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RELIGIOUS EDUCATION AND THE HISTORICAL METHOD OF CONSTITUTIONAL INTREPRETATION—A REVIEW ARTICLE †

Robert E. Rodes, Jr. *

Confusion Twice Confounded is sufficiently typical of a growing body of literature to warrant more extensive treatment than is usually accorded in a book review. It analyzes at great length the opinions in the *Everson* [1] and *McCollum* [2] cases and criticizes them in the light of the historical background of the First Amendment.[3] *Everson,* it will be recalled, derived from the Founding Fathers the doctrine that the Constitution required a "wall of separation between church and state," which was not breached by public payment of transportation to and from parochial schools. *McCollum* used the test laid down in *Everson* to invalidate a system whereby school children wishing to do so were given an opportunity to attend for a short period each week classes of instruction in the religion of their choice conducted on the school premises. Msgr. Brady argues that the Founding Fathers, in forbidding laws "respecting an establishment of religion," intended to do no more than forbid the federal government either to subsidize a religious ministry of official sanction or to interfere with those subsidized by a number of the states. He shows us that in our early history no constitutional objection was raised either to public support of religion generally or to public assistance whereby persons for whom there was some special public responsibility (Indians, the military, etc.) could procure the ministrations of the religion of their choice.

Msgr. Brady comes to us with the credentials of an eminently qualified historian, and there is no reason to question the historical accuracy of anything he says. But in delimiting his historical inquiry by the view that the Constitution furnishes one and only one answer to questions of this sort, discoverable by any fair-minded person without regard to contemporary political or social institutions, it seems to this reviewer that he does a disservice to the cause of formulating an alternative to the unfortunate doctrine laid down in the two decisions under consideration. The canon of constitutional construction he employs is one with which he himself would surely be less

† CONFUSION TWICE CONFOUNDED, by Joseph H. Brady, Seton Hall Press, South Orange, N. J., 1954. Pp. 192. $3.00.

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1. Everson v. Board of Education, 330 U.S. 1 (1947).
2. McCollum v. Board of Education, 333 U.S. 203 (1948).
3. U.S. CONST. AMEND. I.

than content were it applied in other contexts. It is a narrow examination of the specific purpose of the framers of the provision under consideration. He derives his chief support for it from Taney's opinion in the *Dred Scott* case.[4] Taney, following this criterion, held that the ownership of slaves by some of the Founding Fathers proved that they intended to exclude members of the Negro race, free or slave, from the enjoyment of advantages otherwise accorded to human beings as such under the Constitution. To be sure, there is a certain magnificence in the relentless logic of this opinion, but we are hardly proud of it today. Nor should Msgr. Brady, who is very much disturbed by Jackson's avowal in *McCollum* that he is judging according to his "prepossessions," have failed to notice the correlation between the prepossessions of the several judges and their holdings in *Dred Scott*.[5]

Since Msgr. Brady seems to have oversimplified, the most appropriate means of reviewing his work is probably to fill in the omitted complexities. This review will accordingly take up the ideological framework in which the historical questions discussed by Msgr. Brady and the Court present themselves, the manner in which historical material is used by the Court, and the role of the judicial "prepossession" in the decision of constitutional cases.

I

The dynamic conception of constitutional interpretation—which most modern constitutional lawyers consider indispensable to the survival of a system in which a judicially-enforced constitution plays the role it does among us—is probably best stated by Holmes:

> . . . when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[6]

If we are to determine what the First Amendment means to us, rather than what it meant to the Founding Fathers, we cannot content ourselves, as Msgr. Brady seems to, with determining what the Founding

4. Scott v. Sandford, 19 How. 393 (U.S. 1857), cited on pages 47 and 91. He cites as additional authority, Lamar in Lake County v. Rollins, 130 U.S. 662, 670 (1889). An examination of the language quoted from Lamar in connection with the fact situation that called it forth will show that no great significance can be attached to it.

5. For a short and readable narrative of the behind-the-scenes events leading up to *Dred Scott*, see HENDRICK, BULWARK OF THE REPUBLIC 320–32 (1937).

6. Missouri v. Holland, 252 U.S. 416, 433 (1920).

Fathers meant to abolish; we must ask ourselves what institution they meant to found within the shelter of the constitutional prohibition, and what that institution has become.

