbidden exaction, and the prohibition is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end.

The funds used here were raised by taxation. The Court does not dispute, nor could it, that their use does, in fact, give aid and encouragement to religious instruction. It only concludes that this aid is not "support" in law. But Madison and Jefferson were concerned with aid and support in fact, not as a legal conclusion "entangled in precedents." Remonstrance, Par. 3. Here, parents pay money to send their children to parochial schools, and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching.

Believers of all faiths, and others who do not express their feeling toward ultimate issues of existence in any creedal form, pay the New Jersey tax. When the money so raised is used to pay for transportation to religious schools, the Catholic taxpayer, to the extent of his proportionate share, pays for the transportation of Lutheran, Jewish and otherwise religiously affiliated children to receive their non-Catholic religious instruction. Their parents likewise pay proportionately for the transportation of Catholic children to receive Catholic instruction. Each thus contributes to "the propagation of opinions which he disbelieves" in so far as their religions differ, as do others who accept no creed without regard to those differences. Each **[p. 46**] thus pays taxes also to support the teaching of his own religion, an exaction equally forbidden, since it denies "the comfortable liberty" of giving one's contribution to the particular agency of instruction he approves.[[39]](#footnote-39)

New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. Under the test they framed, it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given. That it is a substantial and a necessary element is shown most plainly by the continuing and increasing demand for the state to assume it. Nor is there pretense that it relates only to the secular instruction given in religious schools, or that any attempt is or could be made toward allocating proportional shares as between the secular and the religious instruction. It is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools under the *Pierce* doctrine. And the very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance.

Indeed, the view is sincerely avowed by many of various faiths,[[40]](#footnote-40) that the basic purpose of all education is or should be religious, that the secular cannot be and should not be separated from the religious phase and emphasis. Hence **[p. 47**] the inadequacy of public or secular education and the necessity for sending the child to a school where religion is taught. But whatever may be the philosophy or its justification, there is undeniably an admixture of religious with secular teaching in all such institutions. That is the very reason for their being. Certainly, for purposes of constitutionality, we cannot contradict the whole basis of the ethical and educational convictions of people who believe in religious schooling.

Yet this very admixture is what was disestablished when the First Amendment forbade "an establishment of religion." Commingling the religious with the secular teaching does not divest the whole of its religious permeation and emphasis, or make them of minor part, if proportion were material. Indeed, on any other view, the constitutional prohibition always could be brought to naught by adding a modicum of the secular.

An appropriation from the public treasury to pay the cost of transportation to Sunday school, to weekday special classes at the church or parish house, or to the meetings of various young people's religious societies, such as the YMCA, the YWCA, the YMHA, the Epworth League, could not withstand the constitutional attack. This would be true whether or not secular activities were mixed with the religious. If such an appropriation could not stand, then it is hard to see how one becomes valid for the same thing upon the more extended scale of daily instruction. Surely constitutionality does not turn on where or how often the mixed teaching occurs.

Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed, of all other **[p. 48**] items composing the total burden. Now, as always, the core of the educational process is the teacher-pupil relationship. Without this, the richest equipment and facilities would go for naught. *See Judd v. Board of Education,* 278 N.Y. 200, 212, 15 N.E.2d 576, 582. But the proverbial Mark Hopkins conception no longer suffices for the country's requirements. Without buildings, without equipment, without library, textbooks and other materials, and without transportation to bring teacher and pupil together in such an effective teaching environment, there can be not even the skeleton of what our times require. Hardly can it be maintained that transportation is the least essential of these items, or that it does not, in fact, aid, encourage, sustain and support, just as they do, the very process which is its purpose to accomplish. No less essential is it, or the payment of its cost, than the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without.

For me, therefore, the feat is impossible to select so indispensable an item from the composite of total costs and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about. Unless this can be maintained, and the Court does not maintain it, the aid thus given is outlawed. Payment of transportation is no more, nor is it any the less, essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment, and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation. The only line that can be so drawn is one between more dollars and less. Certainly, in this **[p. 49**] realm, such a line can be no valid constitutional measure. *Murdock v. Pennsylvania,* 319 U. S. 105; *Thomas v. Collins,* 323 U. S. 516.[[41]](#footnote-41) Now, as in Madison's time, not the amount, but the principle, of assessment is wrong. Remonstrance, Par. 3.

## IV

But we are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private, purpose, namely, the promotion of education, and the majority accept this idea in the conclusion that all we have here is "public welfare legislation." If that is true, and the Amendment's force can be thus destroyed, what has been said becomes all the more pertinent. For then there could be no possible objection to more extensive support of religious education by New Jersey.

If the fact alone be determinative that religious schools are engaged in education, thus promoting the general and individual welfare, together with the legislature's decision that the payment of public moneys for their aid makes their work a public function, then I can see no possible basis, except one of dubious legislative policy, for the state's refusal to make full appropriation for support of private, religious schools, just as is done for public **[p. 50**] instruction. There could not be, on that basis, valid constitutional objection.[[42]](#footnote-42)

Of course, paying the cost of transportation promotes the general cause of education and the welfare of the individual. So does paying all other items of educational expense. And obviously, as the majority say, it is much too late to urge that legislation designed to facilitate the opportunities of children to secure a secular education serves no public purpose. Our nationwide system of public education rests on the contrary view, as do all grants in aid of education, public or private, which is not religious in character.

