87TH CONGRESS
1st Session

SENATE

DOCUMENT
No. 29

CONSTITUTIONALITY OF FEDERAL AID TO EDUCATION IN ITS VARIOUS ASPECTS

MISCELLANEOUS MEMORANDUMS OF THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE, AND OPINIONS OF CERTAIN SCHOLARS OF THE LAW RELATIVE TO S. 1021 (A BILL TO AUTHORIZE A PROGRAM OF FEDERAL ASSISTANCE FOR EDUCATION) AND RELATED SUBJECTS, SUBMITTED UPON REQUEST OF THE SUBCOMMITTEE ON EDUCATION OF THE COMMITTEE ON LABOR AND PUBLIC WELFARE; AND A LEGAL ANALYSIS OF THE ADMINISTRATION'S BRIEF ON FEDERAL AID TO CHURCH-SUPPORTED ELEMENTARY SCHOOLS, BY SENATOR KENNETH B. KEATING OF NEW YORK

PRESENTED BY MR. MORSE

MAY 1, 1961.—Ordered to to printed

U.S. GOVERNMENT PRINTING OFFICE
69123 WASHINGTON : 1961

S. Res. 126

IN THE SENATE OF THE UNITED STATES,
May 1, 1961.

Resolved, That there shall be printed as a Senate document the memorandums entitled "The Constitutional Authority of the Congress To Enact S. 1021", "The Impact of the First Amendment to the Constitution Upon Federal Aid to Education", and "Federal Programs Under Which Institutions With Religious Affiliation Receive Federal Funds Through Grants or Loans", submitted on March 28, 1961, by the Secretary of Health, Education, and Welfare to the Subcommittee on Education of the Committee on Labor and Public Welfare, together with the opinions on the questions of the constitutionality of S. 1021 and the constitutionality of a measure which would provide loans for construction purposes to private and parochial schools at both the primary and secondary school levels submitted to the subcommittee by certain professors of law in response to requests by the chairman of the subcommittee; and a legal analysis of the Administration's brief on Federal aid to church-supported elementary schools, by Senator Kenneth B. Keating of New York.

Attest:

FELTON M. JOHNSTON, *Secretary.*

FOREWORD

During the course of hearings upon S. 1021 and related bills for Federal aid to our public schools, it was evident that suggested amendments to the measure extending loans to private and parochial institutions at the elementary levels were a source of serious concern to many citizens and organizations. The concern was voiced to the Education Subcommittee of the the Senate Committee on Labor and Public Welfare in terms of the constitutional problems posed by an enlargement of the public school aid bill to include such loans to private institutions.

In order that the subcommittee might have the benefit of advice from constitutional lawyers, both within and without the Government, on the many areas of constitutional interpretation which are not, as yet, defined with full clarity and precision, I, as chairman of the subcommittee, requested appropriate memorandums from the Secretary of Health, Education, and Welfare. He supplied a series of memorandums on the points at issue. In addition, I drew these points to the attention of distinguished scholars of the law, with the request that, as a public service, they provide the subcommittee with opinions reflecting their considered legal advice.

The following pages contain the responses elicited. To all who gave their advice and counsel go my thanks, and the thanks of the members of the subcommittee, for the thoughtful memorandums prepared.

All who have participated in this effort have contributed to a clearer understanding of a vital area of constitutional interpretation. In my judgment, these documents will be of continuing value to the students of constitutional law for many years to come.

WAYNE MORSE,
Chairman, Education Subcommittee of the Senate Committee on Labor and Public Welfare.

CONTENTS

CONSTITUTIONALITY OF FEDERAL AID TO EDUCATION IN ITS VARIOUS ASPECTS

MEMORANDUMS SUBMITTED BY THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

At the request of Senator Wayne Morse, chairman of the Subcommittee on Education of the Committee on Labor and Public Welfare, the Secretary of Health, Education, and Welfare has supplied memorandums discussing the constitutionality of S. 1021 (a bill to authorize a program of Federal assistance for education) and related subjects. The memorandums, entitled respectively "Constitutional Authority of the Congress To Enact S. 1021," "The Impact of the First Amendment of the Constitution Upon Federal Aid to Education," and "Federal Programs Under Which Institutions With Religious Affiliation Receive Federal Funds Through Grants or Loans" follow. They are preceded by an excerpt from the hearings on S. 1021 during which Senator Morse made his request, and by Secretary Abraham Ribicoff's letter of transmittal which accompanied the memorandums.

Excerpt From Public Hearings on Public School Assistance Act of 1961, Pages 109–110, March 8, 1961

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LOANS TO PRIVATE SCHOOLS

Senator Morse. Mr. Secretary, while it is on my mind, I would like to make a request of the administration through your office. I think you well know that there will probably be intorduced an amendment to this bill which would seek to provide interest-bearing loans to private schools. We, undoubtedly, will devote a considerable amount of time in these hearings in the discussion of such an amendment. The Chair yesterday was notified by two of his colleagues in the Senate that they are preparing such an amendment, and that such an amendment will be introduced. I was asked to make arrangements for some time in these hearings for them to testify in order to present their own views in regard to the amendment.

I may say, incidentally, that I urged them not to introduce the amendment for the very reasons I set forth in my speech on the floor of the Senate when I introduced the administration bill. I feel that the proper thing to do this year is to get the principle of Federal aid to education established as a matter of law in this country for the trial period for which the President asks. This 3-year trial period, in and of itself, requires periodic review on the part of the Congress during its course before the final decision is made upon the adoption of permanent legislation.

REQUESTS FOR ADMINISTRATION VIEWS

But in view of the fact that I am giving you due notice that such an amendment is going to be offered, I would like to ask the administration, through your office, to prepare a brief for this committee setting forth the position of the administration on the constitutional questions and other legal questions raised by such an amendment.

Senator JAVITS. Would the Senator yield at that point?

Senator MORSE. Yes.

Senator JAVITS. I was going to question the witness on that, and could I add to the chairman's request a consideration by the administration of this question? The Supreme Court has decided that in some cases like bus transportation, schoolbooks, a State may without violating constitutional principles give aid to private or parochial schools. Would the Department, therefore, let us have the administration's views upon the fundamental proposition, of course, as requested by the chairman, but also upon this added question whether any accommodation should be given for that kind of aid to the private and parochial schools which is allowable without violating constitutional prohibitions under the Supreme Court decisions? Thank you very much.

Senator MORSE. I want to thank Senator Javits. This was the second question. I am very glad to have it come from him. I would like to have a brief prepared for consideration of this committee setting forth the administration's position concerning any form of aid to private schools. Third, I would like to have the administration submit a brief setting forth its position on the question of constitutionality of Federal aid to education per se.

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THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Washington, March 28, 1961.

Hon. WAYNE MORSE,
Chairman, Subcommittee on Education,
Committee on Labor and Public Welfare,
U.S. Senate, Washington, D.C.

DEAR SENATOR MORSE: On the opening day of the hearings on S. 1021 you requested of me memorandums discussing the constitutionality of that bill and the constitutionality of loans to private schools including sectarian institutions, a consideration of governmental actions which might validly provide some incidental benefit to private schools, and a summary of existing Federal legislation which results in the provision of some benefit to sectarian institutions.

I am enclosing herewith memorandums in response to this request. Except for the summary of existing legislation, which was prepared entirely in this Department, these documents have been prepared by our legal staff in consultation with attorneys of the Department of Justice.

Because of the interrelationship of the factors bearing on the constitutionality of loans and the constitutionality of various forms of indirect aid, we have combined our discussion of these two questions in a single document. We believe that our replies will be more helpful to the committee in this form.

Sincerely,

ABRAHAM RIBICOFF, *Secretary.*

Enclosures.

MARCH 28, 1961.

MEMORANDUM ON THE CONSTITUTIONAL AUTHORITY OF THE CONGRESS TO ENACT S. 1021

The power of the Congress to enact S. 1021 rests on its constitutional authority to appropriate funds to provide for the general welfare of the United States. The scope of that congressional power has been so broadly defined by decision of the Supreme Court, and the expenditures contemplated by S. 1021 fall so clearly within the power, that there is no need to review the controversy which for a century and a half surrounded the Federal power of expenditure, or to refer to the innumerable Federal expenditures that have been made throughout our history for purposes of the general welfare. It is not amiss to point out, however, that the first Federal grants to the States for the purpose of education antedated the Constitution, and that grants for this purpose have been made from time to time ever since.

The existence of the power of expenditure as a separate power independent of the other enumerated powers of Congress, which had so long been in dispute, was finally affirmed by the Supreme Court in *United States* v. *Butler* (297 U.S. 1 (1936)); the contrary view, that expenditures could be made only in support of the other congressional powers, was expressly rejected. The Court did not find it necessary in that case to indicate further the scope of the general welfare clause, but clarification was not long delayed. Challenge to the unemployment compensation and old-age insurance provisions of the Social Security Act brought further decisions affirming in the broadest terms the discretion of Congress in determining what expenditures are for the general welfare of the United States.

In *Steward Machine Company* v. *Davis* (301 U.S. 548 (1937)), the Court said of expenditures for the relief of the unemployed (pp. 586–587):

> The problem had become national in area and dimensions. There was need of help from the Nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the Nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare.

In *Helvering* v. *Davis* (301 U.S. 619 (1937)), the validity of the old-age insurance system was upheld. The Court expounded more fully the meaning of the general welfare clause (pp. 640–641):

> Congress may spend money in aid of the "general welfare" (Constitution, art. I, sec. 8; *United States* v. *Butler*, 297 U.S. 1, 65; *Steward Machine Co.* v. *Davis*, *supra*). There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision (*United States* v. *Butler*, *supra*). The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot

be known through a formula in advance of the event. There is a middleground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. "When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress" (*United States* v. *Butler*, *supra*, p. 67. Cf. *Cincinnati Soap Co.* v. *United States*, *ante*, p. 308; *United States* v. *Realty Co.*, 163 U.S. 427, 440; *Head Money Cases*, 112 U.S. 580, 595). Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times.

The Supreme Court has subsequently sustained, as valid exercises of the power to spend for the general welfare, Federal construction of public housing and Federal projects for reclamation and irrigation (*Cleveland* v. *United States*, 323 U.S. 329 (1945); *United States* v. *Verlach Live Stock Company*, 339 U.S. 725 (1950)). In both of these decisions the Court, on the authority of the *Social Security* cases, treated the congressional determination as decisive of the propriety of the expenditures.

The President in his message to Congress on this subject, and the Secretary of Health, Education, and Welfare in his testimony on S. 1021, have presented to Congress convincing reasons for exercise of the national power of expenditure, in the manner provided in the bill, in support of public primary and secondary school education throughout the Nation. There is no need to repeat or summarize those reasons here. If the Congress concurs in the judgment which the President and the Secretary have expressed, it cannot be doubted that the Supreme Court would accept that judgment as conclusive.

Since Congress would be exercising a power expressly conferred upon it by the Constitution, no question under the 10th amendment would arise. "The [10th] amendment states but a truism that all is retained which has not been surrendered" (*United States* v. *Darby*, 312 U.S. 100, 124 (1941)).

The Supreme Court held many years ago that Federal grants-in-aid to the States, though conditioned upon various actions by the States, raise no justiciable issue at suit of a State or of a taxpayer (*Massachusetts* v. *Mellon*, 262 U.S. 447 (1923)). The Court observed (p. 480):

> Probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject.

To the same effect is *Oklahoma* v. *Civil Service Commission* (330 U.S. 127 (1947)).

United States v. *Butler*, *supra*, has occasionally been cited as though it construed the 10th amendment as a limitation upon powers otherwise granted to Congress. It did not do so. The Court held that the regulatory effect of the expenditures there under consideration, in matters not falling within the powers of Congress, rendered the statute invalid as exceeding the scope of congressional authority. The 10th amendment, said the Court, serves to "forestall any suggestion" that Congress may exercise powers not granted, expressly or by reasonable implication.

Any argument that the *Butler* case construed the 10th amendment as restricting the granted powers was put to rest in the following year, by *Helvering* v. *Davis*, *supra*. The lower court had held the old-age

insurance system unconstitutional, on the ground that assistance to the aged was a matter reserved to the States at the time the Constitution was adopted, and thus reserved to them by the 10th amendment (*Davis* v. *Edison Electric Illuminating Co.*, 89 F. 2d 393 (C.C.A., 1st Circ., 1937)). The court likened care of the aged, in this respect, to education.[1]

In reversing the judgment the Supreme Court said (301 U.S., at pp. 644–645):

> Counsel for respondent has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government may sap those sturdy virtues and breed a race of weaklings. If Massachusetts so believes and shapes her laws in that conviction, must her breed of sons be changed, he asks, because some other philosophy of government finds favor in the halls of Congress? But the answer is not doubtful. One might ask with equal reason whether the system of protective tariffs is to be set aside at will in one State or another whenever local policy prefers the rule of laissez faire. The issue is a closed one. It was fought out long ago. When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the States. So the concept be not arbitrary, the locality must yield (Constitution, art. VI, par. 2).[2]

That the 10th amendment does not limit the granted powers has been consistently held by the Court in subsequent cases (*United States* v. *Darby*, *supra*; *Oklahoma* v. *Civil Service Commission*, *supra*).

It is thus beyond dispute that S. 1021, if enacted by Congress, will be a valid exercise of congressional authority, and that no issue will arise by reason of the 10th amendment.

ALANSON W. WILLCOX,
General Counsel, Department of Health, Education, and Welfare.

MARCH 28, 1961.

MEMORANDUM ON THE IMPACT OF THE FIRST AMENDMENT TO THE CONSTITUTION UPON FEDERAL AID TO EDUCATION

SUMMARY OF CONCLUSIONS WITH RESPECT TO ELEMENTARY AND SECONDARY SCHOOLS

This summary sets out briefly the conclusions reached in the attached memorandum with respect to the application of the first amendment to Federal aid to elementary and secondary schools with religious affiliations. The field of higher education, which presents different factual, historical, and constitutional considerations, is discussed in the body of the memorandum. The memorandum also discusses the problem of obtaining judicial review.

I

The Supreme Court has ruled that the first amendment to the Constitution forbids the use of public funds to "support religious institutions" or "finance religious groups." Legislation which renders support to church schools is unconstitutional in some circumstances.

[1] It may be noted that, if practice in 1789 were controlling, it would confirm the propriety of Federal grants for educational purposes.

[2] It may be noted that of the six Justices who concurred in the Butler opinion, four (Hughes, C.J., and Roberts, Sutherland, and Van Devanter, J.J.) concurred with Cardozo, Stone, and Brandeis, J.J., in *Helvering* v. *Davis*.

But laws designed to further the education and welfare of youth may not be unconstitutional if they afford only incidental benefits to church schools. For example, public funds may unquestionably be used to provide fire and police protection to church schools.

The line between direct support and incidental benefits is not always easy to determine. Decisions of the Supreme Court and relevant State cases cited and discussed in the accompanying memorandum make it clear that it is easier to determine what the first amendment forbids than what it allows.

II

A. Several unconstitutional proposals can be readily identified

1. Across-the-board grants to church schools may not be made. The Supreme Court has declared:

> No tax in any amount, large or small, can be levied to support religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (*Everson* v. *Board of Education*, 330 U.S. 1).

Plainly an across-the-board grant is the type of support which the Court has ruled is prohibited. Since no effort is made to earmark the funds for specific purposes, such a broad grant would inevitably facilitate the performance of the religious function of the school. This the first amendment forbids.

2. Across-the-board loans to church schools are equally invalid. A loan represents a grant of credit. When made at a rate of interest below what is normally available to the borrower, it also constitutes a grant of the interest payments which are saved. These benefits plainly have the purpose of providing financial advantage or convenience to the recipient. And like the broad grant, the across-the-board loan would inevitably facilitate religious instruction.

The Supreme Court has ruled that the first amendment forbids the lending of a public classroom for religious instruction during released time (*McCollum* v. *Board of Education*, 333 U.S. 203). The lending of public property and the lending of public credit are constitutionally equivalent forms of Government assistance. In *Zorach* v. *Clauson* (342 U.S. 306), the Supreme Court stated, "Government may not finance religious groups."

3. Tuition payments for all church school pupils are invalid since they accomplish by indirection what grants do directly. The form of governmental assistance is not controlling. Since tuition payments, whether made to the school or to the parent or student, would constitute support of church schools, they are prohibited by the first amendment. State courts have followed the statements of the *Everson* case to invalidate tuition proposals, since such a practice "compels taxpayers to contribute money for the propagation of religious opinions which they may not believe" (*Almond* v. *Day*, 197 Va. 419, 89 S.E. 2d 851; *Swart* v. *South Burlington Town School Districts*, 167 A. 2d 514).

B. Areas of uncertain constitutionality

The permissible area of legislation which renders incidental benefits to church schools is not clear. The *Everson* case illustrates the closeness of the question. In upholding bus transportation, a form of assistance in no way connected with the religious function of a church school, the Court divided by 5 to 4. The majority opinion suggested that the statute in question "approaches the verge" of impermissible

action under the first amendment (330 U.S., at 16). Nonetheless, bus transportation has been ruled valid, and other collateral benefits like provision of milk and lunches appear equally constitutional, since the benefit is plainly to the health of the child and not to the school itself.

It is also likely that where funds are made available to a church school on a loan basis for special purposes not closely related to religious instruction, constitutional objections may be avoided. An example is title III of the National Defense Education Act which enables church schools to borrow funds for equipment to assist in teaching science, mathematics, and languages. Such programs advance specific national purposes, and their relationship to the religious function of a church school is remote. Moreover, the requirement that such funds be repaid makes it unlikely that a church school will be enabled to free its own funds for religious purposes.

In what other directions this principle of special purpose loans may be extended is difficult to ascertain. Typically secular and sectarian education is so interwoven in church schools as to thwart most possibilities.

Memorandum on the Impact of the First Amendment to the Constitution Upon Federal Aid to Education

The extent to which government, whether Federal, State, or local, may, consistently with the U.S. Constitution, aid religious schools is a problem which, surprisingly enough, is a relatively new one.

Prior to 1947 Federal judicial concern with this field was limited. The only case presented to the Supreme Court involving the expenditure of federally controlled funds to religious schools was *Quick Bear* v. *Leupp* (210 U.S. 50 (1908)), which held merely that provisions in certain Indian appropriation acts prohibiting the use of public funds for the education of Indians in sectarian schools did not prevent trust funds belonging to the Indians and administered by the Federal Government from being used for such schools at their request and such action did not involve the prohibitions of the first amendment.

It was only recently that State action in this field was held subject to first amendment limitations.[1] The first amendment provides that "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." [Emphasis added.] By itself this language is not a limitation on State action, though similar provisions exist in many State constitutions. In 1934, however, freedom of religion as guaranteed by the 1st amendment was construed to be among the liberties protected by the due process clause of the 14th amendment limiting State action (*Hamilton* v. *Regents of the University of California*, 293 U.S. 245 (1934)). Later, in 1947, the now leading case of *Everson* v. *Board of Education* (330 U.S. 1), made it clear that the due process clause forbade State action which would effectuate "an establishment of religion" prohibited by the first amendment. The impact of that case is that State and Federal action affecting religion must now satisfy the standards of the

[1] For this reason the limited number of earlier cases touching upon State action affecting religious schools came up in the context of the question whether property rights were impaired without due process of law in violation of the 14th amendment. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), upholding as a constitutional right the maintenance of private, including parochial, schools; *Cochran* v. *Board of Education*, 281 U.S. 370 (1930), holding that the use of State moneys to provide textbooks for schoolchildren, including those attending private schools, whether sectarian or nonsectarian, is not a taking of property for private purposes.

amendment. Under those standards, what is forbidden to a State is also forbidden to the Federal Government, and what is forbidden to the Federal Government is also forbidden to a State. It is possible, however, that what the Federal Government and the States may properly do without offending the first amendment may nevertheless be prohibited to a particular State because of its own constitutional prohibitions.

In *Everson*, the Supreme Court in a 5 to 4 decision, held that where a local school district, as authorized by State law, reimbursed parents for the bus fare paid by them for public transportation of their children to parochial as well as public schools, such aid did not violate the establishment of religion clause of the first amendment. It was followed in 1948 by *McCollum* v. *Board of Education* (333 U.S. 203). With only Mr. Justice Reed dissenting, the Court there held that the 1st amendment (as made applicable by the 14th amendment to the State) forbade a public school program of "released time" under which religious teachers provided by various denominations were permitted by the Board of Education to hold classes in public school buildings for students who had volunteered for religious instruction. The children not desiring such instruction continued their regular studies in other rooms. In 1952, *Zorach* v. *Clauson* (343 U.S. 306), was decided. By a 6 to 3 vote, a voluntary "released time" program, basically differing from that involved in the *McCollum* case only in that the religious instruction was provided off the school premises, was held constitutional. These three cases constitute the most important judicial precedents in the field. The paucity of Supreme Court precedent is due to two factors: First, it was only in 1934 that the Court read the 14th amendment as embodying the pertinent provisions of the 1st amendment; second, despite the existence of a number of Federal educational programs in recent years, judicial review in Federal courts at the instance of a taxpayer of the lawfulness of Federal expenditures has not been available since *Massachusetts* v. *Mellon* (262 U.S. 447), decided in 1923.[2] It should therefore be emphasized that the questions discussed in this memorandum are probably not open for judicial determination, unless adequate special statutory provisions are enacted to authorize judicial review.