While the history needs a great deal more development by specialists in the field, the impression left with this reviewer by the materials he has been able to examine [7] is that the Founding Fathers and their early nineteenth-century successors—at least the more articulate of them—proposed that the ethical foundations of the nation be placed in a body of principles under which everyone could be expected to work harmoniously toward the fulfillment of the high temporal promise of America, rather than in "sectarian" beliefs or hierarchies, whose "establishment" would result in internal discord. The body of ethical standards thus relied on to give the requisite moral cohesiveness to civil society will be referred to hereafter as the Official Ethic. Its proponents seem to have regarded it as stemming more from principles of political theory than from theological principles, although the presupposition necessary to the erection of any such structure would seem to be that of a certain type of Protestant Christianity [8]—that there is a broad area in which the determination of the individual conscience is not subject to any kind of societal responsibility. The fact that those who do not share this presupposition—including this reviewer—regard it as theological does not keep it from claiming in the light of history a favored place in our constitutional framework.[9] It is on account of this favored position that the embodiment of the Official Ethic in the public school system has been regarded as constitutionally unexceptionable, and has sometimes been regarded as entitled to constitutional protection against competing systems.

There seems little doubt that in the early days of the country the Official Ethic in the minds of many, if not most, Americans, contained

7. Chiefly, PFEFFER, CHURCH, STATE, AND FREEDOM cc. 4 and 5 (1953), 1 STOKES, CHURCH AND STATE IN THE UNITED STATES c. 4, and particularly §§ 7 and 8 (1950), and THAYER, THE ATTACK UPON THE AMERICAN SECULAR SCHOOL, c. 1 (1951), and, of course, the work under review.

8. Howe, Book Review, 64 HARV. L. REV. 170 (1950); Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23, 27–31 (1949).

9. Here this reviewer must disagree with Fr. Murray, *supra* note 8. He contends that as the view that religion is a private matter is a theological view, it cannot have been given a favored position under the First Amendment, since the First Amendment requires the State to be neutral as between theological views. But it would seem that the view that religion is a private matter is both a theological and a political view. Which it is primarily depends on which of the two fields of study is regarded as having the pre-eminence over the other. To a person who believes that religion is not merely a private matter, but the subject of certain responsibilities on the part of society, theology sets limits on the area of inquiry appropriate to political philosophy. But to one who believes that religion is a private matter, the areas of inquiry open to theology are probably delimited by political theory, see Donahoe v. Richards, 38 Me. 379, 409–10 (1854). Thus, to those who accept the view that religion is a private matter, it seems to be a political view, although to those who reject it, it is a theological view.

large elements of "nonsectarian" Christianity—elements that have gradually been squeezed out by the influx of new ideas and new populations, whereby the spectrum of divergence widened, and what was once nonsectarian became sectarian. It is this earlier deposit of nonsectarian Christianity in the Official Ethic that seems to have been the basis for some of the considerations advanced by Msgr. Brady to show that the views of the Founding Fathers and their immediate successors were not in accord with the views advanced by the judges in *Everson* and *McCollum*. But the plans under attack in those two cases did not involve a teaching of nonsectarian religion as part of the Official Ethic; they were definitely sectarian, being calculated to facilitate the education of the child in the religion of his choice by the ministers of that religion.

As Msgr. Brady shows us, Jefferson proposed for his University of Virginia a scheme not unlike that stricken down in *McCollum* whereby the various religious denominations would be invited to establish theological schools in the vicinity of the campus, with certain facilities of the University made available to them and to their students. This proposal might have set the pattern for the development of the public schools, but it did not; rightly or wrongly, the decision when the public schools were established was in favor of teaching the moral principles underlying the state as part of the regular curriculum of the nonsectarian school. Thus, the plans involved in *Everson* and *McCollum* represent departures from the institution as it has developed, which departures stem not from the suggestions of Jefferson, but from the felt needs of the present.

