CHAPTER 3

Keeping Government Out of Religion and Vice Versa

In Goodson v. Northside Bible Church (1966), Judge Daniel Thomas of the United States District Court for the Southern District of Alabama wrote that “no constitutional principle is more firmly imbedded in our heritage” than “what Jefferson termed ‘the wall of separation between Church and State,’” a principle that Thomas wrote was “fundamental to our liberty.”1 To support this conclusion, Thomas cited both the wall metaphor drawn from Thomas Jefferson’s 1802 letter to the Danbury Connecticut Baptist Association—in which Jefferson wrote that he revered the Religion Clauses of the First Amendment for “building a wall of separation between Church and State,” a phrase perhaps inspired by early American sources such as Roger Williams’s 1644 letter to John Cotton2—and the precursor of the Religion Clauses found in James Madison’s 1785 Remonstrance and Memorial against Religious Assessments.3 As Haig Bosmajian notes of the wall metaphor often attributed to Jefferson, “no other metaphor has been so directly defended and challenged” by Supreme Court justices or had its figurality highlighted as extensively and consciously.4 “The words ‘separation of church and state’ are an accurate and convenient shorthand [for] the First Amendment itself,”5 writes R. Freeman Butts, and the words have become, as Daniel Dreisbach describes, “more familiar to the American people than the actual text of the First Amendment.”6

Although the wall metaphor was first cited by the Court in a nineteenth-century polygamy case, its power as a means of understanding the Religion Clauses and the controversy surrounding the metaphor began with Justice Hugo Black’s majority opinion in Everson v. Board of Education (1947). In Everson, Black wrote that “the First Amendment has erected a wall between church and state” which “must be kept high and impregnable,”
preventing “the slightest breach”—a formulation which Robert Tsai notes is “clean, if somewhat chilling”—and for years after Everson the metaphor proliferated in Religion Clause opinions written by justices on all sides of the issue.

As early as McCollum v. Board of Education (1948), however, not only did Justice Stanley Reed object that “a rule of law should not be drawn from a figure of speech”—a statement that itself combines the gnomic aspect, metaphor, and parallelism—but four of the concurring justices expressed doubts about the wall of separation metaphor, and over time the metaphor met with substantial critique and disfavor on the Court for its sweeping and rigid implications. The Court explored alternative metaphors over the years by construing the Religion Clauses as representing an imperfect “line,” a “scale” in which religion and government are balanced, a “boundary” designed to avoid excessive “entanglements,” and a “tight rope” to be “traversed,” but Chief Justice Warren Burger’s majority opinion in Lemon v. Kurtzman (1971) perhaps epitomized opposition to the metaphor by stating that “the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.” While the status of the wall of separation metaphor has deteriorated in the Court’s opinion writing since Lemon, it still persists both in judicial opinion writing on the Religion Clauses and in the public imagination of the constitutionally defined relationship between religion and government.

Attending to the epideictic registers in the Court’s early Religion Clause jurisprudence reveals the central role that another figure plays in the Court’s thought regarding the Religion Clauses, however, specifically the figure of chiasmus exemplified in Justice Robert Jackson’s expression of the relationship between the Religion Clauses in his dissenting opinion in Everson, as one “intended not only to keep the states’ hands out of religion, but to keep religion’s hands off the state.” As a figure of thought or arrangement, the term chiasmus derives from the Greek letter chi (Χ), referring to a transposition or crossing, and is used to refer to any inverted parallelism or repetition of ideas or grammatical structures in reverse order, whether on the discourse level across large portions of a text or entire text or distilled stylistically in the sort of inverted bicolon reflected in Jackson’s dissent in Everson. When words are repeated in reverse order at the level of inverted clauses, particularly in a bicolon such as Jackson’s, a specific variety of chiasmus known as antimetabole
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is formed, sometimes expressed in shorthand by the Latin phrase vice versa. Justice Hugo Black, for example, wrote in his majority opinion in *Everson* that “neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.” The relationship between religion and government is prevalently expressed through the figure of chiasmus both in Madison’s *Remonstrance and Memorial* on which many of the Court’s justices rely in their early writing on the Religion Clauses and in the Court’s Religion Clause jurisprudence itself, serving as a central gesture in the Court’s epideictic registers in religion cases.

The inverted parallelism reflected in the figure of chiasmus has an ancient lineage that predates its appearance in Greek rhetoric, appearing much earlier in Sumero-Akkadian and Ugaritic texts from the third millennium BCE as well as in the Hebrew and Christian scriptures, and the figure is ubiquitous in ancient rhetoric, poetics, and wisdom literature, including eulogies. It is sometimes noted for its “almost ritual enactment.” Far from representing a merely stylistic figure, chiasmus is “one of the earliest forms of thought,” Rodolphe Gasché writes, an “originary form” that “allows the drawing apart and the bringing together of opposite functions or terms and entwines them within an identity of movements” while also infinitely deferring closure through the “substitutability implied by its asymmetry.” According to Robert Hariman, the chiasmus “moves one towards a center that proves to be empty, a space only for crossing,” a movement that ultimately lends itself to “mystification.”

Among famous examples of chiasmus, Gorgias of Leontini famously advised advocates to “kill your opponents’ earnestness with jesting and their jesting with earnestness.” Parallel chiasms bracket Jesus’s Parable of the Workers in the Vineyard in the Christian scriptures, offered in response to the apostle Peter’s question of what the apostles would receive for their sacrifice. The parable starts with the prophetic expression “many that are first shall be last; and the last shall be first” and ends with the explanatory chiasmus “so the last shall be first, and the first last.” The chiasmus has sometimes even simply been called *hysteron proteron* (that is, “the latter first”).

Chiasmus has also served as an important organizing principle for philosophical and legal thought. In the famed Taoist allegory of transformation, the ancient Chinese philosopher Zhuangzi writes that after waking from a dream in which he was a butterfly he questioned whether he
was really a man dreaming of being a butterfly or a butterfly dreaming of being a man.²⁴ Maurice Merleau-Ponty imagines the body-world relationship through a chiasmus, writing that “what begins as a thing ends as consciousness of the thing, what begins as a ‘state of consciousness’ ends as a thing,”²⁵ and Ernesto Grassi writes that “the true philosophy is rhetoric, and the true rhetoric is philosophy.”²⁶ In legal thought, Cicero writes that “a magistrate is a speaking law, and a law is a silent magistrate,”²⁷ and Justice Robert Jackson famously wrote that the Supreme Court is “not final because we are infallible, but we are infallible only because we are final.”²⁸