The difficulties of obtaining a court test of legislation in this area impose a solemn responsibility upon both Congress and the Executive to be especially conscientious in studying the Constitution and relevant Supreme Court decisions so that any enactment will scrupulously observe constitutional limitations.

I. THE CONSTITUTIONAL PRINCIPLES

At the outset it is evident that resolution of the constitutional problems of present concern requires us to deal with the interrelation of three constitutional limitations. Two are contained in the provisions of the first amendment: Neither Congress nor the States may pass any law "respecting an establishment of religion"; neither may they pass any law "prohibiting the free exercise thereof." The third constitutional limitation is found with respect to the Federal Government in the due process clause of the 5th amendment and, for the

[2] In *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), the Supreme Court dismissed an appeal for want of jurisdiction in a suit filed by a State and local taxpayer who had not, on the facts alleged, shown a [illegible] to financial interest.

States, in the due process and equal protection clauses of the 14th amendment. These limitations prohibit the Federal Government or a State from unreasonable discrimination in governmental programs. (See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Brown* v. *Board of Education*, 347 U.S. 483 (1954).)

In many instances these three constitutional limitations overlap in one regard or another to prohibit Federal or State action. For example, a Government program of compulsory education exclusively at State-operated schools which taught religion would violate all three. In other factual circumstances, however, a program which satisfied one or more of the limitations might violate another. For example, a program of educational grants to returning war veterans for their readjustment into civilian life perhaps could not have constitutionally excluded from its benefits applicants who wished to attend sectarian institutions. This would probably be regarded as a classification so unrelated to the expressed public purpose as to offend due process requirements.

There is agreement that education serves a fundamental public purpose (see *Brown* v. *Board of Education*, *supra*, at 493) and accordingly that the Federal Government or a State may use public funds for that purpose. In addition, to that end States with respect to education under their control may also compel children, within reasonable limits of age and maturity, to attend schools. Moreover, they may set reasonable standards for education. At the same time, there seems little doubt that Government may not use its authority in the field of education in order to instruct children in religion generally or in any specific religion. This would violate the establishment-of-religion clause of the first amendment. Nor may government, without interfering with the religious freedom guaranteed by the first amendment and the due process clause, reserve educational functions to public schools and forbid education by private institutions meeting the standards prescribed by law for the public school. (See *Pierce* v. *Society of Sisters*, *supra*.) And in any educational program in which public funds are expended there must be equal treatment for all children; that is, a State may not classify children on the basis of their religion, race, or similar irrelevant considerations without violating equal protection and due process requirements.

It is also evident that these constitutional limitations must be interpreted in the light of specific factual situations. It is the difficulty of attempting to interpret and apply them under contemporary conditions that brings about a potential conflict among them. The most significant of these conditions is that to a substantial extent education at the lower levels, which a State requires and compels, is being carried out by schools which teach according to particular religious tenets, although at the same time satisfying secular educational standards established by the State. This is a form of education which the State cannot constitutionally prohibit. It is settled that individuals have a constitutional right to a religious education. At the same time, sectarian schools are ones which the State cannot constitutionally require a student to attend. There is a constitutional right to freedom of religion or no religion.

The difficult problem is posed by the dual constitutional mandate: that the State must recognize these schools as part of its educational system for purposes of compulsory attendance laws, but that it cannot

support them in ways that would constitute an "establishment of religion."

The problem is accentuated by the fact that American society is one in which religion touches much of everyday life, both in the home and in the school. It is a society in which customs, practices, morals, and ceremonies have been importantly influenced by religion. Fundamental as are the principles contained in the first amendment, it is clear that they cannot always be absolutes. The problem is to draw a line between what is permitted and what is prohibited in accordance with applicable constitutional principles. Since this must be done in the society in which we actually live—a society in which aspects of religion are inextricably entwined with knowledge and culture—history and experience may be sounder guides to locating Jefferson's "wall of separation between church and state" than abstract logic.

Even the general agreement that the State cannot constitutionally permit teaching of religion in public schools illustrates some of the difficulties. Examples of efforts to draw the line between constitutionally permissible and impermissible State action have extended to such matters as readings from the Bible, prayers, and celebrations of religious holidays. Pushing the separation doctrine to its logical extreme would make education virtually impossible. History is replete with religious ideas, principles, and experience. Furthermore, it is readily apparent that what one person would classify as simply secular knowledge another would regard as religious instruction. The content of religious belief is largely the prerogative of religious groups to define, though they differ among themselves as to what is included. The content of education is for public authorities to define. Where definitions overlap difficulties arise.

It would be footless to deny that drawing the line between the permissible and impermissible is a hard task. In the *Everson* case itself, although the Court was unanimously of the view that the establishment of religion clause forbade a State from using public funds for sectarian education, it netherless divided by the closest margin (5–4) on whether State reimbursement of parents for fares paid for public transportation to a sectarian school constituted a prohibited use. But, however, difficult it may be to find the line in marginal situations, this difficulty cannot properly be used to avoid constitutional proscriptions. There are clear cases as well as difficult ones.

To summarize, the broad principles are clear enough in the light of recent decisions. The first amendment does not require Government to be hostile to religion, nor does it permit governmental discrimination against religious activities. The objective is neutrality, however difficult it may be to be neutral or to determine what neutrality requires in relation to particular factual situations. *Zorach* reaffirms that the State may not actively support a religious organization. On the other hand, it may, and perhaps under some circumstances must, temper its secular requirements if religious observances conflict with them.[3] There is the consistent emphasis in the cases that public funds may not be used to finance religion and that public property may not be used to assist it. Yet, the decisions warn that a person may not be denied general public benefits on religious grounds without violating the 1st amendment and the due process and equal protection clauses of the 5th and 14th.

[3] See, for example, the flag salute case, *Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

II. THE JUDICIAL PRECEDENTS

As earlier noted, prior to the decision in *Everson*, the Supreme Court had little occasion to consider the problem of governmental aid to religious schools. The right to attend such schools was clearly established in the 1920's. (See *Pierce* v. *Society of Sisters*, *supra;* see also *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Farrington* v. *Tokushige*, 273 U.S. 284 (1927)). The *Quick Bear* case, *supra*, had dealt with the unique problem of the use of Indian trust funds. The *Cochran* case, *supra*, had been decided before it had been determined that the establishment of the religion clause of the 1st amendment operated upon the States by virtue of the due process clause of the 14th amendment.[4]

As indicated above, the controversy in the *Everson* case concerned a local school board resolution adopted pursuant to a New Jersey statute. This resolution authorized reimbursement to parents of expenditures for transportation of their children to public and Catholic schools on regular buses operated by the public transportation system. A taxpayer filed suit challenging this action of the school board. The Court unanimously agreed that the due process clause of the 14th amendment embodied the "establishment of religion" prohibition contained in the 1st amendment. Five Justices found that the statute involved did not constitute a "law respecting an establishment of religion." It should be emphasized, however, that all nine Justices agreed that the clause prohibited governmental aid to religion; the disagreement turned, rather, upon whether the benefit was conferred upon the children or upon the parochial schools.

The most extensive discussion appears in the dissenting opinion of Mr. Justice Rutledge. On the basis of his evaluation of the historical materials and his view of the objectives of Madison and Jefferson, leading proponents of the amendment, he stated that—

> 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 (330 U.S., at 31–32).

He concluded, therefore, that the taxing power may not be used to give support to religious training or belief and that "transportation, where it is needed, is as essential to education as any other element"; and that it "is impossible to select so indispensable an item from the composite of the 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" (330 U.S., at 47, 48).

Justice Black, writing for the majority, adopted a similar view of the purpose of the first amendment. He stated:

> 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

[4] For this reason the *Cochran* case is dubious authority for the proposition that textbooks may be provided by a State to parochial school students. The crucial question of whether the establishment clause of the first amendment prohibits the expenditure of public funds for textbooks to be used by church school pupils was not presented to the Court in this case, and the Court therefore had no occasion to rule upon the question.

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 nonattendance. 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" (330 U.S., at 15–16).

He concluded, however, that the State cannot deny any of its citizens the benefits of public welfare legislation because of their religion. He emphasized that much of such legislation (for example, that providing fire and police protection, etc.) incidentally benefits religious institutions, and that such benefits do not constitute proscribed support of the institutions. In this light he viewed the New Jersey statute merely as providing a program to get children, "regardless of their religion, safely and expeditiously to and from accredited schools." He therefore interpreted the purpose of the statute as a general, nondiscriminating one, designed to protect the health and safety of all schoolchildren. On this basis he was led to the conclusion that, while the New Jersey statute "approaches the verge" of impermissible action under the first amendment, it did not actually breach the "wall of separation between church and state."

The specific holding in the *Everson* case permitted the use of public funds to confer a limited benefit upon children attending religious schools.[5] Nevertheless, the language and reasoning of both the majority and minority gives scant comfort to those who feel that, as a matter of fairness, State support ought to be provided to those schools. Proponents of this view point out that religious schools meet the educational standards imposed by the States and relieve the States of the burden of educating large numbers of children. The parents of children attending religious schools are taxed to support the public schools, yet receive no reciprocal benefits from the States.

The majority opinion states that—

> 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.* [Emphasis supplied.]

If one assumes that a principal reason for the existence of a religious school is to provide religious teaching and the practice of religion (not available in public schools), and that religious considerations are intertwined in the entire fabric of sectarian education, moneys raised by taxation cannot be used to support such education. Obviously then, direct grants to sectarian schools are prohibited. The only question remaining open is whether the use of funds for general welfare purposes in a manner which benefits religious schools also constitutes prohibited support.

Because the clear import of the *Everson* opinion was that neither the Federal Government nor the States can directly support religious schools, a concentrated attack was made upon its rationale. The focus of this attack was on the Court's reading of history; that, in fact, the purpose of the first amendment was merely to strike at the

[5] Earlier this year the Supreme Court dismissed an appeal for want of a substantial Federal question in *Snyder* v. *Town of Newtown*, 365 U.S. 299, a case in which the Connecticut Supreme Court of Errors, on the authority of *Everson*, upheld the constitutionality of providing bus transportation to parochial school students. Justice Douglas, who had voted with the majority in *Everson*, and Justice Frankfurter, who had voted with the minority, both specially noted their votes to have the Supreme Court review the Connecticut decision.

official establishment of a single sect, creed, or a religion, as exists in England, and that the amendment was not intended to prohibit nonpreferential aid to all religions.[6] This view has been vigorously argued by some scholars. For present purposes it is sufficient to note that it was presented to and considered by the Supreme Court in *McCollum* v. *Board of Education*, *supra*. While it might be argued that Justice Reed adopted this view in his dissent, it is plain that the eight other members of the Court rejected it. The question is not open today.

The *McCollum* case involved the constitutionality of the system of "released time" adopted in Champaign, Ill. Under an arrangement made with various religious faiths, representatives of those faiths were permitted to offer classes in religious instruction in the public schools. The classes were held once a week for 30 minutes in the lower grades and 45 in the higher grades. The teachers were not paid by the public school authorities, and the classes were attended only by students whose parents had requested it. Students who did not choose the program continued their secular studies in other classrooms. Justice Black, writing the opinion of the Court, stated that the arrangement was clearly prohibited by the holding in *Everson:*

> The foregoing facts, without reference to others that appear in the record, 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. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instructions carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the first amendment (made applicable to the States by the 14th) as we interpreted it in *Everson* v. *Board of Education*, * * *." (333 U.S., at 209–210).

He went on to state:

> Recognizing that the Illinois program is barred by the 1st and 14th amendments if we adhere to the views expressed both by the majority and the minority in the *Everson* case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. They argue that historically the first amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions. In addition they ask that we distinguish or overrule our holding in the *Everson* case that the 14th amendment made the "establishment of religion" clause of the 1st amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions (id., at 211).[7]

Zorach v. *Clauson*, *supra*, is the last case in which the Supreme Court has considered the "establishment of religion" prohibition. It also involved "released time." There the plan permitted students actually to be released from the public schools at their parents' request in order to obtain religious instruction elsewhere. The churches participating reported to the schools the names of children released from school who did not appear for religious instruction. In a 6 to 3 decision, the Court concluded that there was no element of

[6] See J. M. O'Neill, "Religion and Education Under the Constitution" (1949). The use of the O'Neill thesis by counsel in the *McCollum* case is referred to in Pfeffer, "Church and State: Something Less Than Separation," 19 U. of Chi. L. Rev. 1, 2 (1951).

[7] In his concurring opinion, Justice Frankfurter also made it clear that "the 1st and 14th amendments have a secular reach far more penetrating in the conduct of government than merely to forbid an 'established church'" (id., at 213). Justice Jackson who, in a separate concurrence expressed doubts as to the standing of the complainant and the scope of the relief granted, concurred in this opinion.

coercion in the plan and that the only issue involved was whether public schools may excuse those who wish to worship or obtain religious instruction. The principles of the earlier cases were, however, carefully preserved. The Court stated:

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here (343 U.S., at 314).

In separate dissents, Justices Black, Frankfurter, and Jackson said that since in effect the machinery of the State was being used to provide pupils to religious groups, the plan was constitutionally indistinguishable from that held invalid in *McCollum*.

The majority opinion, while emphasizing that ours is a religious nation, with profound religious traditions affecting and intermingling with secular activities (id., at 313–314), does not abandon the basic view of the first amendment adopted in *Everson* and *McCollum*. The most that can be said is that the opinion evidenced a somewhat more flexible attitude toward problems of separation.

The State court cases which have been decided since *Everson* have interpreted that case and *McCollum* and *Zorach* as precluding use of public funds to pay tuition at sectarian schools. *Almond* v. *Day* (197 Va. 419, 89 S.E. 2d 851 (1955)), held that State payments to sectarian elementary and secondary schools for the education of war orphans violated the first amendment because such payments utilize—

> * * * public funds to support religious institutions contrary to the principles laid down in *Everson* * * *. It affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery * * *. It compels taxpayers to contribute money for the propagation of religious opinions which they may not believe (89 S.E. 2d, at 858).

Swart v. *South Burlington Town School District* (167 A. 2d 514 (Vt., (1961)), involved a school district which did not maintain a high school. Pursuant to statute the parents were permitted to choose schools, and the district paid the tuition. Under this plan it made tuition payments to Catholic high schools. The court read the *Everson*, *McCollum*, and *Zorach* cases as raising the following question, which it answered affirmatively:

> Does the payment of tuition to a religious denomational school by a public entity finance religious instruction, to work a fusion of secular and sectarian education? (167 A. 2d, at 520).

The court, although noting that the district did not maintain a public high school, that the Catholic schools involved had been approved by the State board of education, and that non-Catholic students were not required to attend religious instruction, concluded, nevertheless, that the first amendment had been violated.

The foregoing two cases are the only State court decisions since *Everson* that have dealt with the payment of tuition to sectarian schools. Both hold such payments unconstitutional on the basis of

that authority. Other State cases, however, have sustained payments to other types of sectarian institutions in specialized circumstances. Thus, payments for the support and maintenance of neglected and dependent children in denominational homes and institutions were upheld because they were considered as reimbursement rather than a use of appropriated funds prohibited by the State constitution (*Schade* v. *Allegheny County Institution District*, 386 Pa. 507, 126 A. 2d 911 (1956)). Payments to sectarian institutions have also been justified where the funds were used exclusively for public purposes and the institution merely operated as a conduit for those purposes. In *Opinion of the Justices* (99 N.H. 519, 113 A. 2d 114 (1955)), there was involved a proposed New Hampshire law which would have provided annual grants-in-aid to hospitals in the State offering nurses' training. This aid would have gone only to charitable hospitals, including sectarian ones which did not discriminate on the basis of the religion of either students or patients. Holding that the grant program would not violate either the first amendment or its New Hampshire equivalent, the court stated:

> The purpose of the grant * * * is neither to aid any particular sect or denomination nor all denominations, but to further the teaching of the science of nursing * * *. The aid is available to all hospitals offering training in nursing without regard to the auspices under which they are conducted or to the religious beliefs of their managements, so long as the aid is used for nurses' training "and for no other instruction or purpose" * * *. If some denomination incidentally derives a benefit through the release of other funds for other uses, this result is immaterial * * *. A hospital operated under the auspices of a religious denomination which receives funds under the provisions of this bill acts merely as a conduit for the expenditure of public funds for training which serves exclusively the public purpose of public health and is completely devoid of sectarian doctrine and purposes.
>
> The fundamental proposition that public moneys shall be used for a public purpose only has not prevented the use of private institutions as a conduit to accomplish the public objectives (113 A. 2d, at 116).[8]

The *Everson*, *McCollum*, and *Zorach* cases have also inspired a large body of scholarly comment. Appendix A is a representative bibliography of such comment. In appendix B we shall briefly describe some of the representative views contained in such comment.

III. THE RELEVANT CRITERIA

The foregoing review suggests the relevancy of several considerations in determining the constitutional reach of the first amendment. The Supreme Court has made it absolutely clear that public funds and public property may not be used for the purpose of assisting any or all religions. In the *Everson* and *McCollum* cases, it has unequivocally rejected the historical argument, whatever its merits, that the establishment clause merely forbids State favoritism among religions.

The initial inquiry, therefore, must be whether a given legislative proposal is honestly designed to serve an otherwise legitimate public purpose and is not a mere subterfuge for religious support. Application of the test is not always easy. In the *Everson* case the majority characterized the New Jersey law as related to the health and safety of children—a legitimate public concern. It was likened to police and

[8] A similar early holding by the Supreme Court is *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). There the Court held that the first amendment did not preclude the Commissioners of the District of Columbia from entering into a contract with an eleemosynary corporation organized by Catholic sisters for the construction of buildings to be operated as part of the hospital.

fire protection services, concededly legitimate "benefits" to religious institutions, "incidental" to the larger public interest (330 U.S., at 16–18). The dissenters viewed the statute differently. They pointed out that, contrary to the Court's interpretation, it discriminated against other private schools. And all four dissenting Justices characterized the statute as having the purpose of getting the child to school—an indispensable part of his education—rather than protecting his health and safety. Indeed, the characterization largely decided the case for both majority and minority. Justice Black for the majority suggested that once the characterization is made in this fashion, it might well be a violation of the 14th amendment and the free exercise clause of the first to discriminate on religious grounds.

This analysis is confirmed by *McCollum* where the Court forbade the use of public school facilities for religious instruction during "released time." Here there could be no possible public purpose except to assist and support religious education—a purpose the Court found proscribed by the first amendment.[9]

The existence of a bona fide legislative purpose does not, however, validate a measure irrespective of any collateral benefit that might be rendered to a religious institution. Assume a legitimate public purpose not explicitly or implicitly related to religious support, as in the concededly constitutional examples cited in *Everson*—police, fire, sewage, and (on *Everson's* assumptions) transportation. Could it properly be contended, for example, that since improving educational standards generally is a legitimate public purpose, any program which has that for an objective is constitutional irrespective of the establishment clause of the first amendment? If the objective is legitimate, are the benefits bestowed on religious schools always and necessarily "incidental?" We think not. The end cannot always justify the means. And where the means employed result in fact in support of religious institutions, the constitutional judgment cannot be avoided.

The problem area, then, is with regard to legislation which has a constitutionally legitimate public purpose but which at the same time has the additional side effect of benefiting a religious institution. This was the problem raised by *Everson*; and the difficulty of its resolution is evidenced both by the 5–4 division of the Court itself and the widespread comment it engendered. How is the line to be drawn between what is proscribed and what is permissible? Once a benefit to a religious institution is conceded, what are the relevant criteria for determining that it is merely "incidental"? What factors are to be taken into account and evaluated?

As Justice Douglas acknowledged in *Zorach*, we live in a culture and society in which religion has played and continues to play a vital role. It is not possible to separate religion completely from other aspects of life, and the Constitution does not require the impossible. There may be no wholly logical distinction between tax exemption of religious property and governmental grants to construct religious edifices. Yet the whole history of church and state and the constitutional policy embodied in the first amendment put tax exemption and grants at opposite poles.[10] Neither the majority nor dissenters

[9] In the *McCollum* case, the Court stated: "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of church and state" (333 U.S., at 212).

[10] See Paulsen, "Preferment of Religious Institutions in Tax and Labor Legislation," 14 Law and Contemp. Prob. 144, 147–152 (1949); Van Alstyne, "Tax Exemption of Church Property," 20 Ohio State

in *Everson* could suggest an easy, workable rule of thumb against which to measure all governmental aid. But history, the language of the Constitution, the judicial decisions, and past practices do furnish an understanding of the criteria that are relevant to a judgment.

1. *How closely is the benefit related to the religious aspects of the institution aided?*

We are here concerned, as previously, with the underlying problem of distinguishing aid to the public generally, or general classes thereof, from aid to religion in particular. As the fire, police, and sewage examples indicate, churches and other religious institutions may receive benefits in their capacities as members of the general public and as property owners. The Constitution does not require that they be discriminated against or be excluded from a general class conceptually and factually unconnected with religion, i.e., property owners.[11] So, too, a church or church school may receive tax exemption when classified with others as nonprofit organizations. Again it meets the group criteria, and there is no constitutional obligation to exclude it from benefits common to the class. Similarly, it may be said validly that children, as such, constitute a class which is a proper object of general welfare legislation. The State has a legitimate concern with their health, their safety, and, indeed, their education. It may extend financial assistance in various ways to achieve these ends. But where this assistance is also assistance to a religious institution, the means become crucial. One horn of the constitutional dilemma is that the State may aid a child to achieve a sound body and a sound mind; the other is that the State may not aid the religious instruction of a child.

