

CASE 1: KYLLO v. UNITED STATES (2001)

CASE HISTORY:

Suspicious that marijuana was being grown in petitioner Kyllo's home in a triplex, agents used a thermal imaging device to scan the triplex to determine if the amount of heat emanating from it was consistent with the high-intensity lamps typically used for indoor marijuana growth. The scan showed that Kyllo's garage roof and a side wall were relatively hot compared to the rest of his home and substantially warmer than the neighboring units. Based in part on the thermal imaging, a Federal Magistrate Judge issued a warrant to search Kyllo's home, where the agents found marijuana growing. After Kyllo was indicted on a federal drug charge, he unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea. The Ninth Circuit ultimately affirmed, upholding the thermal imaging on the ground that Kyllo had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home. Even if he had, ruled the court, there was no objectively reasonable expectation of privacy because the thermal imager did not expose any intimate details of Kyllo's life, only amorphous hot spots on his home's exterior. Kyllo petitioned for a writ of certiorari to the Supreme Court.

Source: Cornell University Law School Legal Information Institute, *Kyllo v. United States*, "Syllabus," <http://www.law.cornell.edu/supct/html/99-8508.ZS.html>

QUESTION:

Is the use of thermal-imaging to obtain probable cause for a search warrant an "unreasonable search and seizure" as proscribed by the Fourth Amendment?

HOLDING (5-4):

Held: Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a [Fourth Amendment](#) "search," and is presumptively unreasonable without a warrant.

RELEVANT CONSTITUTIONAL PROVISION:

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

KYLLO v. UNITED STATES (2001)

MAJORITY OPINION: Justice SCALIA delivered the opinion of the Court, joined by Justices SOUTER, THOMAS, GINSBURG, and BREYER.

This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a “search” within the meaning of the [Fourth Amendment](#).

I.

[Summary of Case History omitted].

II.

The [Fourth Amendment](#) provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” “At the very core” of the [Fourth Amendment](#) “stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” *Silverman v. United States*, [365 U.S. 505](#), 511 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See *Illinois v. Rodriguez*, [497 U.S. 177](#), 181 (1990); *Payton v. New York*, [445 U.S. 573](#), 586 (1980).

On the other hand, the antecedent question of whether or not a [Fourth Amendment](#) “search” has occurred is not so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our [Fourth Amendment](#) jurisprudence was tied to common-law trespass. See, e.g., *Goldman v. United States*, [316 U.S. 129](#), 134—136 (1942); *Olmstead v. United States*, [277 U.S. 438](#), 464—466 (1928). Cf. *Silverman v. United States*, *supra*, at 510—512 (technical trespass not necessary for [Fourth Amendment](#) violation; it suffices if there is “actual intrusion into a constitutionally protected area”). Visual surveillance was unquestionably lawful because “ ‘the eye cannot by the laws of England be guilty of a trespass.’ ” *Boyd v. United States*, [116 U.S. 616](#), 628 (1886) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765)). We have since decoupled violation of a person’s [Fourth Amendment](#) rights from trespassory violation of his property, see *Rakas v. Illinois*, [439 U.S. 128](#), 143 (1978), but the lawfulness of warrantless visual surveillance of a home has still been preserved. As we observed in *California v. Ciraolo*, [476 U.S. 207](#), 213 (1986), “[t]he [Fourth Amendment](#) protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.”

One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a “search” despite the absence of trespass, is not an “unreasonable” one under the [Fourth Amendment](#). See *Minnesota v. Carter*, [525 U.S. 83](#), 104 (1998) (Breyer, J., concurring in judgment). But in fact we have held that visual observation is no “search” at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless

searches are presumptively unconstitutional. See *Dow Chemical Co. v. United States*, [476 U.S. 227](#), 234—235, 239 (1986). In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz v. United States*, [389 U.S. 347](#) (1967). *Katz* involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth—a location not within the catalog (“persons, houses, papers, and effects”) that the [Fourth Amendment](#) protects against unreasonable searches. We held that the [Fourth Amendment](#) nonetheless protected *Katz* from the warrantless eavesdropping because he “justifiably relied” upon the privacy of the telephone booth. *Id.*, at 353. As Justice Harlan’s oft-quoted concurrence described it, a [Fourth Amendment](#) search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. See *id.*, at 361. We have subsequently applied this principle to hold that a [Fourth Amendment](#) search does *not* occur—even when the explicitly protected location of a *house* is concerned—unless “the individual manifested a subjective expectation of privacy in the object of the challenged search,” and “society [is] willing to recognize that expectation as reasonable.” *Ciraolo, supra*, at 211. We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, *Smith v. Maryland*, [442 U.S. 735](#), 743—744 (1979), and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search, *Ciraolo, supra*; *Florida v. Riley*, [488 U.S. 445](#) (1989).

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow Chemical*, we noted that we found “it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened,” 476 U.S., at 237, n. 4 (emphasis in original).

III.

It would be foolish to contend that the degree of privacy secured to citizens by the [Fourth Amendment](#) has been entirely unaffected by the advance of technology. For example, as the cases discussed above make clear, the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. See *Ciraolo, supra*, at 215. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.

The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable [...] While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in

the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the [Fourth Amendment](#). We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area,” *Silverman*, 365 U.S., at 512, constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the [Fourth Amendment](#) was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

The Government maintains, however, that the thermal imaging must be upheld because it detected “only heat radiating from the external surface of the house,” Brief for United States 26. The dissent makes this its leading point, see *post*, at 1, contending that there is a fundamental difference between what it calls “off-the-wall” observations and “through-the-wall surveillance.” But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the [Fourth Amendment](#) in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development. The dissent’s reliance on the distinction between “off-the-wall” and “through-the-wall” observation is entirely incompatible with the dissent’s belief, which we discuss below, that thermal-imaging observations of the intimate details of a home are impermissible. The most sophisticated thermal imaging devices continue to measure heat “off-the-wall” rather than “through-the-wall”; the dissent’s disapproval of those more sophisticated thermal-imaging devices, see *post*, at 10, is an acknowledgement that there is no substance to this distinction. As for the dissent’s extraordinary assertion that anything learned through “an inference” cannot be a search, see *post*, at 4—5, that would validate even the “through-the-wall” technologies that the dissent purports to disapprove. Surely the dissent does not believe that the through-the-wall radar or ultrasound technology produces an 8-by-10 Kodak glossy that needs no analysis (*i.e.*, the making of inferences). And, of course, the novel proposition that inference insulates a search is blatantly contrary to *United States v. Karo*, [468 U.S. 705](#) (1984), where the police “inferred” from the activation of a beeper that a certain can of ether was in the home. The police activity was held to be a search, and the search was held unlawful.

The Government also contends that the thermal imaging was constitutional because it did not “detect private activities occurring in private areas,” Brief for United States 22. It points out that in *Dow Chemical* we observed

that the enhanced aerial photography did not reveal any “intimate details.” 476 U.S., at 238. *Dow Chemical*, however, involved enhanced aerial photography of an industrial complex, which does not share the [Fourth Amendment](#) sanctity of the home. The [Fourth Amendment](#)’s protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, “by even a fraction of an inch,” was too much, 365 U.S., at 512, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes. Thus, in *Karo, supra*, the only thing detected was a can of ether in the home; and in *Arizona v. Hicks*, [480 U.S. 321](#) (1987), the only thing detected by a physical search that went beyond what officers lawfully present could observe in “plain view” was the registration number of a phonograph turntable. These were intimate details because they were details of the home, just as was the detail of how warm—or even how relatively warm—Kyllo was heating his residence.⁵

Limiting the prohibition of thermal imaging to “intimate details” would not only be wrong in principle; it would be impractical in application, failing to provide “a workable accommodation between the needs of law enforcement and the interests protected by the [Fourth Amendment](#),” *Oliver v. United States*, [466 U.S. 170](#), 181 (1984). To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the “intimacy” of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider “intimate”; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which home activities are “intimate” and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know *in advance* whether his through-the-wall surveillance picks up “intimate” details—and thus would be unable to know in advance whether it is constitutional.