Chiasms appear prominently in both the language and structure of Madison’s Remonstrance and Memorial, a document itself informed by the epideictic situation of the church-state battles of the 1780s and which forms an important precursor of the Religion Clauses.²⁹ The Remonstrance consists of fifteen paragraphs which structurally form a single chiasmus centered around the eighth paragraph, itself containing two chiasms on the sentence level, a figurality which echoed a broader tendency of Madison toward eloquent moderation and harmony.³⁰ In the first and last paragraphs of the Remonstrance, Madison appeals to a general theory of inalienable rights; in paragraphs 2 and 14, he addresses the limits of legislative power; in paragraphs 3 and 13, he addresses the imprudence or impracticability of using law to uphold religion; in paragraphs 4 and 12, he extols the necessity of freedom to religious belief; in paragraphs 5 and 11, he claims the bill will upset an existing harmony between religion and government; and in paragraphs 6–7 and 9–10, he enumerates the corrosive effect the bill will have on religion and government, respectively. In paragraph 8, Madison indicts religious establishment as in some cases erecting a “spiritual tyranny on the ruins of Civil authority” and in others “upholding the thrones of political tyranny”—a chastic movement depicting religious establishment as either religion exploiting government or government exploiting religion—and concludes with the chiasmus that a just government protects its citizens in their religious freedom no less than in their property, “neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.”³¹

The structure of Madison’s Remonstrance moves, in other words, from inalienable rights to legislative power to prudence to freedom to harmony to the bill’s consequences to the central chastic paragraph and back again from the bill’s consequences to harmony, freedom, prudence, and
legislative power. The final paragraph then returns to inalienable rights, proclaiming that we must either say that the legislature may “sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred.”32

The claim of the Remonstrance’s central paragraph that a just government protects religious freedom no less than property is represented in more explicitly chiastic form in Madison’s 1792 essay on property, in which he writes that “as a man is said to have a right to his property, he may be equally said to have a property in his rights.” Madison explains the balance of liberty and government which immediately follows this chiasmus with a similar form. “Where an excess of power prevails, property of no sort is duly respected,” he writes, because “no man is safe in his opinions, his person, his faculties, or his possessions,” but correspondingly “where there is an excess of liberty, the effect is the same, though from an opposite cause.” He then repeats the initial chiasmus in the final sentence of the essay: “If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights.”33 If Madison cannot be characterized as a “chiastic personality,” in which the chiasmus was so central to his thought that it constituted a psychological condition,34 the figure was at least central to his thinking about rights and religious freedom in particular, and it is an important precedent to the Religion Clauses of the First Amendment and their interpretation by the Court.

Chiasmus not only “entwines” opposing functions or terms in an “identity of movements,”35 but as Robert Hariman notes it is fundamentally “a figure of social interaction.”36 Emmanuel Levinas describes “a pleasure of contact at the heart of the chiasm,”37 and Hariman writes that this social dimension of the figure activates “the cognitive reciprocity of interpersonal exchange prior to all other social patterning.”38 It is “precisely analogous to the visual experience of looking at another person or at one’s mirror image,” Hariman writes, an experience of doubling which depends on both “proximity and distance, and on there being empty space between one and one’s double.”39

John Ruffin notes that chiasmus “emphasizes both sides of an antithesis,”40 and Jeanne Fahnestock explains that a chiasmus can suggest “not identity but mutual constitution,” as “one term so depends on the other, it does not matter which comes first, an indifference displayed iconically in the syntax of the figure.”41 This leads to a relationship more aligned with
abeyance than obstruction,\textsuperscript{42} one that according to Hariman “profoundly destabilizes the principles of similarity and difference” and “does not allow one to settle on either side of the equation,”\textsuperscript{43} resulting in a “hermeneutical miasma”\textsuperscript{44} used when “what needs to be said eludes representation.”\textsuperscript{45} It is available when “one needs to suggest that there remains more work to do.”\textsuperscript{46} The basis for resolution between the terms of a chiasmus, Hariman writes, is “always signified only by the crossing, which itself supplies no principle of resolution but rather perpetual oscillation,” a “ping-ponging back and forth” like a “small prison house of language.”\textsuperscript{47} It is also a highly conspicuous figure particularly suited to epideictic. As Elie Assis notes, chiasmus constructs \textit{ethos} because it “often directs the reader to the fact that the text is constructed.”\textsuperscript{48}

The chiasmatic relationship between religion and government reflected in Madison’s \textit{Remonstrance}, in the Religion Clauses of the First Amendment, and in the Court’s early Religion Clause jurisprudence represents the “blurred, indistinct, and variable barrier” that Chief Justice Burger described in \textit{Lemon}\textsuperscript{49} more than the “high and impregnable wall” of \textit{Everson}.\textsuperscript{50} The Court’s reliance on the chiasmus in its early cases also suggests, however, that \textit{Lemon’s} interpretation of the Religion Clauses was incipient in the Court’s earliest uses of the wall metaphor.

This chapter examines the epideictic registers in the Court’s early Religion Clause jurisprudence regarding the relationship between religion and public schools, focusing on \textit{Everson v. Board of Education} (1947), \textit{McCollum v. Board of Education} (1948), and \textit{Lemon v. Kurtzman} (1971). I pay particular attention to the intertextual role played by Madison’s \textit{Remonstrance and Memorial} in the epideictic registers of \textit{Everson} and \textit{McCollum} as majority, concurring, and dissenting justices quote and interpret Madison’s \textit{Remonstrance} in their opinions. Attending to this dimension of the Court’s epideictic registers in its early Religion Clause jurisprudence reveals the central role that the figure of chiasmus plays in the Court’s thought regarding the Religion Clauses. A chiasmatic relationship is prevalently expressed both in Madison’s thought and in the Court’s early Religion Clause jurisprudence, and I argue that the prevalence of this figure serves to interpret the wall of separation between church and state as a more indeterminate, flexible, or unstable relationship than traditional interpretations reflect and one that ultimately ended in irresolution.
The High and Impregnable Wall

The United States Supreme Court first held that the First Amendment’s Establishment Clause applied to the states under the Fourteenth Amendment’s Due Process Clause in *Everson v. Board of Education* (1947), a case that arose out of a New Jersey bus voucher program that reimbursed parents for money they spent on bus transportation to send their children to and from school, including Catholic schools that gave students both secular education and religious instruction conforming to the Catholic faith. Although the Court concluded in a 5:4 decision that the Establishment Clause applied to the states under the Fourteenth Amendment—intended to create what Thomas Jefferson called a “wall of separation between Church and State” which the Court described as “high and impregnable,” admitting not “the slightest breach”—the majority nonetheless found that New Jersey had not breached the high and impregnable wall of separation in the case. The bus voucher program, the Court concluded, amounted only to “public welfare” legislation or “general government services” like police and fire protection, utilities, or public highways and sidewalks, and the Establishment Clause was not designed to deny such services to religious schools.

Justice Hugo Black wrote the majority opinion, Justice Wiley Rutledge published a lengthy dissenting opinion in which Justices Felix Frankfurter, Robert Jackson, and Harold Burton joined, and Justice Jackson published a separate dissenting opinion. Because the case inaugurated a new line of constitutional interpretation with broad social consequences by applying the Establishment Clause to the states, it is not surprising that all of the opinions in the case featured epideictic registers. Both Black’s majority opinion and Rutledge’s dissent developed their epideictic registers in part through James Madison’s *Remonstrance and Memorial* and other writings as well as the text of Thomas Jefferson’s *Virginia Bill for Religious Liberty*, which Madison’s *Remonstrance* supported, and the epideictic registers of all of the opinions centrally featured chiasms to describe the relationship between religion and government.