These things are beside the real question. They have no possible materiality except to obscure the all-pervading, inescapable issue. *Cf. Cochran v. Board of Education, supra.* Stripped of its religious phase, the case presents no substantial federal question. *Ibid.* The public function argument, by casting the issue in terms of promoting the general cause of education and the welfare of the individual, ignores the religious factor and its essential connection with the transportation, thereby leaving out the only vital element in the case. So, of course, do the "public welfare" and "social legislation" ideas, for they come to the same thing. **[p. 51**] We have here, then, one substantial issue, not two. To say that New Jersey's appropriation and her use of the power of taxation for raising the funds appropriated are not for public purposes, but are for private ends, is to say that they are for the support of religion and religious teaching. Conversely, to say that they are for public purposes is to say that they are not for religious ones.

This is precisely for the reason that education which includes religious training and teaching, and its support, have been made matters of private right and function, not public, by the very terms of the First Amendment. That is the effect not only in its guaranty of religion's free exercise, but also in the prohibition of establishments. It was on this basis of the private character of the function of religious education that this Court held parents entitled to send their children to private, religious schools. *Pierce v. Society of Sisters, supra.* Now it declares, in effect, that the appropriation of public funds to defray part of the cost of attending those schools is for a public purpose. If so, I do not understand why the state cannot go farther, or why this case approaches the verge of its power.

In truth, this view contradicts the whole purpose and effect of the First Amendment as heretofore conceived. The "public function" -- "public welfare" -- "social legislation" argument seeks, in Madison's words, to "employ Religion [that is, here, religious education] as an engine of Civil policy." Remonstrance, Par. 5. It is of one piece with the Assessment Bill's preamble, although with the vital difference that it wholly ignores what that preamble explicitly states.[[43]](#footnote-43) **[p. 52**] Our constitutional policy is exactly the opposite. It does not deny the value or the necessity for religious training, teaching or observance. Rather, it secures their free exercise. But, to that end, it does deny that the state can undertake or sustain them in any form or degree. For this reason, the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two-fold protection, and, as the state cannot forbid, neither can it perform or aid in performing, the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the Amendment itself.

It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education, that the Constitution forbids it to do so. Both legislatures and courts are bound by that distinction. In failure to observe it lies the fallacy of the "public function"/"social legislation" argument, a fallacy facilitated by easy transference of the argument's basing from due process unrelated to any religious aspect to the First Amendment.

By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome the Amendment's bar. Nor may the courts sustain their attempts to do so by finding such consequences for appropriations which, in fact, give aid to or promote religious uses. *Cf. Norris v. Alabama,* 294 U. S. 587, 294 U. S. 590; *Hooven & Allison Co. v. Evatt,* 324 U. S. 652, 324 U. S. 659; *Akins v. Texas,* 325 U. S. 398, 325 U. S. 402. Legislatures are free to make, **[p. 53**] and courts to sustain, appropriations only when it can be found that, in fact, they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. No such finding has been or could be made in this case. The Amendment has removed this form of promoting the public welfare from legislative and judicial competence to make a public function. It is exclusively a private affair.

The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted, the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8.[[44]](#footnote-44) The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation, it vanishes with the resting. *Id.* Par. 7, 8.[[45]](#footnote-45) Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings, too, the struggle of sect against sect for the larger share, or for any. Here, one by numbers alone will benefit most; there, another. That is precisely the history of societies which have had an established religion and dissident **[p. 54**] groups. *Id.,* Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. *Ibid.* The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit, or all will embroil the state in their dissensions. *Id.,* Par. 11.[[46]](#footnote-46)

Exactly such conflicts have centered of late around providing transportation to religious schools from public funds.[[47]](#footnote-47) The issue and the dissension work typically, in Madison's phrase, to

"destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects."

*Id.,* Par. 11. This occurs, as he well knew, over measures **[p. 55**] at the very threshold of departure from the principle. *Id.,* Par. 3, 9, 11.

In these conflicts, wherever success has been obtained, it has been upon the contention that, by providing the transportation, the general cause of education, the general welfare, and the welfare of the individual will be forwarded; hence, that the matter lies within the realm of public function, for legislative determination.[[48]](#footnote-48) State courts have divided upon the issue, some taking the view that only the individual, others that the institution, receives the benefit.[[49]](#footnote-49) A few have recognized that this dichotomy is false -- that both, in fact, are aided.[[50]](#footnote-50) **[p. 56**] The majority here does not accept, in terms, any of those views. But neither does it deny that the individual or the school, or indeed both, are benefited directly and substantially.[[51]](#footnote-51) To do so would cut the ground from under the public function/social legislation thesis. On the contrary, the opinion concedes that the children are aided by being helped to get to the religious schooling. By converse necessary implication, as well as by the absence of express denial, it must be taken to concede also that the school is helped to reach the child with its religious teaching. The religious enterprise is common to both, as is the interest in having transportation for its religious purposes provided.