The dissent’s proposed standard—whether the technology offers the “functional equivalent of actual presence in the area being searched,” *post*, at 7—would seem quite similar to our own at first blush. The dissent concludes that *Katz* was such a case, but then inexplicably asserts that if the same listening device only revealed the volume of the conversation, the surveillance would be permissible, *post*, at 10. Yet if, without technology, the police could not discern volume without being actually present in the phone booth, Justice Stevens should conclude a search has occurred. Cf. *Karo, supra*, at 735 (Stevens, J., concurring in part and dissenting in part) (“I find little comfort in the Court’s notion that no invasion of privacy occurs until a listener obtains some significant

information by use of the device... . A bathtub is a less private area when the plumber is present even if his back is turned”). The same should hold for the interior heat of the home if only a person present in the home could discern the heat. Thus the driving force of the dissent, despite its recitation of the above standard, appears to be a distinction among different types of information—whether the “homeowner would even care if anybody noticed,” *post*, at 10. The dissent offers no practical guidance for the application of this standard, and for reasons already discussed, we believe there can be none. The people in their houses, as well as the police, deserve more precision.⁶

We have said that the [Fourth Amendment](#) draws “a firm line at the entrance to the house,” *Payton*, 445 U.S., at 590. That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no “significant” compromise of the homeowner’s privacy has occurred, we must take the long view, from the original meaning of the [Fourth Amendment](#) forward. “The [Fourth Amendment](#) is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.” *Carroll v. United States*, [267 U.S. 132](#), 149 (1925). Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a “search” and is presumptively unreasonable without a warrant.

Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.

* * *

The judgment of the Court of Appeals is reversed; the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

KYLLO v. UNITED STATES (2001)

Dissenting Opinion: Justice STEVENS, with whom The Chief Justice [REHNQUIST], O’CONNOR and KENNEDY join, dissenting.

There is, in my judgment, a distinction of constitutional magnitude between “through-the-wall surveillance” that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand. The Court has crafted a rule that purports to deal with direct observations of the inside of the home, but the case before us merely involves indirect deductions from “off-the-wall” surveillance, that is, observations of the exterior of the home. Those observations were made with a fairly primitive thermal imager that gathered data exposed on the outside of petitioner’s home but did not invade any constitutionally protected interest in privacy.¹ Moreover, I believe that the supposedly “bright-line” rule the Court has created in response to its concerns about future technological developments is unnecessary, unwise, and inconsistent with the [Fourth Amendment](#).

There is no need for the Court to craft a new rule to decide this case, as it is controlled by established principles from our [Fourth Amendment](#) jurisprudence. One of those core principles, of course, is that “searches and seizures *inside a home* without a warrant are presumptively unreasonable.” *Payton v. New York*, [445 U.S. 573](#), 586 (1980) (emphasis added). But it is equally well settled that searches and seizures of property in plain view are presumptively reasonable. See *id.*, at 586—587.² Whether that property is residential or commercial, the basic principle is the same: “What a person knowingly exposes to the public, even in his own home or office, is not a subject of [Fourth Amendment](#) protection.’” *California v. Ciraolo*, [476 U.S. 207](#), 213 (1986) (quoting *Katz v. United States*, [389 U.S. 347](#), 351 (1967)); see *Florida v. Riley*, [488 U.S. 445](#), 449—450 (1989); *California v. Greenwood*, [486 U.S. 35](#), 40—41 (1988); *Dow Chemical Co. v. United States*, [476 U.S. 227](#), 235—236 (1986); *Air Pollution Variance Bd. of Colo. v. Western Alfalfa Corp.*, [416 U.S. 861](#), 865 (1974). That is the principle implicated here.