Justice Black began his discussion of the constitutional issue in *Everson* by dramatizing the experience of early Americans which led to the Religion Clauses, stating that the clauses “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.” Although Black lamented that their goal had “doubtless” not been reached, he wrote that “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.”

Building on these features of praise, metaphor, eloquence, and affirmative modality, Black then adopted a sublime historiography, eloquently describing the early American history of the Establishment Clause with enumeration, repetition, and a variety of parallelisms, including chiasmus:

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.

In another dramatic history containing all of the features of epideictic except the gnomic aspect and prominently featuring metaphor, enumeration, and asyndeton, Black wrote of the transplantation of these practices from the old world to the new:

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.

These practices became so commonplace, Black wrote, “as to shock the freedom-loving colonials into a feeling of abhorrence,” which the Religion Clauses expressed.

With this historical foundation laid, Justice Black then quoted extensively from the epideictic registers contained in a 1774 letter from Madison
to a friend, Madison’s *Remonstrance and Memorial*, and the preamble to Jefferson’s *Virginia Bill for Religious Liberty*. Beginning with the letter, Black quoted Madison’s invective against “that diabolical, hell-conceived principle of persecution [that] rages among some,” which he wrote “vexes me the worst of anything whatever.” As Madison writes in the letter quoted by Black in *Everson*, “I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience,” and Madison begs his friend to pity him and “pray for liberty of conscience to all.”

Black then effusively praised Madison’s “great” *Remonstrance and Memorial*, paraphrasing Madison’s “eloquent” argument as that

a true religion did not need the support of law; that no person, either believer or non-believer, 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.

Black wrote that Madison’s arguments received “strong support throughout Virginia,” eventually leading the religious assessments bill, against which it remonstrated, to die in committee and to the enactment of Jefferson’s bill for religious liberty.

Justice Black then quoted at length from the powerful paean to freedom of conscience in Jefferson’s bill for religious liberty, which found among other things that

Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, 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.

Toward the conclusion of Black’s epideictic treatment of the Religion Clauses he surveyed prior First Amendment cases, concluding that “there
is every reason to give the same application and broad interpretation” to the Establishment Clause, a conclusion which he supported with a chiasmus from Watson v. Jones (1871): “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.”61

Before turning to the Court’s holding, Justice Black then wrote a lengthy and densely figured passage featuring various forms of repetition, particularly anaphora, along with asyndeton and the chiasmus referenced in the introduction to this chapter that is signified with the Latin phrase vice versa, culminating in Jefferson’s wall of separation metaphor. The passage has been quoted at least 123 times in later judicial opinions in the United States62:

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.”63

After the lengthy and rousing paean to separationism which formed the core of Justice Black’s opinion—from the dramatic history of religious persecution in England and early America to the eloquent precursors of the Religion Clauses in the writings of the Founders, prior cases extolling the importance of separationism, and his peroration culminating in Jefferson’s wall metaphor—he abruptly returned to a pragmatic register in the final two and a half pages of the opinion. In the final pages, Black argued that while the Religion Clauses had “erected a wall” between
religion and government which “must be kept high and impregnable,” prevent- ing even the “slightest breach,” New Jersey had not breached the wall because reimbursement for busing was similar to other governmentally provided services such as the police, fire department, or public roads. As Justice Robert Jackson wrote in his dissenting opinion, the “undertones” of Black’s opinion, advocating “complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.” Jackson quoted a passage from Lord Byron’s satirical epic Don Juan to support this observation: “The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron’s reports, ‘whispering “I will ne’er consent,”—consented.’

The First Experiment on Our Liberties

Justice Wiley Rutledge wrote a dissenting opinion in Everson twice the length of Justice Black’s majority opinion not counting its appendices which included the entirety of Madison’s Remonstrance and Memorial and the proposed bill for religious assessments to which the Remonstrance responded. Rutledge started his opinion with two epigraphs: the full text of the Religion Clauses of the First Amendment and the following passages from the preamble and text of Jefferson’s 1786 Virginia Bill for Religious Liberty:

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 burdened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief.

The portions of Jefferson’s bill for religious liberty in the latter epigraph were also among those quoted in Black’s majority opinion.
Justice Rutledge began the opinion with disbelief that the Founders would have joined the majority in *Everson* and lamented that “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.” In keeping with his epigraphs, Section I of Rutledge’s opinion offered an effusive paean to the text of the Religion Clauses, which he described as “broadly but not loosely phrased,” the “compact and exact summation of its author’s views formed during his long struggle for religious freedom,” and a “‘Model of technical precision, and perspicuous brevity.’” As a result, he concluded, Madison “could not have confused ‘church’ and ‘religion,’ or ‘an established church’ and ‘and establishment of religion,’” but instead the Religion Clauses were intended 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.” Rutledge then tied the Religion Clauses to their history, writing that “no provision of the Constitution is more closely tied to or given content by its generating history” and that the clauses were at once “the refined product and the terse summation of that history.”

What followed in Section II of Justice Rutledge’s opinion was a lengthy paean to the history of the Religion Clauses and Madison’s struggle for religious liberty, including liberal paraphrases and quotations from Madison’s *Remonstrance and Memorial*, a history Rutledge considered “irrefutable confirmation of the Amendment’s sweeping content.” For both Jefferson and Madison, Rutledge wrote, “religious freedom was the crux of the struggle for freedom in general.” As a member of Virginia’s General Assembly, Madison threw his “full weight” behind Jefferson’s bill for religious liberty, wrote Rutledge, a bill which formed “a prime phase of Jefferson’s broad program of democratic reform.” According to Rutledge, Madison was “unyielding at all times” in his struggle for religious liberty, opposing the religious assessments bill “with all his vigor” before finally publishing his “historic” *Remonstrance and Memorial*. Rutledge described the *Remonstrance* as Madison’s “complete…interpretation of religious liberty,” a “broadside attack upon all forms of ‘establishment’ of religion,” at once “the most concise and the most accurate statement” of Madison’s views regarding establishment. “Because it behooves us in the dimming distance of time not to lose sight of what he and his coworkers had in mind,” Rutledge wrote, “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.”75

Justice Rutledge concluded Section II of his opinion with a powerful amplification of separationism, first by insisting that Madison’s struggle for religious liberty in Virginia was essential to an understanding of the Religion Clauses:

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.76

For Madison, Rutledge wrote, “‘establishment’ and ‘free exercise’ were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom,” a passage that gestured to the chiasmatic relationship between the Religion Clauses. Because Madison believed it was dangerous to tolerate “any fragment” of establishment, Rutledge concluded, Madison sought to “tear out the institution not partially but root and branch, and to bar its return forever.”77

Justice Rutledge asserted that Madison was “more unrelentingly absolute” in opposing state support or aid by taxation than in any other area of religious establishment, and Rutledge quoted the following passage of Madison’s Remonstrance and Memorial in support of the unrelenting separatism that he attributed to Madison:

Because it is proper to take alarm at the first experiment on our liberties…. the freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it.78

Rutledge concluded his paean to separationism with a chiasmus based on one found in paragraph 5 of Madison’s Remonstrance and Memorial, writing that “the principle was as much to prevent ‘the interference of law in religion’ as to restrain religious intervention in political matters.” To support this chiasmus, Rutledge quoted Madison’s chiasm in paragraph 5 of the Remonstrance, in which Madison wrote that “the bill implies either
that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy.”