After this brief historical review, we are in a position to examine the claims of the ideological groups that seem to have been before the Court in the cases under consideration. These seem to be basically three in number:

1. Those who believe that the primary concern of mankind should be an earthly happiness to be achieved through the means of the state or of some decision procedure like those used in running the state. These tend to reject as un-American any religious view that denies the absolute subjection of the things of this world to such a decision procedure, while proclaiming the liberty of every citizen to take such measures concerning the next world as may occur to him, subject to that proviso. They regard the public school as an institution to prepare the child to take his place in the striving toward earthly happiness, and emphasize national unity, usually on the basis of common adherence to the favorite decision procedure.[10] Whatever leads school

10. The nature of the decision procedure thus adhered to varies. Mr. Paul Blanshard, for instance, shows himself a believer in democracy:

"Catholic dialectitians like to describe the infallibility of the Pope as something which resembles the power of the United States Supreme Court. 'See,'

children to be conscious of religious differences they deplore as "divisive." It is not difficult to see in the tenets of this group the basis for Mrs. McCollum's attack on the Champaign plan or Mr. Everson's attack on the payment of bus fares to parochial school students.

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they argue, 'you have a supreme authority in the United States to act as final arbiter under your constitution, and we have a supreme authority under our constitution. It is natural and fitting that such authority should exist.' The analogy is not accurate. The power of the United States Supreme Court is derived from the people, and the people could abolish the Court if they wished to do so by constitutional amendment. The members of the Court are chosen by an elected official and confirmed by an elected Senate. Their power is carefully limited because they are subject to impeachment and trial by an elected body. They have never claimed divine or even juridical infallibility in anything. The Catholic doctrine of the infallibility of the Pope does not provide for any of these democratic safeguards or limitations." AMERICAN FREEDOM AND CATHOLIC POWER 26 (1949).

Mr. Vivian Thayer has a more subtle technique:

"The secular method merely applies to religion a logic that has yielded good fruit in other fields. It is a way of thinking and living which while not exclusively American, is, nevertheless, a unique outgrowth of American experience.

"Herbert Agar has described this method in his volume, *The Price of Union*. The price of union, according to Agar, has been the spirit of accommodation, a willingness of local groups with intense conviction to work hand in hand in the same political party with the partisans of other interests. This self-discipline, or, if you will, a disposition to face reality and to accept half a loaf rather than to press for a whole loaf, has welded together a highly diverse people into one nation and has created a spirit of unity and common action in local and regional groups of different interests and, often, conflicting ideologies." *An "Experimentalist" Position* in AMERICAN EDUCATION AND RELIGION 19, 31–2 (Johnson ed. 1952).

That Mr. Blanshard has put his trust in the things of this world is probably best illustrated in his chapter on *The Church and Medicine, op. cit, supra* at 107–31, where he insists that such subjects as the morality of therapeutic abortion should be decided by doctors, not by experts in moral theology. He seems also to be shocked at the view that the saving of souls in the sickroom is more important than the saving of bodies. Mr. Thayer's decision procedure is perhaps more appealing than Mr. Blanshard's, but he unites with Mr. Blanshard when he makes of a decision procedure a way of life:

"This training in democratic thinking and living seeks neither to impose principles dogmatically upon the young nor to leave them rudderless, possessed only of an 'open mind.' Those who accuse the secular school of a failure to breed conviction, particularly in a democratic faith, overlook the fact that the method of which I have given but a shorthand description, when seen in its full implications, is in itself a structure that will constitute a sound foundation upon which one can ground his life." *Op. cit. supra* note 7, at 32.

"The conquest of the continent thus operated to loosen and to free American society in every way, intellectually, socially, economically, and politically. Men oriented themselves less with reference to the past and the life hereafter, and more and more with respect to the promise of the good life on this earth. In the preparation of young people for an open future the school came to play an ever more pregnant role." *Id.* at 22.

What gives us the clearest insight into Mr. Thayer's principles of mutual accomodation is that he is more anxious to teach them than to use them in resolving disagreements over what to teach.

This group received two checks in the Supreme Court, one in the *Pierce* [11] case, which held that parents who wished to send their children to private schools could not be compelled to send them to the public schools in the interest of national unity, and one in the *Barnette* [12] case, which held that a child who did go to the public school could not be compelled unwillingly to make a symbolic obeisance to the principle of national unity.