While the Court “take[s] the long view” and decides this case based largely on the potential of yet-to-be-developed technology that might allow “through-the-wall surveillance,” *ante*, at 11—12; see *ante*, at 8, n. 3, this case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner’s home. All that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner’s home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others. As still images from the infrared scans show, see Appendix, *infra*, no details regarding the interior of petitioner’s home were revealed. Unlike an x-ray

scan, or other possible “through-the-wall” techniques, the detection of infrared radiation emanating from the home did not accomplish “an unauthorized physical penetration into the premises,” *Silverman v. United States*, [365 U.S. 505](#), 509 (1961), nor did it “obtain information that it could not have obtained by observation from outside the curtilage of the house,” *United States v. Karo*, [468 U.S. 705](#), 715 (1984).

Indeed, the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer. Nor, in my view, does such observation become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.

Thus, the notion that heat emissions from the outside of a dwelling is a private matter implicating the protections of the [Fourth Amendment](#) (the text of which guarantees the right of people “to be secure *in* their ... houses” against unreasonable searches and seizures (emphasis added)) is not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building. A subjective expectation that they would remain private is not only implausible but also surely not “one that society is prepared to recognize as ‘reasonable.’” *Katz*, 389 U.S., at 361 (Harlan, J., concurring).

To be sure, the homeowner has a reasonable expectation of privacy concerning what takes place within the home, and the [Fourth Amendment](#)’s protection against physical invasions of the home should apply to their functional equivalent. But the equipment in this case did not penetrate the walls of petitioner’s home, and while it did pick up “details of the home” that were exposed to the public, *ante*, at 10, it did not obtain “any information regarding the *interior* of the home,” *ante*, at 6 (emphasis added). In the Court’s own words, based on what the thermal imager “showed” regarding the outside of petitioner’s home, the officers “concluded” that petitioner was engaging in illegal activity inside the home. *Ante*, at 2. It would be quite absurd to characterize their thought processes as “searches,” regardless of whether they inferred (rightly) that petitioner was growing marijuana in his house, or (wrongly) that “the lady of the house [was taking] her daily sauna and bath.” *Ante*, at 10—11. In either case, the only conclusions the officers reached concerning the interior of the home were at least as indirect as those that might have been inferred from the contents of discarded garbage, see *California v. Greenwood*, [486 U.S. 35](#) (1988), or pen register data, see *Smith v. Maryland*, [442 U.S. 735](#) (1979), or, as in this case, subpoenaed utility records, see 190 F.3d 1041, 1043 (CA9 1999). For the first time in its history, the Court assumes that an inference can amount to a [Fourth](#)

Amendment violation. See *ante*, at 8.³

Notwithstanding the implications of today's decision, there is a strong public interest in avoiding constitutional litigation over the monitoring of emissions from homes, and over the inferences drawn from such monitoring. Just as "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," *Greenwood*, 486 U.S., at 41, so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. In my judgment, monitoring such emissions with "sense-enhancing technology," *ante*, at 6, and drawing useful conclusions from such monitoring, is an entirely reasonable public service.

On the other hand, the countervailing privacy interest is at best trivial. After all, homes generally are insulated to keep heat in, rather than to prevent the detection of heat going out, and it does not seem to me that society will suffer from a rule requiring the rare homeowner who both intends to engage in uncommon activities that produce extraordinary amounts of heat, and wishes to conceal that production from outsiders, to make sure that the surrounding area is well insulated. Cf. *United States v. Jacobsen*, [466 U.S. 109](#), 122 (1984) ("The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities"). The interest in concealing the heat escaping from one's house pales in significance to the "the chief evil against which the wording of the Fourth Amendment is directed," the "physical entry of the home," *United States v. United States Dist. Court for Eastern Dist. of Mich.*, [407 U.S. 297](#), 313 (1972), and it is hard to believe that it is an interest the Framers sought to protect in our Constitution.

Since what was involved in this case was nothing more than drawing inferences from off-the-wall surveillance, rather than any "through-the-wall" surveillance, the officers' conduct did not amount to a search and was perfectly reasonable.