It is only after Justice Rutledge’s lengthy paean to separationism across the first three sections of his opinion that he turned to applying the Religion Clauses to New Jersey’s bus voucher program in a more pragmatic register in Sections III and IV of the opinion, arguing that “com-mingling 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.” He rejected the majority’s comparison of New Jersey’s voucher program with public welfare legislation or general government services, writing that “of course paying the cost of transportation promotes the general cause of education and the welfare of the individual,” but so does paying all other items of educational expense.” “By casting the issue in terms of promoting the general cause of education and the welfare of the individual,” he wrote, the majority’s argument “ignores the religious factor and its essential connection with the transportation, thereby leaving out the only vital element in the case.” Even in this pragmatic register Rutledge drew on a chiasmus, arguing that the majority opinion “concedes that the children are aided by being helped to get to the religious schooling,” but “by converse necessary implication…, it must be taken to concede also that the school is helped to reach the child with its religious teaching.”

Almost as soon as Justice Rutledge’s pragmatic register had begun, he returned toward the end of section IV of the opinion to an epideictic register which liberally paraphrased and cited Madison’s Remonstrance and Memorial. By the time Rutledge wrote toward the end of section IV, with only a fifth of the body of the opinion to go, that “this is not…just a little case over bus fares,” he had hardly even mentioned New Jersey’s voucher program. Beginning with the chiasmus that “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,” he used praise, exergasia, polyptoton, mesodiplosis, eloquence, the gnomic aspect, and affirmative modality to magnify the value of separationism:

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. 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....The end of such strife can-
not 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.83

To end Section IV of his opinion, Justice Rutledge paraphrased Madison
to write that “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,”84 and he elevated reli-
gious liberty to a sacred right in the final lines of the section:

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.85

In the final sections of his opinion, Justice Rutledge first addressed the
feelings of religious observers, writing that “no one conscious of religious
values can be unsympathetic toward the burden which our constitutional
separation puts on” the religious instruction of children, but “if those feel-
ings should prevail, there would be an end to our historic constitutional
policy and command.”86 Although “hardship in fact there is which none
can blink,” he wrote, “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.”87 Referencing the writings of the
apostle Paul in the Christian scriptures, Rutledge framed the pursuit of
religious instruction without governmental support as a noble sacrifice,
writing that “like St. Paul’s freedom, religious liberty with a great price
must be bought.” For those who insisted on mixing religious education for
their children with secular education, Rutledge wrote, “by the terms of our
Constitution the price is greater than for others.”88

Justice Rutledge then renewed his challenge to the majority’s compari-
son of New Jersey’s bus voucher program to ordinary public safety mea-
sures before extolling separationism in the peroration of his opinion by
again liberally paraphrasing Madison’s Remonstrance and Memorial with attribution of the author only:

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. In my opinion both avenues were closed by the Constitution. Now as in Madison’s day it is [a matter] 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.

Rutledge relied heavily on chiasmus in this passage, the chiastic movement of the dual threats to separationism crossing in the introduction of religion into public education and of public funds into religious education.

A Backward Turn

At only ten pages, Justice Jackson’s separate dissenting opinion in Everson is considerably shorter than both the majority opinion and Justice Rutledge’s dissent, but like the other opinions it contains substantial epideictic registers. Jackson began his opinion by expressing sympathy, “though it is not ideological,” with Catholics who were “compelled by law to pay taxes for public schools, and also…constrained by conscience and discipline to support other schools for their own children.” He challenged the majority’s finding that the New Jersey voucher program was equally available to everyone by noting that it limited reimbursement to those attending public schools and Catholic schools, excluding private schools operated in whole or in part for profit including those serving children with disabilities or special needs. In other words, it privileged the students attending schools of one religious denomination.

After beginning on a relatively pragmatic note, Justice Jackson shifted into an epideictic register in the third section of his opinion to magnify the value of religious liberty, beginning with a chiasmus:
It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school.

The Establishment Clause cannot be circumvented, Jackson wrote, by “a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.”

Responding to the majority’s claim that the New Jersey voucher program had a public rather than a private purpose, Justice Jackson wrote in a passage densely figured with antithesis, mesodiplosis, and consonance that

of course, the state may pay out tax-raised funds to relieve pauperism, but it may not under our Constitution do so to induce or reward piety. It may spend funds to secure old age against want, but it may not spend funds to secure religion against skepticism. It may compensate individuals for loss of employment, but it cannot compensate them for adherence to a creed.

He then concluded his response to the majority’s comparison of the voucher program to public welfare or general government services with a pair of parallel chiasms:

A policeman protects a Catholic, of course—but not because he is a Catholic; it is because he is a man and a member of our society. The fireman protects the Church school—but not because it is a Church school; it is because it is property, part of the assets of our society.

The movement from policeman and Catholic to Catholic and society in the first sentence and from fireman and Church to Church and society in the second reflects a fundamentally chiastic movement further amplified by repetition.

In the peroration of his opinion, Justice Jackson extolled religious liberty as a preeminent right, featuring praise, chiasmus, anadiplosis, mesodiplosis, consonance, eloquence, the gnomic aspect, and affirmative modality:

This freedom was first in the Bill of Rights because it was first in the forefathers’ minds; it was set forth in absolute terms, and its strength is its
rigidity. It was intended not only to keep the states’ hands out of religion, but to keep religion’s hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today’s decision.

The Religion Clauses of the First Amendment had never pleased religious groups, Jackson wrote, but instead “they all are quick to invoke its protections; they are irked when they feel its restraints.” The same people who complained of its burdens enjoyed its protections, he wrote, and “we cannot have it both ways.” He concluded with the metaphor of the Court turning back the clock on religious liberty:

The great purposes of the Constitution do not depend on the approval or convenience of those they restrain. I cannot read the history of the struggle to separate political from ecclesiastical affairs..., without a conviction that the Court today is unconsciously giving the clock’s hands a backward turn.