Notwithstanding the recognition that this two-way aid is given, and the absence of any denial that religious teaching is thus furthered, the Court concludes that the aid so given is not "support" of religion. It is, rather, only support of education as such, without reference to its religious content, and thus becomes public welfare legislation. To this elision of the religious element from the case is added gloss in two respects, one that the aid extended partakes of the nature of a safety measure, the other that failure to provide it would make the state unneutral in religious matters, discriminating against or hampering such children concerning public benefits all others receive. **[p. 57**] As will be noted, the one gloss is contradicted by the facts of record, and the other is of whole cloth with the "public function" argument's excision of the religious factor.[[52]](#footnote-52) But most important is that this approach, if valid, supplies a ready method for nullifying the Amendment's guaranty not only for this case and others involving small grants in aid for religious education, but equally for larger ones. The only thing needed will be for the Court again to transplant the "public welfare/public function" view from its proper nonreligious due process bearing to First Amendment application, holding that religious education is not "supported," though it may be aided, by the appropriation, and that the cause of education generally is furthered by helping the pupil to secure that type of training.

This is not therefore just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present form from a complete establishment of religion, it differs from it only in degree, and is the first step in that direction. *Id..* Par. 9.[[53]](#footnote-53) Today, as in his time,

"the same authority which can force a citizen to contribute three pence only . . . for the support of any one [religious] establishment, may force him"

to pay more, or "to conform to ally other establishment in all cases whatsoever." And now, as then,

"either . . . we must say, that the will of the Legislature is the only measure of their authority, and that, in the plenitude of this authority, they may sweep away all our fundamental rights, or that they are bound to leave this particular right untouched and sacred."

Remonstrance, Par. 15.

The realm of religious training and belief remains, as the Amendment made it, the kingdom of the individual **[p. 58**] man and his God. It should be kept inviolately private, not "entangled . . . in precedents"[[54]](#footnote-54) or confounded with what legislatures legitimately may take over into the public domain.

## V

No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education; at the same time, the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive because, in conscience, they, or their parents for them, desire a different kind of training others do not demand.

But if those feelings should prevail, there would be an end to our historic constitutional policy and command. No more unjust or discriminatory, in fact, is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost. Hardship, in fact, there is which none can blink. But, for assuring to those who undergo it the greater, the most comprehensive freedom, it is one written by design and firm intent into our basic law.

Of course, discrimination in the legal sense does not exist. The child attending the religious school has the same right as any other to attend the public school. But he foregoes exercising it because the same guaranty which assures this freedom forbids the public school or any agency of the **[p. 59**] state to give or aid him in securing the religious instruction he seeks.

Were he to accept the common school, he would be the first to protest the teaching there of any creed or faith not his own. And it is precisely for the reason that their atmosphere is wholly secular that children are not sent to public schools under the *Pierce* doctrine. But that is a constitutional necessity, because we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion. Remonstrance, Par. 8, 12.

That policy necessarily entails hardship upon persons who forego the right to educational advantages the state can supply in order to secure others it is precluded from giving. Indeed, this may hamper the parent and the child forced by conscience to that choice. But it does not make the state unneutral to withhold what the Constitution forbids it to give. On the contrary, it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly. Like St. Paul's freedom, religious liberty with a great price must be bought. And for those who exercise it most fully, by insisting upon religious education for their children mixed with secular, by the terms of our Constitution, the price is greater than for others.

The problem, then, cannot be cast in terms of legal discrimination or its absence. This would be true even though the state, in giving aid, should treat all religious instruction alike. Thus, if the present statute and its application were shown to apply equally to all religious schools **[p. 60**] of whatever faith,[[55]](#footnote-55) yet, in the light of our tradition, it could not stand. For then, the adherent of one creed still would pay for the support of another, the childless taxpayer with others more fortunate. Then too there would seem to be no bar to making appropriations for transportation and other expenses of children attending public or other secular schools, after hours in separate places and classes for their exclusively religious instruction. The person who embraces no creed also would be forced to pay for teaching what he does not believe. Again, it was the furnishing of "contributions of money for the propagation of opinions which he disbelieves" that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires not comprehensive identification of state with religion, but complete separation.

## VI

Short treatment will dispose of what remains. Whatever might be said of some other application of New Jersey's statute, the one made here has no semblance of bearing as a safety measure or, indeed, for securing expeditious conveyance. The transportation supplied is by public conveyance, subject to all the hazards and delays of the highway and the streets incurred by the public generally in going about its multifarious business.

Nor is the case comparable to one of furnishing fire or police protection, or access to public highways. These things are matters of common right, part of the general **[p. 61**] need for safety.[[56]](#footnote-56) Certainly the fire department must not stand idly by while the church burns. Nor is this reason why the state should pay the expense of transportation or other items of the cost of religious education.[[57]](#footnote-57)

Needless to add, we have no such case as *Green v. Frazier,* 253 U. S. 233, or *Carmichael v. Southern Coal Co.,*301 U. S. 495, which dealt with matters wholly unrelated to the First Amendment, involving only situations where the "public function" issue was determinative.