II.

Instead of trying to answer the question whether the use of the thermal imager in this case was even arguably unreasonable, the Court has fashioned a rule that is intended to provide essential guidance for the day when "more sophisticated systems" gain the "ability to 'see' through walls and other opaque barriers." *Ante*, at 8, and n. 3. The newly minted rule encompasses "obtaining [1] by sense-enhancing technology [2] any information regarding the interior of the home [3] that could not otherwise have been obtained without physical intrusion into a constitutionally protected area ... [4] at least where (as here) the technology in question is not in general public use." *Ante*, at 6—7 (internal quotation marks omitted). In my judgment, the Court's new rule is at once too broad and too narrow, and is not justified by the Court's explanation for its adoption. As I have suggested, I would not erect a constitutional impediment to

the use of sense-enhancing technology unless it provides its user with the functional equivalent of actual presence in the area being searched.

Despite the Court's attempt to draw a line that is "not only firm but also bright," *ante*, at 12, the contours of its new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is "in general public use," *ante*, at 6—7. Yet how much use is general public use is not even hinted at by the Court's opinion, which makes the somewhat doubtful assumption that the thermal imager used in this case does not satisfy that criterion.⁵ In any event, putting aside its lack of clarity, this criterion is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.

It is clear, however, that the category of "sense-enhancing technology" covered by the new rule, *ante*, at 6, is far too broad. It would, for example, embrace potential mechanical substitutes for dogs trained to react when they sniff narcotics. But in *United States v. Place*, [462 U.S. 696](#), 707 (1983), we held that a dog sniff that "discloses only the presence or absence of narcotics" does "not constitute a 'search' within the meaning of the [Fourth Amendment](#)," and it must follow that sense-enhancing equipment that identifies nothing but illegal activity is not a search either. Nevertheless, the use of such a device would be unconstitutional under the Court's rule, as would the use of other new devices that might detect the odor of deadly bacteria or chemicals for making a new type of high explosive, even if the devices (like the dog sniffs) are "so limited in both the manner in which" they obtain information and "in the content of the information" they reveal. *Ibid.* If nothing more than that sort of information could be obtained by using the devices in a public place to monitor emissions from a house, then their use would be no more objectionable than the use of the thermal imager in this case.

The application of the Court's new rule to "any information regarding the interior of the home," *ante*, at 6, is also unnecessarily broad. If it takes sensitive equipment to detect an odor that identifies criminal conduct and nothing else, the fact that the odor emanates from the interior of a home should not provide it with constitutional protection. See *supra*, at 7—8. The criterion, moreover, is too sweeping in that information "regarding" the interior of a home apparently is not just information obtained through its walls, but also information concerning the outside of the building that could lead to (however many) inferences "regarding" what might be inside. Under that expansive view, I suppose, an officer using an infrared camera to observe a man silently entering the side door of a house at night carrying a pizza might conclude that its interior is now occupied by someone who likes pizza, and by doing so the officer would be guilty of conducting an unconstitutional "search" of the home.

Because the new rule applies to information regarding the "interior" of the home, it is too narrow as well as too broad. Clearly, a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to a home. If such equipment did provide its user with the functional equivalent of access to a private place—such as, for example, the telephone booth involved in *Katz*, or an office building—then the rule should apply

to such an area as well as to a home. See *Katz*, 389 U.S., at 351 (“[T]he [Fourth Amendment](#) protects people, not places”).

The final requirement of the Court’s new rule, that the information “could not otherwise have been obtained without physical intrusion into a constitutionally protected area,” *ante*, at 6 (internal quotation marks omitted), also extends too far as the Court applies it. As noted, the Court effectively treats the mental process of analyzing data obtained from external sources as the equivalent of a physical intrusion into the home. See *supra*, at 4—5. As I have explained, however, the process of drawing inferences from data in the public domain should not be characterized as a search.