To adopt without qualification the theory that whatever benefits the child is ipso facto constitutional is to ignore the obverse prohibition. It either proves too much or proves nothing at all. The crucial question then becomes separating the permissible from the prohibited, the educational function from the religious one.

The clearest case is across-the-board aid, which necessarily includes items of aid that are closely related to the religious function. No separation is even attempted, and therefore general State grants to sectarian education would seem to be plainly prohibited. Public schools have already been constitutionally prohibited from providing classrooms for religious instruction during released time at no measurable cost to the public purse. A fortiori the Government is prohibited from granting funds to sectarian schools which would, directly or indirectly, serve the same prohibited use.

Milk, school lunch, medical inspection and services, and such like do not raise substantial problems because they do not closely tie in with the religious function served.[12] The Supreme Court has put transportation in the same category. True, all such programs make the sectarian school more attractive educationally than it would otherwise be. But the Constitution does not require the State to handicap religious institutions or force parents to prejudice their children's health in exercising their constitutionally protected right to a sectarian education.

The same principle may, perhaps, be extended to textbooks for the use of individual students where the books in question are common

[11] The same could be said of according the benefits of State incorporation laws to churches.

[12] See Pfeffer, *Church, State and Freedom* (1953), at 474–475.

to the secular and sectarian educational systems.[13] It might also be extended to some equipment, or possibly to facilities, designed for special purposes totally unconnected with the religious function of the schools.

How far this type of assistance, unquestionably of benefit to the sectarian school, can go cannot be conclusively stated. Unavoidably we are dealing here with matters of degree. State court cases indicate that it may be possible to make a tenable distinction between aid to sectarian hospitals and aid to sectarian schools.[14] The Supreme Court put transportation at the outer limits of the constitutionally permissible. Those who see no distinction between transportation and any other form of assistance whatsoever should keep in mind that, apparently, the Court did.

2. *Of what economic significance is the benefit?*

The spectrum of monetary benefits begins with an outright grant and moves through various loan arrangements to the most limited form of assistance, the contract for specified services.

The benefits of a grant are clear. Significant support is provided to the recipient. Moreover, the absence of any required repayment enables the recipient to free its own funds for any purposes, including those which directly support religious aspects of the institution.

A loan confers economic benefit of less degree but not of a different quality than a grant. A loan represents a grant of credit. When made at a rate of interest below what is normally available to the borrower, it also constitutes a grant of the interest payments which are saved. Whatever the interest rate, the lending of credit can be analogized to the lending of a classroom proscribed in the *McCollum* case. While the *Everson* case did talk about the expenditure of tax moneys as constituting the proscribed conduct, *McCollum* did not involve any expenditure, and, therefore, is closer to the loan situation. The lending of public property and the lending of public credit seem indistinguishable as forms of governmental assistance. And in the *Zorach* case, Justice Douglas, speaking for the majority, expressly stated: "Government may not finance religious groups. * * *" (343 U.S., at 314). It is our view that the statement, admittedly dictum, was not confined to grant assistance.

It is also important to recognize that the measurement of economic value is not necessarily the same from the standpoint of the governmental donor and the private recipient. While a loan at slightly above the prevailing rate of Government borrowing might involve no economic loss from the standpoint of taxpayers, it might, nonetheless, be of measurable economic assistance to a private institution unable to secure reasonable credit from non-Government sources.

Also relevant is whether the assistance provided enables a private institution to free its own funds for unrestricted purposes. To the extent that this occurs, the economic benefit becomes the type of across-the-board assistance which inevitably assists religious purposes. Unless a grant is earmarked for a specific purpose which would not otherwise be undertaken by the recipient, a grant program is more likely than a loan program to have the effect of releasing funds for constitutionally impermissible purposes.

When the Government makes contracts for initiation of particular studies or grants for undertaking particular research, any benefit to a

[13] See footnote 4, *supra*.
[14] See, for example, *Opinion of the Justices, supra*; cf. *Schade* v. *Allegheny County Institution District*, supra.

religious institution seems too remote to be constitutionally proscribed. Unlike an across-the-board grant for education for an unrestricted grant for classroom construction and teacher salaries, such programs are primarily to serve a special governmental interest, and the size of the fee or grant is closely related to the cost of the program. In such cases the religious benefits seem remote and incidental. Alternatives would require a preference to secular institutions which in many instances might be less well-equipped to carry out the required research.

3. *To what extent is the selection of the institutions receiving benefits determined by Government?*

There is an important difference between governmental programs that aid institutions as such (including sectarian institutions) or aid them on behalf of all their students and, on the other hand, programs that aid a small number of selected students whose choice of institution alone results in benefit to a sectarian school. In the former case the aid to sectarian institutions is an automatic consequence of Government action; in the latter, it is a matter of chance so far as Government is concerned.

Under the original GI bill, each individual selected the institution he wished to attend, although the Government made the tuition payment directly to the institution. If the Government had selected the institution, however, it would obviously have presented a very different situation, and the mode of selection would have been more relevant than the identity of the payee of the Government check.

A program of financial aid to qualified students attending institutions of their choice, to carry out a public policy of assisting unusually able students to develop their full potentialities, or to encourage study in subjects where there is a shortage of adequately trained persons to serve national needs, does not seem to raise a serious question. The support which a particular religious institution might receive would depend upon the student's choice and would seem, therefore, both indirect and incidental. From the governmental viewpoint it would depend upon chance, not governmental decision. There would seem to be no constitutional significance to the fact that, like other problems of probability, some statistical prediction might be possible of how much aid particular religious institutions might receive. Only if selective standards of eligibility of recipients were to be virtually abandoned so that all college students were eligible would the program appear a disguised method of assisting all colleges, including sectarian ones. Under such a system there would be no functional difference between the award of scholarships and direct payments to colleges on a per capita basis. A program so equivalent to direct subsid would transcend, we believe, the constitutional prohibition.

Everson put some emphasis on who received the assistance, student or institution. From this it has been argued that while assistance to the institution itself is prohibited, assistance to the student is more likely permissible, even though functionally viewed, a similar purpose is served. This view overstates the significance of form alone. We believe that who receives the benefit is important only where form serves a substantive end. The examples above illustrate that it is not simply the identity of the payee which is the determinant of constitutionality.

4. *What alternative means are available to accomplish the legislative objective without resulting in the religious benefits ordinarily proscribed? Could these benefits be avoided or minimized without defeating the legislative purpose or without running afoul of other constitutional objections?*

Within this category, where the constitutional significance of incidental religious assistance is discounted in part by necessity, one could include many of the traditional benefits received by church organizations; for example, police protection, fire protection, and sewage disposal, although these could also be justified by other criteria suggested above. The point is that protection of health and safety within the community cannot reasonably be accomplished without including religious institutions within the class of beneficiaries. Furthermore, to exclude religious institutions from the class benefited would probably be violative of the first amendment as tending to prohibit freedom of worship and of the due process clause as an unreasonable classification.

Another illustration of the criterion here applied lies in the employment of chaplains and the construction of churches and places of worship by the Armed Forces. The purpose of employing chaplains is related to the morale and discipline of the forces, and it is difficult to see how an army could effectively perform its military functions without making provision for the moral welfare of the troops. In the context of military operations, this purpose can be effectuated only by active assistance on the part of the Government.

Conversely, to refuse to facilitate religious activities would be to throw the power of the Government against religion, not to maintain neutrality. To make it legally or factually impossible for a soldier to worship freely and to fail to adjust military necessity to religious freedom, within reasonable limitations, would itself be unconstitutional. Here, it seems, history and constitutional theory require cooperation of church and State not to breach, but rather to preserve, the "wall of separation." Soldiers may not be coerced into church attendance, but making church attendance possible cannot, under the facts of military organization, be constitutionally proscribed. And the difference between using public facilities within the armed services and permitting the use of public facilities in the released time school cases is found in the different demands of military life and the life of schoolchildren in a typical American community.

The *Everson* case itself provides an example, for once it has been determined that the legislative purpose relates to the safety and health of children, it is difficult to see how it could be accomplished without including all children.

One final example where the practicalities are relevant is the GI bill. The purpose of the bill was readjustment of veterans to civilian life by making it possible for them to continue their education. To have conditioned their benefits on attendance at a secular institution would have been impractical in view of the number of veterans and the limited educational resources available. In view of the short-range duration and urgency of the program, the construction of adequate additional facilities would have been impractical if not impossible.[15] Thus, the legitimate legislative purpose could not have been achieved by other reasonable means.

[15] To have excluded from its benefits those veterans who, by conscience or preference, wished to attend sectarian institutions might conceivably have violated due process.

One cannot blink the difficulties of applying this criterion, nor do we suggest it is by any means conclusive. In some instances the support of religious institutions incident to a legitimate public policy may well be so direct and substantial that the policy itself may be legislatively unattainable despite the absence of practical alternatives.

One final argument made by proponents of governmental aid to nonprofit private schools should be mentioned. It has been suggested that the only criterion is whether or not the religious institution benefits qua religious institution or as a member of a more general class. This argument seems to be directly contrary to *Everson* and meets none of the criteria which we believe are determinative of constitutionality. This argument seeks to avoid the Constitution rather than to apply its terms as judicially interpreted. Benefits of some kinds may be conferred upon general classes, as earlier suggested—property owners, corporations, and nonprofit organizations—but we do not believe that the prohibition of tax-raised support of religious institutions can be circumvented merely by giving like support to other institutions, however numerous.

IV. LEGISLATIVE PROGRAMS AND PROPOSALS

Against the authority and criteria already discussed, this section considers legislative proposals which have been introduced or which may possibly be seriously urged. These are (*a*) general educational grants to private nonprofit elementary and secondary schools; (*b*) general educational loans to private nonprofit elementary and secondary schools; (*c*) special purpose programs.

(*a*) *General educational grants to private nonprofit elementary and secondary schools*

Federal grants to sectarian schools for general educational purposes would run squarely into the prohibitions of the first amendment as interpreted in the *Everson*, *McCollum*, and *Zorach* cases. Grants for assistance in the construction of general school facilities and for increasing teachers' salaries, to be administered by governmental agencies and made available directly to sectarian schools, are the clear case of what is proscribed by the Constitution. They meet none of the criteria suggested in the foregoing section. Indeed, if such grants would not violate the establishment provision of the first amendment as judicially interpreted, it is difficult to think of a form of Government aid which would. Aid by way of grants to sectarian schools could only be justified by a reversal of the Supreme Court's interpretation of the establishment clause and a new interpretation which would regard it as merely prohibiting discrimination among religions. Whatever its historical justification, this latter interpretation of the clause has been urged upon the Court in the cases cited and rejected by nine Justices in *Everson* and by eight in *McCollum*. While the tone of the *Zorach* opinion may imply a slight modification of the rigid separation doctrine espoused in *McCollum*, it is clear that it did not modify the Court's earlier interpretation of the establishment provision in any substantial way. Rather, the opinion reiterates the principle that Government may not finance religious institutions.

Since the Supreme Court has spoken, the only serious argument put forward against this conclusion rests more on considerations of fairness than of law. The argument is that, because sectarian schools

meet all prescribed standards of education and because they contribute significantly to the education of American children, they should be entitled to governmental assistance. This argument is bolstered by stating that, in effect, the refusal to grant assistance to children attending such schools constitutes a discrimination against them incompatible with the spirit of the fifth amendment, and, viewed realistically, violates the mandate of the first amendment against prohibiting the free exercise of religion.

The difficulty with this viewpoint, apart from the fact that it has been consistently rejected by the courts,[16] lies in the fact that students attending such schools do so as a matter of free choice. If the choice is not free it is because of the religious beliefs of the individuals making the choice, not because of governmental edict. Since the public schools are open to all children without exception, it cannot be argued that constitutionally proscribed discrimination exists.

The prohibition embodied in the free exercise provision of the first amendment is only a prohibition against Government action which interferes with religious freedom. The Constitution does not require the Government to create conditions which make the free exercise of religion less burdensome financially.

(b) General educational loans to private nonprofit elementary and secondary schools

It has been suggested that even if grants to sectarian elementary and secondary schools are unconstitutional, long-term low-interest loans would not be. While we believe that loans constitute a less substantial assistance to religion than outright grants, we are persuaded by the decisions of the Supreme Court that this proposal is no less a form of support than grants and is equally prohibited by the Constitution. Loans are prohibited by the rationale of the *Everson* decision, and this conclusion is reinforced by *McCollum*, where the Supreme Court declared unconstitutional the provision of classrooms in a public school for religious instruction during "released time." [17] No measurable cost to the Government was involved in the use of such facilities, yet the Court held that the use nonetheless constituted assistance to religion by a governmental entity in violation of the establishment provision.

Low-interest across-the-board construction loans do provide measurable economic benefit to religious institutions. Moreover, there is a total failure in this proposal to distinguish between those aspects of a school which are involved with religious teaching and those which may not be. This combination of factors when applied to elementary and secondary schools places the proposal beyond the limits of permissible assistance.

[16] In *Swart* v. *South Burlington Town School District*, 167 A. 2d 514, *supra*, the Supreme Court of Vermont forbade the payment of tuition by the school district for students attending a parochial school. In meeting the argument stated above, the court said (at pp. 520–521): "Considerations of equity and fairness have exerted a strong appeal to temper the severity of this mandate. The price it demands frequently imposes heavy burdens on the faithful parent. He shares the expense of maintaining the public school system, yet in loyalty to his child and his belief seeks religious training for the child elsewhere. But the same fundamental law which protects the liberty of a parent to reject the public system in the interests of his child's spiritual welfare, enjoins the state from participating in the religious education he has selected. See *Pierce* v. *Society of the Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468.

"Equitable considerations, however compelling, cannot override existing constitutional barriers. Legislatures and courts alike cannot deviate from the fundamental law."

[17] Although use of the pressures of the compulsory attendance laws was a factor in the decision, *Zorach* indicates that use of the school facilities tipped the balance.

(c) Special purpose programs

The Federal Government at present engages in a wide variety of statutory programs that have some impact on sectarian educational institutions. It is significant that the great bulk of Government-supported programs is in fields of higher education. Examples are aids for specialized training; or research connected with national defense, public health, or improving educational methods; or loans for college housing facilities or to permit needy students to attend college. In all such programs no direct connection with religion is present,[18] and the funds in each case appear adequately separated from any religious function to stay within constitutional bounds.

Existing Federal programs at the elementary and secondary level are less extensive in number and size. Typically, such programs either bear a clear-cut relationship to children's health or promote a special purpose with a clear national defense implication. These programs are devoid of any substantial aid to the religious function, and such aid as might possibly occur is both remote and unavoidable.

To what extent a special purpose provides constitutional legitimacy to assistance to elementary or secondary schools depends on the extent to which the specific objectives being advanced are unrelated to the religious aspects of sectarian education. The problem is complicated because assistance for one purpose may free funds which would otherwise be devoted to it for use to support the religious function and thus, in effect, indirectly yet substantially support religion in violation of the establishment clause. At the present time, the National Defense Education Act permits the U.S. Commissioner of Education to make loans to private schools to acquire science, mathematics, or foreign language equipment. We believe such loans are constitutional because the connection between loans for such purposes and the religious functions of a sectarian school seems to be nonexistent or minimal. Furthermore, the money is loaned at one-fourth of 1 percent above the current average yield on all outstanding marketable obligations of the United States, thus avoiding characterization as more than a grant of credit.

There may be some other special purposes for which loans would be equally defensible, but any specific proposal would have to be evaluated against the criteria discussed above.

In considering whether an existing governmental program or a given proposal for new governmental action exceeds constitutional limits of assistance to a religious institution, no single criterion is necessarily decisive. And none of the criteria we have discussed affords precise units of measurement susceptible of easy application. Nevertheless, each criterion is an aid to judgment. What is least likely to be constitutional can readily be distinguished from what is most likely to be constitutional. In forming a judgment as to legisla-

[18] One seeming exception, more apparent than real, has been the aid given over a 5-year period by the National Institute of Mental Health under 42 U.S.C. 242a to three divinity schools to develop curriculums for training clergymen in the recognition and understanding of mental illness. For the purpose of such aid, clergymen along with teachers and lawyers are looked upon as groups which frequently deal with individuals in personal difficulty. The development of training for such groups presents an opportunity to advance the practical utilization of psychiatric knowledge. Such aid would seem to fall, therefore, within the special purpose doctrine.

A more difficult case is the program for the disposal of surplus Government property which includes sectarian institutions. Certainly, measured by the criteria set out in this memorandum, this program has in some instances approached and, it can be argued, has even transgressed constitutional boundaries. In most such cases, however, the property disposed of did not directly benefit the religious programs and training in sectarian schools. In any event the general language, the long history in similar preceding programs, and the legislative acquiescence in such disposal make quite clear the intention of Congress that sectarian institutions not be excluded altogether from the benefits of the program.

tive proposals in the middle ground, all relevant criteria must be accorded due consideration. Ultimately a judgment is required—not a doctrinaire conclusion as to what should be done or should not be done, but a reasoned consideration of how an imprecise statement of fundamental constitutional principles is likely to be applied to each particular factual situation.

V. HIGHER EDUCATION

This memorandum has discussed first amendment principles, relevant judicial decisions, and criteria for determining the constitutionality of specific legislative proposals all in the context of elementary and secondary education. Since proposals are currently being advanced in the field of higher education, it is appropriate to give consideration to the significantly different context in which any constitutional problem concerning these proposals might arise.

The constitutional principles involved are obviously the same whether the subject is elementary and secondary school education or higher education, but the factual circumstances surrounding the application of the principles are dramatically different. The reasons are largely historical.

The history of education in the United States at the grammar and high school level is largely one of free public schools. While private institutions exist and cannot be constitutionally prohibited, the fact of the matter is that some 85 percent of children in the United States are educated in public schools. The reason for this historically lies both in the public policy perceived in educating children and in the implementation of that policy by making education at the lower levels compulsory. In order to compel the education of children, States were obliged to provide a system of education which was open to all. In addition, it was prohibited to the States to teach religion or to give a religious education in such schools. Whatever other courses might have, in theory or even in fact, been possible, the States chose to implement their policy by a system of free public schools.

The history of college and university education is almost precisely the opposite. While from a relatively early date the Federal and some State governments subsidized State universities and colleges, the bulk of advanced education has until recently been carried on by private institutions, the majority of which have a religious origin.

Primary schooling has long been accepted as essential for every American child, and secondary education is rapidly becoming recognized as almost equally a necessity. Attendance at a university or college, on the other hand, has always been a matter of individual decision, dictated or influenced by the circumstances and preferences of the individual child and his family. Even today fewer than half of the high school graduates enter college on a full-time basis, and of these 41 percent are students in nonpublic institutions.[19]

Reflecting these differences in history and practice, State laws everywhere require school attendance of all children for a substantial period of years, whereas, needless to say, there is no corresponding requirement at the college level. Those children whose parents so elect may satisfy the compulsory attendance laws by attendance at

[19] The U.S. Department of Health, Education, and Welfare, Office of Education, estimates that of those who graduate from high school 43 percent enter college on a full-time basis and 10 percent on a part-time basis. Of those who do enter, approximately 60 percent eventually graduate.

private schools, but they are still subject to compulsion once that election has been made. The election can be reversed if the parents wish to do so—if not immediately, then at the start of the next school term or year—but while the election stands, the child is not absolved from enforced attendance at classes, secular or sectarian as the case may be.

The position of the college student is very different. His attendance is wholly voluntary, not merely a choice between alternative commands of the State. He is mature enough, moreover, to have made the decision to attend college and to select the institution best suited to his career objectives, or at least to have participated intelligently in those decisions. Furthermore, he can better understand the significance of sectarian as compared to secular teaching. At some sectarian institutions he is not required to study religion, but if he chooses to do so, or chooses an institution where religious instruction is mandatory, he is merely asserting his constitutional right to the "free exercise thereof."

There are thus important differences between school and college, not only in terms of history and tradition but also in terms of the compulsory nature of attendance. There are differences, too, from the standpoint of the national interest involved. At the college and graduate levels the public institutions alone could not begin to cope with the number of young men and women already in pursuit of higher education, and expansion of these institutions or the creation of new ones sufficient to meet the expected increase of enrollment is out of the question. The effort which it is agreed must now be made in the field of higher education would, if confined to public institutions, force an evermore intensive selection of students and evermore concentrated effort to guide them into fields of study deemed important to the national defense and welfare. It would likely induce these institutions to overemphasize particular fields of study to the detriment of a balanced curriculum. Such warping of our educational policies is not to be contemplated lightly, and, to the extent that Congress finds it appropriate to encourage expansion of our university and college facilities, Congress must be free to build upon what we have, the private as well as the public institutions.

All these considerations indicate that aid to higher education is less likely to encounter constitutional difficulty than aid to primary and secondary schools. The same considerations apply even more forcefully to graduate and specialized education.

The administration bill to assist higher education authorizes loans to institutions, without distinguishing between public and private ones or between those under secular and sectarian sponsorship. It also provides for college scholarships awarded on a competitive basis. These scholarships may be used at any accredited college which the recipient selects. In addition, the bill provides for the payment to the college of a "cost of education" allowance to supplement the scholarship.