With this group are often joined some of the less numerous religious minorities, who, while aware that the public school does not meet their religious needs, fear that they will be overlooked in any attempt to meet the needs of the more numerous denominations or will be set apart in invidious ways from the majority.[13]

2. Religious persons, chiefly Protestants, who accept the principle of separation of Church and State, together with that of the unitary public school system, but who deplore the elimination of "nonsectarian" religion from the Official Ethic as taught in the public schools.[14] They accept systems like the released-time program involved in *McCollum* as a solution, somewhat less than satisfactory, for the problem raised by this elimination.[15]

Basic, perhaps, to the whole decision procedure orientation is the individualistic hierarchy of values:

> "The Educational Policies Commission has said, 'By moral and spiritual values we mean those values which, when applied in human behavior, exalt and refine life and bring it into accord with the standards of conduct that are approved in our democratic culture.'
>
> "It answers the question, 'What things are good?' by enumerating ten moral and spiritual values.
>
> "First in the list is the *supreme importance of the individual personality.* This is declared to be basic, with all other values dependent on it." NATIONAL CONGRESS OF PARENTS AND TEACHERS, MORAL AND SPIRITUAL EDUCATION IN HOME, SCHOOL, AND COMMUNITY 5–6 (1953).

For an integration of most of the shapes taken by individualism since the Middle Ages, see HUGHES, THE CHURCH AND THE LIBERAL SOCIETY (1944).

11. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

12. West Virginia Board of Ed. v. Barnette, 319 U.S. 624 (1943).

13. This seems to be the thrust of Greenberg, *A Jewish Educator's View* in AMERICAN EDUCATION AND RELIGION 39 (Johnson ed. 1952). See also Mr. Pfeffer's account of the experience of the Jewish community in Montreal under the educational system prevailing in Quebec Province. PFEFFER, CHURCH, STATE, AND FREEDOM 42–5 (1953).

14. Harner, *A Protestant Educator's View* in AMERICAN EDUCATION AND RELIGION 77 (Johnson ed. 1952). This distinction between religion as such, on the one hand, and, on the other, the institutional church and the sectarian creed, would seem to rest on presuppositions peculiar to Protestantism—presuppositions which Prof. Harner lists as the supremacy of Scripture over tradition, of faith over works, and of the Christian people over an exclusive priesthood. Private interpretation is at the heart of any such system, and the institutional church is a mere grouping of such interpretations, with no special divine mandate attached to its particular forms or formulations. There is required, however, something on which the private interpretations of all are to operate. See Hale v. Everett, 53 N.H. 9 (1868).

15. The record in *McCollum* indicates a certain amount of nonsectarian pressure in the plan under attack. See particularly the testimony of Mr. Cartlidge

3. Catholics, and adherents of a certain number of other religious bodies, who believe that religious education is necessary for the child and cannot be achieved in a school that is not religiously oriented throughout. At the same time, they attach sufficient importance to their distinctive doctrines or to their institutional churches to deny the efficacy of nonsectarian religion to achieve the orientation they require. Catholics, at least, and perhaps some others of this group, feel that if the State is going to enter into the educational field at all, it is only fair that it subsidize in some measure parochial education, the only kind that fully meets their needs.[16] These, like Group 2, accept the released-time system but are not fully satisfied with it.

This reviewer, although his religious convictions place him in Group 3, is disposed to concede that, as regards the ideological foundations of public education, Group 1 represents the legitimate claim to the heirship of the Founding Fathers. This is not to say that the Founding Fathers would have accepted all the tenets of this group as they now appear. But those tenets flow from the premises on which the Founding Fathers acted, by a line of gradual development whereby some premises were abandoned, others embroidered upon. The thrust in the direction of submerging the divergent religious beliefs under the common experiences of temporal achievement seems to this reviewer to be unmistakable from the start. This may indicate in what sense the Court might have been justified in calling on the Founding Fathers to support the various opinions in *Everson* and *McCollum,* and in what sense Msgr. Brady is not justified in calling on them to castigate the Court.

II

With the problem posed in this form, it is the authors of the schemes under attack in the *Everson* and *McCollum* cases who must ask the

beginning at p. 155, that of Mr. Mellon on p. 127, and the following statement from the trial court's opinion, pp. 60, 66: "The testimony shows that sectarian differences between the sects are not taught or emphasized in the actual teaching as it is conducted in the schools." The church authorities seem to have attempted to supervise the curriculum in such a way as to prevent any religious teacher from teaching things "antagonistic" to any other religion. In addition, there seems to have been considerable reluctance to permit the various Protestant denominations to establish programs of their own in lieu of the nondenominational Protestant teaching that was in a flourishing state. The division of military chaplains into Catholic, Protestant, and Jewish categories seems to present similar problems.