The two reasons advanced by the Court as justifications for the adoption of its new rule are both unpersuasive. First, the Court suggests that its rule is compelled by our holding in *Katz*, because in that case, as in this, the surveillance consisted of nothing more than the monitoring of waves emanating from a private area into the public domain. See *ante*, at 7—8. Yet there are critical differences between the cases. In *Katz*, the electronic listening device attached to the outside of the phone booth allowed the officers to pick up the content of the conversation inside the booth, making them the functional equivalent of intruders because they gathered information that was otherwise available only to someone inside the private area; it would be as if, in this case, the thermal imager presented a view of the heat-generating activity inside petitioner’s home. By contrast, the thermal imager here disclosed only the relative amounts of heat radiating from the house; it would be as if, in *Katz*, the listening device disclosed only the relative volume of sound leaving the booth, which presumably was discernible in the public domain.⁶ Surely, there is a significant difference between the general and well-settled expectation that strangers will not have direct access to the contents of private communications, on the one hand, and the rather theoretical expectation that an occasional homeowner would even care if anybody noticed the relative amounts of heat emanating from the walls of his house, on the other. It is pure hyperbole for the Court to suggest that refusing to extend the holding of *Katz* to this case would leave the homeowner at the mercy of “technology that could discern all human activity in the home.” *Ante*, at 8.

Second, the Court argues that the permissibility of “through-the-wall surveillance” cannot depend on a distinction between observing “intimate details” such as “the lady of the house [taking] her daily sauna and bath,” and noticing only “the nonintimate rug on the vestibule floor” or “objects no smaller than 36 by 36 inches.” *Ante*, at 10—11. This entire argument assumes, of course, that the thermal imager in this case could or did perform “through-the-wall surveillance” that could identify any detail “that would previously have been unknowable without physical intrusion.” *Ante*, at 11—12. In fact, the device could not, see n. 1, *supra*, and did not, see Appendix, *infra*, enable its user to identify either the lady of the house, the rug on the vestibule floor, or anything else inside the house, whether smaller or larger than 36 by 36 inches. Indeed, the vague thermal images of petitioner’s home that are reproduced in the Appendix were submitted by him to the District Court as part of an expert report raising the

question whether the device could even take “accurate, consistent infrared images” of the *outside* of his house. Defendant’s Exhibit 107, p. 4. But even if the device could reliably show extraordinary differences in the amounts of heat leaving his home, drawing the inference that there was something suspicious occurring inside the residence—a conclusion that officers far less gifted than Sherlock Holmes would readily draw—does not qualify as “through-the-wall surveillance,” much less a [Fourth Amendment](#) violation.

III.

Although the Court is properly and commendably concerned about the threats to privacy that may flow from advances in the technology available to the law enforcement profession, it has unfortunately failed to heed the tried and true counsel of judicial restraint. Instead of concentrating on the rather mundane issue that is actually presented by the case before it, the Court has endeavored to craft an all-encompassing rule for the future. It would be far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints.

I respectfully dissent.

CASE 2: EVERSON V. BOARD OF EDUCATION OF EWING TOWNSHIP (1947)

CASE HISTORY:

Pursuant to a New Jersey statute authorizing district boards of education to make rules and contracts for the transportation of children to and from schools other than private schools operated for profit, a board of education by resolution authorized the reimbursement of parents for fares paid for the transportation by public carrier of children attending public and Catholic schools. The Catholic schools operated under the superintendency of a Catholic priest and, in addition to secular education, gave religious instruction in the Catholic Faith. A district taxpayer challenged the validity under the Federal Constitution of the statute and resolution so far as they authorized reimbursement to parents for the transportation of children attending sectarian schools. No question was raised as to whether the exclusion of private schools operated for profit denied equal protection of the laws; nor did the record show that there were any children in the district who attended, or would have attended but for the cost of transportation, any but public or Catholic schools.