Rules of Law and Figures of Speech

The judicial authors of all of the opinions published in Everson devoted substantial attention to the epideictic function of shaping beliefs, desires, and ethical commitments in response to the inauguration of a new line of jurisprudence that would apply the Establishment Clause to state governments under the Due Process Clause of the Fourteenth Amendment. As Robert Tsai notes, the Court “consistently paid homage to the wall of separation by using it as the undisputed starting point for legal inquiry” in the early years of the Court’s Religion Clause jurisprudence, a metaphor Tsai describes as among “the precepts of eloquence governing the era,” nearly all of the justices assuming that “the words of the First Amendment, ‘properly interpreted,’ had ‘erected’ a wall.” Conservative opponents of a strict separationist interpretation of the Religion Clauses immediately challenged the rigidity of the wall metaphor, however, which they believed to symbolize the liberalism of the Warren Court more generally.
According to Tsai, this reactionary movement emerged in the 1950s and 1960s, eventually leading to an “emerging counterdiscourse” on the Court itself reflected in Chief Justice Earl Warren's majority opinion in *McGowan v. Maryland* (1961), in which Warren defensively wrote that to hold Sunday closing laws to be unconstitutional based solely on their “undeniably religious...origin,” despite their secular purpose of setting aside one day a week for “rest, repose, recreation, and tranquility,” would “give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.” An “adaptive period” followed in the 1970s, Tsai writes, which “tried to save the wall by softening its appearance,” the paradigm of which is Chief Justice Warren Burger’s majority opinion in *Lemon v. Kurzman* (1971), in which Burger openly acknowledged that “total separation” was not possible “in an absolute sense” and wrote that the language of the Religion Clauses was “not precisely stated” but “at best opaque,” characterizing the separation of religion and government prescribed by the Religion Clauses as “a blurred, indistinct, and variable barrier” rather than a wall.

Another part of the story, however, is that well beyond Justice Stanley Reed’s remark in *McCollum v. Board of Education* (1948) that “a rule of law should not be drawn from a figure of speech,” doubts about the wall of separation metaphor were expressed by many of the Court’s justices almost immediately after *Everson*. Haig Bosmajian notes that in *Zorach v. Clauson* (1952), for example, Justice Jackson wrote in a “strongly worded” dissenting opinion that “the wall which the Court was professing to erect between Church and State [in *McCollum*] has become even more warped and twisted than I expected,” a comment which reveals not only that Jackson had doubts about the efficacy of the wall of separation metaphor in *Zorach* but that his doubts had preceded the case. Jackson’s doubts about the metaphor, as discussed in the next section of this chapter, emerged in his concurring opinion in *McCollum* the year after *Everson*, along with similar doubts expressed in Justice Frankfurter’s concurring opinion which Jackson joined along with Justices Wiley Rutledge and Harold Burton.

While the wall metaphor immediately met with doubt and eventually with qualification, if not dismay, the prevalence of chiasmus in the Court’s early Religion Clause jurisprudence serves to interpret the wall metaphor as less stable than *Everson*’s “high and impregnable” wall suggested, signifying instead a “perpetual oscillation” between religion and government that “eludes representation” even as the First Amendment proscribes...
certain forms of contact between them, an infinitely deferred closure suggesting that “there remains more work to do,” leading to a relationship that “does not allow one to settle on either side of the equation.” The “blurred, indistinct, and variable barrier” of Lemon was already incipient in the chiasms of Everson and of Madison’s Remonstrance and Memorial on which the justices in Everson drew, as well as in the continuing prevalence of chiasmus in McCollum and even in Chief Justice Burger’s opinion in Lemon.

Madison’s Remonstrance and Memorial was written in response to a bill authored by Patrick Henry to establish a provision for religious teachers, which Henry introduced into the Virginia legislature with what Eva Brann describes as a “fervent speech tracing the downfall of ancient and modern polities to the decay of religion,” and the floor debate between Madison and Henry over the bill anticipated and shaped the Remonstrance. Madison’s notes from the floor debate indicate that he “intended to divert the argument from the preoccupation with the social need for religion to the ‘true question’: Are religious establishments necessary for religion?” As discussed in the introduction to this chapter, the centrality of chiasmus to Madison’s thinking about rights in general and religious freedom in particular is not only evident in the language and structure of the Remonstrance but in Madison’s essay on property and the Religion Clauses themselves. It is also evident in this formative moment in Madison’s floor debate with Patrick Henry over the religious assessments bill as he inverts the question from whether religion is necessary for the state to whether the state is necessary for religion.

Although Madison’s inversion of Patrick Henry’s preoccupation with the social need for religion was a refutative one, it was not a complete reversal of emphasis but reflected chiastic reasoning which proposed that religious establishment posed a threat to both church and state by upsetting a harmonious balance between them. Implicit in the inversion is at least a parity between church and state, or it could even suggest a privilege accorded to religion. The duty of religious conscience, Madison writes in the Remonstrance, is “precedent, both in order of time and in degree of obligation to the claims of Civil Society,” for a person “must be considered a subject of the Governor of the Universe” before they “can be considered as a member of Civil Society.” Every person who becomes a member of “any particular Civil Society,” Madison writes, must do it with “a saving of [their] allegiance to the Universal Sovereign.” Yet this precedence,
Madison, entails that religion is “wholly exempt” from the “cognizance” of civil society. It is not that the jurisdiction of religious conscience is inferior to law; it is simply outside of its cognizance and can neither aid nor be aided by the state, a close approximation of the statement of Jesus to the Pharisees in the Christian scriptures to “render…unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”

In all the chiasms in *Everson*, what is important is the inversion, or crossing, and the parity of respect for both religion and government evinced by the crossing. In the context of the Court’s Religion Clause jurisprudence, the chiastic relationship between the Establishment Clause and the Free Exercise Clause values religion and government equally even as it expresses the urgency of their respective sovereignties. Combined with the other amplifying features of the epideictic registers in which the chiasms appear, religious liberty is infused with a value beyond perceptible limits, ultimately eluding representation. The Religion Clauses reflect not a wall of separation between church and state, but a chiasm of church and state. This relationship becomes more apparent as the Court’s Religion Clause jurisprudence expands, from *McCollum* to *Lemon*, and chiasms continue to appear while the wall of separation faces increasing critique.

**Good Fences Make Good Neighbors**

Although the Court first held that the Establishment Clause applied to the states under the Fourteenth Amendment in *Everson*, the Court first found the Establishment Clause to be violated by a state the following year in *McCollum v. Board of Education* (1948). In *McCollum*, the Court held in an 8:1 decision that an Illinois school’s released time program, in which students were released from their secular classes on a voluntary basis during regular school hours to attend religious instruction led by Protestant teachers, Catholic priests, or Jewish rabbis according to their faith, was an unconstitutional establishment of religion. As in *Everson*, Justice Black wrote the majority opinion in *McCollum*, Justice Frankfurter wrote a concurring opinion joined by Justices Jackson, Rutledge, and Burton—the same four justices who joined Rutledge’s dissenting opinion in *Everson*—and Jackson wrote a separate concurring opinion. As the sole dissenting justice, Justice Reed wrote a dissenting opinion.
In Justice Black’s majority opinion in *McCollum*, he wrote a brief statement of the facts before concluding that they “show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education,” which was “beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith” in violation of the Establishment Clause of the First Amendment. Black wrote his majority opinion in an almost strictly pragmatic register, but the syllogistic logic of his opinion flowed from the epideictic register of his peroration in *Everson* which he quoted in its entirety in *McCollum*, including the chiasmus signified with the phrase *vice versa*:

Neither [a state nor the Federal Government] 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….Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.*

The counsel defending Illinois’s released time program in *McCollum* challenged this passage of *Everson* as having been dicta and urged the Court to reconsider and repudiate it. In *McCollum*, Black did not expressly reject the charge that the *Everson* passage was dicta, but when the Court was again challenged to repudiate the passage as dicta in *Torcaso v. Watkins* (1961), Black wrote for the majority that “we declined to do this” in *McCollum*, but “instead strongly reaffirmed what had been said in *Everson*."