I have chosen to place my dissent upon the broad ground I think decisive, though, strictly speaking, the case might be decided on narrower issues. The New Jersey statute might be held invalid on its face for the exclusion of children **[p. 62**] who attend private, profit-making schools.[[58]](#footnote-58) I cannot assume, as does the majority, that the New Jersey courts would write off this explicit limitation from the statute. Moreover, the resolution by which the statute was applied expressly limits its benefits to students of public and Catholic schools.[[59]](#footnote-59) There is no showing that there are no other private or religious schools in this populous district.[[60]](#footnote-60) I do not think it can be assumed there were none.[[61]](#footnote-61) But, in the view I have taken, it is unnecessary to limit grounding to these matters. **[p. 63**] Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. *See* Johnson, The Legal Status of Church-State Relationships in the United States (1934); Thayer, Religion in Public Education (1947); Note (1941) 50 Yale L.J. 917. In my opinion, both avenues were closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now, as in Madison's day, it is one of principle, to keep separate the separate spheres as the First Amendment drew them, to prevent the first experiment upon our liberties, and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

The judgment should be reversed.

1. "A Bill for Establishing Religious Freedom," enacted by the General Assembly of Virginia, January 19, 1786.See 1 Randall, The Life of Thomas Jefferson (1858) 219-220; XII Hening's Statutes of Virginia (1823) 84. [↑](#footnote-ref-1)
2. Schneider v. State, 308 U. S. 147; Cantwell v. Connecticut, 310 U. S. 296; Murdock v. Pennsylvania, 319 U. S. 105; Prince v. Massachusetts, 321 U. S. 158; Thomas v. Collins, 323 U. S. 516, 323 U. S. 530. [↑](#footnote-ref-2)
3. The briefs did not raise the First Amendment issue. The only one presented was whether the state's action involved a public or an exclusively private function under the due process clause of the Fourteenth Amendment. See 330 U. S. infra. On the facts, the cost of transportation here is inseparable from both religious and secular teaching at the religious school. In the Cochran case, the state furnished secular textbooks only. But see text, infra at note 40 et seq., and 330 U. S. [↑](#footnote-ref-3)
4. Cf. note 3 and text, 330 U. S. see also note 35. [↑](#footnote-ref-4)
5. The statute reads:

"Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school . . . other than a public school, except such school as is operated for profit in whole or in part."

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part."

Laws of New Jersey (1941) c.191. [↑](#footnote-ref-5)
6. The full text of the resolution is given in note 59 infra. [↑](#footnote-ref-6)
7. The public schools attended were the Trenton Senior High School, the Trenton Junior High School, and the Pennington High School. Ewing Township itself provides no public high schools, affording only elementary public schools which stop with the eighth grade. The Ewing school board pays for both transportation and tuitions of pupils attending the public high schools. The only private schools, all Catholic, covered in application of the resolution are St. Mary's Cathedral High School, Trenton Catholic Boys High School, and two elementary parochial schools, St. Hedwig's Parochial School and St. Francis School. The Ewing board pays only for transportation to these schools, not for tuitions. So far as the record discloses, the board does not pay for or provide transportation to any other elementary school, public or private. See notes 58, 59 and text infra. [↑](#footnote-ref-7)
8. IX Writings of James Madison (ed. by Hunt, 1910) 288; Padover, Jefferson (1942) 74. Madison's characterization related to Jefferson's entire revision of the Virginia Code, of which the Bill for Establishing Religious Freedom was part. See note 15. [↑](#footnote-ref-8)
9. See Reynolds v. United States, 98 U. S. 145; Davis v. Beason, 133 U. S. 333; Mormon Church v. United States, 136 U. S. 1; Jacobson v. Massachusetts, 197 U. S. 11; Prince v. Massachusetts, 321 U. S. 158; also Cleveland v. United States, 329 U. S. 14.

Possibly the first official declaration of the "clear and present danger" doctrine was Jefferson's declaration in the Virginia Statute for Establishing Religious Freedom:

"That it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

1 Randall, The Life of Thomas Jefferson (1858) 220; Padover, Jefferson (1942) 81. For Madison's view to the same effect, see note 28 infra. [↑](#footnote-ref-9)
10. Murdock v. Pennsylvania, 319 U. S. 105, 319 U. S. 109; Martin v. Struthers, 319 U. S. 141; Jamison v. Texas, 318 U. S. 413; Marsh v. Alabama, 326 U. S. 501; Tucker v. Texas, 326 U. S. 517. [↑](#footnote-ref-10)
11. Conflicts in other states, and earlier in the colonies, contributed much to generation of the Amendment, but none so directly as that in Virginia or with such formative influence on the Amendment's content and wording. See Cobb, Rise of Religious Liberty in America (1902); Sweet, The Story of Religion in America (1939). The Charter of Rhode Island of 1663, II Poore, Constitutions (1878) 1595, was the first colonial charter to provide for religious freedom.