Source: Cornell University Law School Legal Information Institute, *Everson v. Board of Education of Ewing Township*, "Syllabus," http://www.law.cornell.edu/supct/html/historics/USSC_CR_0330_0001_ZS.html

QUESTION:

Is a New Jersey statute authorizing reimbursement of tax dollars for school transportation costs to all families in a certain district, regardless of the public or private, secular or parochial nature of the schools, an impermissible "law respecting an establishment of religion" under the First Amendment "Establishment Clause"?

HOLDING:

Held: 1. The expenditure of tax raised funds thus authorized was for a public purpose, and did not violate the due process clause of the [Fourteenth Amendment](#).

2. The statute and resolution did not violate the provision of the [First Amendment](#) (made applicable to the states by the [Fourteenth Amendment](#)) prohibiting any "law respecting an establishment of religion."

RELEVANT CONSTITUTIONAL PROVISION:

First Amendment, Establishment Clause:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [...]"

MAJORITY OPINION: Justice BLACK delivered the opinion of the Court, joined by Justices VINSON, REED, DOUGLAS, and MURPHY.

[Summary of Case History omitted].

[...] The only contention here is that the state statute and the resolution,

insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent overlap. *First*. They authorize the State to take by taxation the private property of some and bestow it upon others to be used for their own private purposes. This, it is alleged, violates the due process clause of the [Fourteenth Amendment](#). *Second*. The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of state power to support church schools contrary to the prohibition of the [First Amendment](#) which the [Fourteenth Amendment](#) made applicable to the states.

First. The due process argument that the state law taxes some people to help others carry out their private purposes is framed in two phases. The first phase is that a state cannot tax A to reimburse B for the cost of transporting his children to church schools. This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any nonpublic school, whether operated by a church or any other nongovernment individual or group. But the New Jersey legislature has decided that a public purpose will be served by using tax raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.

It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax raised funds were to be expended was not a public one. *Loan Association v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U.S. 487; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green v. Frazier*, 253 U.S. 233, 240. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general wellbeing of the people. The [Fourteenth Amendment](#) did not strip the states of their power to meet problems previously left for individual solution. *Davidson v. New Orleans*, 96 U.S. 97, 103-104; *Barbier v. Connolly*, 113 U.S. 27, 31-32; *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 157-158.

It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran v. Louisiana State Board of Education*, 281 U.S. 370; Holmes, J., in *Interstate Ry. v. Massachusetts*, 207 U.S. 79, 87. See opinion of Cooley, J., in

Stuart v. School District No. 1 of Kalamazoo, 30 Mich. 69 (1874). The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools, rather than run the risk of traffic and other hazards incident to walking or "hitchhiking." See *Barbier v. Connolly, supra*, at 31. See also cases collected 63 A.L.R. 413; 118 A.L.R. 806. Nor does it follow that a law has a private, rather than a public, purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. See *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 518. Subsidies and loans to individuals such as farmers and home owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history.

Insofar as the second phase of the due process argument may differ from the first, it is by suggesting that taxation for transportation of children to church schools constitutes support of a religion by the State. But if the law is invalid for this reason, it is because it violates the [First Amendment's](#) prohibition against the establishment of religion by law. This is the exact question raised by appellant's second contention, to consideration of which we now turn.

Second. The New Jersey statute is challenged as a "law respecting an establishment of religion." The [First Amendment](#), as made applicable to the states by the Fourteenth, *Murdock v. Pennsylvania*, 319 U.S. 105, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." These words of the [First Amendment](#) reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression "law respecting an establishment of religion" probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting an "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to

time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of nonbelief in their doctrines, and failure to pay taxes and tithes to support them.

These practices of the old world were transplanted to, and began to thrive in, the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or nonbelievers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the [First Amendment](#). No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or nonbeliever, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free, and that cruel persecutions were the inevitable result of government-established religions.

Madison's Remonstrance received strong support throughout Virginia, and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson. The preamble to that Bill stated, among other things, that

Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either...that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; that 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 the statute itself enacted

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...

