# Jackson: Concurrence

MR. JUSTICE JACKSON, concurring.

I join the opinion of MR. JUSTICE FRANKFURTER, and concur in the result reached by the Court, but with these reservations: I think it is doubtful whether the facts of this case establish jurisdiction in this Court, but, in any event, that we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain. I make these reservations a matter of record in view of the number of litigations likely to be started as a result of this decision.

A Federal Court may interfere with local school authorities only when they invade either a personal liberty or a property right protected by the Federal Constitution. Ordinarily this will come about in either of two ways:

*First.* When a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement. We may then set him free or enjoin his prosecution. Typical of such cases was *West Virginia State Board of Education v. Barnette,* 319 U. S. 624. There, penalties were threatened against both parent and child for refusal of the latter to perform a compulsory ritual which offended his convictions. We intervened to shield them against the penalty. But here, complainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that, when others join and he does not, it sets him apart as a dissenter, which is humiliating. **[p. 233]** Even admitting this to be true, it may be doubted whether the Constitution, which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself, and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground.

*Second.* Where a complainant is deprived of property by being taxed for unconstitutional purposes, such as directly or indirectly to support a religious establishment. We can protect a taxpayer against such a levy. This was the *Everson Case,* 330 U. S. 1, as I saw it then and see it now. It was complained in that case that the school treasurer drew a check on public funds to reimburse parents for a child's bus fare if he went to a Catholic parochial school or a public school, but not if he went to any other private or denominational school. Reference to the record in that case will show that the School District was not operating busses, so it was not a question of allowing Catholic children to ride publicly owned busses along with others in the interests of their safety, health or morals. The child had to travel to and from parochial school on commercial busses like other paying passengers and all other school children, and he was exposed to the same dangers. If it could, in fairness, have been said that the expenditure was a measure for the protection of the safety, health or morals of youngsters, it would not merely have been constitutional to grant it; it would have been unconstitutional to refuse it to any child merely because he was a Catholic. But, in the *Everson Case,* there was a direct, substantial and measurable burden on the complainant as a taxpayer to raise funds that were used to subsidize transportation to parochial schools. Hence, we **[p. 234]** had jurisdiction to examine the constitutionality of the levy and to protect against it if a majority had agreed that the subsidy for transportation was unconstitutional.

In this case, however, any cost of this plan to the taxpayers is incalculable and negligible. It can be argued, perhaps, that religious classes add some wear and tear on public buildings, and that they should be charged with some expense for heat and light, even though the sessions devoted to religious instruction do not add to the length of the school day. But the cost is neither substantial nor measurable, and no one seriously can say that the complainant's tax bill has been proved to be increased because of this plan. I think it is doubtful whether the taxpayer in this case has shown any substantial property injury.

If, however, jurisdiction is found to exist, it is important that we circumscribe our decision with some care. What is asked is not a defensive use of judicial power to set aside a tax levy or reverse a conviction, or to enjoin threats of prosecution or taxation. The relief demanded in this case is the extraordinary writ of mandamus to tell the local Board of Education what it must do. The prayer for relief is that a writ issue against the Board of Education

"ordering it to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools . . . and in all public school houses and buildings in said district when occupied by public schools."

The plaintiff, as she has every right to be, is an avowed atheist. What she has asked of the courts is that they not only end the "released time" plan, but also ban every form of teaching which suggests or recognizes that there is a God. She would ban all teaching of the Scriptures. She especially mentions as an example of invasion of her rights "having pupils learn and recite such statements as, *The Lord is my Shepherd, I shall not want.*'" And she objects to teaching that the King James version of the Bible "is **[p. 235]** called the Christian's Guide Book, the Holy Writ and the Word of God," and many other similar matters. This Court is directing the Illinois courts generally to sustain plaintiff's complaint without exception of any of these grounds of complaint, without discriminating between them and without laying down any standards to define the limits of the effect of our decision*.*

To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

While we may and should end such formal and explicit instruction as the Champaign plan, and can at all times prohibit teaching of creed and catechism and ceremonial, and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure **[p. 236]** of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a "science" as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity -- both Catholic and Protestant -- and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found "a Church without a Bishop and a State without a King," is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry. **[p. 237]** The opinions in this case show that public educational authorities have evolved a considerable variety of practices in dealing with the religious problem. Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error. While I agree that the religious classes involved here go beyond permissible limits, I also think the complaint demands more than plaintiff is entitled to have granted. So far as I can see, this Court does not tell the State court where it may stop, nor does it set up any standards by which the State court may determine that question for itself.

The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school boards of the nation,

"to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools,"

is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other, but which themselves, from time to time, change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation.

It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian **[p. 238]** begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions. If, with no surer legal guidance, we are to take up and decide every variation of this controversy, raised by persons not subject to penalty or tax but who are dissatisfied with the way schools are dealing with the problem, we are likely to have much business of the sort. And, more importantly, we are likely to make the legal "wall of separation between church and state" as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.