Governmental assistance directly to colleges for the construction and expansion of academic facilities perhaps raises, in the case of sectarian institutions, a closer constitutional question than scholarships. Fundamentally the distinction between assistance to sectarian colleges and assistance to sectarian elementary and high schools rests upon differences between the educational system which exists in the United

States at the college and graduate school level and the predominantly free public educational system at the elementary and secondary school level. These differences create importantly different factual circumstances against which the criteria previously discussed must be considered to determine the constitutional question.

We are not, at the college level, dealing with a system of universal, free, compulsory education available to all students. The process is more selective, the education more specialized, and the role of private institutions vastly more important. There are obvious limitations upon what the Government can hope to accomplish by way of expanding public or other secular educational facilities. If the public purpose is to be achieved at all, it can only be achieved by a general expansion of private as well as public colleges, of sectarian as well as secular ones.

Loans for construction of facilities may be less constitutionally vulnerable than grants for the same purposes. But this distinction is not here the only one or perhaps even the crucial one. More important are the distinctive factors present in American higher education: the fact that the connection between religion and education is less apparent and that religious indoctrination is less pervasive in a sectarian college curriculum; the fact that free public education is not available to all qualified college students; the desirability of maintaining the widest possible choice of colleges in terms of the student's educational needs in a situation no longer limited by the necessity of attending schools located close to home; the extent to which particular skills can be imparted only by a relatively few institutions; the disastrous national consequences in terms of improving educational standards which could result from exclusion of, or discrimination against, certain private institutions on grounds of religious connection; and the fact that, unlike schools, the collegiate enrollment does not have the power of State compulsion supporting it.

All of the foregoing factors related to higher education are, of course, relevant to the scholarship grants. In addition, the decision as to which college is attended is entirely controlled by the student.

The additional cost-of-education grant paid to the institution is also, in effect, closer to a scholarship than a grant to support the institution chosen. Tuitions vary among colleges owing both to cost differentials and the size of endowment and annual private or public subsidy, but invariably the cost of education exceeds the tuition charged. It is to take account of this fact that the scholarship grant is supplemented by a cost-of-education allowance. In essence, it too is subject to the student's, not the Government's, educational choice.

The payment to the institution is in reality merely a supplement to the scholarship, no less valid constitutionally than the scholarship itself. To regard such payments as unconstitutional would make the question of who receives the payment the one decisive criterion and sacrifice substance to form.

Weighing all these factors, we conclude that the administration's proposals for higher education are within constitutional limits.[20]

[20] It should be pointed out that decisions of the Supreme Court discussing other problems in the field of education have emphasized that different considerations apply to higher education as against elementary and secondary education. Contrast *Hamilton* v. *Regents*, 293 U.S. 245 (1934) (higher education) with *Bolling* v. *Sharpe*, 347 U.S. 297 (1954); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Board of Education* v. *Barnette*, 319 U.S. 624 (1943) (elementary and secondary education).

VI. JUDICIAL REVIEW

The constitutionality of existing Federal legislation which confers some incidental benefits upon sectarian educational institutions has never been tested in the courts. Federal spending legislation ordinarily carries no provisions for judicial review. In the absence of such provisions, the only challenges to spending legislation usually come in the form of suits by individual taxpayers. These litigants lack standing sufficient to sue in a court of the United States, and, where a party to a lawsuit lacks sufficient standing, there is no "case or controversy" which the Federal courts may decide. This requirement of a "case or controversy" is imposed upon the Federal courts by article III of the Constitution, and there appears to be no way in which legislation can dilute this requirement.

The Federal rule with regard to standing to sue on the part of a taxpayer was established in 1923 in the case of *Massachusetts* v. *Mellon* (262 U.S. 447), and is significantly different from the position of a taxpayer in a municipality. In that case, Mr. Justice Sutherland distinguished the two positions as follows:

> But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity (262 U.S., at 487).

The Federal courts are similarly barred from considering an appeal from a State court where a taxpayer's interest is not substantial (*Doremus* v. *Board of Education*, 342 U.S. 429 (1952)).

Because of the rule in *Massachusetts* v. *Mellon*, existing Federal aids to education have presumably been immune to attack in the courts on the ground that they violate the Constitution. There is, therefore, no significance to be attributed to the fact that the existing programs have not been litigated. We can regard them as precedents only for what the Congress and the President, not the Supreme Court, regard as within the first amendment.

If Congress wishes to make possible a constitutional test of Federal aid to sectarian schools, it might authorize judicial review in the context of an actual case or controversy between the Federal Government and an institution seeking some form of assistance.

For example, Congress could direct the Commissioner of Education to make some benefit available to private schools with a requirement that such benefit shall not contribute to an establishment of religion or prohibit the free exercise thereof. The same legislation would also provide for a hearing on a written record of any application rejected and a statement of findings by the Commissioner. The Commissioner's decision rejecting any application for a benefit would be made subject to judicial review. If the Commissioner were to reject the application of a sectarian school on the ground that extending the benefit would violate the statutory provision embodying the prohibition of the first amendment, the applicant could then in effect litigate the constitutional question in court.

In the absence of some such statutory provisions, there appears to be no realistic likelihood that Federal legislation raising the constitu-

69123—61——5

tional issues discussed in this memorandum will be resolved by judicial decision.

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APPENDIX A

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APPENDIX B

DESCRIPTION OF SOME REPRESENTATIVE COMMENTS ON THE EVERSON, MCCOLLUM, AND ZORACH CASES

The views of the scholars who have commented on the *Everson*, *McCollum*, and *Zorach* cases fall roughly into three categories: (1) The view that an inflexible doctrine of separation has the effect of restraining religious freedom in violation of the first amendment and that the holding in *Everson* was correct as far as it went and logically should be extended to permit governmental aid to children attending sectarian schools; (2) the view that the separation must be absolute and that *Everson* was therefore incorrectly decided; and (3) the view that there is room for cooperation between church and state so that governmental aid for education is not invalid because sectarian schools receive incidental benefits, provided that the aid is aimed at achieving a broad public purpose.

1. *The view that extensive Federal aid is constitutionally permissible.*—At present there are about 6,752,000 elementary and secondary school pupils in nonpublic schools.[1] Of these more than 80 percent are in Roman Catholic schools.[2] Confronted by rising costs in the economy generally and in education specifically, Catholic parents contend that in effect they are subject to double taxation. Although some Catholic spokesmen disclaim any attempts to obtain general public school support of religious schools because they believe it may endanger religious liberty and hence would be satisfied with long-term, low-interest loans,[3] there are others who would like to see far more pervasive Federal aid to sectarian schools and the "child-benefit" theory

[1] U.S. Department of Health, Education, and Welfare, Office of Education: "Projected Enrollments in Full-Time Public and Nonpublic Elementary and Secondary Day Schools." The figure for nonpublic schools is 15.2 percent of the estimated total of schoolchildren, kindergarten through grade 12, there being approximately 37,551,000 children in public schools. The total estimated enrollment, public and nonpublic, is 44,303,000.

[2] Based on data from "Summary of Catholic Education 1959," National Catholic Conference, Department of Education, Washington, D.C., which states that the October 1959 enrollment in Catholic elementary and secondary schools was 5,087,197. When projected this indicates 1960-61 enrollments in the neighborhood of 5,240,000.

[3] Rev. Neil G. McCluskey, S.J., editor of the Catholic monthly, America, quoted in the New York Times, Mar. 12, 1961, p. E9.

extended to include aid either to the sectarian institution itself or to the parent.

For example, Professor Weclew is of the opinion that as from the standpoint of public welfare no distinction can be drawn in Federal aid to education between the university and elementary school levels.[4] He says: [5]

> Health, emotional stability, and literacy come more and more to be recognized as community assets in which Government has a vital concern. These assets should be developed and not simply ignored as far as private schools are concerned because parents exercise their constitutional right to send their children to religious schools. Programs promoting these matters of vital concern when set up in religious schools leave the State and children as beneficiaries, and the religious schools only benefit incidentally.

After enumerating various programs under different acts of Congress which have provided assistance both to sectarian institutions and to the individuals utilizing sectarian institutions, Weclew concludes: [6]

> We can only conclude that the wall of separation is permeable, lacks definite boundaries, and is of uncertain height. Time, place, circumstances, and subject matter determine what degree of separation there shall be. There are areas where none will deny that the maximum degree of separation is best for all. There are areas where separation is unnecessary, undesirable, or impossible.

The opinion frequently expressed by the supporters of all-out aid to parochial schools is that the existing restrictive system actually operates to abridge the first amendment's guarantee of freedom of religion. They say that where the Catholic parent has no real choice under existing laws but to violate his conscience because compelled by economic pressures to send his children to a public school, then the law has fallen short of protecting religious liberty for all—poor and rich alike.

This view, vigorously espoused by Professor Henle,[7] is as follows:

> We cannot, as Americans, simply say that this religious scruple is their own affair; that they may come to the public schools if they want aid, but, if they choose not to do so, that's their own affair. This religious conscience is one of the factors in the case and must be taken into account by the Government. Religious liberty and the prohibition of religious qualifications are meaningless unless they relate to the precise peculiarities of each type of conscience. Hence, our courts have shown a punctilious and precise concern to protect the consciences even of minorities commonly regarded as extremists (p. 245).
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> It might be said that the economic pressure is no concern of the State. Yet, it is our concern as Americans not to render lip service to an abstract religious liberty, but to work it out and safeguard it in the concrete. As a matter of fact, in the area of labor law, the courts have recognized "economic pressure" as destroying any real choice when it is actually present. If, in the factual situation, there is no real choice, under the law, except to violate one's conscience, then the law is not safeguarding religious liberty. And this is the worst form of religious discrimination, because it allows true religious liberty only to those who can afford it. American ideals demand an arrangement which will allow religious liberty for each man's conscience, for Catholic, Protestant, Jew, and unbeliever, for rich and poor alike (p. 248).

Under Henle's theory, State aid should be made available to parents whose children go to sectarian schools in the same way as it is to those parents whose children go to public schools.

[4] Weclew, "Church and State: How Much Separation," 10 De Paul L.J. 1, 19-21 (1960).
[5] Id., 21.
[6] Id., 26.
[7] Henle, "American Principles and Religious Schools," 3 St. Louis U.L.J. 237 (1955).

He says:

We are thus faced with this practical situation: American ideals and principles demand that the educational aid, intended to be made available to all through the public school, should actually be made available to all American children whether they attend a public school or, for reasons of conscience, a religious school. The Lutheran parent or child, the Catholic parent or child, the Seventh Day Adventist parent or child, and so forth, who need and want this aid, are entitled to an equivalent share of public aid from the funds to which they also contribute under the law (p. 248).

Under Henle's views, a precedent is the program of veterans' educational benefits, except that he would permit the choice of school to be made by the parent rather than by the student:

In a similar manner we could work out a plan envisioning the child or parent as the beneficiary of all funds collected for educational purposes; if the parent selected the public school the funds can be made available through the public school; if, for conscience reasons, the parent selected a religious school, the fees (to a fair amount) could be paid in the name of the child or parent and in view of the education, not of the religious functions of the institution (p. 251).

Cast in somewhat different language, the argument for "proportionate aid" to sectarian schools is that the general welfare clause of the Constitution (art. 1, sec. 8), which is the basis for Federal aid to education, should not be construed as requiring religious considerations as a standard for inclusion or exclusion of beneficiaries. In this connection, Professor Costanzo says: [8]

Federal aid to education which excludes religious schools from its beneficiaries precisely because of their religious profession and affiliation may place Congress in the incongruous role of promulgating a law prejudicial to the "free exercise thereof" clause; of establishing a preferential status for a secularized education as more worthy of its benefits than religious education, and find itself in the unenviable position of constructively setting a religious test as a norm for inclusion amongst the beneficiaries in the exercise of its general welfare powers; and, lastly, allow, if not actually intend, that exercise of religious liberty in education become a liability before the law in the disbursement of the benefits of the law. This would convert the "no establishment" clause into an affirmative official action in favor of nonreligious education.

2. *The view that absolute separation is constitutionally required.*—A leading exponent of the absolute separation doctrine is Leo Pfeffer whose book, "Church, State and Freedom" (1953), is widely known and cited. Pfeffer draws heavily on the dissents of Justices Jackson and Rutledge in the *Everson* case in challenging the conclusion reached by the majority of the Court that by furnishing bus transportation to pupils attending sectarian schools, the State is doing no more than it does when it provides police protection for children crossing the street or when it supplies fire protection:

It is submitted that both these assumptions rest on fictions. As both dissenting opinions, by Justices Jackson and Rutledge, point out, the New Jersey statute and the Ewing resolution do not provide transportation for children on the streets; they provide transportation only for children going to school, either to a public school or to a Catholic parochial school. A child going to visit a neighbor or to a motion picture theater is just as much subject to the hazards of the road as a child going to school. Yet New Jersey did not make any provision for the transportation of children going to any destination other than school—public or parochial. If New Jersey had so provided, none would dispute that the purpose of the legislation was to provide welfare benefits—indisputably within the State's police power. Since it was restricted to school transportation, it would seem clear that the purpose of the legislation was to provide an educational service.

It would therefore seem fallacious to equate—as Justice Black did—bus transportation and police or fire protection. The purpose of supplying traffic police

[8] Costanzo, "Federal Aid to Education and Religious Liberty," 36 U. Det. L.J. 1, 42 (1958).

is to protect children from accidents; all children are protected, Catholics and Protestants, believers and nonbelievers. The purpose of supplying fire protection is to preserve society's economic assets, whether in the form of church buildings or burlesque theaters. But the purpose of supplying bus transportation is to get children to school, not (at least, primarily) to protect them from traffic hazards.[9]

So, too, Pfeffer finds strong support in Justice Jackson's dissent in *Everson* in his (Pfeffer's) opposition to the argument that Catholic parochial schools provide the secular education which the State is empowered to provide. In the same vein, Pfeffer says: [10]

These authoritative church writings leave little doubt that the education received in Catholic parochial schools is not the secular education which a State may constitutionally provide or pay for.

In Pfeffer's view, if reimbursement for bus transportation may be justified under the State's police power to provide for the welfare of children, so may other expenditures of a similar character: fireproofing sectarian schools; repair of unsafe walls and ceilings, their replacement, and the like.[11]

Despite his strong views respecting various aspects of parochial education, Pfeffer, as well as others in the "absolute separation" school, is able to distinguish the assistance discussed above from the aid rendered by a State in providing free medical and dental services or free hot lunches to children in parochial schools:

These are not educational services but true welfare benefits. A child needs medical and dental care and hot lunches, whether he goes to a public school, to a parochial school, or to no school at all. But he does not need transportation to a school unless he receives instruction at that school; and only in that case is his safety and health protected if the schoolbuilding is fireproof and the rooms warm and ventilated.[12]

Professor Konvitz of Cornell University may be considered as another advocate of absolute separation. He has tried to answer the arguments of Father Wilfred Parsons [13] that parochial schools, insofar as they satisfy government standards for the teaching of secular subjects, should receive financial support to pay the costs of those teaching these subjects. The thrust of Konvitz's argument is that under official Catholic doctrine all the teaching and the whole organization of the school, including teachers and books, are under the supervision of the church; that religion is the foundation of the student's training not only in the elementary school but in the intermediate and higher institutions of learning as well.[14] It is from education in the parochial school that there springs Catholic growth, cohesion, discipline and loyalty. Konvitz says:

When this official philosophy of Catholic education is considered, it becomes clear why any form of public aid to parochial schools is a violation of the Constitution, a breakdown of the separation of church and state.[15]

Konvitz concedes, as Father Parsons suggests, that Americans may not be logical when they refuse public aid to parochial schools yet recognize them as fulfilling the requirements of compulsory education. But Konvitz asserts—

[9] Id., 474–475.
[10] Id., 475.
[11] Id., 476.
[12] Id., 477.
[13] Parsons, "The First Freedom: Considerations on Church and State in the United States" (1948).
[14] Konvitz, "Separation of Church and State: The First Freedom," 14 Law and Contemp. Prob. 44, 58–59 (1949).
[15] Id., 59.

the departure from a narrow logic has been in the interests of a broad liberty * * *. Just as "complete separation between the state and religion is best for the state and best for religion," so, too, the liberty of religious groups to maintain their own schools is "best for the state and best for religion." [16]

In accord with some of the views advocating "absolute separation" are various articles prepared by the editorial staffs of the law reviews. One in the University of Pennsylvania Law Review says: [17]

The strictest limitation upon governmental aid to religious institutions is required by the language, the historical content and the present validity of American constitutional provisions. The principle is clear and undisputed that formal interrelation of church and state institutions is prohibited by the letter and spirit of these provisions. Once established, the principle should be preserved intact against indirect as well as direct abridgment. To support the doctrine of separation is not to advocate irreligion but to maintain institutionally a separation of functions the fusion of which has invariably destroyed the usefulness of both institutions according to democratic standards. * * *

The *Everson* case indicates that a court appraising auxiliary services like transportation to sectarian schools in terms of a present danger of substantial intercontrol of church and state may circumvent the restriction. Logically, however, if such services are public functions justifying State support, then the public welfare feature of sectarian education itself provides an even stronger claim to State support; but there is no judicial dissent from the view that such direct support is proscribed by both Federal and State constitutions.

The use of governmental authority, financial or persuasive, to aid or hinder religious institutions directly or indirectly should be prohibited under the establishment clause of the first amendment.

Another article emphasizes that it is not easy to seal the wall between church and state once it has been pierced in the name of the public welfare: [18]

Teaching of nonreligious courses in religious schools, and the standard of such instruction, is certainly for the public interest—cannot the State then pay to that extent the salaries of religious teachers? * * * Physical fitness of American youth is a matter of public concern—can the State not, under the *Everson* case, build gymnasiums and furnish nurses to parochial schools? * * * The majority opinion in the *Everson* case suggests no line which would be drawn. It serves but one purpose—to enunciate a doctrine which amounts to a tool for the circumvention of the absolute prohibition against establishment of religion in the first amendment.

3. *The "intermediate" position.*—In contrast to the two positions discussed above, there is considerable sentiment among legal scholars for a more moderate position which it is claimed would strike a fair balance between competing interests.

Professor Katz of the University of Chicago Law School originally suggested that, in order to protect the freedom of parents in their choice of schools, a tax deduction of some kind for tuition paid to such schools would be permissible but that affirmative aid to religion should be avoided.[19] He would now go further in the use of tax funds for religious schools upon the theory that the use thereof is not really aid to religion but rather chiefly aid to education, so long as the State's standards for education are satisfied by the religious schools. He says:

If one assumes that the religious schools meet the State's standards for education in secular subjects, it is not aid to religion to apply tax funds toward the cost of such education in public and private schools without discrimination. Like the dissenters in the busfare case, I am not now able to distinguish between the minor payments there involved and payments for educational costs. I believe, therefore, that none of such nondiscriminatory uses of tax funds are forbidden by the first amendment.

[16] Id., 59. This is similar to Justice Jackson's view in *Everson*. See 330 U.S., at 27.
[17] Note, "Public Aid to Establishments of Religion," 96 U. Pa. L. Rev. 230, 240-241 (1947).
[18] Comment, 21 So. Cal. L. Rev. 61, 75 (1947).
[19] Katz, "Freedom of Religion and State Neutrality," 20 U. Chi. L. Rev. 426, 440 (1953).

He admits, however, that his position would be a most unpopular one generally and be subject to attack upon various grounds: [20]

The widespread rejection of the position just defended may be explained in a number of ways. It may reflect a general bias in favor of Government operation for any activity which is to be supported with tax funds. It may reflect a specific bias in favor of public education with only grudging concession of freedom for private schools. It may reflect skepticism as to the quality of education in religious schools and as to the feasibility of enforcing standards. It may reflect distrust of the position of the Roman church as to religious liberty. It may reflect a conviction that the problem is too explosive to be left to ordinary political processes and that the usual principle of State neutrality must, at this point, yield to a principle of absolute and hostile separation.

Prof. Robert F. Cushman believes that since the *Everson* decision the problem of aid to sectarian schools is cast in a different light: [21]

It becomes clear that the crucial issue is not aid to the child versus aid to the school; it is not even the question of whether religion is being aided; the real question is, as it has always been, how do you distinguish aid to the public in general from aid to religion in particular. Religion does and should, as part of the public, share in the benefits extended to the public in general. To hold otherwise is to adopt a position which would permit the State to make of religion an outlaw having no rights which the law is bound to protect. The question, then, is under what circumstances and in what way do religious institutions become part of the public in general.

The difference between providing police protection and providing teachers does not lie in the identity of the beneficiary but in the way in which the aid is extended. Aid is not normally extended to individuals or institutions by name, but rather to groups or classes of individuals or institutions. Any individual or institution falling under the restrictions of the law, or falling heir to its benefits, does so only as a member of such a group. An individual may be a pupil, a pedestrian, a property owner and a parent. A church is at once a corporation, a piece of property, a building, a meeting place, a religious institution and a nonprofit institution. Furthermore, a church may receive police protection when classed as property, tax exemption when classed as a nonprofit institution, sewage connections when classed as a building, and yet be denied financial aid when classed as a religious institution, since such a class may not validly be given public aid. Since the aid goes to groups rather than the individual components of any one group, the eligibility of an institution to receive public aid would seem to depend on which group it is classed in, rather than on its individual characteristics (p. 348).