This Court has previously recognized that the provisions of the [First Amendment](#), in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective, and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute. *Reynolds v. United States*, *supra*, at 164; *Watson v. Jones*, 13 Wall. 679; *Davis v. Beason*, 133 U.S. 333, 342. Prior to the adoption of the [Fourteenth Amendment](#), the [First Amendment](#) did not apply as a restraint against the states. Most of them did soon provide similar constitutional protections for religious liberty. But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups. In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect. Some churches have either sought or accepted state financial support for their schools. Here again, the efforts to obtain state aid or acceptance of it have not been limited to any one particular faith. The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.

The meaning and scope of the [First Amendment](#), preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the [First](#)

[Amendment](#) to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the [Fourteenth Amendment](#) was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina, quoted with approval by this Court in *Watson v. Jones*, 13 Wall. 679, 730:

The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.

The "establishment of religion" clause of the [First Amendment](#) means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." *Reynolds v. United States, supra*, at 164.

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the [First Amendment](#). But we must not strike that state statute down if it is within the State's constitutional power, even though it approaches the verge of that power. *See Interstate Ry. v. Massachusetts*, Holmes, J., *supra*, at 85, 88. New Jersey cannot, consistently with the "establishment of religion" clause of the [First Amendment](#), contribute tax raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the [First Amendment](#) prohibits New Jersey from spending tax-raised funds to pay the bus fares of

parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children, including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services so separate and so indisputably marked off from the religious function would make it far more difficult for the schools to operate. But such is obviously not the purpose of the [First Amendment](#). That Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious, rather than a public, school if the school meets the secular educational requirements which the state has power to impose. See *Pierce v. Society of Sisters*, [268 U.S. 510](#). It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The [First Amendment](#) has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Affirmed.

DISSENTING OPINION: MR. JUSTICE RUTLEDGE, joined by Justices FRANKFURTER, JACKSON and BURTON, dissenting.

“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..."

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. 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 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 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.

[Summary of Case History omitted].

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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." 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 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. For the protective purposes of this phase of the basic freedom, street preaching, oral or by distribution of literature, has been given "the same high estate under the [First Amendment](#) as . . . worship in the churches and preaching from the pulpits." 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, of which the Amendment was the direct culmination. 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. He sought also to have the Declaration expressly condemn the existing Virginia establishment. 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. With Jefferson's departure for Europe in 1784, Madison became the Bill's prime sponsor. 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. 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. But what is of the utmost significance here, "in its final form, the bill left the taxpayer the option of giving his tax to education."

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.

This is Madison's complete, though not his only, interpretation of religious liberty. 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 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. 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. 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," and that "this subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it..." 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.

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. 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 either to restrain or to support. 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. 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." 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. 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, supply it.

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. 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. In the margin are noted also the principal decisions in which expressions of this Court confirm the Amendment's broad prohibition.

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. Test oaths and religious qualification for office followed later. 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. Today, as then, the furnishing of "contributions 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 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.

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, 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 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 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 realm, such a line can be no valid constitutional measure. *Murdock v. Pennsylvania*, 319 U.S. 105; *Thomas v. Collins*, 323 U.S. 516. 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 instruction. There could not be, on that basis, valid constitutional objection.

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.

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.

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, 590; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659; *Akins v. Texas*, 325 U.S. 398, 402. Legislatures are free to make, 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. 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. 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 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.

Exactly such conflicts have centered of late around providing transportation to religious schools from public funds. 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 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. State courts have divided upon the issue, some taking the view that only the individual, others that the institution, receives the benefit. A few have recognized that this dichotomy is false -- that both, in fact, are aided.

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. 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.

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. 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. 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 man and his God. It should be kept inviolately private, not "entangled...in precedents" 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 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 of whatever faith, 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 need for safety. 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. 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 who attend private, profit-making schools. 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. There is no showing that there are no other private or religious schools in this populous district. I do not think it can be assumed there were none. But, in the view I have taken, it is unnecessary to limit grounding to these matters.

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.