16. See Hochwalt, *A Catholic Educator's View* in AMERICAN EDUCATION AND RELIGION 61 (Johnson ed. 1952). The Catholic position in this respect would seem to find justification in Mr. Blanshard's confidence in the public school system as a means of perpetuating his views at the expense of theirs: e.g.: "My own conviction is that the outcome of the struggle between American democracy and the Catholic hierarchy depends upon the survival and expansion of the public school." AMERICAN FREEDOM AND CATHOLIC POWER 286 (1949). Anyone familiar with Catholic doctrine will see from a reading of Mr. Blanshard's book that his attack, although purportedly directed at the hierarchy, goes to the heart of the Catholic religion.

Court to set out in a new direction. On what basis can this be asked? There is some indication that the Official Ethic is taking on a new religious content; this may be the meaning of the well-known language of Douglas in *Zorach* v. *Clauson*.[17] But this would not be enough to sustain the plans under attack; indeed, it would not be enough to support the decision in *Zorach*. What is called for is some fractionalization of the hitherto monolithic Official Ethic, or else a holding that the State may support in some ways moral or religious postulates other than the Official Ethic without establishing a religion.

As has been seen, we cannot at this late date revive Jefferson's plan for the University of Virginia merely because Jefferson proposed it. We must point to a living tradition on which the Court may base the holding we seek. Once outside the monolithic public school system, we will have little difficulty in finding such a tradition. Msgr. Brady points in the right direction by his insistence on the wording of the First Amendment, which forbids not a law establishing a religion, but a law *respecting* an establishment of religion, whether for it or against it. An important purpose of the Amendment thus worded, he shows us, was to protect from federal interference the establishments existing in many of the states at the time the Constitution was adopted. This sets a tone to the document which the Court ignores, and which Msgr. Brady does not develop as well as he should. Even granting that insofar as the First Amendment imports an ideology that ideology is Protestant in principle, our institutions have as much in them of compromise as of ideology.

Thus, as Msgr. Brady points out, the Founding Fathers were not so doctrinaire as to neglect the opportunity to pacify a tribe of Catholic Indians by sending them priests. Nor did they neglect to provide their armed forces with religious ministrations, even though such ministrations are necessarily sectarian.

One of the best illustrations of this pluralistic impetus at work is in the field of church polity. In the early days of our legal system, there seems to have been a strong tendency toward a monolithic approach. It was considered that constitutional principles respecting religion could be served only by treating all religions alike and resolving their temporal affairs under some doctrine of private law, such as that of charitable trusts, or that of voluntary associations. At the same time, there was a strong bias in favor of democracy within the several church organizations, even those whose theological tenets required a hierarchical government. In the end, however, the view that the religious body has the right to rule its own juridical destinies through the governmental organs that are established in it—the

17. Zorach v. Clauson, 343 U.S. 306 (1952). See also 68 STAT. 249 (1954), amending 36 U.S.C. § 172 (1952) by inserting "under God" after "one nation" in the flag salute.

pluralistic view—triumphed completely; today, no other is compatible with the federal Constitution.[18] This development is responsive to the very real needs of various religious bodies unable to fit into the mold imposed on them by the monolithic view. Similar accommodations to the varying religious views in the community are everywhere to be observed.

In other words, while the historical claim of the monolithic view to the control of the public school system is very strong, the public schools as they have developed are an aberration in the general picture of our society, which is pluralistic. The basic trend of our society is to accommodate divergent views, not to suppress them. Indeed, in the public school system itself, the Supreme Court has stricken down forms of implementation of the Official Ethic whenever the element of compulsion became too insistent. Thus, while the State may instill in the public school child the tenets of this Ethic, it cannot force from him a profession of assent.[19] And while it can offer financial advantages to parents to make their children part of this captive audience, it cannot use coercion on those parents who wish to forego these advantages and send their children to a school whose moral postulates are agreeable to their own.[20]

Our society, then, is pluralistic as well as democratic. It exerts pressures toward conformity, but places effective limits on how strong those pressures may be made. With this principle in mind, we may have a basis for a critical evaluation of the Court's position in *Everson* and *McCollum*.