The Constitution, according to the Court, does not forbid all aid to religious institutions. They may receive fire and police protection. What the Constitution forbids is aid to the religious function, and the Court in the *Everson* case divided over the question whether this function was in fact being aided. This being the case, if a State wished sincerely to protect the safety of its children, it could set up children buses on which any child could ride, whether going to a parochial school or to the movies. To insure the health of its children it could provide free lunches, dental and medical care for all children. To improve their minds and morals it could provide free books, museums and libraries. These aids would be available to all children regardless of the school they attended, or whether or not they attended school. The aid would truly be to children (a group which the State may validly aid) irrespective of the religious activity of the individual concerned (pp. 348–349).

Under Professor Cushman's view, constitutional questions would be avoided through legislation which would provide aid for all children of the State, without earmarking it as assistance to children enrolled enrolled in schools, both public and religious:

When, however, the State undertakes to aid just pupils and schools it is no longer aiding all children and all buildings. It is aiding only those identified with the function of institutionalized education, since pupils and schools are groups set up for the sole purpose of identifying certain children and institutions with

[20] Id., 440.
[21] Robert F. Cushman, "Public Support of Religious Education in American Constitutional Law," 45 Nw. U.L. Rev. 333, 347, 348 (1950).

the functions of education. Aid to these groups, then, becomes aid directly to the function for which they are set up. Where schoolbuses are extended to schools, or pupils, they are in aid to the function of education. Where this includes parochial schools and pupils this becomes aid to the function of religious education (p. 349).

As the majority in the *Everson* case pointed out, a State cannot aid religion, but it cannot be denied the right to aid all its children even though some of them attend religious schools. A State statute so drawn as to provide aid to all children as a group, regardless of what that aid might be, would be exceedingly difficult to attack on constitutional grounds as an aid to religion. Thus a State which provided medical service and books to all the children in the State would be virtually assured of the validity of its action. Where, however, a State limits its aid to children enrolled in schools, and this includes both public and religious schools, it lays itself open to the charge that it is aiding two kinds of education, secular and religious, and religious education is something which the States are forbidden to aid (p. 349).

Still another approach has been advanced by Judge Fahy. After citing various precedents, both judicial and legislative, he said: [22]

Consistent with these views on the place of religion in our national life is the established rule that public funds may be used to pay for services rendered, notwithstanding the fact that the payment is to a religious organization. It is immaterial that tax-raised funds are paid to these individuals or organizations by way of reimbursement for money spent by them in furtherance of a public program. Illustrations of existing or possible arrangements of this type include payments by local governments to denominational hospitals, conducted by religious orders or otherwise, for medical services rendered to those entitled to receive such service at public expense; and expenditures by the Federal Government toward the construction of or additions to denominational hospitals, under the Hospital Construction Act.

The same concept has been applied in the field of education. Federal Government payments to a denominational college for teaching or training draftees or veterans, even including training for the clergy, are authorized by the GI bill of rights.

A student note in the Yale Law Journal suggests other standards for achieving a fair and valid result in borderline cases. It was said: [23]

One method of qualifying the *Everson* absolute throughout would be to balance the public benefit in each instance against the aid to religion. Inculcation of moral principles, for instance, may well be found to outweigh the sectarian nature of New York "released time" or religious exercises, even though insufficient to qualify as a full-fledged "public purpose" of the *Everson* variety.

Based upon the dissent of Justice Reed in *McCollum* v. *Board of Education, supra*, at 248–249, that the *Everson* decision did not intend to preclude religious bodies from receiving incidental advantages which other groups similarly situated obtain as a byproduct of organized society, the Yale Law Review Note continues: [24]

Even more far reaching is the method suggested in Mr. Justice Reed's dissent, which would remove the need for any propitiating justification where the "aid" was merely a "byproduct of organized society" and not "purposeful assistance directly to the church itself or to some religious group * * * performing ecclesiastical functions." Such a modification would transcend piecemeal exceptions by shifting the entire wall to a position where practices involving no direct expense to the State, such as "released time" and the use of public buildings for sectarian meetings, could easily be sustained. And direct expenditures, which theoretically are barred by the precept that no tax whatever can be constitutionally "levied to support religious activities," could be validated by a parallel definition of the word "support." While this approach was not specifically negated by the majority or concurring opinions, the 8–1 decision over Mr. Justice Reed's dissent indicates that the Court would be reluctant to relax its *Everson* prohibition to such an extent. The essence of this concept, however, might well be accepted in diluted form by construing State "neutrality" toward religion, which technically seems to save only those benefits in which all share, broadly enough to uphold desirable types of insignificant aid which could not be logically sustained on less drastic grounds.

[22] Fahy, "Religion, Education and the Supreme Court," 14 Law and Contemp. Prob. 72, 82 (1949).
[23] Note, "Tracing the 'Wall': Religion in the Public School System," 57 Yale L.J. 1114, 1121 (1948).
[24] Id., 1121.

MARCH 28, 1961.

FEDERAL PROGRAMS UNDER WHICH INSTITUTIONS WITH RELIGIOUS AFFILIATION RECEIVE FEDERAL FUNDS THROUGH GRANTS OR LOANS

Attached is a description of Federal programs under which educational institutions with religious affiliation receive Federal funds through grants or loans. The following should be kept in mind in using this material:

1. Payments to institutions for which the United States receives a quid pro quo in a proprietary sense are outside the scope of the attached listing. However, Federal programs are so diverse that a clear line in this respect is not always possible, and many programs, not listed here because the Federal Government receives such a quid pro quo, are frequently of benefit to institutions.[1]

2. Programs to pay institutions for training Government civilian or military personnel are not included here. See, for example, 5 U.S.C. 2301 for a Government-wide employees' training program.

3. Except as noted under the last paragraph of the description of programs of the State Department, and in the case of payments by the Department of the Interior for the education of Indian children, educational institutions with religious affiliation participate in all of the programs listed on the same basis as do other nonpublic institutions.[2] (See description of program of Department of the Interior, p. 47, *infra*.)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF EDUCATION

A. *National Defense Education Act programs*

1. *National defense student loan program* (National Defense Education Act (Public Law 85–864), sec. 201 et seq.; 20 U.S.C. 421 et seq.)

Funds are made available by the Commissioner of Education under title II of the National Defense Education Act to enable public and private, nonprofit institutions of higher education to make low-interest loans to needy students.

The Federal Government advances up to 90 percent of the capital needed for a loan fund at an institution.[3] In any fiscal year, the

[1] 42 U.S.C. 1891–1893 provides that authority to contract for basic scientific research at nonprofit institutions of higher education shall be deemed authority to make grants for that purpose. Furthermore, authority to make grants or contracts for basic or applied research at such institutions provides authority to vest in the institution title to equipment purchased with grant or contract funds, without further obligation to the Government.

[2] No statute has been found where authority to deal with nonpublic institutions excludes dealing with those with religious affiliation, except 25 U.S. 278, 279. That law declares "the settled policy of the Government to make no appropriation whatever out of the Treasury of the United States for education of Indian children in any sectarian school." Subsistence and clothing are provided for some children in such schools; 25 U.S.C. 280 authorized the Secretary of the Interior to issue a patent to religious organizations for lands used by them prior to Sept. 21, 1922, for mission or school purposes.

[3] The Commissioner may make loans to institutions to help them finance their required 10-percent advance to the loan fund, where such funds cannot be secured from non-Federal sources upon terms and conditions deemed reasonable by the Commissioner. The term is up to 15 years with interest at such rate as the Commissioner determines will cover all costs to the Government, including probable losses.

Federal capital contribution at any institution may not exceed $250,000. The loan to an individual student may not exceed $1,000 for a fiscal year and no student may borrow more than $5,000 for all years. Special consideration must be given in providing loans to students with superior academic backgrounds who express a desire to teach in elementary or secondary schools (not necessarily those which are public) and students with strong academic backgrounds in science, mathematics, engineering, or a modern foreign language, but other students may also receive loans. Each note must provide that up to 10 percent of the loan (plus interest) will be canceled for each year of service as a full-time teacher in a public elementary or secondary school, but not more than 50 percent of a loan can be canceled in this manner.

2. *National defense fellowships* (National Defense Education Act (Public Law 85–864), sec. 404; 20 U.S.C. 464)

Graduate programs in institutions of higher education are given quotas by the Commissioner of Education for the award of graduate fellowships. The Commissioner awards 1,500 fellowships per year for periods of study in such programs, not in excess of 3 academic years. The individual receiving the fellowship receives $2,000 to $2,400 per year, depending on the year of study, plus an allowance for dependents. In addition, the institution which the individual attends receives the portion of the cost attributable to such individual's study not to exceed $2,500 per fellowship holder per academic year.

3. *Loans to nonprofit private schools* (National Defense Education Act (Public Law 85–864), sec. 305; 20 U.S.C. 445)

Title III of NDEA is designed to strengthen science, mathematics, and modern foreign language instruction in elementary and secondary schools. The title contains provisions for grants to strengthen State supervisory services for public elementary and secondary schools and for grants to enable public elementary and secondary schools to acquire science, mathematics, and modern foreign language equipment (and to remodel space used for such equipment).

Twelve percent of each appropriation for the acquisition of science, mathematics, or foreign language equipment (or minor remodeling of space for such equipment) is required to be allotted by the Commissioner of Education for loans to private, nonprofit, elementary and secondary schools. Affiliation or nonaffiliation with a religious organization is immaterial. The loans are authorized to enable the borrowing school to acquire equipment of the types referred to above (and do minor remodeling) and must bear interest at one-fourth of 1 percent above the current average yield on all outstanding marketable obligations of the United States, adjusted to the nearest one-eighth of 1 percent. Such loans must mature within 10 years.

4. *Testing students in secondary schools* (National Defense Education Act (Public Law 85–864), sec. 504(b); 20 U.S.C. 484(b))

Under title V of the National Defense Education Act, grants to State educational agencies may be used, among other things, for testing students in secondary schools, public or private. The Federal participation through the State grant is one-half the cost of such testing. The section cited above provides that in any State with an approved State plan which is not authorized by law to pay for the cost of testing students in one or more secondary schools, the Commissioner of Education shall arrange for the testing of such students and pay one-half the cost thereof (for the first fiscal year of the program the payment for testing was the full cost). In carrying out this provision during the 1960–61 school year, the Commissioner arranged for testing students in private secondary schools of 40 States. (For purposes of the act the Virgin Islands, Puerto Rico, the District of Columbia, and Guam are treated as States.

The provision for the Commissioner to arrange testing was inserted in the law because it was known that in some States the State educational agency would not have authority to make payments toward the testing of students in nonpublic schools, particularly those with religious affiliation.

5. *Institutes for training secondary school counselors and institutes for training modern foreign language teachers* (National Defense Education Act (Public Law 85–864), secs. 511, 611; 20 U.S.C. 491, 521)

The Commissioner of Education is authorized to contract with institutions of higher education for summer and regular academic year training programs to improve the qualifications of counselors in secondary schools and of modern foreign language teachers. The teachers from public, sectarian or any other types of private schools receive the opportunity for training without tuition costs. However, the act authorizes the Commissioner to pay a stipend for subsistence only to those who are to teach in public schools.

Although the instruction is conducted under a contractual arrangement pursuant to statute, it is included here because the effect is similar to that of a grant. The contract finances educational services by which the participating institutions serve a segment of people whom it would be their normal function to train.

6. *Language and area centers* (National Defense Education Act (Public Law 85–864), sec. 601(a); 20 U.S.C. 511(a))

The Commissioner of Education is authorized to arrange through contracts with institutions of higher education for the establishment and operation by them of centers for the teaching of certain modern foreign languages and studies related to the cultures in which such languages are used. The languages are confined to those for which trained individuals are needed in business, government, or education. While the statute authorizes only contracts for payment of one-half the cost, the program has all the earmarks of a grant situation.

7. *Language fellowships* (National Defense Education Act (Public Law 85–864), sec. 601(b); 20 U.S.C. 511(b))

The Commissioner of Education is authorized to pay stipends to individuals undergoing advanced training in any modern foreign language with respect to which he determines there is a special need in business, government, or education. No payment is made to the institutions of higher education, although the stipend is so computed as to include an amount which will enable the individual to meet his tuition and subsistence needs.

8. *Foreign language research* (National Defense Education Act (Public Law 85–864), sec. 602; 20 U.S.C. 512)

The Commissioner of Education is authorized to contract for studies and surveys relating to the need for improved instruction in modern foreign languages and research in effective methods of im-

proving such instruction. While the statute provides for a contractual arrangement, the program has many of the attributes of a grant situation.

9. *Research and experimentation in more effective utilization of television, radio, motion pictures and related media* (National Defense Education Act (Public Law 85–864), sec. 702; 20 U.S.C. 542)

In carrying out his authorization to make grants or contracts for research, experimentation, and dissemination of information in the development of methods for utilizing new media of communication for educational purposes, the Commissioner of Education has frequently paid for research, experimentation and dissemination activities of institutions of higher education without regard to religious affiliation.

B. *Grants for teaching in the education of mentally retarded children* (Public Law 85–926, sec. 1, as amended by Public Law 86–158 at 73 Stat. 346 (20 U.S.C. 611)

The Commissioner of Education makes grants to public or other nonprofit institutions of higher education to assist them in providing training of teachers in fields related to the education of mentally retarded children. These grants may be used both in connection with the costs of instruction and for establishing and maintaining fellowships. This is a new program under which grants have been made to only 19 instituticns. One of these is known to have religious affiliation.

C. *Cooperative research on problems in education* (Public Law 531, 83d Cong., sec. 1; 20 U.S.C. 331)

The Commissioner of Education is authorized to contract or make other jointly financed cooperative arrangements with institutions of higher education for studies and research on problems in education. In practice all arrangements have been made through contract. The program is listed here, however, because it has many of the attributes of a grant situation.

PUBLIC HEALTH SERVICE

A. *Health research project grants* (Public Health Service Act, sec. 301(d); 42 U.S.C. 241(d) Public Law 660, 84th Cong.; 33 U.S.C. 466, et seq. Public Law 159, 84th Cong.; 42 U.S.C. 1857, et seq.)

Grants are authorized to defray the cost of research projects relating to the causes, prevention, treatment or control of the physical and mental diseases and impairments of man, and also relating to the cause, control and prevention of air and water pollution.[4]

B. *Construction of hospitals and other medical facilities* (Public Health Service Act, title VI; 42 U.S.C. 291, et seq.)

Grants and loans are authorized to meet from one-third to two-thirds the cost of construction of general hospitals and other medical facilities. Such facilities include hospital-related housing for nurses and nursing homes.

[4] A recent amendment (Public Law 86–798) has also authorized the use of up to 15 percent of the amounts appropriated for health research projects for grants to nonprofit universities or other institutions for the general support of their health research and research training programs. While no such grants have yet been made, present plans are to make awards without regard to the religious affiliation of the grantees.

C. *Construction of health research facilities* (Public Health Service Act, title VII; 42 U.S.C. 292 et seq.)

Grants are authorized to meet up to 50 percent of the cost of construction, remodeling or equipping of facilities for the conduct of research in the sciences related to health.

D. *Categorical training grants and traineeships* (Public Health Service Act, secs. 403, 412, 422, 433(a) and 303; 42 U.S.C. 283, 287a, 288a, 289c and 242a)

Grants may be made to training institutions to meet the costs of providing specialized, technical or advanced training with respect to particular diseases of public health significance (cancer, heart disease, mental health, etc.) or with respect to air or water pollution (42 U.S.C. 1857; 33 U.S.C. 466). One example of such grants were those by the National Institute of Mental Health to schools of divinity of the three major faiths to develop on a 5-year pilot basis improved instruction in mental health. Authority is also provided for awarding traineeships to individuals, selected either by the training school or by the Public Health Service, to provide them subsistence support and expenses during their period of categorical training (42 C.F.R., pts. 63 and 64).

E. *Research fellowship grants and awards* (Public Health Service Act, secs. 301(c), 433(a); 42 U.S.C. 241(c), 289c)

Authority is provided to award fellowships to individuals selected by the Service, or to make grants to institutions to permit them to award fellowships, for the purpose of providing subsistence support and expenses to an individual in his conduct of health research or in his acquisition of health research training (42 C.F.R., pt. 61).

F. *Traineeships for professional public health personnel* (Public Health Service Act, sec. 306, 42 U.S.C. 242d)

Authority is provided for awards either directly to individuals, or by means of grants to the training institution to cover the cost of tuition, fees, and subsistence during graduate or specialized training in public health of physicians, engineers, nurses, and other professional health personnel.

G. *Advanced training of professional nurses* (Public Health Service Act, sec. 307; 42 U.S.C. 242e)

Authority is provided for the award of traineeships by grants to training institutions to cover the cost of tuition, fees, stipends and allowances of professional nurses being trained to teach or to serve in an administrative or supervisory capacity.

H. *Project grants for graduate training in public health* (Public Health Service Act, sec. 309; 42 U.S.C. 242g)

Project grants are authorized to be awarded to schools of public health, nursing, or engineering to meet the costs of graduate or specialized training in public health for nurses or engineers and for the purpose of strengthening or expanding graduate public health training in such schools.

I. *Indian health—Aid in construction of community hospitals* (Public Law 85–151; 42 U.S.C. 2005)

Grants are authorized to aid in the construction of community hospitals based on the proportion of construction costs attributable to the health needs of the Indians in the community.

J. *Cancer control grants* (Public Law 86–703)

Under authority of the current Department of Health, Education, and Welfare Appropriation Act grants are made to hospitals, universities or other institutions, for the conduct of cancer prevention, control, and eradication programs.

OFFICE OF VOCATIONAL REHABILITATION

A. *Grants for research, demonstration, and training projects related to vocational rehabilitation* (Vocational Rehabilitation Act (Public Law 565, 83d Cong.). sec. 4(a); 29 U.S.C. 34(a))

The Secretary of Health, Education, and Welfare is authorized to make grants to public and other nonprofit organizations for paying a part of the costs of projects for research and demonstrations in the field of vocational rehabilitation and training of individuals in professional fields which provide services to physically handicapped individuals. Many of the grants for research and demonstration are made to institutions of higher education, and most of the grants for training are made to such institutions. The training grants include an amount to enable the institutions to pay stipends to persons in training.

B. *Vocational rehabilitation fellowships* (Vocational Rehabilitation Act (Public Law 565, 83d Cong.), sec. 7(a)(3); 29 U.S.C. 37(a)(3))

The Secretary of Health, Education, and Welfare is authorized to provide training in technical matters relating to vocational rehabilitation services, including the establishment and maintenance of research fellowships with stipends and allowances. Pursuant to this a limited number of research fellowships are awarded for study and research at various institutions of higher education.

SOCIAL SECURITY ADMINISTRATION

A. *Cooperative research or demonstration projects* (sec. 1110 of the Social Security Act, as added by sec. 331 of Public Law 880, 84th Cong.; 42 U.S.C. 1310)

The Secretary of Health, Education, and Welfare is authorized to make grants to or contracts with public and other nonprofit organizations for paying part of the cost of research or demonstration projects relating to public welfare and social security matters. While the enabling legislation was effective for fiscal year 1957, appropriations were first available to carry out this program during the 1961 fiscal year. Three hundred and fifty thousand dollars has been made available for this purpose, and it is anticipated that one-third to one-half of that amount will be for financing projects at institutions of higher education. In the approval of such projects no distinction is made because of religious affiliation of an institution.

B. *Children's Bureau—Special projects relating to crippled children and maternal and child health services* (secs. 502(b) and 512(b) of the Social Security Act, as amended by secs. 707(b)(1)(A) and 707(b)(2)(A) of Public Law 86–778; 42 U.S.C. 702(b) and 712(b))

The Secretary of Health, Education, and Welfare is authorized to make grants to State health agencies and nonprofit institutions of higher education for special projects in the field of services for crippled children and maternal and child health. Up to now such projects have been financed by State agencies as the result of receiving grants from the Federal Government. In the future, however, grants will be made directly from the Federal Government, and no distinction is planned with respect to institutions with religious affiliations.

OFFICE OF FIELD ADMINISTRATION

Surplus property utilization program (Federal Property and Administrative Services Act of 1949 (Public Law 152, 81st Cong.), as amended, secs. 203(j) and 203(k); 40 U.S.C. 484(j) and (k))

Under these provisions the Secretary of Health, Education, and Welfare is authorized to allocate surplus personal property for transfer by the Administrator of General Services to State agencies for distribution to educational, health, and civil defense organizations. Surplus real estate assigned by the General Services Administrator is transferred by the Secretary of Health, Education, and Welfare for educational and public health purposes at a public benefit discount which can be as much as 100 percent of the appraised fair value. The institutions which receive real and personal property include public and private nonprofit elementary and secondary schools and institutions of higher education.