Justice Frankfurter’s concurring opinion in *McCollum*, which all of the justices who had dissented in *Everson* joined, is the longest opinion published in *McCollum*, although Justice Reed published a dissenting opinion of comparable length. It is useful to begin with Frankfurter’s concluding paragraph in *McCollum*, in which he wrote that “we renew our conviction that ‘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,’” before quoting without attribution Robert Frost’s poem “Mending Wall” on a more poignant note in the final sentence of
his opinion: “If nowhere else, in the relation between Church and State, ‘good fences make good neighbors.’”123 Frankfurter’s qualifying phrase if nowhere else and the gnomic saying good fences make good neighbors from Frost’s poem gesture to a discomfort with the wall metaphor even among the justices who had dissented in Everson. Justice Jackson’s concurring opinion in McCollum, discussed below, reflected a similar discomfort with the sweeping scope of the wall metaphor and the prospect that the floodgates of litigation had been opened by the Court’s opinion in McCollum, despite his concurrence in the decision.

The opening line of Frost’s poem “Mending Wall,” something there is that doesn’t love a wall, which is repeated near the end of the poem, is as famous as the poem’s final line good fences make good neighbors, quoted by Justice Frankfurter at the end of his McCollum opinion. The neighbor in Frost’s poem who tells the narrator “good fences make good neighbors” is portrayed as a dark and enigmatic figure in the poem:

He moves in darkness as it seems to me,
Not of woods only and the shade of trees.
He will not go behind his father’s saying.

The neighbor does not answer the narrator’s argument that the wall is unnecessary since neither of the two own livestock, but only repeats unresponsively that “good fences make good neighbors” in the final line of the poem.123

An allusion to Frost’s poem also seems to have begun Justice Frankfurter’s opinion in McCollum, forming a poetic frame through which the opinion considered separationism. In the third sentence of the opinion, Frankfurter wrote that “the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer.”124 The meaning of a “spacious conception” like the separation of church and state, he wrote, is “unfolded as appeal is made to the principle from case to case,” and the agreement in the abstract that the Religion Clauses were designed to erect a wall of separation between church and state “does not preclude a clash of views as to what the wall separates,”125 a phrase that echoes Frost’s line in “Mending Wall”:

Before I build a wall I’d ask to know
What I was walling in or walling out.126
Although Justice Reed’s comment in *McCollum* that “a rule of law should not be drawn from a figure of speech”127 has received more scholarly attention, Frankfurter explained his statement about the inevitable clash of views regarding what the wall separates by stating similarly that “accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase.” The wall metaphor, he wrote, could not be “illuminatingly” applied until the history of religious education in America was considered, along with the place of released time programs in that history.128

After these introductory remarks, Justice Frankfurter devoted roughly half of the remainder of the opinion to his account of the history of released time programs. Although he recognized that “traditionally, organized education in the Western world was Church education,” he concluded that the evolution of colonial education into the modern public school system was “the story of changing conceptions regarding the American democratic society.”129 Noting that Madison’s *Remonstrance and Memorial* arose out of a proposal to support religious education, Frankfurter wrote that the modern public school “derived from a philosophy of freedom reflected in the First Amendment.”130 This evolution of separationism was not imposed on the states, he wrote, but “merely reflected a principle then dominant in our national life” in which states were willing participants as Americans responded to “the particular needs of a young and growing nation” with “zealous watchfulness against fusion of secular and religious activities.”131

Justice Frankfurter punctuated his history of separationism in American schools with his first shift into an epideictic register to support the assertion that “the secular public school did not imply indifference to the basic role of religion in the life of the people.” The “deep religious feeling of James Madison is stamped upon the *Remonstrance*,” Frankfurter wrote, and the secular public school was the “means of reconciling freedom in general with religious freedom.”132 Combining praise, exergasia, repetition, parallelism, asyndeton, ploce, the gnomic aspect, and affirmative modality, he magnified the value of modern secular education to cohesive sentiment in a democracy:

The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures
in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to [nonreligious] instruction.133

He repeated this focus on cohesion later in his opinion when he stressed that public education “should be the training ground for habits of community” and that separation of religion and government was “one of the vital reliances of our Constitutional system for assuring unities.”134 This focus echoed Frankfurter’s majority opinion in Minersville School District v. Gobitis (1940), discussed in Chapter 2, particularly his statement in Gobitis that “the ultimate foundation of a free society is the binding tie of cohesive sentiment” and his conclusion that as a result society may “utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty.”135

Before turning to the rise of released time programs in the United States, Justice Frankfurter noted President Grant’s effort in the 1870s to amend the Constitution to specifically prohibit the use of public funds for religious education consistent with the amendment of many state constitutions.136 Frankfurter also quoted the lawyer and statesman Elihu Root for saying that “it is not a question of religion, or of creed, or of party; it is a question of declaring and maintaining the great American principle of eternal separation between Church and State,”137 and quoted the following two chiasms from the American lawyer and judge Jeremiah Black:

The manifest object of the men who framed the institutions of this country, was to have a State without religion, and a Church without politics—that is to say, they meant that one should never be used as an engine for any purpose of the other….Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate.138
Frankfurter noted that the fact that Elihu Root and Jeremiah Black would agree on separationism despite their sharp political differences “affords striking proof of the respect to be accorded that principle.”

Justice Frankfurter then attributed the rise of released time programs to George Wenner’s 1905 proposal to the Interfaith Conference on Federation that public schools “release” their monopoly on children’s time by excusing them from school on Wednesday afternoons so that “churches could provide ‘Sunday school on Wednesday,’” a proposal that Frankfurter noted “aroused considerable opposition.” Frankfurter nonetheless noted that released time programs had grown to two million participants in 2,200 communities by the time of McCollum, a scope which he wrote “indicates the importance of the problem” but also made the constitutional violations of the programs “ominous.” He amplified how much the programs differed, however, writing that “‘released time’ as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication,” as programs “differ from each other in many and crucial respects,” and therefore “we do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid ‘released time’ program.”