III

To sum up the foregoing, it appears that democracy and civil liberty as we know them have from the outset meant different things to different people. To the Founding Fathers, and perhaps to a majority of Americans even today, they represent an ideological basis for society, rooted in a habit of mind that accepts no absolute moral values of universal applicability. Behind this habit of mind lies the premise, sometimes articulated, always implicit, that there are no such values, or that none have yet been discovered. From such a premise, it follows that all solutions to life's problems are tentative, depending on the social context and the needs of the individual personality. To so empiric a way of life, the readiness to give all viewpoints a hearing, and to abandon such as have outlived their usefulness, is vital. Liberty, then, is regarded as the civil manifestation of the right of the individual to act on such tentative solutions as may commend themselves to him

18. This history is traced out in the cases in chapters 1 and 2 of HOWE, CASES ON CHURCH AND STATE IN THE UNITED STATES (1952). See also Professor Howe's foreword to *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91 (1953).

19. West Virginia Board of Ed. v. Barnette, 319 U.S. 624 (1943).

20. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

and democracy as the necessary limitation on liberty in the interest of enabling other individuals to do the same. What has been referred to as the Official Ethic has become a shifting congeries of values with these principles at the core.

In contradistinction to the adherents of this doctrine are those who believe in a system of absolute values to which their neighbors ought to adhere, but which seem inappropriate for implementation as such by means available to the civil State. To these, the cement of our society is not the "right" of the individual to act on such solutions as commend themselves to him, but charity, a virtue which moves them to live in harmony with their neighbors even if persuaded that the latter err, and err grievously.[21] Under this view, liberty and democracy are adhered to as appropriate civil manifestations of that charity, but not as absolutes.

The difference between these two viewpoints is often submerged in the day-to-day workings of society, but it becomes quite apparent in the field of education, where the presence of an ideological element is regarded on all sides as necessary. To those who hold the first of these viewpoints, liberty and democracy are that ideological element. To those who hold the second, they are not: to those who regard as central an ideology of moral absolutes, liberty and democracy, however desirable as solutions to the problems they address, cannot be more than secondary concerns.

We have seen that the claim of the former, ideological, view of liberty and democracy to embodiment in the public school system has a strong historical basis, but that the claim of any peaceable group of citizens to be accommodated in accordance with their own needs is at least equally strong, and that the proponents of the plans under attack in the two cases under consideration must sustain them, if at all, by persuading the Court to apply the latter principle at the expense of the former. What basis have they for asking the Court to do this?

The chief basis is that there has been a decision by the appropriate political authorities, who have worked out an adjustment between the conflicting demands of the two principles. Religion is accommodated, not established. In each case the public school, faithful to its historical background, adheres to the ideology of the Official Ethic, with only a minimal concession to the dissenter. In one case, he is allowed to bring in, at no public expense, a person to instruct him for half an hour a week in the ideology in which he believes; in the other case, he is given the bus fare to go somewhere else.

21. Thus, Archbishop Carroll, the founder of the American hierarchy, is quoted with respect to his flock as wishing ". . . to preserve in their hearts a warm charity and forbearance toward every other denomination of Christians, and at the same time to preserve them from that fatal and prevailing indifference which views all religions as equally acceptable to God and salutary to men. . . ." quoted in 1 STOKES, CHURCH AND STATE IN THE UNITED STATES 331 (1950).

Nor are these concessions being demanded as constitutional right.[22] Quite the opposite: having been accorded, they are under constitutional attack from adherents of the ideology officially embodied in the public school. The inversion whereby the intransigent among the in-group thus make use of the Bill of Rights to suppress moderate concessions to the out-group is flimsily grounded, to say the least. Mr. Everson complains that some of his tax money is being diverted to allow other citizens to seek on their own terms what they cannot accept on his. Mrs. McCollum complains that allowing others to stand up for what they believe in embarrasses her little boy by making it necessary for him to do the same. Despite the ideological content of the First Amendment, its place in our constitutional structure, like that of all the Bill of Rights, is properly as a vindication of individuality or pluralism against political pressures to conform; the use to which Mr. Everson and Mrs. McCollum attempt to put it would make of it instead an additional instrument of conformist pressure.[23]