ATOMIC ENERGY COMMISSION

(Atomic Energy Act of 1946 (Public Law 585, 79th Cong.), as amended, secs. 3(a), 5(c)(2); 42 U.S.C. 2051, 2111)

The Atomic Energy Commission operates a variety of programs under which support is given for activities in institutions of higher education. For purposes of this listing these programs are grouped as follows:

1. Special fellowships for study at institutions of higher education under which payments are made to individuals to cover tuition and subsistence costs for students in nuclear science and engineering and for graduate work in the atomic energy aspects of the life sciences.
2. Grants to institutions to enable them to acquire:
   (*a*) nuclear laboratory equipment,
   (*b*) research reactors, and
   (*c*) teaching aids and laboratory equipment for radioisotope technology.
3. Loans of materials for instruction in nuclear fields and for research reactors.
4. Support of research in institutions of higher education through grants or contracts in various fields involving atomic energy.
5. Summer institutes in institutions of higher education to train teachers in various fields relating to atomic energy. Instructional

costs are defrayed by the Atomic Energy Commission; stipends to teachers, who may be from schools with religious affiliation are paid by the National Science Foundation. (cf. National Defense Education Act counseling and foreign language institutes (p. 39, supra) where, because of statute, stipends are paid only to public school teachers.)

VETERANS' ADMINISTRATION

A. *Vocational rehabilitation* (veterans' benefits (Public Law 85–857), ch. 31, secs. 1503, 1504; 38 U.S.C. 1503, 1504)

Training is purchased from educational institutions of all types, including those with sectarian affiliation, for the rehabilitation of war veterans with service connected disabilities. In addition, a subsistence allowance is paid the veteran.

B. *Educational benefits for World War II and Korean veterans* (veterans' benefits (Public Law 85–857, ch. 33, sec. 1601 et seq.; 38 U.S.C. 1601 et seq.)·

Educational benefits for veterans of World War II were included in Public Law 346, 78th Congress. Under the original arranagement, tuition payment was made directly to the school which the veteran attended, and this could include a theological school. In addition, a subsistence payment was made to the veteran. The arrangement for payment of tuition directly to the school was changed by Public Law 550, 82d Congress, which authorized a payment to the veteran and left it to him to take care of any tuition charges. The program for World War II veterans ended in July 1956, except for a small number of persons who were entitled to training benefits beyond that date. The present program authorized by Public Law 85–857 provides for an education and training allowance directly to the veteran. Small allowances are paid to each educational institution to reimburse it for the cost of making required reports to the Veterans' Administration regarding the veterans in attendance (38 U.S.C. 1645).

C. *War orphans educational assistance* (veterans' benefits (Public Law 85–857), ch. 35, secs. 1701 et seq.; 38 U.S.C. 1701 et seq.)

This program provides educational opportunities for children of wartime veterans who died from a service-incurred disease or injury. The student must be pursuing an approved program of education in an institution of higher education or in a vocational school below the college level. Payments are made directly to the student to meet in part the expense of his tuition and subsistence. The Veterans' Administrator is required to pay each educational institution $1 per month for each eligible person enrolled to assist in defraying the cost of preparing and submitting reports (38 U.S.C. 1765).

NATIONAL SCIENCE FOUNDATION

(National Science Foundation Act of 1950 (Public Law 507, 81st Cong.), secs. 3 (a) (2), (3), (4) and (b), 11(c) and 14, as amended by Public Law 85–510, sec. 2, and Public Law 86–232, sec. 1; 42 U.S.C. 1862 (a), (2), (3), (4) and (b), 1870(c) and 1872a (b))

Pursuant to broad statutory authorizations to foster research and education in scientific fields, the National Science Foundation provides the following support for activities in institutions of higher education:

1. Fellowships for various types of graduate studies include allowance for tuition and subsistence and permit study at any accredited nonprofit institution of higher education in the United States or abroad.

2. Summer, academic year and inservice institutes are financed at institutions of higher education through stipend and tuition payments to improve the qualifications of high school and college teachers in science and mathematics. Stipends are paid without regard to the fact that the teacher is from a school with religious affiliation. (Cf. National Defense Education Act counseling and foreign language institutes (p. 39, supra) where, because of statute, stipends are paid only to public schoolteachers.)

3. Special projects in science education are financed to provide the experimental testing and development of promising new ideas for the improvement of science instruction.

4. Programs are financed to improve course content and supplementary teaching aids in science.

5. Grants are made for basic research in the sciences, including funds for the use of graduate students as research assistants.

STATE DEPARTMENT

The State Department supports educational activities to a considerable extent by a variety of programs for international exchange, improvement of cultural relationships and rendering of technical assistance to foreign countries. Basically, under the programs students from this country are permitted to attend educational institutions abroad and students from foreign countries are permitted to attend educational institutions in this country. In either case payments are made to cover the cost of instruction and subsistence. For the education of foreign students in this country, the State Department makes contractual arrangements with the Institute of International Education, a private nonprofit organization in New York City, which in turn sponsors and makes specific arrangements for educating the foreign students. Training for a profession in religion is not financed but schools with religious affiliation are used. In performing this service IEE gives financial aid to the students to cover tuition and other related student costs.

The State Department has also made direct financial arrangements with universities and charitable organizations in this country to provide student leader seminars, high school training for teenagers, and English language classes for foreign students. In addition, the State Department has a variety of exchange and other educational programs by which foreign individuals are able to study in this country with the assistance of other Government agencies and private educational organizations. Examples of programs are:

1. U.S. information and educational exchange programs (22 U.S.C. 1991, et seq.).

2. Technical cooperation with foreign countries (22 U.S.C. 1891, et seq.).

Under 22 U.S.C. 1448, a program has been implemented for technical cooperation in the form of assistance to schools abroad founded

or sponsored by citizens of the United States and serving as demonstration centers for methods and practices employed in the United States in certain areas of training. A specific limitation of this program established by the State Department is that no funds may be channeled to a school operated under religious auspices.

DEPARTMENT OF DEFENSE

The Department of Defense has a number of training and research programs which finance activities at institutions of higher education. Research contracts fall under the procurement authority of each of the three branches of the Armed Forces. Thus, research is supported because of benefits to be received by the Defense Department and training is paid for because it improves the qualifications of military and civilian personnel. Such arrangements have also been made on a grant basis to institutions pursuant to 42 U.S.C. 1891–1893, which specifies that the authority to contract for certain scientific research at nonprofit institutions of higher education shall be deemed to be authority to make grants.

SMALL BUSINESS ADMINISTRATION

Business management research (Small Business Investment Act of 1958 (Public Law 85–699), sec. 602(c); 15 U.S.C. 636(d))

The Small Business Administration is authorized to make grants to various organizations including colleges, universities, and schools of business for research in the field of business management and finance. Grants have been made in prior years including those to institutions with religious affiliation. No funds are available to conduct this activity for the 1961 fiscal year.

DEPARTMENT OF AGRICULTURE

A. *National school lunch program* (National School Lunch Act (Public Law 396, 79th Cong.), as amended; 42 U.S.C. 1751 et seq.)

The purpose of this program is to improve the health and well-being of the Nation's children by providing funds and foods to States and territories for use in serving nutritious midday meals to children attending schools of high school grade and less. The Federal assistance is through payments to the educational agency of each State which then channels the aid to participating schools. However, 42 U.S.C. 1759 provides that in any State where the State educational agency is not permitted by law to disburse the funds to nonprofit schools they shall be disbursed directly to such schools for program purposes. In more than half of the States the educational agency has considered that it could not make the funds available to nonprofit private schools and as a result in those States the Secretary of Agriculture makes funds available directly to such nonprofit schools, including those with religious affiliation.

B. *Special milk program* (Agricultural Act of 1954 (Public Law 690, 83d Cong.), sec. 204(b); 7 U.S.C. 1446(c))

Under this program funds of the Commodity Credit Corporation are used to increase the consumption of fluid milk by children in nonprofit schools of high school grade and under, in nonprofit nursery schools, child care centers, etc., devoted to the care and training of children.

C. *Forestry research* (Public Law 466, 70th Cong., sec. 1; 16 U.S.C. 581)

The Secretary of Agriculture is authorized to conduct research relating to reforestation and forest products through arrangements with outside organizations. A part of this program is conducted through cooperative arrangements with colleges and universities, and at least one such arrangement has been made with a university with religious affiliation.

D. *Use of national forests* (30 Stat. 36; 55th Cong.; 16 U.S.C. 479)

The act of June 4, 1897, cited above, authorizes a group of persons residing in the vicinity of national forests to occupy not exceeding 2 acres of forest land for the erection of a school and not exceeding 1 acre for the erection of a church. A total of 163 schools were on forest land on June 30, 1959. Information is not available as to possible religious affiliation, but it is believed that few if any of such schools have religious affiliation. There is, however, no rule to prevent erection of a school because of such affiliation.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

University research program (National Aeronautics and Space Act of 1958 (Public Law 85–568), sec. 203(b)(5); 42 U.S.C. 2473(b)(5))

Research is conducted through contract with institutions of higher education in matters within the scope of interest of the National Aeronautics and Space Administration. The agency has also made grants to institutions with religious affiliation pursuant to the provision of 42 U.S.C. 1891–93, which provides that authority to contract with institutions of higher education for certain types of research shall also include the authority to make grants.

DEPARTMENT OF INTERIOR

Education of Indian children

Title 25, United States Code, section 278, declares it—

> to be the settled policy of the Government to make no appropriation whatever out of the Treasury of the United States for education of Indian children in any sectarian school.

(See *Quick Bear* v. *Leupp* (1908), 210 U.S. 50, holding that a similar prohibition did not apply to an appropriation from funds held by the United States in "trust" for a tribe.) Title 25, United States Code, section 279, authorizes the Secretary to provide Indian children in missions with the rations and clothing to which they would be entitled under treaty stipulations if living with their parents.

The Bureau of Indian Affairs arranges for the placement of Indian children in schools with religious affiliation only because of special circumstances. In such cases they make no payment toward instructional costs but do use welfare funds to pay the institution for other needs of the children.

HOUSING AND HOME FINANCE AGENCY

College Housing Loan Program (Housing Act of 1950 (Public Law 475, 81st Cong.), sec. 401 et seq.; 12 U.S.C. 1749)

The Housing and Home Finance Administrator is authorized to make construction loans to assist public and private nonprofit institutions offering at least a 2-year program of higher education and public and private nonprofit hospitals operating student nurse or internship programs so that they may provide new or improved housing and other related facilities (such as dining rooms, student centers and infirmaries) for students and faculties. Under this program, loans are made only where the institution is unable to secure funds for such purposes from other sources upon equally favorable terms and conditions. The loans can cover up to the full cost of construction and have a maturity of up to 50 years. Interest may not exceed one-fourth percent above the average interest rate on outstanding Federal obligations.

OPINIONS OF CERTAIN SCHOLARS OF THE LAW ON S. 1021 AND RELATED SUBJECTS

The letter of inquiry dated March 23, 1961, from Senator Wayne Morse to Profs. Arthur E. Sutherland, Wilber G. Katz, and Mark DeWolfe Howe, and their replies thereto are as follows:

MARCH 23, 1961.

Prof. ARTHUR E. SUTHERLAND, *Professor of Law, Harvard University, Cambridge, Mass.*

Prof. WILBER G. KATZ, *Professor of Law, The University of Chicago, Chicago, Ill.*

Prof. MARK DEWOLFE HOWE, *Professor of Law, Harvard University, Cambridge, Mass.*

DEAR PROFESSOR: As you may know, the Education Subcommittee of the Senate Committee on Labor and Public Welfare has recently completed public hearings on S. 1021 and related bills. The proposed legislation is concerned with an extension of Federal aid to the public school systems of the various States.

During the course of the hearings, it became evident that areas of constitutional controversy were of great interest to witnesses participating in the hearings.

In view of your eminence in the field of constitutional law, as chairman of the subcommittee, I respectfully request your views on the following points:

1. The constitutionality of S. 1021, a copy of which is enclosed.
2. The constitutionality of a measure which would provide loans for construction purposes to private and parochial schools at both the primary and secondary school levels.

With respect to the second request, it may be assumed that the interest rate on such loans would be sufficiently high to cover the cost to the Government of the hiring of the money. It would not, therefore, be a commercial rate of interest, in that the Government would not expect to make a profit from such loans. In other words, the Government would not expect to be "out of pocket" as a result of the transaction.

A further assumption would be that the administration of the program would be governed by guidelines established in the law to assure that repayment ability criteria were met by all successful borrowers.

I can assure you that I and my colleagues will be most appreciative of your assistance in considering the constitutional implications of legislation of this type. On behalf of the subcommittee may I express our thanks for this public service.

With kindest regards.

Sincerely,

WAYNE MORSE,
Chairman, Subcommittee on Education.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., March 27, 1961.

Senator WAYNE MORSE,
U.S. Senate, Washington, D.C.

MY DEAR SENATOR MORSE: I have received your request for an expression of my views concerning (1) the constitutionality of S. 1021, and (2) the constitutionality of a suggested measure which would provide loans for construction purposes to parochial and other private schools at primary and secondary levels. With respect to the second question I am making the assumptions which you summarized in the sixth and seventh paragraphs of your letter of March 23.

There can be no serious question, in my judgment, concerning the constitutionality of S. 1021. Unless there is some technical flaw in the printed bill which has escaped my eye it seems to me wholly clear that the Congress has ample power to give such financial support to public schools throughout the Nation as it may consider appropriate for the promotion of the general welfare.

I cannot take seriously any suggestion that may have been made that Federal aid to the public schools is unconstitutional if equivalent or analogous help is not provided to private schools. Certainly the whole history of public education in this country make it clear that there is no obligation on the Government which supports public schools to make its funds available also to private schools. The fact that some of these private schools are the agencies through which parents may assure their children a religious education does not, I feel sure, support the thesis that either the parochial schools or the parents of children attending those schools are denied a constitutional liberty or equality if the burden of maintaining the schools is left wholly in private hands.

I mention these considerations with respect to S. 1021 only because I fear that some persons who have been seeking to secure Federal aid for parochial schools have attempted to elevate an argument based on concepts of equity to the dignity of a contention grounded in the Constitution. I believe that the claim when stated in constitutional terms is wholly unjustified. If that be so then I can see no colorable argument that S. 1021 is unconstitutional.

This leads me to your second question. While the first amendment, as interpreted by the Supreme Court in the *Everson* and *McCollum* cases, remains the law of the land doubts concerning the constitutionality of the suggested program of loans, as it applies to parochial schools, have obvious justification. I am myself persuaded, however, that a plan of the sort described, subject to some limitations, does not violate the first amendment.

Perhaps I can best explain my position in this matter by dealing first with the constitutionality of loans to nondenominational private schools. It seems to me quite clear that there is no constitutional barrier to Federal financing of the educational activities of private schools which are serving the public interest by providing that kind of instruction which the States prescribe for public schools. I see no reason, in other words, by Federal grants or loans might not be made to Exeter and Andover, when the aid is directed toward the "public" aspects of their enterprise. I should suppose, however, that it would be of very questionable constitutionality, under the first amendment, for a Federal grant or loan to be made to Andover or

Exeter for the construction of a chapel. Obviously a parochial school would have no better right to expend Federal money for the building of a chapel or the decoration of its classrooms with religious symbols than would a nondenominational private school.

I realize, of course, that many men of good will, and many lawyers of extensive learning, conceding what I have so far asserted, would insist that it is impossible for responsible statesmen, asked to help the parochial schools in a time of need, to disregard the fact that most parochial schools are by the very nature of the faith that led to their establishment compelled to make all instruction religious education. They would urge, therefore, that if I concede, as I do, the unconstitutionality of Federal aid in the construction of chapels I should acknowledge that the physics and chemistry laboratories, the slide rules and blackboards in the arithmetic classrooms, are chapels and symbols. Perhaps if I were a better or more relentless logician than I am, I should. The fact, however, is that these questions of constitutionality—like almost all others—seem to me ultimately to be questions of degree. And when I consider those questions I am satisfied that a valid line may be drawn between governmental support of activities that are predominantly of civil concern and those which are predominantly of religious significance.

From what I have said you will see that I am not willing to endorse, without qualification, the constitutionality of the suggested plan of loans for all construction programs in private schools. I believe that serious questions of constitutionality would be presented were there to be no limitations with respect to the type of program for which support might be sought. Of course, I realize that the opponents of any and all programs of aid to parochial schools insist that my innocence will permit bookkeepers to circumvent the prohibitions of the first amendment. Perhaps they are right. I suspect, however, that this bookkeeping habit has become something like a constitutional tradition to which we must adjust ourselves.

May I add two more words. It seems to me that the difficulties of assuring a judical resolution of the constitutional issues which I have discussed make it more than normally important that these problems be considered with the greatest care and deliberation in the Congress. The tendency to suggest that because the questions may be nonjusticiable the Congress need not worry, strikes me as wholly indefensible. If there are nonjusticiable problems presented the Congress owes a peculiarly nondelegable duty to resolve them. I am encouraged by your letter to believe that your committee recognizes this special responsibility. Finally I should like to add an expression of an opinion which you did not seek. I believe that it would be a mistake to make provision at the present time for aid to private elementary and secondary schools. I express this strong opinion in order that you may realize that I have attempted to keep my political opinion and my professional judgment in different compartments of my mind.

Very sincerely yours,

MARK DEW. HOWE,
Professor of Law.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., March 28, 1961.

Hon. WAYNE MORSE,
Senate Office Building, Washington, D.C.

DEAR SENATOR MORSE: Yesterday's mail brought your letter of March 23, 1961, enclosing a copy of S. 1021 and asking my opinion on two points of constitutional law. I have examined S. 1021 and write this letter to give an answer to your inquiries according to my best estimate of this difficult subject. About 10 days ago, at the request of Congressman McCormack of Massachusetts, I sent to him a written opinion concerning H.R. 4970 which, as you know, like S. 1021, concerns Federal aid to schools. The memorandum is printed in the Congressional Record of March 22, 1961, at page A2026. I have taken the liberty of using in this letter a large part of my memorandum to Congressman McCormack.

You ask me first what I think of the constitutionality of S. 1021; secondly, you ask me my opinion of "the constitutionality of a measure which would provide loans for construction purposes to private and parochial schools at both the primary and secondary school levels."

I am sure, of course, that your committee needs no reminder of the great difference between constitutional limitation of congressional powers and, on the other hand, considerations of wise legislative policy. Still I think that it is well, at the outset, for me to state that his memorandum deals only with the constitutional powers of the Congress. Much legislation which the Congress could constitutionally enact, still might, to a Senator or Representative, or to a President considering a veto, seem an unwise exercise of legislative policy even though intra vires the Congress. You ask me only what lies within congressional power. To isolate the constitutional issue in such a situation I may usefully require myself to assume hypothetically that whatever measure is in question appears to the Congress and to the President to be beneficial and desirable for the country as a whole. I then ask myself whether, despite this hypothetical resolve, the Constitution denies to the Congress power to enact the measure, and forbids the President to approve it.

As to the constitutional power of the Congress to extend the aid to public schools proposed by S. 1021, I should have no doubt. The contemplated benefit to public education seems to me clearly within the power to spend for the general welfare granted by article I, section 8, clause 1, of the Constitution, to the Congress. Some commentators have suggested that to grant Federal funds to public institutions, without at the same time making grants to private nonprofit institutions including schools sponsored by religious groups, would deny to these latter the equal protection implicitly guaranteed by the Federal due process clause in the fifth amendment. This objection, as a matter of constitutional law, seems to me without substance. I do not here express any opinion of these policy considerations involved which rest in legislative discretion. The principle of equal protection does not guarantee uniform governmental treatment of all human beings; it requires uniform treatment save where a reasonable ground of differentiation exists. The line between public and private education seems to me one which the Congress can constitutionally draw. In many respects Government treats that

which is publicly controlled differently from that which is nongovernmental.

One question arises in my mind about section 103, headed "assurance Against Federal Interference in Schools." The terms of this section are broadly inclusive. The Federal judiciary is made up of officers or employees of the United States, and Federal judges could therefore be thought within the proscription of that section. If some part of the financial aid to States appropriated by the bill should be used in a discriminatory manner forbidden by the 14th amendment, would section 103 in terms purport to withdraw from the judiciary their present competence to take jurisdiction of the matter? I am confident that no such intention is in the mind of any sponsor of the legislation; the words deserve however, some careful scrutiny.

Your second question treats of loans for construction of primary and secondary parochial and other private schools. I take it that the measure, or a companion measure, would provide similar loans for public school construction as well; and that the provisions of law would in general resemble those of title 4 of the Housing Act of 1950 (12 U.S.C. sec. 1749 et seq.). A measure which would single out schools sponsored by a religion, making religious character a condition of public benefits, would present questions quite different from a measure granting loans to educational institutions generally, including nonprofit private religious schools along with the public and lay private institutions.

For the purposes of this letter then, I assume, for example, a measure providing loans on terms similar to those provided by title 4 of the Housing Act of 1950 (12 U.S.C., sec. 1749 and following). Suppose that the Congress should be convinced that better elementary and secondary education was necessary to the general welfare of the United States, to its capacity to produce necessary scientists and technicians to aid in our national defense, and to produce the necessary educated men and women to conduct our complex governmental and private economic system. The Congress might consider that our children and youths must look to the elementary and secondary schools in this country for a firm grounding in such basic building blocks of education as an accurate and understanding use of the English tongue; elementary mathematics; the history of the United States and its neighbor nations; some knowledge of the geographical fundamentals of the United States and of the rest of the world, and of our own resources and those for which we depend on other nations; a reasonable familiarity with the structure of our National and State Governments, with our constitutional ideals and practices; some knowledge of the basic principles of the sciences on which we depend more and more for existence; and some acquaintance with some of the languages used by our friends of other countries. The Congress might also be impressed by the useful technical skills taught in many of our school systems.

