# Black: Dissent

MR. JUSTICE BLACK, dissenting.

*Illinois ex rel. McCollum v. Board of Education,* 333 U. S. 203, held invalid as an “establishment of religion” an Illinois system under which school children, compelled by law to go to public schools, were freed from some hours of required school work on condition that they attend special religious classes held in the school buildings. Although the classes were taught by sectarian **[p. 316]** teachers neither employed nor paid by the state, the state did use its power to further the program by releasing some of the children from regular class work, insisting that those released attend the religious classes, and requiring that those who remained behind do some kind of academic work while the others received their religious training. We said this about the Illinois system:

“Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax established and tax supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment. . . .”

*McCollum v. Board of Education, supra,* at pp. 333 U. S. 209-210.

I see no significant difference between the invalid Illinois system and that of New York here sustained. Except for the use of the school buildings in Illinois, there is no difference between the systems which I consider even worthy of mention. In the New York program, as in that of Illinois, the school authorities release some of the children on the condition that they attend the religious classes, get reports on whether they attend, and hold the other children in the school building until the religious hour is over. As we attempted to make categorically clear, the *McCollum* decision would have been the same if the religious classes had not been held in the school buildings. We said:

“Here *not only* are the State's tax supported public school buildings used for the dissemination of religious doctrines. The State *also* affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. *This* is **[p. 317]** not separation of Church and State.”

(Emphasis supplied.) *McCollum v. Board of Education, supra,* at p. 333 U. S. 212. *McCollum* thus held that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do.

I am aware that our *McCollum* decision on separation of Church and State has been subjected to a most searching examination throughout the country. Probably few opinions from this Court in recent years have attracted more attention or stirred wider debate. Our insistence on “a wall between Church and State which must be kept high and impregnable” has seemed to some a correct exposition of the philosophy and a true interpretation of the language of the First Amendment to which we should strictly adhere.[[1]](#footnote-1) With equal conviction and sincerity, others have thought the *McCollum* decision fundamentally wrong,[[2]](#footnote-2) and have pledged continuous warfare against it.[[3]](#footnote-3) The opinions in the court below and the briefs here reflect these diverse viewpoints. In dissenting today, I mean to do more than give routine approval to our *McCollum* decision. I mean also to reaffirm my faith in the **[p. 318]** fundamental philosophy expressed in *McCollum* and *Everson v. Board of Education,* 330 U. S. 1. That reaffirmance can be brief because of the exhaustive opinions in those recent cases.

Difficulty of decision in the hypothetical situations mentioned by the Court, but not now before us, should not confuse the issues in this case. Here, the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery. That this is the plan, purpose, design and consequence of the New York program cannot be denied. The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids. In considering whether a state has entered this forbidden field, the question is not whether it has entered too far, but whether it has entered at all. New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation, but combination, of Church and State.

The Court's validation of the New York system rests in part on its statement that Americans are “a religious people whose institutions presuppose a Supreme Being.” This was at least as true when the First Amendment was adopted, and it was just as true when eight Justices of this Court invalidated the released time system in *McCollum* on the premise that a state can no more “aid all religions” than it can aid one.[[4]](#footnote-4) It was precisely because Eighteenth **[p. 319]** Century Americans were a religious people divided into many fighting sects that we were given the constitutional mandate to keep Church and State completely separate. Colonial history had already shown that, here as elsewhere, zealous sectarians entrusted with governmental power to further their causes would sometimes torture, maim and kill those they branded “heretics,” “atheists” or “agnostics.”[[5]](#footnote-5) The First Amendment was therefore to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters whom they could not convert to their faith. Now, as then, it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all nonbelievers can be maintained. It is this neutrality the Court abandons today when it treats New York's coercive system as a program which merely “encourages religious instruction or cooperates with religious authorities.” The abandonment is all the more dangerous to liberty because of the Court's legal exaltation of the orthodox and its derogation of unbelievers.

Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law, but because they loved their God. The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells. The spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy **[p. 320]** hand of government. Statutes authorizing such repression have been stricken. Before today, our judicial opinions have refrained from drawing invidious distinctions between those who believe in no religion and those who do believe. The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law.

State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of “cooperation,” to steal into the sacred area of religious choice.

1. See, e.g., Newman, The Sectarian Invasion of Our Public Schools; Moehlman, The Wall of Separation between Church and State; Thayer, The Attack upon the American Secular School, pp. 179-199; Butts, The American Tradition in Religion and Education, pp. 201-208. See alsoSymposium on Religion and the State, 14 Law & Contemp.Prob. 1-159. [↑](#footnote-ref-1)
2. See, e.g., O'Neill, Religion and Education Under the Constitution, pp. 219-253; Parsons, The First Freedom, pp. 158-178; Van Dusen, God in Education. See also Symposium on Religion and the State, supra. [↑](#footnote-ref-2)
3. See Moehlman, supra, n. 1, at p. 42. O'Neill, supra, n. 2, at pp. 254-272. [↑](#footnote-ref-3)
4. A state policy of aiding “all religions” necessarily requires a governmental decision as to what constitutes “a religion.” Thus is created a governmental power to hinder certain religious beliefs by denying their character as such. See, e.g., the Regulations of the New York Commissioner of Education providing that

“The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.”

(Emphasis added.) Art. 17, § 154, 1 N.Y. Official Code Comp. 683. This provides precisely the kind of censorship which we have said the Constitution forbids. Cantwell v. Connecticut, 310 U. S. 296,310 U. S. 305. [↑](#footnote-ref-4)
5. Wertenbaker, The Puritan Oligarchy, 213-214. [↑](#footnote-ref-5)