With these considerations in mind, we are perhaps in a position to examine the result actually reached by the Court in the two cases. Msgr. Brady is not alone in attaching only a modicum of importance to the fact that the result reached by the majority in *Everson* was an upholding of the pluralistic concession. But in view of the nature of the adjustment that has to be made, perhaps the result is as important as the reasoning. There is something for everyone in *Everson*. No adherent of the Offiicial Ethic could fail to be gratified by the vehemence with which the basic principle of separation of Church and State is espoused. At the same time, a way is laid down whereby the dissenter can be given all that the political authorities of a given state are minded to give him. The "child benefit" theory is adequate to support any kind of state reimbursement for the cost of attending non-public schools.

Meanwhile, as is shown both in *McCollum* and in the rationale

22. The Supreme Court seems never to have adopted the view that a person is constitutionally entitled to exemption on account of his religious scruples from a duty the State can impose on those who have no such scruples. See the handling in West Virginia Board of Ed. v. Barnette, 319 U.S. 624 (1943) of the earlier case of Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). On the other hand, it has given a favorable reception to legislative adoption of exemptions based on religious scruples. Selective Draft Law Cases, 245 U.S. 366, 389 (1918).

23. The non-establishment clause of the First Amendment has, of course, considerable importance as an additional safeguard for the "free exercise" protected by the next clause. But, as Fr. Murray points out, this context would not call for the absolute application made in Everson and McCollum, but for an evaluation of the impact of a given activity on freedom of exercise. *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23 (1949). Passing to the Fourteenth Amendment, there would seem to be analogous question as to whether the state action involved deprives anyone of life, liberty or property. The Court seems to have subsumed this question under that of standing, *i.e.*, whether there is a case or controversy. It would seem that these should be two different questions. *See* McCollum v. Board of Ed., 333 U.S. 203, 232 (1948) (Jackson, J., concurring).

chosen for *Everson,* the State continues to take no cognizance of religious organizations as such, but continues to approach them only through the medium of the individual citizen. This is not pluralism as the political theorists know it, although there seems to be little practical difference.[24] The Court, while adhering to the constitutional framework whereby the Official Ethic is maintained as the state ideology, has introduced a means whereby the dissenter can be given scope for development, and for urging his needs in the proper place—before his neighbors in the political forum. If he approaches with temperance and reason the opportunity thus afforded, he may need no more.

IV

These, then, are some of the factors that it would seem a criticism of the *Everson* and *McCollum* cases ought to consider. Obviously, a historian with Msgr. Brady's qualifications could have given a more authoritative account of the relevant historical considerations than can this reviewer; it is a matter for regret that he has not done so. But his failure is understandable: a reading of the opinions in question will indicate how easily one might be deceived into thinking that the Justices were attempting to do exactly what Msgr. Brady has done better. While the various opinions, particularly Jackson's in *Everson* and Frankfurter's in *McCollum,* contain adequate statements of the issues in their contemporary context, they are all interwoven with appeals to the Founding Fathers. If the latter can be said to have been used for the purpose Msgr. Brady attributes to them—that of supporting the respective opinions by an inexorable reasoning process—there is little doubt that Msgr. Brady is right in calling them specious.

But the judge is not what Msgr. Brady is, an objective observer of history. He is a part of it, responsible for carrying it forward into a context different from that in which it began. He thus marshals historical elements as leading up to his decision, not as compelling it. Viewed in this light, the opinions under consideration are less flagrantly specious than Msgr. Brady considers them. While, like most judicial opinions, they adhere to the fiction of inevitability, a person familiar with the jurisprudence of the Supreme Court has little difficulty following them. They point to the type of evil that called forth the constitutional provision involved in the case and then set out to see if the governmental action complained of is productive of the same type of evil. In this process, the judge is, to be sure, exercising a good deal of discretion. He is picking from the Founding Fathers one principle that he will regard as governing the case, and ignoring other principles that might also be discovered in the Founding Fathers, and

24. *Cf.* note 22 *supra;* Bradfield v. Roberts, 175 U.S. 291 (1899); Gardner, *Liberty, the State, and the School,* 20 LAW & CONTEMP. PROB. 184 (1955).

might also be regarded as governing the case. Some of the foregoing material may serve to indicate what justification the authors of the several opinions have and have not for picking one principle instead of another.