The climactic period of the Virginia struggle covers the decade 1776-1786, from adoption of the Declaration of Rights to enactment of the Statute for Religious Freedom. For short accounts, see Padover, Jefferson (1942) c. V; Brant, James Madison, The Virginia Revolutionist (1941) cc. XII, XV; James, The Struggle for Religious Liberty in Virginia (1900) cc. X, XI; Eckenrode, Separation of Church and State in Virginia (1910). These works and Randall, see note 1, will be cited in this opinion by the names of their authors. Citations to "Jefferson" refer to The Works of Thomas Jefferson (ed. by Ford, 1904-1905); to "Madison," to The Writings of James Madison (ed. by Hunt, 1901-1910). [↑](#footnote-ref-11)
12. Brant, cc. XII, XV; James, cc. X, XI; Eckenrode. [↑](#footnote-ref-12)
13. See Brant, c. XII, particularly at 243. Cf. Madison's Remonstrance, Appendix to this opinion. Jefferson, of course, held the same view. See note 15.

"Madison looked upon . . . religious freedom, to judge from the concentrated attention he gave it, as the fundamental freedom." Brant, 243, and see Remonstrance, Par. 1, 4, 15, Appendix. [↑](#footnote-ref-13)
14. See Brant, 245-246. Madison quoted liberally from the Declaration in his Remonstrance, and the use made of the quotations indicates that he considered the Declaration to have outlawed the prevailing establishment in principle, if not technically. [↑](#footnote-ref-14)
15. Jefferson was chairman of the revising committee and chief draftsman. Co-revisers were Wythe, Pendleton, Mason and Lee. The first enacted portion of the revision, which became known as Jefferson's Code, was the statute barring entailments. Primogeniture soon followed. Much longer the author was to wait for enactment of the Bill for Religious Freedom, and not until after his death was the corollary bill to be accepted in principle which he considered most important of all, namely, to provide for common education at public expense. See V Jefferson, 153. However, he linked this with disestablishment as corollary prime parts in a system of basic freedoms. I Jefferson, 78.

Jefferson, and Madison by his sponsorship, sought to give the Bill for Establishing Religious Freedom as nearly constitutional status as they could at the time. Acknowledging that one legislature could not "restrain the acts of succeeding Assemblies . . . and that, therefore, to declare this act irrevocable would be of no effect in law," the Bill's concluding provision, as enacted, nevertheless asserted:

"Yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that, if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right."

1 Randall, 220. [↑](#footnote-ref-15)
16. See I Jefferson, 70-71; XII Jefferson, 447; Padover, 80. [↑](#footnote-ref-16)
17. Madison regarded this action as desertion. See his letter to Monroe of April 12, 175; II Madison, 129, 131-132; James, cc. X, XI. But see Eckenrode, 91, suggesting it was surrender to the inevitable.

The bill provided:

"That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid. . . ."

See also notes 1, 43 infra.

A copy of the Assessment Bill is to be found among the Washington manuscripts in the Library of Congress. Papers of George Washington, Vol. 231. Because of its crucial role in the Virginia struggle and bearing upon the First Amendment's meaning, the text of the Bill is set forth in the Supplemental Appendix to this opinion. [↑](#footnote-ref-17)
18. Eckenrode, 99, 100. [↑](#footnote-ref-18)
19. Id., 100; II Madison, 113. The bill directed the sheriff to pay

"all sums which . . . may not he appropriated by the person paying the same . . . into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever."

Supplemental Appendix. [↑](#footnote-ref-19)
20. See generally Eckenrode, c. V; Brant, James, and other authorities cited in note 11 above. [↑](#footnote-ref-20)
21. II Madison, 183; and the Appendix to this opinion. Eckenrode, 100 ff. See also Fleet, Madison's "Detached Memoranda" (1946) III William & Mary Q. (3rd Series) 534, 554-562. [↑](#footnote-ref-21)
22. The major causes assigned for its defeat include the elevation of Patrick Henry to the governorship in November of 1784; the blunder of the proponents in allowing the Bill for Incorporations to come to the floor and incur defeat before the Assessment Bill was acted on; Madison's astute leadership, taking advantage of every "break" to convert his initial minority into a majority, including the deferment of action on the third reading to the fall; the Remonstrance, bringing a flood of protesting petitions, and the general poverty of the time. See Eckenrode, c. V, for an excellent short, detailed account. [↑](#footnote-ref-22)
23. See James, Brant, op. cit. supra, note 11. [↑](#footnote-ref-23)
24. V Madison, 176. Cf. notes 33, 37. [↑](#footnote-ref-24)
25. V Madison, 132. [↑](#footnote-ref-25)
26. Brant, 250. The assurance made first to his constituents was responsible for Madison's becoming a member of the Virginia Convention which ratified the Constitution. See James, 154-158. [↑](#footnote-ref-26)
27. The amendment with respect to religious liberties read, as Madison introduced it:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."

1 Annals of Congress 434. In the process of debate, this was modified to its present form. See especially 1 Annals of Congress 729-731, 765; also note 34. [↑](#footnote-ref-27)
28. See text of the Remonstrance, Appendix; also notes 13, 15, 24, 25 supra, and text.