Because Illinois’s released time program required religious teachers to obtain the permission of the school superintendent before they were allowed to teach in the program and required attendance reports to be submitted to school authorities, Frankfurter wrote, religious education was “patently woven into the working scheme of the school,” actively furthering “inculcation in the religious tenets of some faiths,” which “sharpens the consciousness of religious differences” in violation of the Establishment Clause.

Justice Frankfurter returned to an epideictic register for the peroration of his opinion in the final two paragraphs, combining praise, exergasia, metaphor, antithesis, polyptoton, eloquence, the gnomic aspect, and affirmative modality to magnify the value of separationism:

Separation means separation, not something less. Jefferson’s metaphor in describing the relation between Church and State speaks of a “wall of separation,” not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing,
what the Constitution sought to keep strictly apart. “The great American principle of eternal separation”—Elihu Root’s phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities.144

After emphasizing that Jefferson’s wall of separation is not a “fine line easily overstepped” in the penultimate paragraph of the opinion, Frankfurter ended by referencing Robert’s Frost’s poem “Mending Wall,” as discussed above, writing that “if nowhere else, in the relation between Church and State, ‘good fences make good neighbors.’”145

By ending on this poignant note, Justice Frankfurter substantially qualifies his enthusiasm for the wall metaphor, drawing as his conclusion does on the neighbor’s rote repetition of the line in Frost’s poem in response to the narrator’s objections to the wall that separated them. It suggests a sublime perspective from which the wall is ultimately beyond the efficacy of law or our perceptual capacities, a perspective suggested earlier in the opinion when Frankfurter recognized that the common use of the metaphor did not preclude “a clash of views as to what the wall separates” and that the issue could not be resolved “by a mere phrase,” as well as when he noted that the scale of potential breaches in the wall presented by the rapid growth of released time programs in the United States during the twentieth century had become “ominous.”146

Justice Frankfurter’s misgivings about the scope of the Court’s decision reflected in his references to the wall metaphor, his characterization of the scale of released time programs as “ominous,” and his effort to limit the holding to the unique facts of Illinois’s program did not fully satisfy Justice Jackson, who joined Frankfurter’s opinion but also wrote separately to express additional concerns about “the number of litigations likely to be started as a result of this decision” and the need to “place some bounds on the demands for interference with locals schools that we are empowered or willing to entertain.”147 Jackson’s dissenting opinion was brief and began in a pragmatic register to note that the relief the Court granted was extraordinary in its breadth because it granted without qualification the plaintiff’s request for a writ of mandamus directing the local board of education to “immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools,” a writ that extended far beyond Illinois’s released time program.148 “The sweep and detail of these complaints is a danger signal,” Jackson wrote,
which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision.”

Justice Jackson then shifted into an epideictic register to amplify how intricately intertwined religion was with history and culture, raising difficult questions regarding how to implement separationism in public education that he admitted were “more than I know.” Beyond Illinois’s released time program, Jackson wrote, the Court could “at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselytizing in the schools,” but “it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff’s completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction.”

Expounding on the limits and desirability of completely eliminating religion from secular education, Justice Jackson used a dense convergence of praise, exergasia, enumeration, antithesis, mesodiplosis, eloquence, the gnomic aspect, and a relatively affirmative modality, although he used some epistemic qualifiers to emphasize the potentially insoluble nature of the relationship between religion and government:

Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a “science” as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind.

“The fact is,” Jackson wrote, that “nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences” derived from a variety of sources spanning world history, and “one can hardly respect a system of education that would leave
the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.” Jackson concluded that it was unlikely people could teach such controversial subjects with perfect detachment and that “the task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy.”

In the final paragraphs of his opinion, Justice Jackson objected to the Court’s “uniform, rigid and, if we are consistent,…unchanging standard” effected by its decision in McCollum “for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes.” To apply such a standard, Jackson wrote, was to “allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school in the nation.” Neither the Constitution nor any other legal authority, he wrote, provided one word to assist judges in determining “where the secular ends and the sectarian begins in education.” The Court had “no law but our prepossessions,” Jackson wrote, and was likely to see many more cases like McCollum if it endeavored with no identifiable legal standard to decide “every variation of this controversy, raised by persons…who are dissatisfied with the way schools are dealing with the problem.” More importantly, Jackson wrote, the Court was likely to “make the legal ‘wall of separation between church and state’ as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded,” a reference to the famous serpentine wall at the University of Virginia. Despite joining the decision of the case, Jackson’s opinion betrays trepidation about the wall of separation metaphor, expressing both that it was too rigid and that it could become too serpentine.

A Blurred and Variable Barrier

In Lemon v. Kurtzman (1971), taxpayers and citizens challenged the constitutionality of statutory school programs in Pennsylvania and Rhode Island, which in Pennsylvania reimbursed the cost of teachers’ salaries, textbooks, and instructional materials in secular subjects and in Rhode Island paid teachers in nonpublic elementary schools a supplement of 15 percent of their salary. In both cases, state aid was provided to church-related educational institutions. The Court held that both programs
were unconstitutional under the Religion Clauses of the First Amendment. Writing for a unanimous Court, Chief Justice Warren Burger began his discussion of the constitutional issue by writing that “candor compels acknowledgment...that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.”

The language of the Religion Clauses, he wrote, was “not precisely stated” but “at best opaque, particularly when compared with other portions of the Amendment,” considering the use of the word *respecting* in the Establishment Clause’s prohibition of any “law respecting an establishment of religion.”

In the absence of a more precisely stated provision, Justice Burger wrote, “we must draw lines with reference to the three main evils against which the Establishment Clause was designed to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity.” He then announced a three-pronged test reflecting “cumulative criteria” developed by the Court over many years:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster “an excessive government entanglement with religion.”

Although the Pennsylvania and Rhode Island programs had a secular legislative purpose and did not advance religion, Burger concluded, the cumulative impact of the statutes “involves excessive entanglement between government and religion.” He acknowledged that “total separation is not possible in an absolute sense,” because “some relationship between government and religious organizations is inevitable” insofar as “religious values pervade the fabric of our national life.”

The relationship between religion and government prescribed by the Religion Clauses was, Justice Burger wrote, “a blurred, indistinct, and variable barrier” rather than a wall. In order to determine whether a statute fosters an “excessive entanglement” between religion and government, he wrote, the Court must examine “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” Both the Pennsylvania and Rhode Island education programs failed the test.
Despite the fact that the wall of separation metaphor was all but discarded in Lemon and the epideictic registers of the opinion were muted relative to Everson and McCollum—perhaps because Lemon was not perceived to inaugurate change to the same extent as the Court’s early Religion Clause cases—Justice Burger still drew substantially on chiasms to support the decision. Describing the divisive political potential of the education programs before the Court, for example, Burger wrote that it was inconsistent with history and tradition to let the Religion Clause issues preclude attending to the many legal questions involved in governance:

The highways of church and state relationships are not likely to be one-way streets, and the Constitution’s authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion’s intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.\textsuperscript{169}