Zorach v. *Clauson*[25] may shed some light on these considerations. It will be noted that in that case all the talk is about pluralism. Again, then, the judge is not trying to derive a principle of constitutional law from language or history; he is stating the principle of constitutional law which, in the light of its development in our history and of the convictions of the judge himself, he deems applicable. To state the applicable principle is, of course, to decide the case. We can only hope he will give a lucid explanation of why he deems it applicable. While the *Everson* and *McCollum* opinions are not perfect on this score, they are at least adequate.

V

But if neither history nor language dictates an inevitable result, on what basis are the judges deciding the case? Jackson in *McCollum* says this: "It is a matter on which we find no law but our own prepossessions." [26] After pointing out that Black, who speaks for the majority in both cases, can be applying no different criterion, Msgr. Brady says: "Of this explanation Justice Black can hardly be proud, nor the Court for which he speaks. With this explanation we, the American people can hardly be content as we face the future with a Court proven, by its own words, to be so dangerously unjudicial." [27] This statement seems indicative of an attitude that is open to serious objection.

Jackson's remark seems to be no more than a grudging admission that he and his colleagues are bringing to their task of constitutional interpretation an ethical norm of which they are persuaded.[28] If we, the American people, are to be discontented with the decisions thus arrived at, it will not be because they are unjudicial, but because they are wrong. To illustrate with the now less controversial example of *Dred Scott,* we are not surprised to find that Taney, who favored slavery, rather than McLean, who opposed it, found in the ownership of slaves by the Founding Fathers an obstacle to the inclusion of Negroes within the ambit of the Constitution. Nor are we surprised to find that the popular discontent with the decision was associated with a view of slavery, not with a view of constitutional construction. Those of us who see slavery as a moral evil have no difficulty in saying that the ownership of slaves by the Founding Fathers was a departure from the princi-

25. Zorach v. Clauson, 343 U.S. 306 (1952).
26. McCollum v. Board of Education, 333 U.S. 203, 238 (1948) (concurring opinion).
27. Pp. 173–4.
28. *Cf.* the various opinions in Adamson v. California, 332 U.S. 46 (1947).

ples they laid down for posterity—a departure which it is by no means incumbent on us to perpetuate.

Taney's decision, then, was erroneous, but not unjudicial. His error was in failing to regard slavery as a moral evil. Had he accepted the correct moral view of slavery, even though he would not have refused to give any recognition to the institution as he found it, he would have read the Constitution in such a way as to favor in a given case the claim to be free. In other words, it is generally acknowledged today that our constitutional structure gives the judge a certain discretionary authority over the positive law. He must consider in the light of his own conscience both the scope of that authority and the direction in which it is to be exercised. Where our institutions call for a detached ethical judgment, he must make it.

Words like "due process of law" and even "establishment of religion" are signals calculated to call forth just this ethical judgment and the detached position in which the judge is placed by our federal Constitution is calculated to enable him to elicit it, informed by study but unswayed by faction or favor. The delegation of such a role to the judge, rather than to an official more responsive to political pressure, would seem appropriate to a conviction that there exists an ethical standard of which the human conscience can inform itself by the use of reason. Such a conviction seems to accord with the teachings of the Catholic Church better than the view that the judge should blindly follow the intentions of the Founding Fathers, regardless of the moral validity of those intentions. The latter view would seem to require a positivistic philosophy which Msgr. Brady would surely not want to embrace.

To accept the role of the judicial conscience in giving effect to the ethical content of the Constitution will be to put the instant controversy on the only level on which a solution is possible. No amount of probing into the views of Jefferson or Madison is going to convince a man that the State can furnish bus fare to parochial school children, if he believes that the very survival of the American Way of Life depends on discouraging Catholicism by all possible means short of actual persecution. Nor will he be persuaded of the constitutionality of the plan involved in *McCollum,* if he believes it can serve no conceivable purpose except as the first step in a conspiracy to put the Pope in the White House. But if Catholics, and any other religious groups in an analogous position, show that our national life rests on a firmer foundation than a common devotion to nonsectarianism, if they show that they have deserved of America a better opportunity to develop in accordance with their own principles than is afforded them by the nonsectarian public school, they may hope for a generous response from the judiciary, and from other Americans as well.

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