Madison's one exception concerning restraint was for "preserving public order." This he declared in a private letter, IX Madison, 484, 487, written after the First Amendment was adopted:

"The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded agst. by an entire abstinance of the Govt. from interference in any way whatever, beyond the necessity of preserving public order & protecting each sect agst. trespasses on its legal rights by others."

Cf. note 9. [↑](#footnote-ref-28)
29. The third ground of remonstrance, see the Appendix, bears repetition for emphasis here:

"Because it is proper to take alarm at the first experiment on our liberties . . . , [t]he freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment may force him to conform to any other establishment in all cases whatsoever?"

(Emphasis added.) II Madison 183, 185-186. [↑](#footnote-ref-29)
30. Eckenrode, 105, in summary of the Remonstrance. [↑](#footnote-ref-30)
31. "Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretention falsified by the contradictory opinions of Rulers in all ages, and throughout the world; the second an unhallowed perversion of the means of salvation."

Remonstrance, Appendix, Par. 5; II Madison 183, 187. [↑](#footnote-ref-31)
32. As is pointed out above, note 3, and in 330 U. S. infra, Cochran v. Board of Education, 281 U. S. 370, was not such a case. [↑](#footnote-ref-32)
33. See text supra at notes 24, 25. Madison, of course, was but one of many holding such views, but nevertheless agreeing to the common understanding for adoption of a Bill of Rights in order to remove all doubt engendered by the absence of explicit guaranties in the original Constitution.

By 1791, the great fight over establishments had ended, although some vestiges remained then and later, even in Virginia. The glebes, for example, were not sold there until 1802. Cf. Eckenrode, 147. Fixing an exact date for "disestablishment" is almost impossible, since the process was piecemeal. Although Madison failed in having the Virginia Bill of Rights declare explicitly against establishment in 1776, cf. note 14 and text supra,in 1777, the levy for support of the Anglican clergy was suspended. It was never resumed. Eckenrode states:

"This act, in effect, destroyed the establishment. Many dates have been given for its end, but it really came on January 1, 1777, when the act suspending the payment of tithes became effective. This was not seen at the time. . . . But, in freeing almost half of the taxpayers from the burden of the state religion, the state religion was at an end. Nobody could be forced to support it, and an attempt to levy tithes upon Anglicans alone would be to recruit the ranks of dissent."

P. 53. See also pp. 61, 64. The question of assessment however was revived "with far more strength than ever, in the summer of 1784." Id. at 64. It would seem more factual, therefore, to fix the time of disestablishment as of December, 1785-January, 1786, when the issue in large was finally settled. [↑](#footnote-ref-33)
34. At one point, the wording was proposed: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 Annals of Congress 729. Cf. note 27. Representative Huntington of Connecticut feared this might be construed to prevent judicial enforcement of private pledges. He stated

"that he feared . . . that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia, but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it, for a support of ministers or building of places of worship might be construed into a religious establishment."

1 Annals of Congress 730.

To avoid any such possibility, Madison suggested inserting the word "national" before "religion," thereby not only again disclaiming intent to bring about the result Huntington feared, but also showing unmistakably that "establishment" meant public "support" of religion in the financial sense. 1 Annals of Congress 731. See also IX Madison, 484-487. [↑](#footnote-ref-34)
35. The decision most closely touching the question, where it as squarely raised, is Quick Bear v. Leupp, 210 U. S. 50. The Court distinguished sharply between appropriations from public funds for the support of religious education and appropriations from funds held in trust by the Government essentially as trustee for private individuals, Indian wards, as beneficial owners. The ruling was that the latter could be disbursed to private, religious schools at the designation of those patrons for paying the cost of their education. But it was stated also that such a use of public moneys would violate both the First Amendment and the specific statutory declaration involved, namely, that

"it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school."

210 U.S. at 210 U. S. 79. Cf. Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 210 U. S. 322. And see Bradfield v. Roberts, 175 U. S. 291, an instance of highly artificial grounding to support a decision sustaining an appropriation for the care of indigent patients pursuant to a contract with a private hospital. Cf. also the authorities cited in note 9. [↑](#footnote-ref-35)
36. See text at note 1. [↑](#footnote-ref-36)
37. " . . . but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Const., Art. VI, § 3. See also the two forms prescribed for the President's Oath or Affirmation. Const., Art. II, § 1. Cf. 71 U. S. 4 Wall. 333; Cummings v. Missouri, 4 Wall. 277; United States v. Lovett, 328 U. S. 303. [↑](#footnote-ref-37)
38. In the words of the Virginia statute, following the portion of the preamble quoted at the beginning of this opinion:

". . . even the forcing him to support this or that teacher of his own religious persuasion is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards which, ceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind. . . ." [↑](#footnote-ref-38)
39. See note 38. [↑](#footnote-ref-39)
40. See Bower, Church and State in Education (1944) 58:

". . . the fundamental division of the education of the whole self into the secular and the religious could not be justified on the grounds of either a sound educational philosophy or a modern functional concept of the relation of religion to personal and social experience."