In the final paragraph of the opinion, Burger also used a chiasmus to support the boundary the decision marked. Although “some involvement and entanglement are inevitable, lines must be drawn” based on the choice made by our system of government that “government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government.”\textsuperscript{170} Chiasms also appear in other opinions of the era, such as in Justice William Brennan’s concurring opinion in School District of Abington Township v. Schempp (1963), in which Brennan quoted the same chiasma of Jeremiah Black quoted by Justice Frankfurter in his concurring opinion in McCollum: “The manifest object of the men who framed the institutions of this country, was to have a State without religion, and a Church without politics.”\textsuperscript{171}

A Variable Resolve

The epideictic registers in the Court’s early Religion Clause jurisprudence, such as those in the Court’s First Amendment free speech jurisprudence discussed in Chapter 2, illustrate the interdiscursive relationship between judicial discourse and the ritual and ceremonial discourse of epideictic. The Court’s early Religion Clause cases also reveal the powerful intertextual
influence of Madison’s struggle for religious liberty and his Remonstrance and Memorial for Religious Assessments, particularly the figure of chiasmus that pervades the form and structure of the Remonstrance and of the Religion Clauses Madison authored. Similar to the role that paramologia played in the Court’s First Amendment free speech cases, chiasmus formed a central gesture of the epideictic registers in the Court’s early Religion Clause cases which equally magnified the value of both religious and secular life. The epideictic registers in the cases reflect less of a conflict between religion and government than conflicting approaches to the proper balance between them.

In the Court’s early Religion Clause cases, the figure of chiasmus magnified the value of both religion and government without privileging either, a paean to both religious and secular life which proved more durable than the obstruction symbolized by the wall metaphor but one which in the end only resulted in the sort of “hermeneutical miasma” that Robert Hariman notes of chiasmus more generally. The capacity of chiasmus to symbolize the Court’s inability to find a more suitable metaphor for the relationship between religious and secular life may explain its durability. Although the judicial authors in the cases responded to the epideictic situation created by the inauguration of a new line of constitutional jurisprudence with broad social consequences by addressing the beliefs, desires, and ethical commitments that informed their decisions, they struggled to apprehend a national character or resolve regarding the issue.

When Justice Burger wrote in Lemon that “total separation” of religion and government was not possible “in an absolute sense” and that the language of the Religion Clauses was “not precisely stated” but “at best opaque,” characterizing the separation of religion and government prescribed by the Religion Clauses as “a blurred, indistinct, and variable barrier” rather than a wall, he expressed the culmination of a lengthy period in which the Court had become disillusioned with the wall metaphor and sought alternative metaphors through which to think about the Religion Clauses. At different times, the Court had alternatively construed the clauses to represent an imperfect “line,” a “scale” on which to balance interests, a “boundary” designed to avoid excessive “entanglements,” a “tight rope” to be “traversed,” and had construed the wall metaphor itself with more concrete imagery as “serpentine,” “warped and twisted,” or through an allusion to the wall in Robert Frost’s poem “Mending Wall.”
The figure of chiasmus captures the Court’s failure to discover a stable principle of resolution in its Religion Clause jurisprudence, a conspicuous figure for magnifying the value of both religious and secular life without resolving their “proximity and distance.”

The central role of chiasmus in the Court’s early Religion Clause cases also illustrates the philosophical significance of figures, which Jeanne Fahnestock notes “belong in the pragmatic or situational and functional dimension of language,” revealing “a fundamental, generative cognitive process” no less than metaphor. Far from representing a merely stylistic figure, as Rodolphe Gasché argues chiasmus is an “originary” form of thought that “allows the drawing apart and the bringing together of opposite functions or terms and entwines them within an identity of movements” while also infinitely deferring closure through the “substitutability implied by its asymmetry.” Rather than serving as mere ornamentation or artistic expression, chiasmus is “constitutive or iconic” of the Court’s thought regarding the relationship between religion and government, forming a “verbal summary that epitomizes a line of reasoning,” a “condensed or even diagram-like rendering of the relationship among a set of terms, a relationship that constitutes the argument and that could be expressed at greater length.” The figure forms an essential part of the Court’s thought.

As discussed in Chapter 1, the Scientific Revolution and Enlightenment’s insistence that invention be exclusively governed by deductive logic and the scientific method reduced rhetoric to a purely ornamental function by eliminating invention from its purview. As Ernesto Grassi explains the thesis of modern rationalism, rhetoric and figurality were “to be appreciated primarily from the outside, for pedagogical reasons, that is, as aids to ‘alleviate’ the ‘severity’ and ‘dryness’ of rational language” or merely to make it “‘easier’ to absorb rational truth.” Metaphor and the “easy vanity of fine speaking” characterized by an elaborate use of tropes and figures was condemned as misleading because figures appeal to the senses rather than reason and because metaphor transfers and transforms meaning in a manner that frustrates logical precision. Peter Ramus rejected the idea that rhetoric constituted a form of reasoning which had been widely recognized since the time of Aristotle, and Francis Bacon rejected the equally long-standing idea that rhetoric had an epistemic function of discovering new knowledge. To modern reformers, rhetoric and the humanistic tradition of which it formed a central part—which “always concerned itself
with the union of res and verba,” of “content” and “form”—were considered only of literary and aesthetic, not philosophical, significance.\textsuperscript{189}

As Fahnestock notes, however, “there has always been an undertow working against the separation of invention and style, and it is even possible to discover arguments stylistically.”\textsuperscript{190} Although in reference to the wall of separation metaphor Justice Reed wrote that “a rule of law should not be drawn from a figure of speech”\textsuperscript{191} and Justice Frankfurter wrote that the Court’s application of the Religion Clauses could not be achieved by “a mere phrase”\textsuperscript{192}—comments which participated in the bias that figurality possesses only literary and aesthetic, not philosophical, significance—in the history of the Religion Clauses the figure of chiasmus first emerged as a fundamental habit of mind of Madison and symbolizes the Court’s irresolution regarding the relationship between religious and secular life in its early Religion Clause cases. Ivo Strecker describes the potential of chiasmus to “shatter expectations and conventions,” which forms its “rhetorical energy” and leads to both pleasure and pain as the figure first shatters expectations but ultimately fails to gain lasting adherence because it provides no principle of resolution between its terms.\textsuperscript{193} While Madison’s sententious chiasms may have shattered expectations in his struggle for religious liberty in the eighteenth century, in the Court’s early Religion Clause jurisprudence they led only to the “small prison house of language” that Robert Hariman describes, a “perpetual oscillation” between chiastic terms.\textsuperscript{194}

The following chapter examines the epideictic registers in the Court’s privacy jurisprudence through an analysis of Justice Anthony Kennedy’s majority opinion in Obergefell v. Hodges (2015) and a genealogy of the leading cases on which Obergefell relied, revealing both the accumulating force of epideictic across a century of cases as well as interpretive figures in the early development of the constitutional right of privacy that form important foundations of the Court’s privacy jurisprudence, central figurations that amplify the basis of judicial authority to recognize rights such as privacy not explicitly enumerated in the Constitution.