Suppose, further, that the Congress should decide to promote the national welfare in aid of these educational objectives by making loans for, say, 50 years, at not more than 2¾ percent interest, to such of our public and private nonprofit schools alike as attain reasonable standards. Would these loans violate the Constitution of the United States if a large number of the private schools to be aided should be church schools, including in their curricula not only such standard

lay learning as I have described, but also instruction in the doctrines of a religious faith?

The principal constitutional clauses which bear on this question are article I, section 8, clause 1, which provides that—

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *

and clause 18 of the same section—

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

This general grant of power is to some extent limited by various other clauses. The one here relevant is in the first part of the first amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: * * *

This portion of the first amendment contains two quite different provisions. The last six words eliminate from possible congressional power any law "prohibiting the free exercise" of any religion. Such a restriction is not relevant to this letter. I hear of no proposal for compulsory participation in religious exercises, nor for compulsory abstention from, or penalty for, religious exercises. Such a measure would raise considerations quite different from those discussed in this letter. The only question you put to me, as I understand it, is whether the Congress is devoid of constitutional power to make such long-term loans as I have described because they would be provided in a statute which should be considered a "law respecting an establishment of religion * * *."

Relevant to this study are several possible sources of information. One of these concerns the frame of mind of the Senators and Congressmen who proposed the first amendment, and that of the State legislators who ratified it. This is a difficult inquiry; the men involved were very numerous; the records of their motivation are not complete; different men may well have been prompted by different ideas; and one who engages in this research may begin to doubt whether the Congress in 1961 should have its powers delimited by an uncertain guess at the frame of mind of men who lived 170 years ago.

Another source of guidance as to the meaning of the establishment clause is study of the decisions handed down by the Supreme Court of the United States. Under our system that Court has the last word in constitutional construction, but judgments on "establishment" are hard to find. Justices of the Supreme Court, in the course of opinions, have on various occasions expressed ideas having a general connection with "establishment"; but American lawyers traditionally draw a rather sharp distinction between those things which a court actually decides, and those expressions made by the way, obiter dicta, off the immediate issue, not directly involved in the adjudication. Thus the *Everson* case (330 U.S. 1 (1947)) which arose under the 14th amendment, presented an issue described by Mr. Justice Black in the Court' opinion as follows (the case involves schoolbus fares):

> 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 14th 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 1st amendment which the 14th amendment made applicable to the States.

The majority of the Court found no constitutional obstacles preventing this reimbursement for bus transportation. But in his opinion Mr. Justice Black also wrote:

> The "establishment of religion" clause of the 1st 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 nonattendance. 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."

While all lawyers properly pay respect to such dicta, still statements of this sort, not directly relevant to the decision of the Court, do not carry the weight, as precedent, of an actual adjudication.

A third source of guidance can be found in the decisions of the Congress and the President of the United States appearing in the enactment and approval of legislation. Members of the Congress and the President are of course bound by oath to support the Constitution, and they conscientiously carry this out. Hence their judgment, expressed in the enactment or approval of legislation, properly has weight as precedent, particularly where, as in the field we are discussing, there is very little judicial decisional matter directly relevant. I shall in this letter briefly discuss these three sources of constitutional material—the opinions of the sponsors of the first amendment; judicial opinions; and legislative enactment and presidential approval as an indication of constitutionality.

The subjective intention of the congressional draftsmen of the first amendment, and of the State legislators who ratified it are not clear. In 1789 when the Congress proposed the Bill of Rights, favored religions were supported by taxation and other measures in a number of States. Massachusetts continued such tax support until 1833. The Members of Congress who proposed the first amendment had before them as an example of establishment the "Established Church" in England; they knew or could have known of controversies over tax support for churches in various States. Part of the motivation for the first 10 amendments, which took effect in 1791, was a desire to protect "States rights"—as appears from the terms of the 10th amendment. Some who favored the first amendment may have thus desired to protect their existing State-support for a favored church from Federal interference by a "law respecting an establishment of religion." Others may have felt an opposition to any and all governmental intervention in religion. But the earliest Congresses provided for chaplains in the U.S. Army (see act of Mar. 5, 1792, vol. I, Stat. at L. 241); the earliest legislators must have recognized that no completely tight wall was possible between church and state. The words

of the first amendment are not explicit on federally supported schools. It would be difficult, and probably not useful, to guess at whether the people who 170 years ago proposed and ratified the establishment clause whould have thought it forbade the suppositious school-loan bill I have described.

Adjudications of the Supreme Court on Federal legislation challenged under the establishment clause are hard to find. (I here do not refer to such obiter dicta as I mention earlier in this letter, but to adjudications on the merits.) Perhaps the small number of such adjudications can, in part, be explained by the doctrine in the Federal courts that a Federal taxpayer, not otherwise affected by an act of Congress has no standing in court to argue that the statute is unconstitutional. Thus in 1928 the U.S. Court of Appeals in the District of Columbia held that a taxpayer had no standing to challenge the constitutionality of the payment of salaries to the Chaplain of the Senate, of the House of Representatives, the Army, or the Navy on the ground that this payment constituted a religious establishment violating the first amendment (*Elliott* v. *White*, 23 F. 2d 997).

There are a few cases which approach the problem of this letter, though none is precisely in point. In 1899, a man named Bradfield sued the Treasurer of the United States to enjoin the payment of moneys to a hospital in the District of Columbia on the ground that, as the hospital was under the control of a Roman Catholic religious order, the payment would constitute an "establishment of religion." Passing over the question of the taxpayer's standing to bring the action, the Supreme Court, through Mr. Justice Peckham, unanimously held that the hospital was a secular corporation, and although its individual members might all be members of a religious order of the Roman Catholic Church, this would not characterize the hospital as a religious or sectarian body. The Court therefore affirmed the judgment of the lower court dismissing the bill (*Bradfield* v. *Roberts*, 175 U.S. 291 (1899)). In 1908 the Supreme Court decided *Quick Bear* v. *Leupp*, 210 U.S. 50. By treaty with the Sioux the United States in 1868 had agreed to furnish a teacher and schoolhouse for every 30 Sioux children "who can be induced or compelled to attend." To carry out this provision the Congress appropriated funds, and in 1896 Francis E. Leupp, Commissioner of Indian Affairs, proposed to make a contract with the Bureau of Catholic Indian Missions, a Roman Catholic organization, by which the United States would pay funds to that Bureau in order to maintain and educate Sioux Indian pupils at the St. Francis Mission Boarding School on the Rosebud Reservation in South Dakota. Quick Bear, a member of the Sioux Tribe of the Rosebud agency, brought an action in the Federal courts to enjoin Commissioner Leupp from carrying out the arrangement. The Supreme Court, dismissing the action, said of the constitutional question—

> Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic Indian Missions. It is not contended that it is unconstitutional, and it could not be.

In support of this statement, the Court cited *Bradfield* v. *Roberts*, the District of Columbia hospital matter which I described above.

There are a few cases discussing the constitutionality of "establishment" by a State, after the enactment of the 14th amendment in 1868. I have already mentioned the *Everson* case (330 U.S. 1 (1947)), which upheld New Jersey payments for bus transportation of parochial

pupils equally with others. In Mr. Justice Black's opinion in that case sustaining the constitutionality of the payment the Court stressed its concern for the safety of schoolchildren on the highways. The case could be thought of as upholding the New Jersey statute authorizing the payments, on the ground that the State legislature primarily considered the benefit to the children, not the benefit to the parochial school which was only incidental to the other primary objective. Another case involved provision by the State of Louisiana of lay textbooks for children in parochial as well as public schools. This was *Cochran* v. *Louisiana Board of Education*, 281 U.S. 370 (1930). Citizens and taxpayers in Louisiana brought suit in the State courts in an effort to enjoin Louisiana officials from paying out State moneys for this purpose. The plaintiffs argued that this violated the 14th amendment in that private property was taken by the State and used for private purposes, that it was so taken—

> to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State by furnishing textbooks free to the children attending such private schools.

The Supreme Court upheld the State statute providing for the textbooks. Pointing out that among the books none was adapted to religious instruction, the Court held that the taxing power of the State was exerted for a public purpose.

> The legislation does not segregate private schools or their pupils as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.

The principle of the New Jersey school bus case was reenforced on February 20, 1961, when the Supreme Court of the United States dismissed the plaintiffs' appeal in *Snyder et al.* v. *The Town of Newton* for want of a substantial Federal question. See 81 Supreme Court Reporter 692, advance sheet of March 15, 1961. Such a dismissal is a disposition on the merits of the case, and an authoritative precedent. See the separate opinion of Mr. Justice Brennan in *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959). Connecticut taxpayers had sought a declaratory judgment that transportation of parochial school pupils on publicly owned school buses violated the State constitution and the 14th amendment of the Federal Constitution. The Supreme Court of Connecticut found no violation of the 14th amendment, though it found that income of two specific funds could, under State law, be used only for public school purposes. (See 147 Conn. 374, 161 A. 2d 770 (1960).) The per curiam dismissal by the Supreme Court of the United States was not unanimous. Mr. Justice Frankfurter and Mr. Justice Douglas stated that probable jurisdiction should be noted.

Some mention should here be made of the opinions in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948). Here a parent of a child in the Champaign, Ill., public schools, the parent being also an Illinois taxpayer, succeeded in enjoining a program under which teachers of religion not paid by public funds of any Illinois municipality came into the public schools each week, for 30 or 45 minutes depending on the grade, to give religious instruction on the school premises to children of their respective faiths. Children not desiring to participate were allowed during that period to go to other places in the school building to pursue secular studies. Mr. Justice Jackson,

writing a special concurring opinion in the *McCollum* case, pointed out that here, unlike the *Everson* case, there was no showing of any resulting measurable burden upon the complaining taxpayer. He points out that perhaps the religious classes might be said to add some wear and tear on the public buildings and they should be charged with some expense for heat and light, but he adds that the cost was neither substantial nor measurable and "no one seriously can say that the complainant's tax bill has been proved to be increased because of this plan." To sustain the jurisdiction of the Court in the *McCollum* case, recourse might be had to the personal embarrassment imposed upon the child for whom the parent spoke. The boy was obliged to dissent from his classmates, to claim exemption from religious instruction, in their presence, to embarrass himself by being different. The *McCollum* case therefore can be thought of as presenting a case of individual hardship imposed on a schoolchild, on religious grounds, which is quite a different thing from a religious objection put forward when no one is individually harmed. That *McCollum* may have to be sustained as a case of individual hardship appears from the later judgment in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), in which the Supreme Court refused to pass on the constitutionality of a New Jersey statute providing for reading of Bible verses in public schools on the ground that the facts presented no "case or controversy," essential to jurisdiction of a Federal court. The only standing of the plaintiff was that of a taxpayer, he had no child in school when the case reached the Supreme Court; and there was no demonstration of any State expenditure. The decision in *Doremus* appears to take away whatever force McCollum might seem to have as a judgment concerning a State "establishment of religion," except as the Illinois arrangement may have caused individual hardship.

One ends with the conclusion that the Supreme Court of the United States has never held that a loan such as that in the statute which I outline above, would be in excess of congressional powers because of the first amendment. Insofar as actual adjudication on State statutes is concerned, the *Everson* and *Cochran* cases indicate the contrary. It may be significant that in those cases the aim of the legislation was not religious indoctrination but the safety and the law educational advancement of the schoolchild—the aim which I assume the Congress would have if it were to provide for such loans.

Congressional and executive action furnishes more precedents concerning Federal aid which includes religious schools than can be found in judicial determinations. An unsuccessful proposal for a constitutional amendment is somewhat enlightening. The Blaine amendment, passed by the House of Representatives in August 1886 by a vote of 180 to 7, proposed, among other things, to make a constitutional directive that—

> no public property, and no public revenue of, nor any loan of credit by or under the aurhority of the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or antireligious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or antireligious, organization or denomination shall be taught. * * *

The amendment failed to gain the necessary two-thirds vote in the Senate however. But the offer of this Blaine amendment could be

thought significant because its congressional sponsors evidently thought the first amendment insufficient clearly to inhibit appropriation, by the U.S. Congress, of funds for the purposes supposed earlier in this letter. The Blaine amendment is set forth in footnote No. 6 in the opinion of Mr. Justice Black in the *McCollum* case, 333 U.S. 203 at page 219.

A number of Federal statutes make grants of Federal funds in aid of some educational end, and include among the proposed recipients of distribution, nonprofit private institutions which may be under sectarian control. Instances are more numerous above the high school level than at or below it. Grade school children get the benefit of funds distributed under the National School Lunch Act, June 4, 1946, 42 U.S.C. 1760. Under this legislation (see 42 U.S.C., sec. 1753) if the State is barred by its laws from distributing funds to nonprofit private schools of any category the United States may distribute funds directly to such nonprofit private schools.

The National Defense Education Act of 1958 provides for loans of Federal funds to elementary and secondary schools including private schools of a nonprofit character, for the purpose of equipping these schools with scientific and modern language instructional equipment. Congressional committee reports on this legislation (see United States Code Congressional and Administrative News, 1958, p. 4731 ff.) show the purpose of the Congress to increase the excellence of education in subjects thought necessary in our defense and foreign relations efforts.

Title IV of the Housing Act of 1950, 12 U.S.C. section 1749 and following, provides for loans of Federal money for a period up to 50 years, at a rate of interest of 2¾ percent or less, to provide "housing and other educational facilities for students and faculties * * *" at any public or nonprofit private educational institution, if it offers at least a 2-year program leading toward a baccelaureate degree. These loans, thus by the terms of the statute, go to institutions above the high school level, but the distinction in principle between a junior college and a senior high school is not entirely clear.

The United States is authorized by legislation (see 42 U.S.C. 2051) to make grants for reactors to "* * * institutions or persons * * *." The United States provides scholarship funds to various classes of deserving students; these funds in due time come to the institutions which the students attend. The GI bill of rights is a familiar example. Also familiar, so much so that it goes almost unnoticed, is the Federal provision of Reserve officer training programs leading to Army, to Air Force, and to Navy commissions. (See 10 U.S.C. 4382 ff.) Many of these programs are in effect at colleges and universities under the control of religious orders.

Certain common characteristics are observable in all this legislation. In the first place it does not make grants or loans to churches, religious missions, etc. The benefits go either to students, or to institutions training students; the benefits go to public and private institutions alike; they go to private institutions regardless of their religious or nonreligious affiliation. The religious affiliation of a school or college receiving a loan, or of a school or college to which students resort under scholarships, is therefore incidental and is not signled out by the Federal legislation. In the second place, there is in each of these pieces of legislation an observable end other than the cultivation of

religion. Federal funds go to strengthen the Armed Forces, to build up our national scientific or linguistic capabilities or, as in the grants under the Housing Act of 1950, to build up our educational system generally.

The comment might be made that in none of these instances is there a Federal loan or grant of money to an institution to be spent however the institution sees fit, or to be spent as the institution sees fit except for religious instruction. This fact is notable; but perhaps the distinction between existing Federal provisions and an across-the-board benefit is more apparent than practical. Suppose, for example, a junior college with limited funds, needing essential faculty housing and student dormitories. A 50-year Federal loan for such prescribed building under the Housing Act of 1950 would release the college's funds for other purposes; some of the college's general funds which otherwise would necessarily be used for student housing might then be available for religious instruction. An elementary or secondary school needing science and language equipment, but with a limited budget, has funds released for general educational purposes when the United States provides funds for scientific and linguistic purposes.

It seems to me that a congressional loan such as that outlined earlier in this letter, to raise the standard of instruction in basic lay educational subjects might well in its terms exclude the direct expenditure of its funds for religious or sectarian purposes. But the indirect effect on a sectarian school would however be to release for general purposes some funds perhaps otherwise used for lay instruction. This possibility has not in the past inhibited the Congresses which passed such legislation as I have mentioned or the Presidents who approved it. No governing distinction is apparent to me between these legislative precedents and the hypothetical measure which I described at the beginning of this letter.

During the mid-1930's, many writers sharply criticized the American doctrine of judicial review of the constitutionality of social and economic legislation enacted by the Congress. None of that criticism was directed against unconstitutionality on "establishment" grounds. Indeed, I know of no case in which the Supreme Court ever has held any act of Congress invalid as a "law respecting an establishment of religion." But the Supreme Court for a number of years up to 1935 and 1936 did hold unconstitutional some Federal legislation on the ground that it exceeded the powers entrusted to the Congress by the Constitution, that, according of the then comparatively more limited view of congressional power over interstate commerce granted by article I, section 8, clause 3, it was ultra vires the National Government. Examples are *United States* v. *Butler* (296 U.S. 1 (1936)) and *Carter* v. *Carter Coal Co.* (298 U.S. 238 (1936)), holding unconstitutional the Agricultural Adjustment Act of 1933 and the Bituminous Coal Conservation Act of 1935.

Since 1936 the Supreme Court has held no Federal statute unconstitutional except where it imposed what the Court found to be an unreasonable hardship or injustice on some individual. The cases invalidate laws—

(*a*) Creating a presumption that, where an ex-convict is in possession of a firearm, he received, shipped, or transported it in interstate commerce. *Tot* v. *United States* (319 U.S. 563 (1943)).

(*b*) Prohibiting payment of any salary to three named persons, save for jury duty or military service. *United States* v. *Lovett* (328 U.S. 303 1946)).

(*c*) Penalizing, in self-contradictory terms one who refuses to allow a Federal officer to inspect a food factory. *United States* v. *Cardiff* (344 U.S. 174 (1952)).

(*d*) Providing for separate schools for Negro and white children in the District of Columbia. *Bolling* v. *Sharpe* (347 U.S. 497 (1954)).

(*e*) Subjecting a former serviceman to trial by court-martial, after his discharge, for offenses committed while in service, *United States ex rel. Toth* v. *Quarles* (350 U.S. 11 (1955)).

(*f*) Providing for trial by court-martial of dependents of servicemen, stationed overseas, for capital crimes. *Reid* v. *Covert; Kinsella* v. *Kreuger* (354 U.S. 1 (1957)). In 1960 the Supreme Court extended this holding to include dependents charged with noncapital crimes, *Kinsella* v. *United States ex rel. Singleton* (361 U.S. 234 (1960)); and civilian employees charged with capital or noncapital offenses, *Grisham* v. *Hagan* (361 U.S. 278 (1960)), *McElroy* v. *United States ex rel. Guagliardo; Wilson* v. *Bohlender* (361 U.S. 281 (1960)).

(*g*) Depriving of U.S. nationality one convicted by court-martial of wartime desertion, and dismissed or dishonorably discharged from the Armed Forces. *Trop* v. *Dulles* (356 U.S. 86 (1958)).

As the school-aid legislation I here discuss would not impair any person's free exercise of religion, it would have to be judged as a question of "ultra vires." The absence of any ultra vires holding on Federal legislation by the Supreme Court since 1936 increases my feeling that if in some way such a school-aid statute could be brought before that court, it would be upheld.

The New York Times of March 29, which reached me just before the typing of this letter was completed, carries an abridged version of the memorandum on the same subject prepared in the Department of Health, Education, and Welfare. I have read the abridgment of this document with the great respect which it deserves. I have been trying to analyze the reasons for its conclusion that the long-term loans in question would be beyond the constitutional powers of the Congress, whereas I am not convinced of this. In the first place, the departmental memorandum stating, for one example, "* * * the Supreme Court has spoken * * *" (New York Times, Mar. 29, 1961, p. 22, col. 5) relies, more than I am accustomed to rely, on certain sweeping obiter dicta of the Justices in the *Everson School-Bus* case. The actual decisions of the Court seem to me inconsistent with what is there said, to a degree which makes me doubt the literal absolutes of those dicta. Secondly, the departmental memorandum relies, for constitutional justification of past legislation, on legislative purpose which I cannot distinguish from the legislative purpose of the long-term loans here under discussion. The Nation needs the young scientists and linguists for whose benefit the Congress has already aided private nonprofit elementary and secondary schools: this national need, the departmental brief states, renders that aid constitutional, despite its effect, in parochial schools, in freeing other funds. I cannot see the distinction in principle between the motive

tion for this aid, and that for aid to schools to help them teach English or government or history or geography. The country needs pupils trained in all these; aid for any of these would release funds which could give incidental aid to religious indoctrination. Logically the Department memorandum would, it seems to me, have to call the whole list unconstitutional. Finally I think the departmental brief tends to rely on constitutional barriers which would disable the Congress to act, in a situation in which I should incline more to rely on the discretion of the National Legislature. Our problem is "establishment." Certainly the "establishment" clause of the first amendment discloses a national policy against control of Government by religious organizations and against governmental control of religious observances; but as follows from the departmental brief itself, a considerable discretion rests in the Congress to adopt measures for ends other than religious, even where the legislation will as an incident aid an organized religion. Similarly the 10th amendment and article I, section 8, clause 3 disclose a national policy against omnicompetent Federal control of the economy; but the effect of these clauses as limitations on congressional exercise of the commerce power has, since 1936, been regarded as depending more on their appeal to congressional wisdom than on their cutting off congressional power. A Congress might read the first amendment and conclude that further legislation would be unwise where it would indirectly aid church schools along with others. But congressional judgment of unwisdom is quite different from congressional disability to legislate.