See also Vere, The Elementary School, in Essays on Catholic Education in the United States (1942) 110-111; Gabel, Public Funds for Church and Private Schools (1937) 737-739 [↑](#footnote-ref-40)
41. It would seem a strange ruling that a "reasonable," that is, presumably a small, license fee cannot be placed upon the exercise of the right of religious instruction, yet that, under the correlative constitutional guaranty against "an establishment," taxes may be levied and used to aid and promote religious instruction, if only the amounts so used are small. See notes 30-31 supra, and text.

Madison's objection to "three pence" contributions and his stress upon "denying the principle" without waiting until "usurped power had . . . entangled the question in precedents," note 29, were reinforced by his further characterization of the Assessment Bill:

"Distant as it may be, in its present form, from the Inquisition, it differs from it only in degree. The one is the first step, the other the last, in the career of intolerance."

Remonstrance, Par. 9; II Madison 183, 188. [↑](#footnote-ref-41)
42. If it is part of the state's function to supply to religious schools or their patrons the smaller items of educational expense, because the legislature may say they perform a public function, it is hard to see why the larger ones also my not he paid. Indeed, it would seem even more proper and necessary for the state to do this. For if one class of expenditures is justified on the ground that it supports the general cause of education or benefits the individual, or can he made to do so by legislative declaration, so even more certainly would he the other. To sustain payment for transportation to school, for textbooks, for other essential materials, or perhaps for school lunches, and not for what makes all these things effective for their intended end, would be to make a public function of the smaller items and their cumulative effect, but to make wholly private in character the larger things without which the smaller could have no meaning or use. [↑](#footnote-ref-42)
43. "Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society, which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as, from their circumstances and want of education, cannot otherwise attain such knowledge, and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of preeminence amongst the different societies of communities of Christians; . . . ."

Supplemental Appendix; Foote, Sketches of Virginia (1850) 340. [↑](#footnote-ref-43)
44. "Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the powers of this world. . . . Because the establishment in question is not necessary for the support of Civil Government. . . . What influence, in fact, have ecclesiastical establishments had on Civil Society? . . . [I]n no instance have they been seen the guardians of the liberties of the people."

II Madison 183, 187, 188. [↑](#footnote-ref-44)
45. "Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."

II Madison 183, 187. [↑](#footnote-ref-45)
46. "At least let warning be taken at the first fruits of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forbearance, love and charity' which, of late, mutually prevailed into animosities and jealousies which may not soon be appeased."

II Madison 183, 189. [↑](#footnote-ref-46)
47. In this case, briefs amici curiae have been filed on behalf of various organizations representing three religious sects, one labor union, the American Civil Liberties Union, and the states of Illinois, Indiana, Louisiana, Massachusetts, Michigan and New York. All these states have laws similar to New Jersey's, and all of them, with one religious sect, support the constitutionality of New Jersey's action. The others oppose it. Maryland and Mississippi have sustained similar legislation. Note 49 infra. No state without legislation of this sort has filed an opposing brief. But at least six states have held such action invalid, namely, Delaware, Oklahoma, New York, South Dakota, Washington, and Wisconsin. Note 49, infra. The New York ruling was overturned by amendment to the state constitution in 1938. Constitution of New York, Art. XI, 4.