This letter is long, but the subject is complicated and cannot usefully be discussed in a few sentences. The effect of the relevant constitutional provisions is not obvious: it depends, as do many great constitutional issues, on matters of degree and emphasis. I find it difficult to see a clear distinction in constitutional principle between much of the existing Federal aid to education, and aid of the type concerning which you ask me. The State and Federal constitutional provisions are not alike in terms; but the Supreme Court judgment upholding provision of textbooks for both parochial and public school children in *Cochran* v. *Louisiana* seems to me in principle to support the provisions for loans which you describe. I hesitate to assume that the Supreme Court was wrong in *Cochran;* and that Congresses and Presidents have acted in excess of their constitutional powers when providing the Federal benefits I have discussed. If the Supreme Court, the Congress, and the Executive have been correct in these decisions, I see no constitutional reason why long-term loans for construction would exceed the powers of the Congress.

Sincerely yours,

ARTHUR E. SUTHERLAND.

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, Ill., March 29, 1961.

Hon. WAYNE MORSE,
U.S. Senate, Washington, D.C.

DEAR SENATOR MORSE: You have asked my opinion as to the constitutionality of a measure which would provide loans for construction purposes to private and parochial schools at both the primary and secondary school levels. My interest in this problem has related primarily to the first amendment's prohibition of laws "respecting an establishment of religion or prohibiting the free exercise thereof * * *." In my opinion inclusion of parochial schools with other private schools in the measure you propose would not violate this provision. I believe that the Constitution leaves Congress free to pattern its aid to education in a way which protects the freedom of choice of students and parents as to the schools in which Federal benefits may be enjoyed. This principle is supported by the decision in *Everson* v. *Board of Education* (330 U.S. 1 (1947)), with which your subcommittee is familiar.

Congress has previously shown concern for freedom in the choice of schools. This principle was embodied in the GI bill for veterans educational benefits and, at the precollege level, in the law governing educational cost for congressional and Supreme Court pages. The following provision is in section 88a of title 2 of the United States Code:

> (c) * * * said page or pages may elect to attend a private or parochial school of their own choice: *Provided, however,* That such private or parochial school shall be reimbursed by the Senate and House of Representatives only in the same amount as would be paid if the page or pages were attending a public school under the provisions of subsections (a) and (b) of this section.

You have asked my opinion also as to the constitutionality of S. 1021. In my opinion the fact that this bill contains no provision for private or parochial schools does not render it unconstitutional as a law "restraining the free exercise" of religion. In legislation indirectly affecting freedom of educational choice, Congress has a wide area of discretion in which its action would be neither an "establishment of religion" on the one hand, nor a restraint of its "free exercise" on the other.

I am sorry that I have not been able to take time to develop these opinions more fully for presentation to your subcommittee.

Sincerely yours,

WILBER G. KATZ,
Professor of Law.

A LEGAL ANALYSIS OF THE ADMINISTRATION'S BRIEF ON FEDERAL AID TO CHURCH-SUPPORTED ELEMENTARY SCHOOLS [1]

(By Senator Kenneth B. Keating of New York)

APRIL 24, 1961.

A number of people have asked my opinion as a lawyer of the brief of the Department of Health, Education, and Welfare on the constitutionality of Federal aid to church supported elementary schools. During the partial Easter recess I had an opportunity to study the brief in detail. I would like today to analyze the brief from a strictly legal point of view and without regard to the policy considerations which are relevant to this subject. I will discuss the brief point by point in the same order and under the same headings as the brief contains.

INTRODUCTION

The brief, noting the general difficulties in securing judicial review of the lawfulness of Federal expenditures, concludes that this imposes—

> solemn responsibility upon both Congress and the Executive to be especially conscientious in studying the Constitution and relevant Supreme Court decisions to that any enactment will scrupulously observe constitutional limitations.

This statement warrants several comments. First of all, it must be recognized that the "difficulty" referred to would handicap judicial review by supporters of aid to church schools if such schools were excluded from the program to the same extent as it would handicap judicial review by the opponents of aid to church schools if such schools were included in the program. Hence any difficulties which might exist in obtaining judicial review argue as much for as against inclusion of church schools. This is particularly true since constitutional problems can be raised by unreasonable exclusion as well as improper inclusion of children not attending public schools.

Apart from this, however, the statement in the brief is misleading. Judicial review of Federal expenditures may be difficult, but as this same brief points out 40 pages later—

> Congress wishes to make possible a constitutional test of Federal aid to sectarian schools, it might authorize judicial review in the context of an actual case or controversy between the Federal Government and an institution seeking some form of assistance.

In such a case, the brief goes on to say, "the applicant could then in effect litigate the constitutional question in court."

Constitutional limitations should always be "scrupulously observed" in the enactment of legislation. But in this situation as in most others, it will be the Supreme Court not the Congress which makes the final legal determination. We should always be careful in considering legislation to comply with constitutional limitations, but the

[1] Relates to HEW memorandum dated Mar. 23, 1961, and entitled "The Impact of the First Amendment of the Constitution Upon Federal Aid to Education," which appears at p. 5 of this document.

suggestion in the brief that Congress and not the courts will have the last word on this issue is decidedly misleading.

I. THE CONSTITUTIONAL PRINCIPLES

This portion of the brief explains that:

> The first amendment does not require Government to be hostile to religion, nor does it permit governmental discrimination against religious activities. The objective is neutrality, however difficult it may be to be neutral or to determine what neutrality requires in relation to particular factual situations.

This fine statement of principles with which I agree is completely ignored in the remainder of the brief. It gives evidence of having been written by someone who was barred from any further participation in the preparation of the brief.

II. THE JUDICIAL PRECEDENTS

This section of the brief is replete with quotations from dissenting opinions and in almost every case gives more weight to what was said by way of dictum than to what the cases actually held. As every lawyer knows, dictum can be found for almost any proposition and dissenting opinions have academic value only, unless they are subsequently adopted by a majority of the court. It is the decision or holding of the court that is of crucial significance not the window dressing in which it is presented or the contrary views of the dissenters.

This point is best illustrated by a comparison made in the brief between the dissenting views of Mr. Justice Rutledge in the *Everson* case (330 U.S. 1) and Mr. Justice Black's majority opinion in the same case. Immediately after noting Justice Rutledge's view that the taxing power could not be used to provide transportation for Catholics as well as public school children, the brief states that Mr. Justice Black "writing for the majority adopted a similar view of the purpose of the first amendment." This is truly an incredible statement. If Justice Black had adopted a view similar to Justice Rutledge, the case would have been decided the other way. The truth is that Justice Black said that the provision for transportation was valid and Justice Rutledge said it was invalid. These views are not similar, they are conflicting and it was Justice Black who was writing for the Court. This shows the difference between the holding or decision of a case and hypothetical discussions in the Court's opinions which do not have any weight in determining the law of the case.

I dwell on these distinctions in order to emphasize the incredible fact that the principal conclusions in the Health, Education, and Welfare brief are based almost entirely on some of the dicta in the *Everson* case. By the same token, these conclusions virtually ignore the actual holding in that case which was that parents of Catholic school students could be reimbursed by the Government for fares paid for public transportation to their institutions in the same manner as the parents of the public school children were reimbursed. There may be other considerations supporting some of the conclusions in the brief. But the dicta in the *Everson* case is a shaky foundation for the administration's firmly stated opinions on this issue.

At one point the brief attempts to bolster the "authority" of the *Everson* dicta by quotations from two late Supreme Court decisions involving the "released time" problem. In the first of these cases

(*McCollum* v. *Board of Education*, 333 U.S. 203) the Court held that it was unlawful for the State to release public school children from some of their classes on condition that they attend religious classes on the school premises. The Court made it clear that the States could not utilize their compulsory education system to "coerce" attendance at religious classes. In the second case (*Zorach* v. *Clauson*, 342 U.S. 306) the "released time" plan permitted students actually to be released from the public schools at their parents' request in order to obtain religious instruction elsewhere. The Court held that this voluntary arrangement was lawful, commenting that—

> We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

These cases are the only Federal decisions cited in the brief for the conclusion that "tuition payments for all church school pupils are invalid since they accomplish by indirection what grants do directly." Some State court decisions are also cited but they are concededly conflicting. The controlling authorities, accordingly, are the *Everson* case upholding payment for transportation to church schools, the *Zorach* case upholding the release of public school pupils to attend religious classes on a voluntary basis, and the *McCollum* case prohibiting the coerced attendance of public school children in religious classes. These decisions just do not add up to anything like what is claimed for them in the administration's brief.

III. THE RELEVANT CRITERIA

This section of the Health, Education, and Welfare brief reads as though each paragraph was written by a different person. The first of the relevant criteria it sets forth is "whether a given legislative proposal is honestly designed to serve an otherwise legitimate public purpose and is not a mere subterfuge for religious support." The *Everson* case certainly is good authority for this proposition. Within the space of one page, however, this proposition is radically amended and the statement is made that "where the means employed result in fact in support of religious institutions, the constitutional judgment cannot be avoided." Perhaps all this statement means is that a constitutional judgment cannot be avoided, i.e., either a favorable or an adverse judgment. No one could argue with this observation. But if it means that an adverse constitutional judgment cannot be avoided, then the statement finds no support in the decisions in any of the cases cited.

Actually neither the "legitimate public purpose" or the "support of religious institutions test" is ultimately relied upon. The true test, as develops a few paragraphs later, is whether the benefit to the religious institution is "merely incidental." It is by this standard that the brief goes on to judge all of the specific proposals for aid to education.

As interesting as the test itself are the criteria set forth for determining whether a benefit is merely incidental. They are:

> (1) How closely is the benefit related to the religious aspects of the institutions aided? (2) of what economic significance is the benefit? (3) to what extent is the selection of the institutions receiving the benefits determined by Government? and (4) what alternative means are available to accomplish the legislative ob-

jectives without resulting in the religious benefits ordinarily proscribed? Could these benefits be avoided or minimized without defeating the legislative purpose or without running afoul of other constitutional objections?

One thing must be made clear about this elaborate description of the applicable constitutional criteria. The whole thing is simply the view of the authors of this brief. There are no cases which set forth any such tests or criteria. The rationale of the brief may appeal to some as a desirable approach to the subject, but it can make no claim as an authoritative statement of the present law. Any such pretensions must be exposed as presumptuous and unjustified.

IV. LEGISLATIVE PROGRAM AND PROPOSALS

This portion of the brief raises serious question about virtually every legislative proposal applicable to church-supported nonprofit schools. It concludes that Federal school aid grants made available directly to sectarian schools "are the clear case of what is proscribed by the Constitution." With respect to long-term, low-interest loans the brief states "this proposal is no less a form of support than grants and is equally prohibited by the Constitution." Special purpose programs depend for their validity on "the extent to which the specific objectives being advanced are unrelated to the religious aspects of sectarian education." Not too much hope is suggested for programs which go beyond those which happen to be in effect now.

These conclusions follow logically enough from the negative considerations advocated earlier in the memorandum. They are no stronger, however, than the premises on which they are based. Both the premises and conclusion reveal a basically hostile attitude toward nondiscriminatory Federal grant-in-aid programs. The absence of any attempt at reconciliation is apparent from the whole tone of the brief. Lip service is given to the dual principles of nondiscrimination and disestablishment, but isolation of nonpublic education is the dominant motive of the Government's memorandum.

V. HIGHER EDUCATION

A sharp distinction is drawn in the brief between elementary and college education largely on the basis that elementary education is compulsory while higher education is voluntary. The college student who chooses an institution where religious instruction is mandatory "is merely asserting his constitutional right to the 'free exercise' thereof," it is said in the brief.

Moreover, the brief points out, at the college and graduate level public institutions alone "could not begin to cope" with the problems involved. Accordingly it concludes that—

> to the extent that Congress finds it appropriate to encourage the expansion of our university and college facilities, Congress must be free to build upon what we have, the private as well as the public institutions.

On this basis the brief justifies scholarships for sectarian schools, and both direct assistance and loans to such colleges, all of which happen to be provided for in the administration's bill. The readiness of the administration's brief to record unqualified recognition to grant-in-aid programs to sectarian universities sharply contrasts with its attitude toward aid to sectarian elementary schools. The distinctions out-

lined in the brief are relevant, but they would hardly be considered decisive by any objective observer.

Compulsory education laws are satisfied by attendance at either sectarian or nonsectarian institutions. The grant of aid to both would not make attendance at either type of institution any more or less compulsory. And the practical distinction falls completely when it is recognized that more than 5 million children now attend sectarian schools. It is about as unrealistic to plan a comprehensive aid-to-education bill at the elementary school level which isolates this huge group of children as it would be to plan an aid to higher education which ignored these students attending sectarian colleges.

The section of the brief on higher education gives away the essentially preconceived character of the whole document. Plans have been proposed for grants, loans, and other aid to higher education. Of course they are constitutional. It has been proclaimed that similar aid to elementary schools would be unconstitutional and the brief sets out to prove that such is the case. I do not doubt that the administration is entitled to ask for a brief supporting its predetermined position. But the resulting document must be evaluated for what it is; namely, an advocate's defense of an already prescribed point of view. No brief is entitled to the weight of a court decision, but least of all a brief written to justify a position reached before the research has even begun.

VI. JUDICIAL REVIEW

This section of the brief is the most constructive since it outlines a method for providing judicial review of Federal expenditures for aid to education. I agree that the method outlined is feasible and would be valid and I would expect that any aid-to-education bill would contain provisions along the lines suggested.

Now I would like to discuss briefly my views as to what the proper criteria are for judging the constitutionality of specific proposals. I would not contend that my opinion will inevitably be substantiated any more than I would concede that the administration's views will find ultimate vindication. This is a difficult subject about which to make any forecasts with confidence and the best thing all of us could do is recognize this difficulty and not try to act like Supreme Court Justices. Therefore, all I intend by my analysis is to show that there is another side to the argument and that the views of the administration are by no means conclusive.

The standards for judging any proposals must be based on the opinion in the *Everson* case. As I have already noted, the holding of this case was that Government reimbursement out of tax funds to parents for money expended by them for the bus transportation of their children to Catholic parochial schools was constitutional. The majority opinion of the Court by Mr. Justice Black makes these points, among others:

(1) "These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic faith."

(2) Due process is not violated 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 * * *. The fact that a State law, passed to

satisfy a public need, coincides with the personal desires of th
individuals most directly affected, is certainly an inadequat
reason for us to say that a legislature has erroneously appraise
the public need."

(3) The State cannot "contribute tax-raised funds to the sup
port of an institution which teaches the tenets and faith of an
church, nor can a State hamper its citizens in the free exercis
of their own religion. Consequently, it cannot exclude individu
Catholics, Lutherans, Mohammedans, Baptists, Jews, Meth
odists, nonbelievers, Presbyterians, or the members of any oth
faith, because of their faith, or lack of it, from receiving th
benefits of public welfare legislation."

(4) "Measured by these standards we cannot say that th
first amendment prohibits * * * (a State) from spending tax
raised funds to pay the bus fares of parochial school pupils as
part of a general program under which it pays the fares of pupil
attending public and other schools."

(5) The fact that such support "helped" children to get t
parochial schools or encouraged them to remain in such schoo
does not violate the first amendment.

(6) The first amendment "requires the State to be a neutral i
its relations with groups of religious believers and nonbelievers
it does not require the State to be their adversary. State powe
is no more to be used so as to handicap religions than it is t
favor them."

I have taken the time to quote from the *Everson* opinion because o
the widespread misinterpretation to which it has lately been subjected
How different the words of the Court are from the inflexible, una
commodating tone of the Government's brief. The essence of th
court's approach is neutrality as between religious and public school
The essence of the Government's approach is isolation of the nonpubl
schools. The *Everson* case is the law today and must be accepted a
such until the decision is overturned or modified. It gives scant sup
port to the hostile and antagonistic approach in the Government
brief to nondiscriminatory aid-to-education proposals.

Another critically important decision on this subject is *Pierce* v
Society of Sisters (268 U.S. 510). In that case, the Supreme Court hel
unconstitutional an enactment in Oregon compelling the attendanc
at "public schools" of children up to the eighth grade. The Cou
noted in its opinion that the Constitution "excludes any gener
power of a State to standardize its children by forcing them to a
cept instruction from public teachers only."

The case of *Cochran* v. *Board of Education* (281 U.S. 370) is simila
in import. It was contended in that case that a State enactmen
providing tax funds for the purchase of schoolbooks was unlawfu
since "its purpose was to aid private, religious, sectarian and othe
schools not embraced in the public educational system of th
State * * *." A unanimous Supreme Court rejected this contention
The opinion of the Court, by Mr. Chief Justice Hughes, accepted th
view of the State court that the "schoolchildren and the State
rather than the schools, were the beneficiaries of the appropriation
for books. The State court had noted that what the statute con
templated was that "the same books that are furnished children at
tending public schools shall be furnished children attending privat

ools" and that "among these books, naturally, none is to be ex-
cted, (sic) adapted to religious instruction." The Supreme Court
ncluded that:

The legislation does not segregate private schools, or their pupils, as its bene-
aries, or attempt to interfere with any matters of exclusively private concern.
interest is education, broadly; its method, comprehensive. Individual inter-
s are aided only as the common interest is safeguarded.

These cases offer the guidelines for a proper approach to the con-
tutional problems involved in a comprehensive aid to education
islation. They refute any notion that all forms of nondiscriminatory
deral assistance applicable to public and nonpublic schools are
constitutional. On the contrary, they strongly suggest that a
iberate policy of excluding from the benefits of general welfare
islation, schools with religious affiliations may raise substantial
nstitutional questions. The Supreme Court has given clear recogni-
n to the historic fact that we have a dual system of education in
s country at the elementary as well as the college level. It has been
pains to point out that this dual system is constitutionally protected
ainst governmental action which would destroy church supported
mentary schools.

In our efforts to adhere to the limitations of the 1st amendment,
us not forget the limitations of due process in the 5th and 14th
endment and the provisions vouchsafing the "free exercise" of
r religious beliefs. Fairness and balance in our approach to the
bject of Federal aid to education may be a legal as well as a moral
ligation.

Neither the Constitution nor the cases construing it tell us what
d of aid-to-education bill to enact. We must devise a program
ich will meet the practical as well as the legal problems involved.
Personally, I have always believed that a great deal could be accom-
shed by giving tax relief to individuals for their educational expenses.
der the provisions of a bill I have introduced for this purpose
792), individuals filing Federal income tax returns would be
rmitted to deduct from their gross income, fees and tuition up to
00 paid to educational institutions for themselves and their children
dependents. Included would be outlays to any recognized edu-
ional institution, including colleges, universities, graduate schools,
vate school, parochial schools, technical training schools and
vice schools. Such a program could serve as a supplement to
ect Federal assistance to public schools, and the two programs
gether would be well designed to foster our dual systems of education.
The Internal Revenue Service has informed me that the annual
venue that would be lost by permitting such a tax deduction would
about $300 million. This is a substantial sum but it is less than is
posed in many of the other aid-to-education proposals. The tax
duction approach has the great merit of not interfering with the
e choice of schools by the families and children involved.

Investment in education is one activity to which the Federal
overnment should give every encouragement. Businesses are now
rmitted to deduct promotional expenses on the ground that these
penses generate further business and in the long run additional
venues. The same is certainly true of investment in education.
e difference in income levels among those with high school, college

and graduate degrees is a well-known fact. And in a larger sense the whole country is enriched by a better educated populace.

One final word and I shall conclude. Recently a separate bill was introduced to authorize loans to private nonprofit schools for the construction of elementary and secondary school facilities. It was suggested at that time that this measure should be acted upon separately from bills for public school aid in order to avoid any church-state controversy in our consideration of Federal aid-to-education legislation.

Personally, I do not believe that separation of these two school aid bills avoids the constitutional questions which have been raised. What separation really does is initially to determine the constitutional issue adversely to the position of the church-supported schools, for it implies a rejection of the principle that both systems of education should be treated in a nondiscriminatory manner by the Federal Government. If Congress goes too far in this direction, it may impair the freedom of choice principle declared by the Supreme Court in the *Pierce* case. There is no doubt that the Supreme Court said in that case that governmental action which forced all children to accept instruction from public school teachers only would be unconstitutional.

Moreover, provision for Federal aid only to church-supported schools places such aid in its most difficult constitutional posture. It has never been contended that the Federal Government could aid church schools as a separate proposition. Rather, the argument for such aid has been that it is justified to avoid discrimination against the non-public-school system. This rationale is substantially blurred by the separation of the two systems of education in our legislative deliberations.

Accordingly, I believe that such separation would raise unintended additional hazards to the fair treatment of both types of education by the Federal Government. A separate bill for church-supported schools, actually would serve to buttress the arguments against support of such schools by favoring them solely as religious institutions rather than as coordinate members of the educational community. This would raise regrettable, practical consequences, and it would be inconsistent with the sanction the Supreme Court has given to reasonably nondiscriminatory treatment of all educational institutions.

In conclusion I want to emphasize again that what I have discussed in this statement are the constitutional criteria pertinent to the aid-to-education issue. I have not attempted to analyze the policy considerations which should shape any specific legislative proposal. My only purpose has been to offer, as a lawyer, some understanding of the highly important legal problems which this subject poses. I submit these observations in all modesty but I hope I have succeeded in clarifying in some measure these difficult questions.

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