Furthermore, in this case, the New Jersey courts divided, the Supreme Court holding the statute and resolution invalid, 132 N.J.L. 98, 39 A.2d 75, the Court of Errors and Appeals reversing that decision, 133 N.J.L. 350, 44 A.2d 333. In both courts, as here, the judges split, one of three dissenting in the Supreme Court, three of nine in the Court of Errors and Appeals. The division is typical. See the cases cited in note 49. [↑](#footnote-ref-47)
48. See the authorities cited in note 49, and see note 54. [↑](#footnote-ref-48)
49. Some state courts have sustained statutes granting free transportation or free school books to children attending denominational schools on the theory that the aid as a benefit to the child, rather than to the school. See Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930, with which compare Sherrard v. Jefferson County Board of Education, 294 Ky. 469, 171 S.W.2d 963; Cochran v. Board of Education, 168 La. 1030, 123 So. 664, aff'd, 281 U. S. 281 U.S. 370; Borden v. Board of Education, 168 La. 1005, 123 So. 655; Board of Education v. Wheat, 174 Md. 314, 199 A. 628; Adams v. St. Mary's County, 180 Md. 550, 26 A.2d 377; Chance v. State Textbook R. & P. Board, 190 Miss. 453, 200 So. 706. See also Bowker v. Baer, 73 Cal.App.2d 653, 167 P.2d 256. Other courts have held such statutes unconstitutional under state constitutions as aid to the schools. Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576, but see note 47, supra; Smith v. Donahue, 202 App.Div. 656, 195 N.Y.S. 715; State ex rel. Traub v. Brown, 36 Del. 181, 172 A. 835; Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002; Mitchell v. Consolidated School District, 17 Wash.2d 61, 135 P.2d 79; Van Straten v. Milquet, 180 Wis. 109, 192 N.W. 392. And cf. Hlebanja v. Brewe, 58 S.D. 351, 236 N.W. 296. And since many state constitutions have provisions forbidding the appropriation of public funds for private purposes, in these and other cases, the issue whether the statute was for a "public" or "private" purpose has been present. See Note (1941) 50 Yale L.J. 917, 925. [↑](#footnote-ref-49)
50. E.g, Gurney v. Ferguson, 190 Okla. 254, 255, 122 P.2d 1002, 1003; Mitchell v. Consolidated School District, 17 Wash.2d 61, 68, 135 P.2d 79, 82; Smith v. Donahue, 202 App.Div. 656, 664, 195 N.Y.S. 715, 722; Board of Education v. Wheat, 174 Md. 314, dissenting opinion at 340, 199 A. 628 at 639. This is true whether the appropriation and payment are in form to the individual, or to the institution. Ibid. Questions of this gravity turn upon the purpose and effect of the state's expenditure to accomplish the forbidden object, not upon who receives the amount and applies it to that end or the form and manner of the payment. [↑](#footnote-ref-50)
51. The payments here averaged roughly $40.00 a year per child. [↑](#footnote-ref-51)
52. See 330 U. S. [↑](#footnote-ref-52)
53. See also note 46 supra, and Remonstrance, Par. 3. [↑](#footnote-ref-53)
54. Thus, each brief filed here by the supporters of New Jersey's action, see note 47, not only relies strongly on Cochran v. Board of Education, 281 U. S. 370, but either explicitly or in effect maintains that it is controlling in the present case. [↑](#footnote-ref-54)
55. See text at notes 17-19 supra, and authorities cited; also Foote, Sketches of Virginia (1850) c. XV. Madison's entire thesis, as reflected throughout the Remonstrance and in his other writings, as well as in his opposition to the final form of the Assessment Bill, see note 43, was altogether incompatible with acceptance of general and "nondiscriminatory" support. See Brant, c. XII. [↑](#footnote-ref-55)
56. The protections are of a nature which does not require appropriations specially made from the public treasury and earmarked, as is New Jersey's here, particularly for religious institutions or uses. The First Amendment does not exclude religious property or activities from protection against disorder or the ordinary accidental incidents of community life. It forbids support, not protection from interference or destruction.

It is a matter not frequently recalled that President Grant opposed tax exemption of religious property as leading to a violation of the principle of separation of church and state. See President Grant's Seventh Annual Message to Congress, December 7, 1875, in IX Messages and Papers of the Presidents (1897) 4288-4289. Garfield, in a letter accepting the nomination for the presidency, said:

". . . it would be unjust to our people, and dangerous to our institutions, to apply any portion of the revenues of the nation, or of the States, to the support of sectarian schools. The separation of the Church and the State in everything relating to taxation should be absolute."

II The Works of James Abram Garfield (ed. by Hinsdale, 1883) 783. [↑](#footnote-ref-56)
57. Neither do we have here a case of ratemaking by which a public utility extends reduced fares to all school children, including patrons of religious schools. Whether or not legislative compulsion upon a private utility to extend such an and advantage would be valid, or its extension by a municipally owned system, we are not required to consider. In the former instance, at any rate, and generally, if not always, in the latter, the vice of using the taxing power to raise funds for the support of religion would not be present. [↑](#footnote-ref-57)
58. It would seem at least a doubtfully sufficient basis for reasonable classification that some children should be excluded simply because the only school feasible for them to attend, in view of geographic or other situation, might be one conducted in whole or in part for profit. Cf. note 5. [↑](#footnote-ref-58)
59. See note 7 supra. The resolution was as follows, according to the school board's minutes read in proof:

"The transportation committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier as in recent years. On Motion of Mr. Ralph Ryan and Mr. M. French. the same was adopted."

(Emphasis added.) The New Jersey court's holding that the resolution was within the authority conferred by the state statute is binding on us. Reinman v. Little Rock, 237 U. S. 171, 237 U. S. 176; Hadacheck v. Sebastian,239 U. S. 394, 239 U. S. 414. [↑](#footnote-ref-59)
60. The population of Ewing Township, located near the City of Trenton, was 10,146 according to the census of 1940. Sixteenth Census of the United States, Population, Vol. 1, 674. [↑](#footnote-ref-60)
61. In Thomas v. Collins, 323 U. S. 516, 323 U. S. 530, it was said that the preferred place given in our scheme to the great democratic freedoms secured by the First Amendment gives them "a sanctity and a sanction not permitting dubious intrusions." Cf. Remonstrance, Par. 3, 9. And, in other cases, it has been held that the usual presumption of constitutionality will not work to save such legislative excursions in this field. United States v. Carolene Products Co., 304 U. S. 144, 304 U. S. 152, note 4; see Wechsler, Stone and the Constitution (1946) 46 Col.L.Rev. 764, 795 et seq.

Apart from the Court's admission that New Jersey's present action approaches the verge of her power, it would seem that a statute, ordinance or resolution which, on its face, singles out one sect only by name for enjoyment of the same advantages as public schools or their students, should be held discriminatory on its face by virtue of that fact alone, unless it were positively shown that no other sects sought or were available to receive the same advantages. [↑](#footnote-ref-61)